**EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Industry and Science

*Industry Research and Development Act 1986*

*Industry Research and Development (Norske Skog Boyer – Feasibility Study Program) Instrument 2022*

**Purpose and Operation**

Section 33 of the *Industry Research and Development Act 1986* (the IR&D Act) provides a mechanism for the Minister to prescribe programs, by disallowable legislative instrument, in relation to industry, innovation, science or research, including in relation to the expenditure of Commonwealth money under such programs.

The statutory framework provided by section 33 of the IR&D Act enables a level of flexibility to provide authority for Commonwealth spending activities in relation to industry, innovation, science and research programs. This allows the Government to respond quickly and appropriately to the need to implement innovative ideas and pilot programs on an ongoing basis and as opportunities arise. Prescribing programs in legislative instruments provides transparency and parliamentary oversight of Government programs and spending activities, whilst reducing administrative burden on the Commonwealth.

Once a program is prescribed by the Minister under section 33, subsection 34(1) allows the Commonwealth to make, vary or administer arrangements in relation to activities under the prescribed program. Arrangements may include contracts, funding agreements or other arrangements, and may provide for money to be payable by the Commonwealth to one or more third parties. The power conferred on the Commonwealth by subsection 34(1) may be exercised on behalf of the Commonwealth by a Minister or an accountable authority of a non‑corporate entity, or by their delegate (under section 36).

The purpose of the *Industry Research and* ***Development*** *(Norske Skog Boyer – Feasibility Study Program) Instrument 2022* (the Legislative Instrument) is to prescribe the Norske Skog Boyer – Feasibility Study Program (the Program). Funding for the Program has been secured through the Department of Industry, Science and Resources (the Department) 2022-23 Budget. The Program provides $2.0 million of funding to Norske Skog Paper Mills (Australia) Limited (Norske Skog) (plus $0.1 million for departmental grant administration) over the 2022-23 and 2023-24 financial years to conduct a feasibility study for the replacement of the coal-fired boiler at the Norske Skog Boyer Plant in Tasmania (the Plant) as part of the Australian Government’s “Plan for a Better Economy, Better Budget, Better Future”.

The Program will support Norske Skog to conduct a feasibility study for the replacement of the coal-fired boiler at the Plant, which is Australia’s only publication grade paper mill. The feasibility study will determine investment-ready transition options to a contemporary boiler at the Plant to enable increased efficiency and the reduction of greenhouse gas emissions and to secure thermal energy supply.

Funding authorised by this Legislative Instrument comes from Program 1.2 Growing innovative and competitive businesses, Outcome 1, as set out in the *Portfolio Budget Statements 2022-23, Budget Related Paper No. 1.11, Industry, Science and Resources Portfolio (*[*https://www.industry.gov.au/sites/default/files/2022-10/October\_2022-23\_Industry%2C%20Science%20and%20Resources\_PBS.pdf*](https://www.industry.gov.au/sites/default/files/2022-10/October_2022-23_Industry%2C%20Science%20and%20Resources_PBS.pdf)*)* at pages 16 and 39. This Program forms part of the “Local Industry Grants” package.

The Program will be delivered by AusIndustry, which is a specialised design, management and delivery body within the Department with extensive expertise and capability in delivering similar programs.

This Program provides $2.0 million through a one-off, non-competitive grant to Norske Skog (plus $0.1 million for departmental grant administration). The Program is administered by the Department in accordance with the *Commonwealth Grant Rules and Guidelines 2017* ([*https://www.finance.gov.au/government/commonwealth-grants/commonwealth-grants-rules-and-guidelines*](https://www.finance.gov.au/government/commonwealth-grants/commonwealth-grants-rules-and-guidelines))*.* As this is a one-off, non-competitive grant to the identified eligible recipient (which is a trading corporation), there are no selection criteria; however, the grant is contingent on the submission of an acceptable project proposal with sufficient relevant supporting information commensurate with the funding amount. This is subject to assessment of merit in accordance with the Grant Opportunity Guidelines, including but not limited to consideration of value for money, ability of project to deliver intended outcomes, and associated risk. To be successful the application must demonstrate merit in each of these areas.

