

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Infrastructure, Transport, Regional Development and Local Government

Industry Research and Development Act 1986

Industry Research and Development (Regional Aviation Connectivity 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 for Industry and Science 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 the Minister's power under subsection 33(1) to the Minister or Ministers responsible for administering the *Civil Aviation Act 1988*, under subsection 33(6) of the IR&D Act to prescribe the Regional Aviation Connectivity Program (the Program).

The statutory framework provided by s33 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 s33, 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 s36).

The purpose of the *Industry Research and Development (Regional Aviation Connectivity Program) Instrument 2024* (the Legislative Instrument) is to prescribe the Regional Aviation Connectivity Program (the Program). The funding for the Program has been secured through the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department) Budget.

The Program provides funding to support and develop regional aviation services and regional aviation companies. The Program will support the Australian Government's policy objectives to maintain essential aviation connectivity to regional communities.

The Legislative Instrument will authorise funding to support and develop regional aviation services and regional aviation companies. Under the Program, this may include the Commonwealth entering into agreements with regional aviation companies in administration to provide funding to facilitate the continued operation of the company during the period of administration. The Legislative Instrument may authorise funding to a regional aviation company under administration to ensure the administration of the company does not result in the company being prematurely wound up or no longer providing regional aviation services. In addition, funding may be provided to assist persons affected by a regional aviation company being under administration, including persons whose flights have been cancelled.

The Program will provide the Government with flexibility to respond in a timely manner to developments in the aviation sector that risk continued accessibility of essential passenger air services for regional communities across Australia. The need for Government funding to support and develop regional aviation services and regional aviation companies may not be known in advance and require timely action under the Program to meet Australian Government objectives to maintain essential aviation connectivity to regional Australian communities.

The financial implications for the Program prior to public announcement of support are not for publication, as disclosure of funding could impact commercial negotiations with potential funding recipients. Disclosure of funding to be delivered under the Program will be published in relevant Portfolio Budget Statements after funding to eligible recipients is announced.

The Program will be delivered by the Department, which has expertise and experience in delivering programs that support regional aviation and connectivity, such as the Regional Airports Program and the Regional Aviation Access Program.

To provide flexibility in how Government support is delivered, including for situations that may require an expedited response, the Program will utilise the funding arrangement that best achieves Australian Government policy objectives.

Funding under the Program may be provided through the financial mechanism most suited to the type and level of support required, including through a grant, guarantee, loan or other investment vehicle.

Financial arrangements used to deliver the Program will be in adherence and accordance with relevant legislation and guidance (as appropriate and applicable) which may include, for example: the *Commonwealth Grants Rules and Principles 2024*, the Commonwealth Procurement Rules and/or other requirements under the *Public Governance, Performance and Accountability Act 2013*.

Decisions that the Commonwealth will enter into an agreement with a regional aviation company in administration to facilitate and maintain regional aviation services will be made by Government (via Cabinet).

The Minister for Infrastructure, Transport, Regional Development and Local Government, the Secretary to the Department, or the Program Delegate may enter into agreements with a regional aviation company in administration in accordance with decisions of Government. Expenditure decisions under an agreement will be made by the Program Delegate, who is a Senior Executive with responsibility for aviation or airport regulatory matters, on behalf of the Commonwealth, and in accordance with decisions of Government.

Any Commonwealth funding agreement entered into by the Government or a delegate on behalf of the Commonwealth under the Program will adhere to and be compliant with relevant financial framework and reporting obligations and processes.

This Legislative Instrument will enable Government to flexibly and quickly respond to developments in the regional aviation sector that could threaten or negatively impact the delivery of regional aviation services. Australians living in regional and remote areas rely on air transport to access essential goods and services, including health and education services, for the movement of high-value, time-sensitive goods, to support local businesses and employment opportunities, and connect communities with friends and family. Regional aviation services support social, cultural, health and economic outcomes for their communities. The Program established by this Legislative Instrument allows the Australian Government to respond, if necessary, to support and develop air connectivity for regional and remote Australian communities where that ongoing connectivity may be at risk.

Whilst specific funding arrangements for the Program will be determined on a case-by-case basis depending on the agreements entered into by Government, the Program involves the allocation of finite resources to a regional aviation service or a regional aviation company that can meet Australian Government objectives to maintain regional aviation connectivity.

Decisions by the Program Delegate will not be subject to external merits review, because the Delegate will be acting directly to implement a decision by Government to enter into an agreement with a regional aviation company in administration. A decision by Government to enter into an agreement to provide funding to a regional aviation company in administration to maintain aviation services to regional Australian locations is a policy decision.

Persons who are otherwise affected by decisions or who have complaints about the Program may have recourse through 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.

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

- trade and commerce power (s 51(i) of the Constitution)
- the bankruptcy and insolvency power (s51(xvii) of the Constitution)
- the corporations power (s 51(xx) of the Constitution)
- the power to grant financial assistance to the States (s 96 of the Constitution)
- the referral power (s 51(xxxvii) of the Constitution)
- the Territories power (s 122 of the Constitution).

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’.

The Program prescribed by the Legislative Instrument may provide funding for regional aviation services where those services occur between States (for example, funding a regional aviation company that provides or supports interstate flights to or from regional or remote areas).

Bankruptcy and insolvency power

Section 51(xvii) of the Constitution empowers the Parliament to make laws with respect to ‘bankruptcy and insolvency’.

The Program prescribed by the Legislative Instrument may provide funding to a regional aviation company that is under administration within the meaning of the *Corporations Act 2001*.

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 *Industry Research and Development Act 1986* (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 may be eligible to receive benefits under the Program prescribed by the Legislative Instrument. The benefits conferred by the Program will be directed to assisting those corporations in the conduct of their ordinary activities. The Program will impose terms and conditions on those corporations under an 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.

Power to grant financial assistance to the 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 prescribed by the Legislative Instrument may involve grants of financial assistance to the States to help support and develop regional aviation services and regional aviation companies.

Referral power

Section 51(xxxvii) of the Constitution relates to ‘matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States’.

The Queensland and Tasmanian Parliaments referred the matter of ‘air transport’ to the Commonwealth Parliament through the enactment of the *Commonwealth Powers (Air Transport) Act 1950* (Qld) and the *Commonwealth Powers (Air Transport) Act 1952* (Tas) respectively. The Program prescribed by the Legislative Instrument may involve funding regional aviation services in Queensland and Tasmania.

Territories power

Section 122 of the Constitution empowers the Parliament to ‘make laws for the government of any territory’.

The Program prescribed by the Legislative Instrument may involve funding to support and develop regional aviation services and regional aviation companies operating in a Territory, between Territories or between a Territory and a State.

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

Background

Access to affordable and reliable air services is important to rural and regional Australia, connecting Australians with family, community and essential goods and services. It enables access to international markets, for both people and goods, expanding business opportunities that facilitate our economic growth. Access to aviation is vital for the health, social and economic wellbeing of remote communities, including to support Closing the Gap targets related to improving education, health and employment outcomes.

Australia is a challenging operating environment for domestic airlines due to low population densities across vast distances. These challenges are demonstrated by the fact that Australia's domestic aviation industry has not historically grown sustainably beyond two major carriers, (with a few limited exceptions) and several domestic carriers exiting the market. Operational challenges are compounded for regional airline operators, with regional routes often typified by low passenger demand, and very thin margins (or even being unprofitable, with some state governments regulating or subsidising routes to ensure connectivity for communities).

The Program has been developed so that the Australian Government is able to respond to preserve air connectivity for regional and remote communities where connectivity is threatened or unable to otherwise be maintained.

Authority

Section 33 of the *Industry Research and Development Act 1986* provides authority for the Legislative Instrument.

Consultation

The Program prescribed is designed to give future flexibility to allow the Australian Government to be able to respond in a timely manner to developments in the regional aviation sector.

Extensive consultation with industry and impacted communities on the importance of supporting and developing regional aviation services and regional aviation companies was carried out through the development of the *Aviation White Paper: Towards 2050*, released on 26 August 2024.

As a future-focused Program, consultation about the Program cannot be undertaken. However, consultation on measures to be delivered under the program will be completed in line with the requirements of each measure.

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.

Regulatory Impact

It is estimated that the regulatory burden is likely to be minor (Office of Impact Analysis (OIA) reference number OIA24-08276).

Details of the *Industry Research and Development (Regional Aviation Connectivity Program) Instrument 2024*

PART 1 – PRELIMINARY

Section 1 – Name of Instrument

This section specifies the name of the Legislative Instrument as the *Industry Research and Development (Regional Aviation Connectivity Program) Instrument 2024*.

Section 2 – Commencement

This section provides that the Legislative Instrument commences on the day the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section specifies the provision of the *Industry Research and Development Act 1986* (the 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 Regional Aviation Connectivity Program (the Program) for the purposes of s 33 of the Act.

Subsections (3) to (5) of the Prescribed Program are not exhaustive.

The Program will provide funding to support regional aviation to support and develop regional aviation services and regional aviation companies. The Program reflects the Australian Government's understanding of the importance of reliable and affordable services to regional Australia. In particular, the Program will provide funding to regional aviation companies in administration to support and maintain regional connectivity and the delivery of regional aviation services. Funding will be provided in the form of the most suitable funding arrangement that can best achieve Australian Government policy objectives around supporting regional connectivity and accessibility to air services for regional and remote communities.

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 with

other countries, and among the States (s51(i) of the Constitution), bankruptcy and insolvency (s51(xvii) of the Constitution), foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth (s51(xx) of the Constitution), financial assistance to States (s51(xxxvi) and s96 of the Constitution), matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States (s51(xxxvii) of the Constitution) and the government of a Territory (s122 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 (Regional Aviation Connectivity 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 *Industry Research and Development (Regional Aviation Connectivity Program) Instrument 2024* (the Legislative Instrument) provides legislative authority to commit Commonwealth funding for the Regional Aviation Connectivity Program (the Program).

The purpose of the Program is to maintain regional aviation services by supporting regional aviation companies in administration. The Program is designed to provide the Government with flexibility to respond to developments in the aviation sector that risk continued accessibility of air services for regional communities across Australia.

Human rights implications

This Legislative Instrument positively engages the right to education and health, to the extent that maintaining air services for regional and remote communities facilitates access to health and education services.

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

Conclusion

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

The Hon Catherine King MP

Minister for Infrastructure, Transport, Regional Development and Local Government