Monitor 2 of 2023 – Ministerial Response

Contents

THE HON ANDREW GILES MP

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MC23-032651

Ms Fattimah Imtoual
Committee Secretary (A/g)
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

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Dear Committee Secretary

Thank you for your correspondence of 21 November 2023 in relation to the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation on the *Migration Amendment (Biosecurity Contravention) Regulations 2023* (the Instrument). I appreciate the opportunity to respond to the matters raised by the Committee in *Delegated Legislation Monitor 14 of 2023*, and thank you for bringing this matter to my attention.

I note the Committee has requested further detail about what consultation was undertaken in relation to the Instrument, and the justification if no public consultation was undertaken, including with visa holders, relevant peak bodies or other experts. I offer the following comments and additional information in response.

General comments

The *Biosecurity Act 2015* provides the overarching regulatory framework for the management of diseases and pests entering Australia that may cause harm to human, animal or plant health or the environment. Contraventions of the Biosecurity Act pose a serious threat to Australia's economy, agricultural sector, animal, plant, human health and the environment.

The grounds for visa cancellation provided for in paragraph 2.43(1)(s) of the Migration Regulations 1994—where the Minister reasonably believes that a visa holder has contravened a specified provision of the Biosecurity Act—complement the offences in the Biosecurity Act. The biosecurity-related visa cancellation grounds provide an additional layer of risk treatment and mitigation where some temporary visa holders may seek to circumvent Australia's biosecurity framework and requirements.

The biosecurity-related visa cancellation grounds in paragraph 2.43(1)(s) of the Migration Regulations was first introduced on 17 April 2019. At the time, the grounds included specified offence provisions of the Biosecurity Act including subsections 126(2), 128(2), 532(1) and 533(1). The Instrument operates to expand the cancellation ground in paragraph 2.43(1)(s) to ensure that it also includes, appropriately, the new offence in subsection 186A(1) of the Biosecurity Act relating to concealment of conditionally non-prohibited goods.

Consultation

The subsection 186A(1) concealment offence was inserted in the Biosecurity Act on 6 December 2022 by the *Biosecurity Amendment (Strengthening Biosecurity) Act 2022*. The amendment of the Migration Regulations, to include subsection 186A(1) in the scope of the biosecurity-related grounds for visa cancellation, maintains consistency between the Biosecurity Act and the Migration Regulations and ensures a whole-of-government approach to managing biosecurity risks at the border.

The Department of Home Affairs engaged with the Department of Agriculture, Fisheries and Forestry (DAFF) in the development of the Instrument, and DAFF supported the amendment. As the Instrument does not substantially alter the operation of the existing legislation, no further consultation on the Instrument was considered necessary in the circumstances. DAFF engaged in consultation in relation to the measures in the Biosecurity Amendment (Strengthening Biosecurity) Bill 2022, which included the new offence in subsection 186A(1). The Bill's explanatory memorandum describes the consultation undertaken by DAFF in relation to the measures in the Bill.

Australia's biosecurity requirements, and the potential for visa cancellation at the border as a consequence of biosecurity breaches, are well understood by international travelers, industry stakeholders and relevant peak bodies. The potential impact of the amendments is limited to international travelers (non-citizens who hold temporary visas) who contravene Australia's biosecurity laws. The Department and DAFF are also continuing to work closely to ensure that public messaging (including pre-departure education) about the possibility of visa cancellation for the contravention of biosecurity laws and the development of communication material for incoming passengers. This ensures visa holders who may be affected by the Instrument will be made aware of their biosecurity obligations, and the possible consequences for breaches, before they arrive in Australia.

Delegations, safeguards and merits review

The Committee has also requested advice as to why it is considered necessary and appropriate to delegate the powers or functions in the Instrument; who the power or function will be delegated to, including whether that person will be required to have the appropriate skills, qualifications and experience to exercise the powers or functions; and whether any safeguards or limitations apply to the exercise of these powers or functions, including whether merits review is available.

The amendment in the Instrument, to include a breach of subsection 186A(1) of the Biosecurity Act as grounds to consider discretionary cancellation of a temporary visa, operates in conjunction with the existing power to cancel a visa under paragraph 116(1)(g) of the *Migration Act 1958* (the Migration Act).

Visa cancellation is only undertaken by officers who have completed comprehensive training in visa cancellations and are assessed as competent to undertake this work. The cancellation ground in paragraph 2.43(1)(s) is only available where the visa holder has arrived in Australia but has not yet been immigration cleared. As such, it is appropriately trained and qualified Australian Border Force (ABF) officers working at Australia's airports and seaports who may be called on to consider visa cancellation on these grounds. ABF officers are delegated the Minister's power under section 116 to cancel a person's visa on the ground in paragraph 2.43(1)(s) of the Migration Regulations. ABF officers are the first point of contact for non-citizens arriving at Australia's international border, and are responsible for assessing whether a non-citizen may have contravened Australia's biosecurity laws under paragraph 2.43(1)(s) of the Migration Regulations. As this assessment and determination would occur at the border ahead of immigration clearance, the delegation of this power to ABF officers is necessary and appropriate.

