Monitor 12 of 2023 – Ministerial Response

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The Hon Jason Clare MP
Minister for Education

Reference: MC23-004445

Senator Linda White
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Scrutiny of Delegated Legislation Committee
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Dear Senator White

Thank you for the Scrutiny of Delegated Legislation Committee's (the Committee) correspondence of 14 September 2023 regarding scrutiny concerns with the *Australian Education Regulations 2023* (the Regulations). I provide the following advice to the Committee.

Exercise of powers under sections 33, 39 and 39A

Background

1. The Australian Government provides significant Commonwealth financial assistance under the *Australian Education Act 2013* (the Act) for approved bodies[1] representing government and non-government schools.

2. The provision of this financial assistance carries responsibilities and requirements for approved bodies under the Act, for example as set out in section 75 (requirements relating to operating not for profit, being fit and proper, and maintaining financial viability), section 77 (ongoing policy requirements including implementing the Australian Curriculum, participating in the National Assessment Program – Literacy and Numeracy, and reporting), and section 78 (ongoing requirements on use of public funding).

3. The Department of Education administers the Act and the Regulations, and has established processes for monitoring the compliance of approved bodies with their legislative responsibilities and requirements including, if necessary, taking appropriate action in instances of non-compliance.

4. The requirements under sections 33, 39 and 39A of the Regulations are essential to the ongoing monitoring of approved bodies' compliance with the Act and Regulations. These powers further continue in substance the same requirements that were imposed under the previous *Australian Education Regulation 2013* (the 2013 Regulation).

[1] Note the following are the types of approved bodies under the Act – approved authority, block grant authority, and non-government representative body.

Parliament House, Canberra ACT 2600

Section 33

5. Reflecting the above, in appointing an authorised person under section 33 of the Regulations, the factors taken into account in that appointment will depend on the nature of the investigation or compliance activity that is intended to take place, consistently with the role of an authorised person contemplated by sections 39 and 39A.

6. An authorised person could be a legal practitioner, investigator, auditor, former regulator, or forensic accountant depending on the specific details to be investigated. By way of example, if an investigation related to the financial matters of an approved body, the Minister could consider whether a person had suitable experience and qualifications in auditing or accounting. In addition, when appointing an authorised person to undertake auditing activities of approved bodies' compliance with the Act and Regulations, for example the requirements in sections 75 and 77 of the Act, consideration could be given to demonstrated compliance audit qualifications and suitable associated expertise and experience.

Sections 39 and 39A

7. The powers under sections 39 and 39A of the Regulations are used to require information or access to records from approved bodies relating to their compliance, in circumstances where it is not otherwise available to the department. These are essential powers to ensure the ongoing integrity and accountability of Commonwealth financial assistance provided under the Act, and provide an appropriate and balanced mechanism for investigating non-compliance including misuse of financial assistance.

8. This may include requiring an approved body to provide access to records about its expenditure of Commonwealth financial assistance, the evidentiary basis for financial and other reporting to the department (including where that may have directly influenced the calculation of Commonwealth financial assistance – such as school census), and to ensure that it has appropriate and suitable governance arrangements for its schools and management of public funding.

9. Both provisions are limited in their application to information or records related to compliance with the Act or Regulations, and associated financial administration. This limitation confines the exercise of the powers to require information to matters that are directly connected to approved bodies meeting their responsibilities and requirements for Commonwealth financial assistance.

10. Further, an approved body is not required to comply with the requirement to give access in accordance with subsections 39(2) and (5), unless an authorised person has given reasonable notice of the access required and that the access occurs at reasonable times in accordance with subsection (6). Subsection (7) also requires that the authorised person seek and consider the views of the body about any access required, ensuring that it has an opportunity to be heard about any proposed access.

11. An additional safeguard is the limited scope of sections 39 and 39A – the requirements apply only to bodies that have been approved under the Act to receive Commonwealth financial assistance. The provisions do not operate more broadly, and do not prescribe any offence or civil penalty for failure to comply. The imposition of these requirements strikes an appropriate balance between the rights and liberties of those bodies, and the obligations that flow from receiving public funding under the Act.

Collection of personal information under sections 39 and 39A

12. Sections 39 and 39A of the Regulations are limited in scope to information and records that relate to compliance with the Act and Regulations, and associated financial administration. Information of this kind would generally not be personal information, as it generally consists of financial records, governance arrangements, and operational records.

13. Personal information may however be accessed either incidentally, or in certain specific circumstances where the nature of the investigation or auditing activity may require information about an individual. For example, in considering whether an approved body meets the basic ongoing requirement to be 'fit and proper', it may be necessary to take into account information about individual officers of that body. By way of another example, certain student records (for example, enrolment and attendance) may be required to be accessed, to ensure the veracity and completeness of school census reporting used in calculating Commonwealth financial assistance. This is essential to ensuring the integrity of the primary purpose for the Act and the Regulations.

14. To the extent that personal information is accessed under sections 39 and 39A, the *Privacy Act 1988* will apply to that information, and would be required to be collected, used and disclosed consistently with the Australian Privacy Principles. The department takes its privacy responsibilities seriously, and consistently aims to ensure that appropriate privacy control and protocols are in place for activities undertaken that may involve personal information.

Availability of independent merits review

Review of decisions under the Act

15. The Regulations prescribe a range of matters that support the ongoing operation of the Act, which itself contains provisions related to the review of decisions. In particular, section 118 of the Act provides for the review of a range of decisions, including the capacity for a relevant person to seek internal view of a decision in first instance, and subsequently review by the Administrative Appeals Tribunal. The availability or otherwise of merits review for decisions under the Regulations remains the same in substance as under the preceding *Australian Education Regulation 2013*.

16. These decisions include the determination of a school's total entitlement for Commonwealth financial assistance under subsection 26(4) of the Act, which includes the capacity to seek review of matters going towards the calculation of that entitlement, the determination of a school's capacity to contribute score under subsection 52(1) of the Act, decisions related to the status of approved bodies, and determinations made under subsection 110(1) of the Act for repayment or reduction of Commonwealth financial assistance.

Matters not suitable for review – preliminary or procedural decisions

17. A decision that is a preliminary or procedural step in the making of a substantive decision is generally not suitable for merits review (see paragraphs [4.3] – [4.4] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

18. Section 5 of the Regulations allows the Minister to prescribe a 'census day' for a school for a year, which in turn enables approved bodies to meet certain obligations to provide information prescribed by the Regulations for the purposes of paragraph 77(2)(f) of the Act. There is no automatic consequence for a breach of these requirements, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

19. Subsection 9B(6) of the Regulations allows the Minister to beneficially determine a longer period of time within which an approved body can apply for a determination under subsection 9B(3) of the Regulations. This is a procedural decision related to the decision that may be made under subsection 9B(3) (itself a reviewable decision). Further, it would still remain open to the Minister to make a determination under subsection 9B(3) on the Minister's own initiative in appropriate cases, even where an application has not been made within time.

20. Sections 11 and 63 of the Regulations prescribe matters related to a decision of the Minister under paragraphs 110(1)(a) and (b) of the Act, which are themselves reviewable decisions in accordance with the Act.

21. Section 12 of the Regulations prescribes matters related to the pro-rating of Commonwealth financial assistance for the operation of section 27 of the Act. Section 27 directly relates to decisions made under section 26 of the Act about a school's total entitlement to Commonwealth financial assistance, which itself is a reviewable decision under the Act. As such, the operation of section 12 of the Regulations is able to be considered on merits review, were an approved body to request a review of its total entitlement.

