# EXPLANATORY STATEMENT

## Issued by authority of the Minister for Superannuation, Financial Services and the Digital Economy and Minister for Women’s Economic Security

*Industry Research and Development Act 1986*

*Industry Research and Development (Consumer Data Right****—****AEMO Concessional Loan Program) Instrument 2022*

Section 33 of the *Industry Research and Development Act 1986* (the IR&D Act) provides a mechanism for the Minister for Industry, Energy and Emissions Reduction 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, Energy and Emissions Reduction has delegated his power under subsection 33(1) to the Minister for Superannuation, Financial Services and the Digital Economy and Minister for Women’s Economic Security, to prescribe the Consumer Data Right – AEMO Concessional Loan Program (the Program). The delegation was made under subsection 33(6) of the IR&D Act.

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. Prescribing programs in disallowable legislative instruments provides transparency and parliamentary oversight of Government programs and spending activities, while reducing the administrative burden on the Commonwealth.

Once a program is prescribed 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 (Consumer Data Right****—****AEMO Concessional Loan Program) Instrument 2022* (the Instrument) is to prescribe the Program. The purpose of the Program is to facilitate a loan that will allow the Australian Energy Market Operator (AEMO) to upgrade its systems and procedures, so that it can make its relevant data available in a form that can be shared with consumers via the internet, in accordance with the Consumer Data Right (CDR) provisions in the *Competition and Consumer Act 2010* (CCA).

This is necessary because AEMO will be a ‘data holder’ (and have data holder obligations) when the CDR begins to apply to the energy sector in November 2022. Support in the form of a loan is appropriate because AEMO is currently unable to recover costs from industry. The Parliament of South Australia is expected to consider amendments to the National Electricity Law, which would enable AEMO to recover CDR related costs from industry in the future.

Prescribing the Program is not a matter more appropriate for parliamentary enactment, noting that AEMO requires the funding as soon as possible in advance of November 2022 for the system and procedure upgrades to be completed in time.

Program decisions will be made by the Minister for Superannuation, Financial Services and the Digital Economy and Minister for Women’s Economic Security or delegate.

The eligibility criteria for the Program would include that the recipient of the loan is AEMO.

The Program will not be subject to external merits review as it involves the provision of funds by way of a one-off concessional loan to AEMO. As explained above, the purpose of the funding is to enable AEMO to comply with the CDR. Given the objectives of the Program, there would be no utility in funding decisions being subject to merits review.

Persons who are otherwise affected by decisions or who have complaints about the Program will have recourse to the Department of the Treasury (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.

There are no conditions that need to be met before the power to prescribe programs can be exercised.

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

In accordance with section 17 of the *Legislation Act 2003*, AEMO, the Department of Industry, Science, Energy and Resources, and the Department of Finance were consulted in development of the Program. The Department of Industry, Science, Energy and Resources, and the Attorney-General’s Department have been consulted on this Instrument. No public consultation was undertaken, reflecting the nature of the Program as a one-off concessional loan and that AEMO is the sole entity directly affected by the Instrument.

Details of the Instrument are set out in Attachment A.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Instrument commenced on the day after registration on the Federal Register of Legislation.

The Program has been assessed as having no more than a minor regulatory impact (OBPR reference number 44619). Accordingly, a minor Regulation Impact Statement has been prepared. An estimated average annual regulatory cost of $2051.14 is identified for AEMO, the sole entity that will bear a regulatory impact.

A Statement of Compatibility with Human Rights is at Attachment B.

**ATTACHMENT A**

**Details of the *Industry Research and Development (Consumer Data Right—AEMO Concessional Loan Program) Instrument 2022***

Section 1 – Name of Instrument

This section specifies the name of the Instrument as the *Industry Research and Development (Consumer Data Right****—****AEMO Concessional Loan Program) Instrument 2022* (the Instrument).

Section 2 – Commencement

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

Section 3 – Authority

The Instrument is made under section 33 of the *Industry Research and Development Act 1986* (the IR&D Act).

Section 4 – Definitions

This section includes definitions of terms used in the Instrument.

Section 5 – Prescribed Program

This section prescribes the Consumer Data Right – AEMO Concessional Loan Program (the Program) for the purposes of section 33 of the IR&D Act.

