

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Climate Change and Energy

*Industry Research and Development Act 1986*

*Industry Research and Development (Carbon Capture Technologies Program) Instrument  
2023*

### **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 Minister for Industry and Science has delegated, under subsection 33(6) of the IR&D Act, the power under subsection 33(1) of the IR&D Act to the Minister responsible for administering the *Climate Change Act 2022* to prescribe the Carbon Capture Technologies Program (the Program). This is currently the Minister for Climate Change and Energy.

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 under section 33, subsection 34(1) of the IR&D Act 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 of the IR&D Act).

The purpose of the *Industry Research and Development (Carbon Capture Technologies Program) Instrument 2023* (the Legislative Instrument) is to prescribe the Program under section 33 of the IR&D Act. The funding for the Program has been secured through the Department of Climate Change, Energy, the Environment and Water (the Department) 2022-23 Budget. The Program provides \$65 million over eight years as part of the Australian Government's commitment to support research, development and demonstration of emerging and priority carbon dioxide capture, carbon dioxide transport and carbon dioxide utilisation technologies.

The purpose of the Program is to:

- reduce and remove greenhouse gas emissions to contribute to meeting Australia's greenhouse gas emission reduction obligations; and

- accelerate the research, development and demonstration of emerging and priority carbon dioxide capture and carbon utilisation technologies to:
  - broaden the application of carbon capture, use and storage technologies to include hard-to-abate sectors (including the cement, chemicals and steel sectors), or other-non energy industrial emissions and negative emissions technologies; and
  - assist in reducing the costs of such technologies.

Funding authorised by this Legislative Instrument comes from Program 1.1: Reducing Australia's greenhouse gas emissions, Outcome 1, as set out in the *Portfolio Budget Statements 2022, Budget Related Paper No. 1.3, Climate Change, Energy, the Environment and Water Portfolio* (<https://www.dcceew.gov.au/sites/default/files/documents/dcceew-2022-23-pbs.PDF>) at page 29 and 36.

The Program is administered by the Department of Climate Change, Energy, the Environment and Water.

The Program is a competitive, merits-based grants program and will be delivered by the Business Grants Hub and in accordance with the requirements of the Commonwealth resource management framework, including the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Commonwealth Grant Rules and Guidelines 2017*.

To be eligible to apply for the program, applicants must propose a project aimed at researching, developing or demonstrating carbon dioxide capture and carbon dioxide utilisation technologies in Australia. Activities eligible for grant support may include those associated with design, construction, testing or research, development and deployment of such technologies.

Grant applications will be assessed based on merit criteria, which will include the alignment of proposed activities with program objectives, the capability and capacity of the applicant to deliver the activity outlined in the application and the impact that any grant support will have on the activity.

Further information regarding the grant opportunity will be provided through grant opportunity guidelines. These guidelines will be published on [business.gov.au](https://business.gov.au) and [GrantConnect \(grants.gov.au\)](https://grants.gov.au).

Spending decisions will be made by the Program Delegate, who is responsible for administering the Program, taking into account the recommendations of an assessment against the Program guidelines. The Program Delegate is a Senior Executive Service officer who holds delegation under the relevant financial frameworks, including under the PGPA Act and sections 34 and 35 of the IR&D Act. The SES officer would be an appropriate person who would have relevant expertise in, and understanding of, the subject matter, and be able to perform relevant functions in accordance with the Commonwealth resource framework.

As the Program is an open competitive grant that supports the implementation of policy decisions made by the Government, the Program will not be subject to merits review. Merits review of the Program would not be appropriate as the grants allocate a finite amount of

funding, from which all potential claims for a share of the resource cannot be met. Overturning an original decision not to provide a grant to an applicant would affect an allocation already made to another party, making merits review inappropriate for the Program.

The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see items 4.11 to 4.15 of *What decisions should be subject to merits review?*).

Persons who are otherwise affected by decisions or who have complaints about the Program will be able to provide feedback 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.