22. Sections 21 and 23 of the Regulations provide for preliminary decisions of the Minister in working out a CTC score for a school under section 52 of the Act. Decisions under subsection 52(1) are the substantive determination of a school's CTC score and are reviewable decisions under the Act. As such, the operation of sections 21 and 23 of the Regulations is able to be considered on merits review, were an approved body to request a review of its CTC score.

23. Sections 25 and 25B of the Regulations prescribe matters to be taken into account in making a decision under the Act to determine an amount of financial assistance under sections 69 and 70 of the Act respectively, which are the substantive decisions under the Act. Although those decisions are not themselves reviewable, they are generally not considered suitable for merit review on the basis that they involve the allocation of a finite resource between competing applicants (see paragraph [4.11] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

24. Sections 26, 27 and 28 of the Regulations prescribe matters the Minister may have regard to in determining whether certain requirements for approval have been or are being met, for the purposes of making a decision about the approval of a body under the Act. Decisions not to approve, or to vary or revoke an approval, are reviewable in accordance with section 118 of the Act.

25. Sections 29, 30, 31, and matters under Schedule 1 generally deal with circumstances where it may be appropriate for additional direction to be provided to an approved body on its use of Commonwealth financial assistance. For example, an approved body may be directed to use financial assistance for a specific program purpose (such as a funding program) or a purpose that may vary from what may otherwise be the general application of the relevant provision, or alternatively an approved body could request an extension in time to use financial assistance.

26. In practice, these provisions are also generally able to be used on application or request by an approved body, for example under Part 7 of Schedule 1 (Schools Upgrade Fund), directions on the use of Commonwealth financial assistance are generally targeted for project(s) that result from successful applications for funding. It is important to further note, there is no automatic consequence for failing to comply with such directions, unless the Minister decides to take compliance action under the Act which would itself be reviewable as set out in section 118 of the Act.

27. Sections 36, 43, 46, 52 and 59 of the Regulations contain largely procedural decisions relating to the national assessment program, financial reporting, national reporting of school information, and school reports. There is no automatic consequence for failing to meet requirements that are affected by decisions under these provisions, unless the Minister decides to take compliance action under the Act which would be reviewable as set out in section 118 of the Act.

28. Subsections 65(1), (2) and (3) of the Regulations prescribe matters for the purposes of subsection 125(1) of the Act, which allows the Minister to use or disclose school education information in accordance with the Regulations. Decisions under that provision are not reviewable, however they are not considered suitable for merits review as they are decisions for which there would be no appropriate remedy (see paragraph [4.49] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Matters not suitable for review – appointing a person to perform specified functions

29. Section 33 of the Regulations allows the Minister to appoint an authorised person to undertake certain functions under the Regulations. Decisions to appoint a person to undertake a specific function are not considered appropriate for merits review (see paragraphs [4.40] to [4.43] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Matters not suitable for review – decisions of a law enforcement nature

30. Section 39A of the Regulations allows the Minister to require information to be produced by certain approved bodies related to the body's compliance with the Act or the Regulations, or in relation to certain financial matters. This power is investigative in nature and relates to a body's compliance with the law, and so is not considered appropriate for merits review (see paragraphs [4.31] to [4.33] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

Matters not suitable for review – legislation-like decisions

31. Certain provisions of the Regulations, for example sections 58, 58A, 58B and subsection 65(4), further involve decisions to determine matters by legislative instrument.

32. These and other types of decisions of general application that are legislation-like are considered unsuitable for merits review on the basis that they are more properly subject to the regime of scrutiny and publication that applies to those instruments (see paragraph [3.3] of the Administrative Review Council's guidance *What decisions should be subject to merit review?*).

33. The availability or otherwise of merits review for decisions under the Regulations remains the same in substance as under the preceding *Australian Education Regulation 2013*. The Act and the Regulations, taken together, provide for the review on the merits of substantive decisions about entitlement to Commonwealth financial assistance and in relation to approval and compliance matters for bodies approved under the Act.

I trust this information is of assistance.

Yours sincerely

[redacted]

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9/10/2023

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26 September 2023

The Hon Jason Clare MP
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Australian National University (Governance) Statute 2023
Response to Senate Standing Committee for the Scrutiny of Delegated Legislation

Dear Minister

I refer to the *Delegated Legislation Monitor*, No. 9 of 2023, of the Senate Standing Committee for the Scrutiny of Delegated Legislation which, among other instruments, considered the *Australian National University (Governance) Statute 2023*, under Standing Order 23(4A), which confers power on the Committee to consider instruments even where not subject to disallowance.

The University recognises the important role of the Senate Standing Committee, values its consideration of University Statutes, Rules and Orders, and strives to ensure it responds to questions from the Committee as fully and as constructively as it can. The University thanks the Committee for its comments on the *Australian National University (Governance) Statute 2023*.

The Committee raised technical concerns in relation to delegation of administrative powers and functions; and the adequacy of explanatory materials and no-invalidity clauses. The University's responses regarding each of these concerns is detailed below.

Delegation of administrative powers and functions; adequacy of explanatory materials

The University has carefully considered the Committee's comments in relation to the appropriate delegation of powers and functions as outlined in Part 7, sections 65-67 of the Statute.

The provisions of Part 7 are not intended to operate in isolation, but as an integral part of the University's comprehensive Delegations Framework.

The University is a large, complex organisation that needs delegated authorities to operate effectively. These are the ends for which Part 7 was drafted. However, the University is equally concerned to ensure that delegated authorities are exercised properly and support the application of high standards of governance consistently across the University.

It is for this reason that the University has been progressively removing separate delegation and sub-delegation powers in individual items of University legislation and moving to reliance on general provisions that can be used in a consistent way across the University.

It is important to recognise that the delegation provisions of Part 7 do not operate in isolation, but instead form part of a comprehensive Delegations Framework for delegating authority within the University.

The Delegations Framework provides important limitations and safeguards for the delegation and sub-delegation of functions. The framework is governed by policy and procedure approved by the University's Council. (Copies of the current policy and procedure are attached for the Committee's information.)

The Delegations Framework includes the following features:

- The Delegations Framework covers all delegations of authority within the University and is not limited to, but includes, delegations under Part 7 of functions under University legislation and under decisions of the University's Council and Vice-Chancellor.
- The Delegations Framework is managed centrally and at a high level within the University. The University's Council has delegated authority to the Vice-Chancellor to oversee management of the framework and to approve amendments to it from time to time. Proposals for new delegations, and modifications of existing delegations, must be approved by the Vice-Chancellor on the recommendation of the Delegations Administrator.
- The Delegations Framework also reflects the University's position-based organisational structure. The University's view is that it would be impractical to properly manage a complex organisation like the University otherwise than though the flexible, structured, consistent use of delegations. It is also the University's view that it is not practicable for the details of these delegations to be set out in University legislation.
- Under the Delegations Framework the University's delegations are managed in a systematic, transparent way. All delegations are published on an internal University Delegations Website. Delegation assignments are recorded and managed within the University's HR Management System and recorded against position data.
- Delegations are assigned on a position rather than an individual basis. A staff member appointed to a position is able to exercise the position's delegations. The delegations also extend to a person acting in the period for a specified period. The delegations for a position are generally established when a position is created and can be updated if duties change. Banded (Generic) Delegations (e.g. delegations authorising expenditure of funds) are assigned in accordance with the level of responsibility for a position.
- The University follows a merits-based appointments policy. The University would not appoint a person to a position within the University unless it was satisfied that the person had the skills, qualifications and experience required for the position, including the skills, qualifications and experience required to exercise the position's delegations.
- The Delegations Framework includes important provisions for the responsibilities of delegates, disclosure of interests, regular monitoring, oversight and review of delegations, and training.
- The provisions of Part 7 were included in the previous (now repealed) statute in 2020.
- The University notes the explanatory statement included for the Statute did not include a detailed explanation of the background to the provisions in Part 7. The University will include an increased level of detail and background explanation in future explanatory statements to outline our position on delegations and the practical limitations on their exercise.