Spending decisions will be made by the Program Delegate who is the General Manager responsible for administering the Program, taking into account the recommendations of the Department. The Program Delegate is an SES officer who holds delegation under the Department’s general financial framework, including delegation under the *Public Governance, Performance and Accountability Act 2013*, and sections 34 and 35 of the IR&D Act.

The Program will not be subject to merits review. Merits review of the Program is not appropriate because decisions will relate to the provision of a one-off, non-competitive grant to a certain service provider over other service providers. The Administrative Review Council has recognised that decisions of this nature should be excluded from merits review (see paragraphs 4.16 to 4.19 of What decisions should be subject to merits review? available at <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>).

Persons who are otherwise affected by decisions or who have complaints about the Program will have recourse to the Department. The Department investigates any complaints about the Program in accordance with its complaints policy and procedures. If a person is not satisfied with the way the Department handles the complaint, they may lodge a complaint with the Commonwealth Ombudsman.

The Legislative Instrument specifies that the legislative powers in respect of which the instrument is made are the following:

**Corporations power**

Section 51(xx) of the Constitution empowers the Parliament to make laws with respect to ‘foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth’.

In *Williams v Commonwealth* (2014) 252 CLR 416 (*Williams No 2*), the High Court, considering section 32B of the *Financial Management and Accountability Act 1997* (the FMA Act), held (at [50]) that:

A law which gives the Commonwealth the authority to make an agreement or payment of that kind is not a law with respect to trading or financial corporations. The law makes no provision regulating or permitting any act by or on behalf of any corporation.

However, the relevant provisions of the IR&D Act are substantially different to the provisions considered by the High Court in *Williams No 2*. Section 34 of the IR&D Act corresponds to section 32B of the FMA Act considered by the High Court in *Williams No 2*. However, the FMA Act contained no provision in terms equivalent to those of section 35 of the IR&D Act.

Subsection 35(2) of the IR&D Act limits the arrangements made under section 34 so that, where a party to an arrangement made under section 34 is a constitutional corporation, the arrangement must be subject to a written agreement containing terms and conditions under which money is payable by the Commonwealth. The corporation must comply with the terms and conditions. The activities of the corporation are therefore regulated through the terms and conditions made under each agreement pursuant to subsection 35(2).

Further, subsection 35(3) provides that the agreement must provide for circumstances in which the corporation must repay amounts to the Commonwealth.

Only a constitutional corporation will be eligible to receive benefits under the Program prescribed by the Legislative Instrument. The benefits conferred by the Program will be directed to assisting a trading corporation, Norske Skog, in the conduct of its ordinary activities (the production of publication grade paper). The Program will impose terms and conditions on Norske Skog under a grant agreement in accordance with section 35 of the IR&D Act, in relation to receipt of benefits under the Program. The terms and conditions will set out what the funding may be used for, and the circumstances in which it must be repaid.

**External affairs power**

Section 51(xxix) of the Constitution gives the Commonwealth Parliament power to make laws with respect to ‘external affairs.’ The external affairs power supports legislation implementing Australia’s international obligations under treaties to which it is a party. Australia has obligations relevant to this legislative instrument under the following treaties:

1. the Kyoto Protocol to the United Nations Framework Convention on Climate Change done at Kyoto on 11 December 1997 ([2008] ATS 2) (Kyoto Protocol), particularly Article 10;
2. the Paris Agreement done at Paris on 12 December 2015 ([2016] ATS 24) (Paris Agreement), particularly Article 4; and
3. the United Nations Framework Convention on Climate Change done at New York on 9 May 1992 ([1994] ATS 2) (United Nations Framework Convention on Climate Change), particularly Article 4.

The Kyoto Protocol includes obligations on Australia to take action to reduce emissions. For example, Article 10(b) requires parties to formulate, implement and report upon climate change mitigation and adaptation programs.

The Paris Agreement was entered into by the parties to the United Nations Framework Convention on Climate Change to enhance its implementation. Under the Paris Agreement, Australia has a “nationally determined contribution”, comprising a 2030 emissions reduction target of 43 per cent below 2005 levels and net zero emissions by 2050. Australia’s greenhouse gas emission reduction targets, which reflect its nationally determined contribution, have been legislated in the *Climate Change Act 2022*. Relevantly, Article 4.2 of the Paris Agreement provides that “[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve” and that “[p]arties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions”.