### **Statutory preconditions to the making of the Legislative Instrument**

Subsection 33(2) of the IR&D Act prescribes statutory preconditions for the making of a legislative instrument under section 33(1) of the IR&D Act. Subsection 33(2) provides a program may only be prescribed under subsection 33(1): (a) to the extent that it is with respect to one or more legislative powers of the Parliament; and (b) if it is not a program to subsidise the extraction of coal or natural gas.

For the purposes of paragraph 33(2)(a) of the IR&D Act, the ‘Statement of the Relevance and Operation of Constitutional Heads of Power’ section of this Explanatory Statement outlines the extent to which the Program is with respect to one or more of the legislative powers of the Parliament.

For the purposes of paragraph 33(2)(b) of the IR&D Act, the Program is not a program to subsidise the extraction of coal or natural gas. Although certain carbon dioxide capture, carbon dioxide transport and carbon dioxide utilisation technologies could potentially support the extraction of coal or natural gas, section 7 of the Legislative Instrument provides that research, development and demonstration in relation to, or for the purposes of supporting the extraction of coal or natural gas, including via enhanced petroleum recovery or other means, are not eligible activities for funding under the Program.

### **Statement of the Relevance and Operation of Constitutional Heads of Power**

For the purposes of subsection 33(3) of the IR&D Act, the Legislative Instrument specifies that the legislative powers in respect of which it is made are the following:

#### *Corporations power*

Paragraph 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’ (together, constitutional corporations).

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) of the IR&D Act.

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

Constitutional corporations will be eligible to receive benefits under the Program prescribed by the Legislative Instrument, should they be successful in the grant process. The benefits conferred by the Program will be directed to assisting those corporations in the conduct of their ordinary activities (generally involving some aspect of carbon management such as carbon dioxide capture and utilisation). The Program will impose terms and conditions on those corporations 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 powers*

Paragraph 51(xxix) of the Constitution empowers the Parliament 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 party. Australia has obligations under the following treaties discussed below.

Australia has relevant obligations under the United Nations Framework Convention on Climate Change, particularly under Article 4 to address climate change and its impacts including by:

- formulating, implementing, publishing and regularly updating 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, and measures to facilitate adequate adaptation to climate change (Article 4.1(b));
- promoting and cooperating in the development, application and diffusion, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases in all relevant sectors (Article 4.1(c)); and
- adopting national policies and taking 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 (Article 4.2(a)).

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

Further, under the Paris Agreement, Australia has a nationally determined contribution to reduce Australia's net greenhouse gas emissions to 43% below 2005 levels by 2030. Relevantly, Article 4.2 of the Paris Agreement provides that parties shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve, and that parties shall pursue domestic mitigation measures to achieve the contribution.

The Program seeks to encourage development and application of carbon dioxide capture and utilisation technologies to reduce and remove greenhouse gas emissions in Australia, especially in hard-to-abate sectors. These technologies have the potential to significantly reduce Australia's emissions, contributing to treaty obligations. Applicants to the Program will be required to provide an assessment of the nature and quantity of emissions reduced through the proposed activity.

#### *Power to grant financial assistance to States*

Section 96 of the Constitution empowers the Parliament to 'grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

The Program may provide funding to a state government, agency or authority to undertake research, development and demonstration activities relating to carbon dioxide capture and carbon dioxide utilisation technologies.

#### *Territories power*

Paragraph 122 of the Constitution empowers the Parliament to 'make laws for the government of any territory'.

The Program may provide funding to a territory government, agency or authority to undertake research, development and demonstration activities relating to carbon dioxide capture and carbon dioxide utilisation technologies.

#### **Authority**

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

#### **Consultation**

The Department has engaged with industry and research stakeholders; Commonwealth, state and territory governments; and international agencies regarding the Program. Feedback through consultation has highlighted the need for government support to accelerate the advancement and deployment of CCUS technologies in order for them to contribute to emission reduction targets. Stakeholders further highlighted the need for carbon dioxide capture projects to be linked to utilisation or geological storage applications to achieve emissions abatement.

In accordance with section 17 of the *Legislation Act 2003*, the Attorney-General's Department and the Department of Industry, Science and Resources have been consulted on this Legislative Instrument.