The Program provides funding via a loan to facilitate an upgrade of the Australian Energy Market Operator’s (AEMO) information technology systems. This is so that AEMO can make its relevant data available in a form that can be shared with consumers, by way of the internet, in accordance with the Consumer Data Right (CDR) provisions in the *Competition and Consumer Act 2010* (CCA).

Section 6 – Specified Legislative Power

The Instrument specifies that the legislative powers in respect of which it 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 (within the meaning of paragraph 51(xx) of the Constitution); and
* postal, telegraphic, telephonic, and other like services (within the meaning of paragraph 51(v) of the Constitution).

Loan Arrangements

Funding of $6.153 million will be made available to AEMO, by way of a loan on concessional terms, to support the upgrade of AEMO’s systems and procedures so it can make its data available in a form that can be shared via the internet with consumers and accredited persons in accordance with the CDR.

This is necessary because AEMO will be a secondary data holder when the CDR begins to apply to the energy sector.

The applicable data sharing model is established by the *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2021*. In a typical scenario in this model, a CDR consumer (as defined in subsection 56AI(3) of the CCA) seeks a service from an accredited person (such as a market comparison website). The accredited person requests CDR data (as defined in subsection 56AI(1) of the CCA) from the CDR consumer’s energy retailer (with the consent of the CDR consumer). This allows the accredited person to provide its service (such as comparing energy retailers against each other, specifically tailored to the CDR consumer’s needs).

Some of the CDR data requested by the accredited person may be held by the retailer in its own capacity as a CDR data holder. However, some of the data may be held by AEMO. The energy retailer will be required under the CDR Rules to request the data from AEMO, and AEMO discloses the requested data to the energy retailer in response. The energy retailer is then required to disclose any AEMO data it has received to the accredited person who in turn provides goods and services to the CDR consumer.

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’ (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).

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

The only entity eligible to receive benefits under the Program is a constitutional corporation. The benefits conferred by the Program will be directed to assisting the corporation, AEMO, in the conduct of its ordinary activities as a CDR data holder. Terms and conditions with which AEMO must comply to receive funding under the Program will be set out in a loan agreement in accordance with section 35 of the IR&D Act.

Communications power

The Instrument also specifies that a legislative power in respect of which it is made is the communications power (paragraph 51(v) of the Constitution). Paragraph 51(v) of the Constitution empowers the Parliament to make laws with respect to postal, telegraphic, telephonic and other like services.

In that regard, funding provided under the Instrument will support AEMO to make data available in a form that can be shared with consumers and accredited persons via the internet.

**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 (Consumer Data Right—AEMO Concessional Loan Program) 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

This Legislative Instrument prescribes the Consumer Data Right – AEMO Concessional Loan Program (the Program) for the purposes of subsection 33(1) of the *Industry Research and Development Act 1986*. The purpose of the Program is to facilitate a loan that will allow the Australian Energy Market Operator (AEMO) to upgrade its systems and procedures, so that it can make its relevant data available in a form that can be shared with consumers via the internet, in accordance with the Consumer Data Right (CDR) provisions in the *Competition and Consumer Act 2010* (CCA).

### Human rights implications

The substance of this Legislative Instrument and the Program does not engage any of the applicable rights or freedoms.

The Program facilitates AEMO’s compliance with law that engages the right to freedom from unlawful or arbitrary interference with privacy under Article 17 of the International Covenant on Civil and Political Rights. AEMO is a designated data holder under the *Consumer Data Right (Energy Sector) Designation 2020* and must comply with provisions in Part IVD of the CCA and the *Competition and Consumer (Consumer Data Right) Rules 2020.*

Part IVD of the CCA and the *Competition and Consumer (Consumer Data Right) Rules 2020* engage Article 17. This is because the CDR enables personal information to be collected, and requires personal information to be shared, at the request of a consumer. The risk to privacy is heavily mitigated by stringent privacy safeguards that apply to designated data holders and accredited recipients of CDR data. The explanatory materials to that legislation detail the extent to which Article 17 is engaged.

However, this Legislative Instrument does not, by itself, engage Article 17. In substance, the Legislative Instrument does not enable or require the collection or disclosure of any personal information. This Legislative Instrument merely prescribes the Program for the purposes of subsection 33(1) of the *Industry Research and Development Act 1986*.

### Conclusion

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