No-invalidity clauses

The University has carefully considered the Committee's comments about sections 30, 70(3) and 71 of the Statute.

The University is concerned to ensure that decisions of the returning officer for the election of a Council member have an appropriate degree of finality within the University and that election outcomes are not unduly delayed. The University intention was always that relevant external or judicial review of decisions of a returning officer should continue to be available in appropriate cases.

Nevertheless, to address this concern from the Committee, it is proposed to recommend to the University's Council that section 30 be amended to make it clear that the section does not exclude or limit judicial review of the result of an election for a Council member. The University will also outline further detail in the Explanatory Statement to ensure the context and intent of Section 30 is clear.

Further, and having regard to the Committee's comments in relation to sections 70(3) and 71, it is proposed to also recommend amendment to the University's Council, to remove these sections in their entirely from the Statute at the earliest opportunity.

I again thank the Committee for their interest and comments with regard to the ANU Governance Statute (2023) and hope this further information assists in addressing the queries and concerns raised.

Yours sincerely

[redacted]

Belinda Farrelly
University Secretary and Director, Governance and Risk
Australian National University

Competition and Consumer (Gas Market Code) Regulations 2023 - Responses to Standing Committee for the Scrutiny of Delegated Legislation's Monitor 10 of 2023 (F2023L00994)

Significant penalties in delegated legislation

The Committee sought advice as to:

- why the significant penalties are necessary and appropriate for inclusion in delegated legislation; and
- further justification for the inclusion of such significant penalties, with reference to the Attorney-General's Department's Guide to Framing Commonwealth Offences.

The Competition and Consumer (Gas Market Code) Regulations 2023 (the Code) are made under sections 53L and 172 of the *Competition and Consumer Act 2010* (the Act). The inclusion of civil penalties in the Code is consistent with the framework provided for in the Act, and approaches to other industry codes under the Act. Part IVBB of the Act was inserted by the *Treasury Laws Amendment (Energy Price Relief Plan) Act 2022* allowing for regulations to prescribe gas market codes (section 53L).

Section 53L of the Act provides that the Code may prescribe matters required or permitted by the Act to be prescribed by a gas market code. Subsection 53ZJ(1) of the Act provides that a gas market instrument (which includes a gas market code as defined in section 4 of the Act) may provide for civil penalties.

Paragraph 2.3.4 of the Attorney-General's Department's Guide to Framing Commonwealth Offences provides examples of where it may be appropriate to delegate offence content, including where:

- the relevant content involves a level of detail that is not appropriate for an Act; and
- prescription by legislative instrument is necessary because of the changing nature of the subject matter.

Part IVBB of the Act was inserted to urgently address gas market prices, power imbalances and systemic issues which may limit buyers' ability to negotiate gas supply contracts on reasonable terms. Flexibility is essential to adapt to changing markets, and having technical details in delegated legislation also allows industry and other stakeholders to participate in the development of any changes, including specific penalties. If this flexibility was limited, quick updates could not be made and markets and stakeholders may be negatively affected.

A high level of detail is also required in relation to the regulation of the gas market, including, for example, the scope of regulated gas (the 'gas commodity' covered by the Code) and the matters that must be included in a gas expression of interest (EOI), which is specific and suitable for delegated legislation. The civil penalties set out in the Code are consistent with the requirements in Part IVBB of the Act. The framework for Part IVBB is based on the Industry Codes model in Part IVB of the Act and is similar to the Consumer Data Right model in Part IVD, both of which use the same approach in relation to inclusion of penalties in delegated legislation.

Subsection 76(1A) of the Act sets out the maximum amounts for pecuniary penalties under gas market instruments. The civil penalties in the Code are consistent with subsection 76(1A) as they do not exceed the maximum amounts set out in the table.

Where specific amounts for civil penalties are provided in the Code, these are lower than the maximum penalty amount provided for under the Act. The maximum penalty has been designed to provide an effective deterrent to breaches of the law, whilst ensuring a penalty cannot be considered an acceptable cost of doing business.

The maximum penalty available for breach of a civil penalty provision of a gas market instrument also aligns with the maximum penalty for anti-competitive conduct and breaches of the Australian Consumer Law. The maximum penalty also reflects the potential consequences that contravening conduct could have on other gas market participants and Australian consumers more broadly, and the need for a strong deterrent to ensure compliance with the new framework.

Availability of independent merits review; availability of judicial review; no invalidity clause

Exclusion of merits review

The Committee requested advice as to whether independent merits review is available in relation to discretionary decisions under the instrument and, if not, the circumstances of the relevant decisions which justify their exclusion from merits review, by reference to the Administrative Review Council's guide, *What decisions should be subject to merits review?*

Independent merits review is not available under the Code. The Administrative Review Council's guide, '*What decisions should be subject to merits review?',* sets out factors that may justify excluding decisions from merits review. In accordance with the Council's guidance, many discretionary decisions under the Code are not considered appropriate for merits review because they are policy decisions of high political content. For instance, they may impact on Australia's trade and exports, international relations, economy, and on the welfare of Australians through the regulation of the Australian gas market. This would include decisions under subsections 61(1), 63(1) and 68(1).

Consistent with the Council's guidance, other discretionary decisions under the Code are not suitable for merits review on the basis that they are preliminary or procedural decisions that facilitate, or that lead to, the making of a substantive decision. This would include decisions under subsections 61(4), 62(2), 63(2) and 75(1). Including review rights in relation to these decisions would frustrate or delay administrative decision-making processes under the Code. The Council's guidance also clarifies that decisions involving the delegation of a function or power to a person should not be subject to merits review. The exclusion of section 77 of the Code from merits review is justified on this basis.

Part 8 of the Code specifically includes procedural safeguards designed to ensure the rights and interests of persons are not unduly impacted by discretionary decisions made under the Code. For example, the Energy Minister must give at least 14 business days' written notice of conditions proposed to be included in a conditional Ministerial exemption to the person or persons that will be subject to the conditions, unless an exception applies.

Furthermore, the Code includes statutory rights in sections 59 and 67 for an applicant to withdraw their application for a conditional Ministerial exemption, variation, or revocation. An applicant may, for instance, wish to withdraw their application during the 14-business day notice period if they are not willing to accept the conditions proposed. The statutory withdrawal right recognises that the application process for an exemption from penalty provisions in the Code is voluntary, and that exemptions should be granted on terms acceptable to applicants and the Government, in a way that achieves the objectives the of the scheme.

Availability of judicial review and 'no invalidity' clauses

The Committee requested advice as to why the no invalidity clauses are considered necessary and appropriate and whether there are any safeguards in place in relation to decision under those provisions.

Subsections 61(7) and 76(3) provide that a failure to comply with the consultation requirements prior to granting a conditional Ministerial exemption and undertaking a review of the Code's operation, respectively, do not affect the validity of the exemption or the review. As the Code already effectively requires two Government Ministers – the Energy Minister and the Resources Minister – to agree before granting an exemption or commencing a review, it is appropriate in the circumstances that failing to consult two additional Government Ministers (the Minister administering Part IVBB of the Act and the Industry Minister) does not invalidate an exemption or review.

In the case of an exemption, the importance of thorough consultation is to be balanced against the need for certainty, as parties may enter contracts based on a supplier exemption, and failure to consult with other Government Ministers should not affect the certainty of that decision. Nevertheless, it is the intention that the consultation process in both s 61(6) and 76(2) occurs in all but the most urgent circumstances.

It is also significant to note that 'no invalidity' provisions only apply in relation to a failure by the Energy Minister and Resources Minister to comply with the consultation processes in subsections 76(2) and 61(6) and do not affect a person's right to seek judicial review in relation to other matters. As such, avenues to challenge decision-making remain.

Strict liability offences

The Committee requested advice as to:

- whether the offence provisions in the instrument are intended to be offences of strict liability; and
- if so, why the strict liability offences are necessary and appropriate with reference to the principles set out in part 2.2.6 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.

The Code contains civil penalty provisions as provided for under section 53ZJ of the Act. Section 53ZJ of the Act allows a gas market instrument to provide that a provision is a civil penalty provision or that a person is liable to a civil penalty if they contravene the provision. The penalty provisions in the Code are not offences of strict liability.

A 'strict liability' offence is defined in section 6.1 of the *Criminal Code Act 1995* (the Criminal Code) as an offence that does not contain a fault element for any of the physical elements of the offence, and the defence of mistake of fact under section 9.2 of the Criminal Code is available. A strict liability offence can only be applied by an express provision to this effect. Likewise, a civil penalty provision is enforceable under section 79 of the *Regulatory Powers (Standard Provisions) Act 2014* if, as outlined in subsection 79(2), the provision expressly sets out the words "Civil penalty" at its foot or another provision provides that the provision is a civil penalty provision. While most of the penalty provisions in the Code do not contain a fault element, they are all expressed as civil penalty provisions with either the words "Civil penalty" at the foot of the provision or by expressly stating that it is a civil penalty provision.

Only sections 30 and 31 of the Code require an element of good faith within the meaning of the unwritten law. A person contravenes section 30 or 31 if a court finds that the person did not act in good faith. To make that determination, the court may have regard to certain matters listed in section 32 that are relative to the person's state of mind, such as whether the person acted honestly and the extent to which the person has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives. The presence of a 'fault' element means that sections 30 and 31 are not strict

liability offences. In addition, subsections 30(2) and 31(3) explicitly state that these provisions are civil penalty provisions.

As set out in the Explanatory Statement, the civil penalty provisions in the Code are not 'criminal' for the purposes of human rights law. The inclusion of strict liability offences was not considered necessary in the development of the Code. This is because, pursuant to part 2.2.6 of the Attorney-General's Department's *Guide to Framing Commonwealth Offences*, the penalty units in each civil penalty in the Code exceed the amount appropriate for a strict liability offence (60 penalty units for an individual; 300 for a body corporate). In addition, there is no need to deter the conduct set out in the Code by applying strict liability offences as punishment. The nature of the conduct in the Code is operational and contravention does not need to be dealt with on a criminal level. As there were no legitimate grounds to apply strict liability, it would not have been appropriate to include strict liability offences in the Code.

As set out in the Explanatory Statement, the civil penalty provisions are intended to be regulatory and disciplinary, and aim to encourage compliance with the Code. Further, the provisions do not apply to the general public, but instead to a sector or class of people (such as suppliers and buyers of regulated gas) who should reasonably be aware of their obligations under the Code. The civil penalties are intended to enable an effective disciplinary response to non-compliance.

Privacy; conferral of discretionary powers; adequacy of explanatory materials

The Committee requested advice as to:

- whether the information that may be collected, used and/or disclosed under the instrument includes personal information; and
- whether any statutory safeguards apply to protect personal information that may be collected under Part 6, including whether the *Privacy Act 1988* applies; and
- whether a person is required to comply with a request from the Energy Minister under section 75; and
- what factors are required to be considered in determining what is 'contrary to the public interest' under subsection 43(3).

Personal information

In general, information collected and published under the Code would pertain to businesses, rather than individuals. In particular, it is intended that information collected from suppliers under Part 6 of the Code would not be personal information. In limited circumstances, there may be some information collected, used or disclosed under the Code that is personal information for the purposes of the *Privacy Act 1988* (Privacy Act). For example, the names and contact details of individuals making applications on behalf of the entity applying for a Conditional Ministerial exemption. In these cases, the information will be dealt with in accordance with Privacy Act obligations.

Section 75

Section 75 of the Regulations provides that the Energy Minister may request additional information and documents from certain persons in connection with an application for a conditional Ministerial exemption, or to vary or revoke such an exemption, under sections 58 or 66 respectively. The purpose of this provision is to permit the Energy Minister to collect and consider relevant information from persons – who may not necessarily be the applicants for the Ministerial exemptions – in deciding whether to grant the exemption.

There are no legal consequences if a person fails to comply with section 75 – that is, persons who are issued with a request under section 75 are not required to respond to the notice. However, where the Energy Minister considers it necessary to seek information or documents from specific persons before making an exemption decision, a failure to provide such information may practically delay the decision-making process. If insufficient information is provided, a person's application may be rejected because the Minister cannot be satisfied of a certain matter.

Subsection 43(3)

The ACCC must publish certain information on deemed exemptions for small suppliers available under section 55 as soon as practicable after the ACCC has obtained that information. This is to ensure transparency for the market, and ensure it is clear which suppliers can exceed the 'reasonable price' (as this will affect the negotiation of contracts). However, the ACCC does not have to publish if publication would prejudice the commercial interests of the supplier in a substantial way or is contrary to the public interest.

What is contrary to the public interest will depend on the circumstances. In determining what is contrary to the public interest, the ACCC may consider whether publishing certain information:

- is of serious concern or benefit to the public, not merely of individual interest, and
- related to matters of common concern or relevance to all members of the public, or a substantial section of the public, including whether publication will pose risks to the stability of the market or economy.

Matters more appropriate for parliamentary enactment

We note the concerns of the Committee with regard to this instrument. The policy objectives of the Code are consistent with the overarching purpose of enabling provisions in the Act, which allow for the establishment of a gas market code.

Those enabling provisions were made under the *Treasury Laws Amendment (Energy Price Relief Plan) Act 2022,* which was passed by the current Parliament. The Explanatory Memorandum to that Act specifies that a gas market code would need to deal with a broad range of matters, with sufficient obligations to ensure proper regulation of the industry. The measures in the Code give effect to the requirements and expectations of the primary legislation.

The Hon Jason Clare MP
Minister for Education

Reference: MC23-004444

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Dear Senator

I am writing in relation to the scrutiny concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) and detailed in Delegated Legislation Monitor 9 of 2023.

The Committee raised concerns with the following instruments, the *Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023* and the *Australian National University (Governance) Statute 2023*. I appreciate the opportunity to provide advice on the matters raised by the Committee, please see the response below.

Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023

The Committee has asked why it was considered necessary and appropriate to remove the spending cap in relation to grants made under the National Priorities Pool Program (the Program).

The *Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023* removes previous section 16 of the *Higher Education Support (Other Grants) Guidelines 2022* (the Principal Instrument). Previous section 16 provided that grants made under the Program in respect of projects were capped at $6,500,000 for the years 2022, 2023, 2024 and 2025. New section 16 does not set out what amount will be spent on the Program for each of the grant years.

The figure of $6,500,000 reflected the projected amounts available for the Program at the time of drafting section 16 of the Principal Instrument. Due to the impact of the COVID-19 pandemic, uncommitted funding was reprofiled into forward years resulting in additional funding being available for the Program. Removal of the cap will allow investment of the full amount of funding available in the Program, rather than inadvertently preventing the expenditure of available Program funding.

I further note that while I have the power to specify, in the Principal Instrument, the amount that will be spent on the Program in a particular year under paragraph 41-15(2)(c) of the *Higher Education Support Act 2003* (the Act), this is a discretionary power, and I am not obliged to do so. I also note that, in determining the amounts to be spent on grants under the

Program, I will continue to be limited by any determination made under section 41-45 of the Act, which provides a cap on the total payments able to be made under Part 2-3 of the Act (the Part under which a number of grants, including for the Program are made). The current determination, *Higher Education Support (Maximum Payments for Other Grants) Determination 2020*, can be found at www.legislation.gov.au/Details/F2023C00058.

Australian National University (Governance) Statute 2023

The *Australian National University (Governance) Statute 2023* (the Statute) is a legislative instrument made by the Australian National University Council (the governing body of the university) under section 50 of the *Australian National University Act 1991*. Noting this, the Australian National University has considered the matters raised by the Committee in relation to the Statute and has provided me with the advice and supporting documentation at Attachment A in response to the Committee's concerns.

I trust this additional information is of assistance.

Yours sincerely

[redacted]

JASON CLARE

4/10/2023

Encl.

Attachment A

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

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

Observations from the Committee:

The *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (the Environment Regulations) confer a number of discretionary decisions on the National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA).

In its *Delegated Legislation Monitor 10 of 2023*, the Committee states that the Environment Regulations do not appear to provide for merits review of these decisions. The Committee further states that, while the explanatory statement appears to justify why merits review is excluded in relation to some of the decisions in the Environment Regulations, it does not do so for the majority of the discretionary decisions provided for in the instrument.

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

- whether the discretionary decisions that can be made under this instrument are subject to independent merits review, and if so, a list of these decisions; and
- a list of the discretionary decisions that are not subject to merits review under the instrument, and what characteristics of each of these decisions justify the exclusion of review, by reference to the grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* (ARC guidance).

Response:

The discretionary decisions that can be made by NOPSEMA under the Environment Regulations are not subject to independent merits review.

As described in the explanatory statement, a number of the discretionary decisions in the Environment Regulations are preliminary in nature. The ARC guidance states that preliminary or procedural decisions that facilitate, or that lead to, the making of a substantive decision are unsuitable for review.

For example, under section 27 of the Environment Regulations, NOPSEMA must decide provisionally if a submitted or resubmitted environment plan includes material apparently addressing all of the provisions of Division 2 of Part 4 of the Environment Regulations (which sets out the content requirements for an environment plan). This initial completeness check is not an assessment of the appropriateness, quality or adequacy of the environment plan. NOPSEMA is only required to determine that there is some information included in the plan to address each of the content requirements, for the purposes of publication of the plan prior to NOPSEMA's assessment of the plan (and public comment if the plan is for a seismic or exploratory drilling activity). If NOPSEMA decides that an environment plan does not include material apparently addressing each of the content requirements, the titleholder will have the ability to incorporate the material by modifying the plan and resubmitting it to NOPSEMA.

Another example is a decision by NOPSEMA to request further written information about a submitted offshore project proposal, resubmitted offshore project proposal or environment plan during its assessment of the proposal or plan (sections 8, 12 and 32). The ability to request further information is intended to be used in circumstances where insufficient information has been included in a proposal or plan, or the information provided requires clarification to assist NOPSEMA to make a decision. NOPSEMA cannot request information that is not otherwise required by the Environment

Regulations. NOPSEMA must still assess the proposal or plan, and make a decision in accordance with the Environment Regulations, whether or not the additional information is provided.

The explanatory statement further describes that certain decisions involve the evaluation of complex and competing facts and policies, following extensive inquiry which may include public consultation. It is consistent with the ARC guidance that decisions involving this type of process and complexity would not be subject to merits review. Decisions of this nature include a decision to accept or refuse to accept an offshore project proposal (section 13) and a decision to accept an environment plan (including in part or subject to limitations or conditions), and give notice of an opportunity to modify and resubmit an environment plan or refuse to accept an environment plan (section 33).

These decisions require a highly technical understanding and analysis of the environmental risks associated with offshore petroleum and greenhouse gas activities, and the sufficiency of proposed environmental management measures to reduce impacts and risks to as low as reasonably practicable and an acceptable level. This requires an analysis of competing factors, including differing views that may be submitted by stakeholders, reference to environmental policies and guidance, and the ability to access and understand the relevance and applicability of available scientific knowledge or research.

The Environment Regulations also include decisions that the ARC guidance states are unsuitable for merits review as they have such limited impact that the costs of review cannot be justified. For example, a summary of an accepted environment plan that is submitted by the titleholder for publication must be to the satisfaction of NOPSEMA (subsection 35(7)). There is little substantive effect of a decision by NOPSEMA that a summary is not to the satisfaction of NOPSEMA. It does not impact or change NOPSEMA's decision to accept the environment plan, does not prevent the titleholder undertaking an activity and is not a ground for NOPSEMA to withdraw acceptance of the plan. In effect, the titleholder would need to submit a revised summary until NOPSEMA is satisfied with the summary for public disclosure. The summary draws from or points to content already in the environment plan. Given the limited impact of the decision, the cost of merits review would be disproportionate to the significance of the decision under review.

The Australian Government has announced a policy review of the environmental management regulatory regime for offshore petroleum and greenhouse gas storage activities. Noting the Committee's comments, the availability of independent merits review for discretionary decisions under the Environment Regulations can be considered further as part of the review. In the meantime, it is important that the Environment Regulations continue in force to ensure regulatory certainty, and to provide a robust framework for the management of environmental impacts and risks of offshore petroleum and greenhouse gas activities to as low as reasonably practicable and an acceptable level.

Response to the Committee's question about the availability of judicial review

Observations from the Committee:

The Environment Regulations contain four no-invalidity clauses (in subsections 9(3), 13(3), 33(4) and 33(9).

In its *Delegated Legislation Monitor 10 of 2023*, the Committee states that the explanatory statement provides that 'this ensures the validity of all decisions is maintained and provides NOPSEMA with flexibility to make thorough and informed decisions in any circumstances'. However, the Committee states there is no detail about the circumstances in which this may occur, noting that the timeframes may be set by NOPSEMA itself.

The Committee requests the Minister's advice as to:

- why the no-invalidity clauses in sections 9, 13 and 33 of the instruments are necessary and appropriate and whether there are any safeguards in place in relation to decisions under these provisions; and
- the circumstances, and likelihood, that NOPSEMA might exceed the specified time limits for making a decision, particularly as the instrument appears to allow NOPSEMA to determine the time period for making decisions, if the 30-day period cannot be met.

Response:

Subsections 9(3), 13(3), 33(4) and 33(9) of the Environment Regulations each provide that NOPSEMA's failure to comply with set timeframes for making certain decisions does not affect the validity of those decisions. The relevant provisions relate to the requirement for NOPSEMA to make certain decisions within a 30 day period, or if NOPSEMA is unable to meet this timeframe, by no later than the day by which NOPSEMA advises the titleholder that a decision will be made. The relevant decisions are:

1. a decision that an offshore project proposal is suitable for publication (section 9);
2. a decision to accept or refuse to accept a resubmitted offshore project proposal (section 13); and
3. a decision to accept or refuse to accept an environment plan or a resubmitted environment plan (section 33).

The main intent of these provisions is to ensure the validity of NOPSEMA's decisions if NOPSEMA fails to comply with the 30 day period. However, it is acknowledged that the provisions will also apply in the unlikely event that NOPSEMA does not make a decision by any later day advised by NOPSEMA.

As the explanatory statement notes, these provisions ensure the validity of NOPSEMA's decisions is maintained. This will increase regulatory certainty for titleholders. For example, if a decision is made to accept an environment plan on the basis that NOPSEMA is reasonably satisfied that the plan meets the acceptance criteria, but that decision is not made within the stipulated timeframes because of an administrative oversight, the titleholder should not be penalised by having NOPSEMA's decision to accept their environment plan determined to be invalid.

NOPSEMA has processes in place to ensure compliance with time limits so that decisions are made in a timely manner. To date, NOPSEMA has either completed all its offshore project proposal and environment plan assessments within the 30 day period, or has advised the titleholder within that timeframe that further time is required to make a decision.

For context, a decision to require extra time beyond the 30 day period is generally used in conjunction with NOPSEMA providing the titleholder with a reasonable opportunity to modify the offshore project proposal or environment plan after inadequacies have been identified in its written submission, in accordance with NOPSEMA's published assessment policies. This gives the titleholder the opportunity to address those issues before a final decision is made.

In relation to a decision that an offshore project proposal is suitable for publication (section 9) or a decision to accept or refuse to accept a resubmitted offshore project proposal (section 13), NOPSEMA has published an offshore project proposal assessment policy (available at /www.nopsema.gov.au/sites/default/files/documents/2021-03/A469720.pdf). The policy, which relates to similar provisions in the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (the 2009 Environment Regulations), describes NOPSEMA's administration of the Regulations and outlines when extra time beyond the 30 day period may be needed to make a decision. There can be various reasons, including where NOPSEMA has requested further written information from the proponent or where the project is complex with significant or uncertain impacts or risks.

In relation to a decision to accept or refuse to accept an environment plan or a resubmitted environment plan, NOPSEMA has published an environment plan assessment policy (available at www.nopsema.gov.au/sites/default/files/documents/2021-03/A662608.pdf). The policy, which relates to similar provisions in the 2009 Environment Regulations, notes a range of reasons why NOPSEMA may be unable to make a decision in the 30 day timeframe, including the following:

- if a seismic or exploratory drilling activity environment plan submitted following a public comment period is deemed to be incomplete
- because of the complexity of the submission (that is, for complex or large activities)
- in consultation with the titleholder, when other submissions from the same titleholder are identified to be of a higher assessment priority
- when NOPSEMA has requested further written information
- if NOPSEMA is awaiting financial assurance declarations or confirmation from a titleholder (see NOPSEMA's financial assurance for petroleum titles policy for further details at www.nopsema.gov.au/sites/default/files/documents/2021-03/A607991.4.pdf).

The relevant provisions only provide for the validity of a decision to the extent that NOPSEMA fails to meet the decision-making timeframes. Judicial review of NOPSEMA's decision could still be sought on other grounds such as failing to provide procedural fairness, failing to take into account a relevant consideration or an error of law.

Accordingly, the 'no invalidity' provisions in subsections 9(3), 13(3), 33(4) and 33(9) of the Environment Regulations are necessary, reasonable and proportionate to provide regulatory certainty and avoid potential disadvantage to titleholders in the unlikely event that the timeframes set out in the Environment Regulations are not met.

Response to the Committee's question about strict liability; significant penalties

Observations from the Committee:

The Environment Regulations contain a number of strict liability offences. The penalties for these offences range from 30 to 80 penalty units. Specifically, subsections 17(1), 18(1) and 19(1) provide for 80 penalty units for an individual.

In its *Delegated Legislation Monitor 10 of 2023*, the Committee states that while the explanatory statement contains an explanation for why it necessary and appropriate to impose offences of strict liability, the Committee remains concerned about the high penalties imposed by subsections 17(1), 18(1) and 19(1) in delegated legislation.

The Committee would therefore appreciate the Minister's advice as to:

- why the above significant penalties are necessary and appropriate for inclusion in delegated legislation; and
- the justification for including penalties that exceed the Committee's expectations, and the expectations set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences*.

Response:

The maximum of 80 penalty units only applies to the most serious offences in the Environment Regulations. Subsection 17(1) makes it an offence for a titleholder to undertake an activity under a title without an environment plan in force for the activity. Subsection 18(1) makes it an offence for a titleholder to undertake an activity under a title in a way that is contrary to the environment plan or a limitation or condition of acceptance of an environment plan. Subsection 19(1) makes it an offence

for a titleholder to undertake an activity under a title after the occurrence of any significant new or increased environmental impact or risk arising from the activity, and the new or increased impact or risk is not provided for in the environment plan in force for the activity.

An environment plan sets out comprehensive measures and arrangements for managing the environmental impacts and risks of an activity to ensure that those impacts and risks will be reduced to as low as reasonably practicable and will be of an acceptable level. It ensures that activities will be conducted in a matter consistent with the principles of ecologically sustainable development and that all potential impacts on matters protected under Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and the broader environment will be managed to an acceptable level.

A higher penalty is appropriate given there are potentially severe environmental consequences that may result from non-compliance with these provisions in relation to an environment plan. If a titleholder undertakes an activity without an environment plan in force, does not undertake an activity in accordance with an environment plan or undertakes an activity when the environment plan does not provide for a significant new or increased impact or risk, there is a risk of environmental impacts and damage to protected matters under the EPBC Act and the broader environment. These higher penalties therefore reflect the seriousness of the offence. The *Guide to Framing Commonwealth Offences* states that a higher maximum penalty will be justified where the consequences of the commission of the offence are particularly dangerous or damaging.

These offence provisions apply to a 'titleholder'. Given the high costs involved in the oil and gas and greenhouse gas storage industries, in most (if not all) cases the titleholder will be a corporation rather than an individual. Furthermore, the offshore resources industry is a multi-billion dollar industry, with the capability and capacity to be aware of their regulatory obligations. A penalty less than 80 penalty units is considered unlikely to provide a sufficient deterrent or punishment to titleholders for non-compliance with these offences, or to reflect the seriousness of a worst-case offence against one of these provisions.

The penalty of 80 penalty units imposed by subsections 17(1), 18(1) and 19(1) is consistent with the 2009 Environment Regulations. This same penalty has been imposed since the Regulations originally commenced. The penalty is also consistent with the penalty imposed under similar offence provisions, such as regulations 5.04(1), 5.05(1) and 5.05(1A) of the *Offshore Petroleum and Greenhouse Gas (Resource Management and Administration) Regulations 2011*. The *Guide to Framing Commonwealth Offences* states that a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. Reducing the penalty amount compared to the 2009 Environment Regulations may suggest that environmental risks are now commensurately lower, or that non-compliance with the relevant provisions is perceived as less significant by the Australian Government.

The Committee states that significant penalties should ordinarily be included in primary, rather than delegated, legislation to ensure appropriate parliamentary oversight of the scope of the offence and penalty. The offences in subsections 17(1), 18(1) and 19(1) relate to environment plans. All the provisions relating to environment plans are contained in the Environment Regulations, rather than in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act). It is considered that setting out all the provisions relating to environment plans in one instrument provides greater clarity to regulated entities, rather than including the majority of provisions in the Regulations, and the offence provisions in the OPGGS Act.

Response to the Committee's question about legal certainty; clarity of drafting

Sections 57 and 58 of the Environment Regulations provide that a fee is payable to NOPSEMA which is the total of the expenses incurred by NOPSEMA in considering an offshore project proposal or financial assurance arrangements respectively.

In its *Delegated Legislation Monitor 10 of 2023*, the Committee states that sections 57 and 58 appear to impose an unknown liability on a person or body corporate. The Committee further states that, in the absence of further information in the explanatory statement, it is unclear how the relevant fees will be calculated or negotiated, whether there is a maximum amount that can be charged, or if a person may seek either internal or independent review of the fee that is determined.

Therefore, the Committee requests the Minister's advice about:

- how the fees referred to in sections 57 and 58 of the instrument will be calculated; and
- noting the instrument states 'that it is expected that NOPSEMA and the person…will agree on the terms of payment of the fee', further detail about the process in place to ensure an agreement; and
- whether there is a maximum cap or limit on the fee that can be charged; and
- whether a person may seek internal or independent review of the fee that is determined and if so, further detail about this.

Response:

The Environment Regulations provide that a fee is payable to NOPSEMA for its consideration of an offshore project proposal (section 57) and assessment of financial assurance arrangements proposed by a titleholder in relation to a petroleum activity (section 58).

As noted in the explanatory statement, NOPSEMA's regulatory functions under the OPGGS Act and regulations are fully cost-recovered through levies and fees payable by the offshore petroleum and greenhouse gas storage industries. Subsections 57(2) and 58(2) of the Environment Regulations provide that the fee is the total of the expenses incurred by NOPSEMA in considering the offshore project proposal or assessing the financial assurance arrangements respectively. The fee is due and payable in accordance with the terms of an invoice for the fee issued by NOPSEMA to the person who submitted the proposal or the titleholder.

In relation to how the fees are calculated for consideration of offshore project proposals, NOPSEMA recovers its expenses through a fee-for-service. The fee is calculated by multiplying the hourly rate of each NOPSEMA staff member by the number of hours they worked on considering the proposal. Hourly rates are reviewed annually and are inclusive of fixed corporate overheads, which are also reviewed annually.

When an offshore project proposal is submitted, NOPSEMA will provide advice to the person who submitted the proposal on the fee-for-service NOPSEMA will apply to its consideration of the proposal, for discussion and agreement. In practice, it is expected that NOPSEMA and the person who submitted the proposal would agree on the terms of payment of the fee. NOPSEMA's pre-submission engagement costs are not charged.

In relation to the fees for assessing financial assurance arrangements under section 58 of the Environment Regulations, most titleholders use a method developed by the Australian Energy Producers to estimate an appropriate level of financial assurance for pollution incidents that may arise because of their proposed petroleum activities. NOPSEMA has assessed and endorsed the Australian Energy Producers' method. In complex cases, some titleholders have also engaged external expert assistance to help them in preparing their proposed financial assurance arrangements. In those cases, NOPSEMA does not charge a fee for assessing the financial assurance arrangements. The costs

associated with NOPSEMA's review and handling of the financial assurance declaration and confirmation forms are considered part of the routine administration associated with the environment plan, for which levies are applied.

In exceptional circumstances, if a titleholder does not use the approved Australian Energy Producers method or the complexity of the proposed financial assurance arrangements exceeds the limitations of that method, NOPSEMA may recover the expenses incurred in assessing and validating financial assurance arrangements through a fee-for-service. As with offshore project proposals, the fee is calculated by multiplying the hourly rate of each NOPSEMA staff member by the number of hours they worked on the assessment. The fee may also include the cost of engaging external experts to thoroughly assess the proposed arrangements in order to assist NOPSEMA's assessment.

As is the case with offshore project proposals, NOPSEMA will engage with a titleholder to provide advice on the potential fee that may apply to assessment of the financial assurance arrangements for discussion and agreement.

The fee payable under section 57 or 58 of the Environment Regulations is limited in that it must not exceed the total expenses incurred by NOPSEMA in considering the offshore project proposal or assessing the financial assurance arrangements (subsections 57(2) and 58(2)). In relation to review of the fee, a person may request internal review of the fee that NOPSEMA has determined. To date, NOPSEMA has not received such a request. However, NOPSEMA may remit all or part of an imposed fee where it is considered appropriate, as noted in NOPSEMA's cost recovery policy (available at www.nopsema.gov.au/sites/default/files/documents/Environment%20Plan%20Levies%20and%20Cost%20Recovery%20policy.pdf).

In making that decision, NOPSEMA would be likely to consider a range of factors, such as the amount of NOPSEMA expenses incurred, the complexity of the submission, and how far the submission has progressed through the assessment process. Judicial review of NOPSEMA's decision about the fee could also be sought on such grounds as an error of law.

The fee provisions in section 57 and 58 are consistent with the equivalent provisions in the 2009 Environment Regulations which have been in place for a number of years. The department is not aware that concerns have been raised as to uncertainty or lack of clarity arising from the drafting of these provisions.

THE HON STEPHEN JONES MP
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS23-001937

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Suite 1.111
Parliament House
CANBERRA ACT 2600

04 OCT 2023

Dear Senator

I am writing in relation the Senate Standing Committee for the Scrutiny of Delegated Legislation's comments in Delegated Legislation Monitor 9 of 2023 regarding the Insurance Exemption Determination No. 1 of 2023 (the determination).

In the monitor, you asked for my advice as to whether there is any intention to conduct a review of the provisions in the determination to determine if they remain necessary and appropriate, including whether it is appropriate to include the measures in delegated legislation.

While I do not currently intend to instigate a specific review of these provisions, regulators within the Treasury portfolio routinely assess the application and ongoing relevance of instruments through their administration. I also note that, as outlined in the Attorney-General's Department's *Guide to managing the sunsetting of legislative instruments*, the sunsetting processes in the *Legislation Act 2003* apply unless an instrument is explicitly exempt. The sunsetting regime provides an opportunity to assess whether an instrument is still required and to consider other updates to both instrument and related primary legislation to ensure the instrument remains fit for purpose. The determination is subject to a 10-year sunsetting period and as such, the ongoing need for the exemptions will be considered in advance of 1 October 2033.

I trust that this information assists with the Committee's deliberations.

Yours sincerely

[redacted]

The Hon Stephen Jones MP

Parliament House Canberra ACT 2600 Australia
Telephone: (02) 6277 7230

Attorney-General

Reference: MC23-037411

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

By email: sdlc.sen@aph.gov.au

Dear Chair

I write to provide advice on the concerns raised by the Committee in its *Delegated Legislation Monitor 11 of 2023,* tabled in the Senate on 9 October 2023, in relation to the National Anti-Corruption Commission Regulations 2023 (the Regulations). The Committee sought further advice about the conferral of discretionary powers and the availability of independent merits review and internal review of certain decisions under Regulations. I enclose detailed advice on these issues.

The Committee also sought my advice as to whether the explanatory statement to the Regulations can be amended to include the additional information I provided to the Committee in my letter of 22 September 2023 and the information included in this response. I undertake to update the explanatory statement to the Regulations in accordance with the Committee's request.