As noted in the Explanatory Statement, visa cancellation officers, including ABF officers, are supported by department policies, procedural instructions and standard operating procedures in relation to visa cancellation, including the biosecurity grounds as amended by the Instrument. These documents provide comprehensive guidance, procedures and support in relation to visa cancellation under section 116 of the Migration Act, including the process for visa cancellation specifically where the Minister's delegate reasonably believes the visa holder has contravened a specified provision of the Biosecurity Act, including new subsection 186A(1).

Decisions to cancel a visa on the grounds in paragraph 2.43(1)(s) of the Migration Regulations are not merits-reviewable. Section 338 of the Migration Act sets out the circumstances in which merits review is available in relation to certain visa cancellation decisions. A decision to cancel a visa in immigration clearance is not merits reviewable (paragraph 338(3)(b) of the Migration Act). However, the Minister (or the Minister's delegate) is required to provide for processes of natural justice before making a decision to cancel a visa on biosecurity-related grounds. This includes giving the non-citizen notice that their visa may be cancelled, the proposed reasons for the cancellation and an opportunity for the non-citizen to respond before cancellation occurs. This is provided for in Subdivision E of Division 3 of Part 2 of the Migration Act, and is supported by related departmental policies, procedural instructions and training for delegates.

Thank you for raising these matters. I trust this information will assist the Committee in its consideration of the Instrument.

Yours sincerely

ANDREW GILES

19/01/2024

THE HON MADELEINE KING MP
MINISTER FOR RESOURCES
MINISTER FOR NORTHERN AUSTRALIA

MS24-000242

Ms Hannah Dibley
Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
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Dear Ms Dibley

I refer to your email of 8 February 2024 seeking further information in relation to the *Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023* (the GHG Regulations).

In the *Delegated Legislation Monitor 1 of 2024*, tabled in the Senate on 7 February 2024, the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) requested further information relating to the GHG Regulations. Specifically, the Committee sought advice regarding the availability of independent merits review for discretionary decisions made by the responsible Commonwealth Minister under subsections 25(1) and 32(2) of the GHG Regulations and additional information in relation to discretionary decisions made by the responsible Commonwealth Minister under subsections 25(1) and 32(2).

A response to the matters raised is enclosed with this letter.

Yours sincerely

[redacted]

Madeleine King MP

6/2/2024

Enc (1) - Response to the Senate Standing Committee for the Scrutiny of Delegated Legislation

Attachment A

Response to the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023

Response to the Committee's questions about the availability of independent merits review

The Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023 (the GHG Regulations) confer a number of discretionary decisions on the responsible Commonwealth Minister which are excluded from independent merits review. This includes decisions in relation to the approval or refusal of a draft site plan (subsection 25(1)) and withdrawal of an approved site plan in specified circumstances (subsection 32(2)).

In its *Delegated Legislation Monitor 1 of 2024* tabled in the Senate on 7 February 2024 (Delegated Legislation Monitor), the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) states that the explanatory statement to the GHG Regulations does not adequately justify why merits review is excluded in relation to these decisions in the GHG Regulations, with regard to the factors set out in the Administrative Review Council's Guide: *What decisions should be subject to merits review?* (the ARC guide).

The Committee therefore requests the Minister's advice as to whether further justification can be provided as to why:

- decisions under subsection 25(1) of the GHG Regulations to approve or refuse draft site plans are appropriate for exclusion from merits review, with reference to the ARC guide, noting the potential significant consequences of draft site plans; and
- decisions under subsection 32(2) of the GHG Regulations to withdraw approval of a site plan are appropriate for exclusion from merits review, with reference to the ARC guide and, if known, examples of the kinds of other relevant decisions that would be considered to fall within law enforcement decisions excluded in that guidance.

The Committee also notes that that the exclusion of merits review on the basis of decision-makers' expertise is not in accordance with the ARC guide.

Response:

The information provided by the Committee in its Delegated Legislation Monitor is noted, particularly in relation to the application of the ARC guide. Given the purpose of merits review, it is important to give adequate and detailed consideration to provisions which should, or should not, be subject to merits review.

The Australian Government has announced a policy review of the offshore environmental management framework, inclusive of the carbon capture and storage regulatory regime. The review will examine opportunities for regulatory and administrative certainty and efficiency for carbon capture and storage projects. Noting the Committee's comments, the availability of independent merits review for the discretionary decisions under the GHG Regulations identified by the Committee will be considered further as part of the review.

In the meantime, it is important that the GHG Regulations continue in force to ensure regulatory certainty, and to provide a robust framework for GHG injection and storage operations in offshore areas. The GHG Regulations remake the previous Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2011 in substantially the same form. The previous Regulations did not provide merits review for discretionary decisions under those Regulations. While acknowledging that this does not justify the exclusion of merits review in the

longer-term, it is considered that the forthcoming review is the appropriate forum in which to consider the application of merits review.