The United Nations Framework Convention on Climate Change includes a range of obligations on Australia to take domestic actions that reduce Australia’s emissions of greenhouse gases. Relevantly, it provides that parties shall:

* formulate, implement, publish and regularly update national and, where appropriate, regional programs containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol on Substances that Deplete the Ozone Layer done at Montreal on 16 September 1987 ([1989] ATS 18]), and measures to facilitate adequate adaptation to climate change;[[1]](#footnote-2)
* promote and cooperate in the development, application and diffusion of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases in all relevant sectors including energy, transport, industry, agriculture, forestry and waste management sectors;[[2]](#footnote-3) and
* adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs.[[3]](#footnote-4)

For the purposes of the above obligations in the Kyoto Protocol, the Paris Agreement, and the United Nations Framework Convention on Climate Change, the Legislative Instrument will support the reduction of greenhouse gas emissions from the Plant.

Further details of the Legislative Instrument are set out at **Attachment A.**

**Authority**

Section 33 of the IR&D Act provides authority for the Legislative Instrument.

**Consultation**

The Department consulted Norske Skog on the outcomes expected from the Program and the activities necessary to be undertaken. The Department also consulted with the Tasmanian Government in relation to its $2.0 million contribution of funding to support Norske Skog’s project objectives. These consultations informed the design of the Program.

In accordance with section 17 of the *Legislation Act 2003*, the Attorney-General’s Department has been consulted on this Legislative Instrument.

**Regulatory Impact**

It is estimated that the regulatory burden is nil (the Office of Impact Analysis (OIA) reference number: OBPR22-02615).

A Statement of Compatibility with Human Rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at **Attachment B**.

**Attachment A**

**Details of the *Industry Research and Development (Norske Skog Boyer – Feasibility Study Program) Instrument 2022***

**Section 1 – Name of Instrument**

This section specifies the name of the Legislative Instrument as the *Industry Research and* ***Development*** *(Norske Skog Boyer – Feasibility Study Program) Instrument 2022.*

**Section 2 – Commencement**

This section provides that the Legislative Instrument commences on the day after registration on the Federal Register of Legislation.

**Section 3 – Authority**

This section specifies the provision of the IR&D Act under which the Legislative Instrument is made.

**Section 4 – Definitions**

This item provides for definitions of terms used in the Legislative Instrument.

**Section 5 – Prescribed Program**

This section prescribes the Program for the purposes of section 33 of the IR&D Act.

The Program provides funding to Norske Skog to conduct a feasibility study for the replacement of the coal-fired boiler at the Plant. The feasibility study will determine investment-ready transition options to a contemporary boiler at the Plant to enable increased efficiency and the reduction of greenhouse gas emissions and to secure thermal energy supply.

**Section 6 – Specified Legislative Power**

This section specifies that the legislative powers in respect of which the Legislative Instrument is made are the powers of the Parliament to make laws with respect to: foreign corporations and trading or financial corporations formed within the limits of the Commonwealth (paragraph 51(xx) of the Constitution); and external affairs (paragraph 51(xxix) of the Constitution).

**Attachment B**

**Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

*Industry Research and* ***Development*** *(Norske Skog Boyer* – *Feasibility Study) Instrument 2022*

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

The Legislative Instrument provides legislative authority to commit Commonwealth funds for the *Norske Skog Boyer - Feasibility Study Program* (the Program). The Program provides $2.1 million of funding across the 2022-23 and 2023-24 financial years to support Norske Skog Paper Mills (Australia) Limited (Norske Skog) conduct a feasibility study for the replacement of the coal-fired boiler at the Norske Skog Boyer Plant in Tasmania (the Plant) as part of the Australian Government’s “Plan for a Better Economy, Better Budget, Better Future”.

The purpose of the Program is to facilitate a feasibility study to determine investment-ready transition options to a contemporary boiler at the Plant to enable increased efficiency and the reduction of greenhouse gas emissions and to secure thermal energy supply.

**Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

**Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

**The Hon Ed Husic MP**

**Minister for Industry and Science**

1. See Article 4.1(b). [↑](#footnote-ref-2)
2. See Article 4.1(c). [↑](#footnote-ref-3)
3. See Article 4.2(a). [↑](#footnote-ref-4)