As the Program has undergone extensive consultation, it was considered unnecessary to undertake additional consultation in relation to the Legislative Instrument.

### **Regulatory Impact**

It is estimated that the regulatory burden is likely to be minor (OBPR reference number OBPR22-03260)

### **Other**

Further details on the Legislative Instrument are set out in Attachment A.

The Legislative Instrument is compatible with the human rights and freedoms recognised or declared under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. A full statement of compatibility is set out in Attachment B.

**Details of the *Industry Research and Development (Carbon Capture Technologies Program) Instrument 2023***

**Section 1 – Name of Instrument**

1. Section 1 provides that the name of the Legislative Instrument is the *Industry Research and Development (Carbon Capture Technologies Program) Instrument 2023* (the Legislative Instrument).

**Section 2 – Commencement**

2. Section 2 provides that the Legislative Instrument commences on the day after registration on the Federal Register of Legislation.

**Section 3 – Authority**

3. Section 3 provides that the Legislative Instrument is made under section 33 of the *Industry Research and Development Act 1986* (the Act).

**Section 4 – Definitions**

4. Section 4 provides for definitions of terms used in the Legislative Instrument.

**Section 5 – Prescribed Program**

5. Section 5 prescribes, for the purposes of subsection 33(1) of the Act, the Carbon Capture Technologies Program (the *program*).
6. The program provides funding to support the research, development and demonstration of emerging and priority carbon dioxide capture and carbon dioxide utilisation technologies.
7. The purpose of the program is to:
  - a. reduce greenhouse gas emissions to contribute to meeting Australia's greenhouse gas emission reduction obligations; and
  - b. accelerate the research, development and demonstration of emerging and priority carbon dioxide capture and carbon dioxide utilisation technologies to:
    - i. broaden the use of carbon capture, utilisation and storage (CCUS) technologies to include hard-to-abate sectors (including the cement, chemicals and steel sectors), other non-energy industrial emissions and negative emissions technologies; and
    - ii. assist in reducing the cost of such technologies.

**Section 6 – Specified Legislative Power**

8. Section 6 specifies, for the purposes of subsection 33(3) of the Act, that the legislative powers of the Parliament in respect of which the Legislative Instrument is made are:
  - a. foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (within the meaning of paragraph 51(xx) of the Constitution);
  - b. external affairs (within the meaning of paragraph 51(xxix) of the Constitution) as it relates to measures that would assist Australia to meet its obligations under one or more of the following:
    - i. the United Nations Framework Convention on Climate Change, particularly Article 4;
    - ii. the Kyoto Protocol, particularly Article 10;
    - iii. the Paris Agreement, particularly Article 4;
  - c. matters in respect of which this Constitution makes provision until the Parliament otherwise provides (within the meaning of paragraph 51(xxxvi) of the Constitution), together with section 96 of the Constitution;
  - d. the government of a Territory (within the meaning of section 122 of the Constitution).

#### **Section 7 – Eligibility criteria relating to program**

9. Section 7 specifies the eligibility criteria relating to the program for the purposes of subsection 33(4) of the Act.
10. The eligibility criteria relating to the program include the requirement that research, development and demonstration in relation to, or for the purposes of:
  - a. nature-based carbon sequestration;
  - b. supporting fossil fuel production or fossil fuel energy generation; and
  - c. supporting the extraction of coal or natural gas, including via enhanced petroleum recovery or other means;are not eligible activities for funding under the program.
11. Nature-based carbon sequestration includes activities such as agro-forestry, blue carbon, soil carbon sequestration and ocean alkalisation.



## **Statement of Compatibility with Human Rights**

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

*Industry Research and Development (Carbon Capture Technologies Program) Instrument  
2023*

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 purpose of the *Industry Research and Development (Carbon Capture Technologies Program) Instrument 2023* (the Legislative Instrument) is to prescribe the Carbon Capture Technologies Program (the Program). The Program provides \$65 million over eight years as part of the Australian Government's commitment to support research, development and demonstration of emerging and priority carbon dioxide capture and carbon dioxide utilisation technologies.

### **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 Chris Bowen MP  
Minister for Climate Change and Energy**