Response to the Committee's question about the conferral of discretionary powers

The GHG Regulations enable the responsible Commonwealth Minister to have regard to any other matters that the Minister considers relevant when making a decision as to whether to approve or refuse a draft site plan (subsection 25(3)), or to approve or refuse a draft variation to an approved site plan (subsection 42(3)).

In the Delegated Legislation Monitor the Committee states that the provisions appear to confer broad discretionary powers on the Minister, and the explanatory statement to the GHG Regulations does not provide guidance on the types of matters that may be relevant matters for the purpose of these provisions.

The Committee therefore requests the Minister's advice as to:

- examples of the types of 'other matters' that may be relevant under subsections 25(3) and 42(3) of the GHG Regulations; and
- whether there are any safeguards or limitations on these discretionary powers.

Response:

Section 25 of the GHG Regulations requires the responsible Commonwealth Minister to either approve or refuse to approve a draft site plan submitted by an applicant for a greenhouse gas injection licence. The Minister may approve the draft site plan if reasonably satisfied that it meets the criteria set out in Division 2 of Part 4 of the GHG Regulations. Subsection 25(3) provides that the Minister may also have regard to any other matters the Minister considers relevant in deciding whether to approve the draft site plan.

Section 42 requires the responsible Commonwealth Minister to either approve or refuse to approve a draft variation of an approved site plan submitted by a GHG injection licensee. The Minister may approve a draft variation if reasonably satisfied that it meets the criteria in subsection 42(2). Subsection 42(3) provides that the Minister may also have regard to any other matters the Minister considers relevant in deciding whether to approve the draft variation.

The decision to approve or refuse to approve a draft site plan or variation of an approved site plan is discretionary, even if the Minister is reasonably satisfied that the draft site plan or variation otherwise meets the criteria set out in the GHG Regulations. Subsections 25(3) and 42(3) make clear that, in exercising this discretion, the Minister can consider other relevant matters that may not otherwise be specified in the criteria when deciding whether to approve or refuse to approve a draft site plan or variation.

It is likely that site plans will be complex documents. While the other criteria specified in the GHG Regulations cover key matters that the Minister must take into account when making a decision, it may not be possible to cover all matters that may be relevant on a case-by-case basis, particularly given that each greenhouse gas injection and storage operation will differ in relation to matters including location, the nature of the identified greenhouse gas storage formation, potential behaviour of an injected greenhouse substance, and infrastructure and equipment to be used for operations.

In addition, the relevant provisions of the GHG Regulations have not yet been applied, as there have been no applications for a greenhouse gas injection licence to date. Although efforts have been made to include criteria relating to the key matters that are foreseen to be relevant, it is not certain that the criteria specified in the GHG Regulations will cover all of the key matters that are relevant to a decision whether to approve or refuse to approve a draft site plan or variation of an approved site plan.

In this context, subsections 25(3) and 42(3) ensure that other relevant matters can be taken into account by the Minister.

If it becomes evident in practice that particular matters are frequently taken into account by the Minister as "other relevant matters", to increase regulatory clarity and certainty the GHG Regulations can be amended in future to prescribe these matters as criteria to be taken into account for decisions generally.

The responsible Commonwealth Minister can only take into consideration other matters that are relevant to the decision to approve a draft site plan or variation of an approved site plan. The Minister could not take into account irrelevant considerations. The Minister's decision would also need to be consistent with other administrative law principles. For example, common law procedural fairness applies to decisions to approve or refuse to approve a draft site plan or variation of an approved site plan. This means that the Minister will be required to give the applicant or licensee a reasonable opportunity to comment on any adverse matters that the Minister proposes to take into account in making the decision, and consider any comments before a decision is made.

The applicant or licensee will also be able to apply for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* or the *Judiciary Act 1903* if the applicant or licensee considers that the Minister took into account one or more irrelevant considerations in making the decision, or is not satisfied that adequate procedural fairness was provided before the decision was made.

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MS24-000118

Senator Linda White
Chair
Senate Standing Committee for the
Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator White Linda

I refer to a request received from the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) on 8 February 2024. The request relates to the financial assistance scheme for respondents to applications brought under the *Family Law (Child Abduction Convention) Regulations 1986* prescribed in the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2023* (Attorney-General's Portfolio Regulations).

In particular, the Committee requested whether the Attorney-General's Portfolio Regulations' explanatory statement can be amended to include the additional justification provided for excluding independent merits review with reference to the relevant grounds in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*.

I agree to issue a replacement explanatory statement. My department will arrange for the lodgement of the replacement explanatory statement on the Federal Register of Legislation and will advise the Committee secretariat once registered.

I note that on 5 December 2023 the Committee gave notice of a motion to disallow the Attorney-General's Portfolio Regulations.

I have copied this letter to the Attorney-General, the Hon Mark Dreyfus KC MP.

Yours sincerely

[redacted]

Katy Gallagher

19 FEB 2024