



5 August 2021

The Hon Christian Porter MP
Minister for Industry, Science and Technology
Parliament House
CANBERRA ACT 2600

Via email: industrydlo@industry.gov.au

CC: Minister for Energy and Emissions Reduction, The Hon Angus Taylor MP,
angus.taylor@energy.gov.au; dlotaylor@industry.gov.au

Minister for Resources and Water, The Hon Keith Pitt MP,
minister.pitt@industry.gov.au

Dear Minister,

**Industry Research and Development Instruments [F2021L00610] [F2021L00536] [F2021L00539]
[F2021L00547] [F2021L00567]**

The Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) assesses all disallowable legislative instruments against scrutiny principles outlined in Senate standing order 23. The committee has identified scrutiny concerns in relation to the above instruments, and the committee seeks your advice in relation to these matters.

***Parliamentary oversight
Adequacy of explanatory materials***

Senate standing order 23(3)(k) requires the committee to consider whether an instrument complies with any other ground relating to the technical scrutiny of delegated legislation. This includes whether an instrument limits parliamentary oversight. In addition, Senate standing order 23(3)(g) requires the committee to scrutinise each instrument as to whether the accompanying explanatory material provides sufficient information to gain a clear understanding of the instrument.

The committee raises the matter outlined below in relation to the following instruments:

- Industry Research and Development (Boosting Australia's Diesel Storage Program) Instrument 2021 [F2021L00610];
- Industry Research and Development (Growing Australia's Cyber Skills Program) Instrument 2021 [F2021L00536];
- Industry Research and Development (Modern Manufacturing Initiative Program) Instrument 2021 [F2021L00539];
- Industry Research and Development (Carbon Capture, Use and Storage Development Program) Instrument 2021 [F2021L00547]; and
- Industry Research and Development (Beetaloo Cooperative Drilling Program) Instrument 2021 [F2021L00567].

These instruments prescribe spending for specified government programs. However, the eligibility criteria for the various programs are not set out on the face of each instrument, nor are they set out in detail in the instruments' accompanying explanatory statements.

In general, the committee will be concerned where significant details concerning the operation and application of measures prescribed by an instrument are set out in non-legislative policy guidance. The committee notes that this issue often arises in instruments made under Part IV of the *Industry Research and Development Act 1986*.

In these instances, the instruments provide for the broad purposes of the grant programs. While the explanatory statements contain high-level guidance as to how the programs may operate, they generally state that further information about the programs including the eligibility criteria will be set out in grant guidelines.

The committee understands from informal correspondence that your department's preferred approach is for eligibility criteria for programs to be specified in grant guidelines. However, parliamentary oversight is limited where such criteria are not set out in either the instrument itself or its explanatory statement. The committee considers that the scrutiny of instruments which, in combination with their enabling Act, authorise the Commonwealth to spend public money is an essential aspect of parliamentary scrutiny and control of Commonwealth expenditure. The eligibility criteria for these programs should therefore be included in legislative instruments which are subject to parliamentary oversight, or at least in the explanatory statements accompanying such instruments, as opposed to non-legislative guidance.

The committee also generally expects explanatory statements to fully explain the purpose and operation of each section of the relevant instrument. This accords with the requirements of paragraph 15J(2)(b) of the *Legislation Act 2003*, as well as the more general expectation that an explanatory statement be sufficiently comprehensive as to assist with the interpretation of the law.

In light of the above, the committee would appreciate your advice as to whether the explanatory statements to each of the five instruments could be amended to set out the eligibility criteria for the programs specified.

Matters more appropriate for parliamentary enactment

Senate standing order 23(3)(j) requires the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment, which should be included in primary, rather than delegated, legislation.

The committee raises the matter outlined below in relation to the Industry Research and Development (Modern Manufacturing Initiative Program) Instrument 2021 [F2021L00539].

This instrument prescribes the Modern Manufacturing Initiative Program (the Program). The explanatory statement to the instrument states that the program will provide \$1.3 billion over four financial years from 2020-21 to 2023-24 as part of the government's commitment to upscale Australia's manufacturing capability and to strengthen future resilience.

By authorising government spending on the Program, the instrument deals with significant matters relating to Commonwealth investment in the manufacturing sector. In this context, it is unclear whether this instrument provides the sole legislative basis for the Modern Manufacturing Initiative Program, or whether at least elements of this program may have been previously considered by the Parliament.

Noting that the Modern Manufacturing Initiative Program appears to be a significant element of Commonwealth industry policy, the committee requests your advice as to whether there is any primary or delegated legislation supporting or regulating the Modern Manufacturing Initiative Program beyond this instrument.

The committee's expectation is to receive a response in time for it to consider and report on the instrument while it is still subject to disallowance. If the committee has not concluded its consideration of an instrument before the expiry of the 15th sitting day after the instrument has been tabled in the Senate, the committee may give notice of a motion to disallow the instrument as a precautionary measure to allow additional time for the committee to consider information received.

Noting this, and to facilitate the committee's consideration of the matters above, the committee would appreciate your response by **19 August 2021**.

Finally, please note that, in the interests of transparency, this correspondence and your response will be published on the committee's website.

If you have any questions or concerns, please contact the committee's secretariat on (02) 6277 3066, or by email to sdlc.sen@aph.gov.au.

Thank you for your assistance with this matter.

Yours sincerely,

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation