

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Defence Industry

Industry Research and Development Act 1986

Industry Research and Development (Defence Industry Export Program) Instrument 2024

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, under subsection 33(6) of the Act, delegated the Minister's power under subsection 33(1) to the Minister or Ministers responsible for the administration of indigenous sensitive products and supporting services of Australia's defence industry sector under the *Defence Act 1903*, to prescribe the Defence Industry Export Program (the Program). This is currently the Minister for Defence Industry.

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 Commonwealth entity, or by their delegate (under section 36).

The purpose of the *Industry Research and Development (Defence Industry Export Program) Instrument 2024* (the Legislative Instrument) is to prescribe the Defence Industry Export Program (the Program). Although the Program will involve the commitment of money by the Commonwealth, funding for the Program will be fully sourced from amounts paid by participating foreign governments to the Commonwealth and credited to the Defence Endowments, Bequests and Other Trust Moneys Special Account 2019 (Special Account).

Under the Program, the Commonwealth, represented by the Department of Defence (Department), will enter into agreements with foreign governments to facilitate the export of

defence capabilities manufactured in Australia. The Department will also enter into production agreements with the Australian manufacturers of relevant defence capabilities to facilitate their supply to the relevant foreign government. The Legislative Instrument will authorise payment of the production costs to manufacturers, and entry into agreements about these payments. An example of a defence capability that may be the subject of arrangements under the Program and exported to one or more foreign governments is the Heavy Weapon Carrier, which is manufactured by Rheinmetall Defence Australia.

All expenditure under the Program will be sourced directly from the foreign governments participating in the Program. Prior to any production costs falling due, the foreign government will make payment to the Department to be held on trust and credited to the Special Account. When production costs become payable to the Australian manufacturer (in accordance with the agreement between the Department and the manufacturer) funds will be debited out of the Special Account in accordance with the terms of the agreement between the Department and the participating foreign government. The Program will not involve any expenditure beyond the amounts credited to the Special Account by foreign governments in accordance with their agreements with the Department.

The purpose of the Program is to facilitate export opportunities for Australia's defence industry, while ensuring that Australia's defence capability needs are met. The Program will facilitate the Department's involvement in the production and supply of defence capabilities to foreign governments, and result in significant benefits for Australian defence industry (including in relation to retention of personnel and skills base) as well as the Commonwealth's defence capability needs (including in relation to supply chain surety).

The Program also represents an opportunity to enhance Australia's strategic relationship with trusted foreign government security partners through the export of defence capabilities, as approved by Government.

The Program will be delivered by the Department.

Decisions that the Commonwealth will enter into agreements with foreign governments for the export of defence capabilities, and corresponding agreements with manufacturers for their production, will be made by Government (either via Cabinet, or by one or more responsible Ministers).

The Associate Secretary (SES Band 3) (Program Delegate), may enter into agreements with manufacturers and foreign governments on behalf of the Commonwealth, in accordance with decisions of Government. The Program Delegate will also authorise payments to the relevant manufacturers in accordance with those agreements, and the agreement with the foreign government. The Program Delegate will hold 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.

Decisions by the Program Delegate will not be subject to external merits review, because of the close connection between those decisions and the decision by Government to enter into an agreement with a foreign government. A decision to enter into an agreement with a foreign government is a policy decision of high political content. The Administrative Review Council has recognised that such decisions should be excluded from merits review (see paragraphs [4.22]-[4.30] 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>). Entry into an agreement with the relevant manufacturer for the production of the defence capability will be essential to facilitate the agreement between the Commonwealth and the foreign government. Spending decisions made by the Program Delegate under the Program will be in accordance with the terms of such agreements.

Persons who are otherwise affected by decisions or who have complaints about the Program will have recourse to the Department. The Department will investigate 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.

Statement of the Relevance and Operation of Constitutional Heads of Power

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

Trade and commerce power

Section 51(i) of the Constitution empowers the Parliament to make laws with respect to ‘trade and commerce with other countries, and among the states’.

In that regard, the Program prescribed by the Legislative Instrument is aimed at facilitating international trade of defence capabilities.

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

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

The Department of Finance, the Department of the Prime Minister and Cabinet and the Department of Foreign Affairs and Trade have been consulted about the Program.

Regulatory Impact

It is estimated that the regulatory burden is likely to be minor (OBPR reference number OIA24-06684).

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**

Details of the *Industry Research and Development (Defence Industry Export Program) Instrument 2024*

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Defence Industry Export Program) Instrument 2024*.

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 *Industry, Research and Development Act 1986* (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 Defence Industry Export Program (the Program) for the purposes of section 33 of the IR&D Act.

Under the Program, the Commonwealth (represented by the Department of Defence) will be authorised to make payments to Australian manufacturers for the production of defence capabilities on behalf of foreign governments.

This will facilitate export opportunities for Australia's defence industry, while ensuring that Australia's defence capability needs are met.

Section 6 – Specified Legislative Power

This section specifies that the legislative power in respect of which the Legislative Instrument is made is the power of the Parliament to make laws with respect to trade and commerce (paragraph 51(i) of the Constitution).

Statement of Compatibility with Human Rights

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

Industry Research and Development (Defence Industry Export Program) Instrument 2024

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 expend funds in relation to the Program.

Under the Program, the Commonwealth (represented by the Department of Defence) will enter into agreements with Australian manufacturers for the export of defence capabilities manufactured in Australia to foreign governments. These agreements will support decisions made by Government to enter into agreements with foreign governments for the export of those defence capabilities. Under these arrangements the foreign government will make payments to the Commonwealth to be held on trust, which will be credited to the Defence Endowments, Bequests and Other Trust Moneys Special Account 2019 (Special Account). The Commonwealth will then make corresponding payments to the manufacturer of the defence capability from the Special Account, which will be debited accordingly.

The Program will facilitate the export of defence capabilities, while ensuring that Australia's defence capability needs are met.

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 Pat Conroy MP
Minister for Defence Industry