I trust this information will assist the Committee in its consideration of the Regulations.

Yours sincerely

[redacted]

THE HON MARK DREYFUS KC MP
16 /10/2023

Encl. *Advice to the Senate Standing Committee for the Scrutiny of Delegated Legislation: National Anti-Corruption Commission Regulations 2023, Delegated Legislation Monitor 11 of 2023*

Parliament House Canberra ACT 2600 • Telephone: (02) 6277 7300

Advice to the Senate Standing Committee for the Scrutiny of Delegated Legislation: National Anti-Corruption Commission Regulations 2023, *Delegated Legislation Monitor 11 of 2023*

Conferral of discretionary powers; adequacy of explanatory materials

The committee requested the Attorney-General's advice as to:

- *how the powers under subsection 21(2) and section 24 of the Regulations operate as a limitation or safeguard where the Secretary is specified as the approving official and whether there are any other safeguards in place where this occurs; and*
- *whether the explanatory statement to the instrument can be updated to include the additional detail regarding limitations and safeguards on the relevant discretionary powers, as well as the factors to be taken into account in exercising those powers.*

Conferral of discretionary powers – limitations and safeguards

Section 19 of the National Anti-Corruption Commission Regulations 2023 (the Regulations) provides that the approving official for an application for legal financial assistance under Part 5 will be the Attorney-General, unless the National Anti-Corruption Commissioner gives the Secretary of the Attorney-General's Department (Department) a certificate specifying an alternative approving official. The alternative approving official may be either the Secretary, the Prime Minister or the Finance Minister. The Secretary is included as a possible approving official under the Regulations to ensure that the Commissioner has the option of selecting a non-ministerial approving official where necessary, to ensure that the independence and operations of the National Anti-Corruption Commission (NACC) are not inadvertently compromised by an application for legal financial assistance. It is anticipated that, in practice, the Secretary would only be certified as the approving official in limited circumstances.

In situations where the Secretary is certified by the NACC as the appropriate approving official for an application, sections 21(2) and section 24 of the Regulations would operate as practical limitations or safeguards on the exercise of the Secretary's discretionary powers. This is because section 43 of the Regulations provides for delegation by the Secretary of certain functions, powers and duties under the Regulations. The Secretary may, in writing, delegate all or any of the Secretary's functions, powers or duties (not including any functions, powers or duties the Secretary has as an approving official) under sections 19, 21, 22 and 24, to an SES employee, or an acting SES employee, in the Department.

It is the Secretary's intention to delegate powers, duties and functions under relevant sections of the Regulations – including subsection 21(2) and section 24 – to appropriate senior officers in the Department who will be responsible for receiving and processing applications for legal financial assistance. The Department is currently progressing an instrument of delegation to implement the Secretary's intention.

In practice this will mean that, where the Secretary is certified as the approving official and exercises the relevant discretions in relation to an application made under Part 5, another senior officer in the Department with the appropriate delegation will exercise the functions under subsection 21(2) (certifying costs as reasonable) and section 24 (monitoring strategies) in relation to that application.

The separation of the exercise of these functions and powers through a delegation instrument will ensure subsection 21(2) and section 24 to continue to operate as a safeguard on the approving official's discretion in situations where the Commissioner considers it necessary that the Secretary be the approving official.

Adequacy of explanatory materials

The Department will amend the Explanatory Statement to the Regulations to include additional detail regarding limitations and safeguards on the relevant discretionary powers, as well as the factors to be considered in exercising those powers, provided above and to the Committee previously in the Attorney-General's letter of 22 September 2023.

Availability of independent merits review; adequacy of explanatory materials

The committee requested the Attorney-General's advice as to:

- *whether the explanatory statement can be amended to include the additional information provided about the justification for exclusion of decisions made under subsection 7(8) from merits review;*
- *whether a further explanation can be provided as to how decisions made under subsections 6(1) and Part 4 can affect an allocation that has already been made and whether the explanatory statement can be amended to include this explanation; and*
- *whether internal review in relation to decisions made under section 6 and Part 4 could be provided for.*

Decisions under section 6

The Committee has noted the requirement set out in the Administrative Review Council's (ARC's) guide *What decisions should be subject to merits review?* that decisions involving the allocation of finite resources between competing applicants may not be suitable for merits review if the overturning of one allocation would affect an allocation already made to another party. In the case of decisions under section 6, the Committee appropriately points out that all persons who are eligible under section 6 are 'entitled' to payment of the maximum travel allowance. That is – if a decision about one applicant's entitlement were overturned, it would not affect the entitlement of others.

As such it is more appropriate to characterise decisions to grant applications made under section 6 as automatic or mandatory decisions. Consistent with the ARC's guidance at paragraphs 3.8-3.9, such decisions leave no room for merits review to operate.

Specifically, the circumstances giving rise to this mandatory decision under section 6 are that:

- the witness has applied for payment of travel allowance and provided the evidence required under subsection 6(4);
- under subsection 6(1), the witness is entitled to be paid their expenses incurred up to the maximum allowance, because they must travel with an overnight absence to appear at a hearing;
- the witness has complied with subsection 6(5) by providing evidence of their required overnight absence and expenses incurred; and
- under subsection 6(6), the decision-maker is satisfied the witness has complied with subsection 6(5).

Once all of these conditions are met, the decision-maker is required to approve the application, because subsection 6(1) provides that the witness is entitled to receive the allowance. This is despite subsection 6(6) being framed as a discretion. Despite the language of that subsection indicating that the decision maker 'may' grant an application, it is clear from subsection 6(1) that – where the relevant circumstances are satisfied, the witness is entitled to the allowance.

Once a person's entitlement has been determined, subsection 6(7) requires the decision maker to assess whether the amount claimed by the witness is equal to or less than the 'maximum travel

allowance' set out in subsection 6(2), and if necessary must reduce the amount payable to the maximum amount – but this does not affect the witness's entitlement to the allowance.

Similar considerations apply to decisions under section 7 relating to accommodation and meal allowances.

While merits review of decisions under sections 6 and 7 is not appropriate, it may be appropriate for the NACC to implement internal review and complaint procedures in situations where a witness is dissatisfied with a decision regarding the maximum amount of allowance paid – for example, where decision maker assesses under subsection 6(7) that the witness should be paid less than the amount they have claimed on the basis that the amount claimed is not equal to or less than the maximum travel allowance set out in subsection 6(2). The implementation of such internal review processes is a matter for the NACC to consider.

The Department will monitor the operation of the Regulations and may consider future amendments if it becomes clear that there is a pressing need for internal review processes to be outlined in the Regulations in the future.

Decisions under Part 4

Grants of legal assistance under Part 4 of the Regulations will be made from finite administered funding allocations provided to the department for this purpose. Decision will be made in accordance with the *Commonwealth Guidelines for Legal Financial Assistance 2012*, which require decision makers to have regard to the total amount of funding available in considering each application. The *Commonwealth Guidelines for Legal Financial Assistance 2012* are well-established and apply to a range of existing legal financial assistance schemes across the Commonwealth.

As the number of applicants that will be eligible and approved for funding under Part 4 is unquantifiable, the funding allocation will need to be carefully managed to ensure that all approved grants can be accommodated, while also ensuring these allocations of funds are distributed equitably and consistently.

If a decision under Part 4 was overturned or changed as the result of merits review, this would have a direct and significant impact on the ability of the department to maintain consistency and fairness for other applicants and may result in applicants in similar circumstances receiving vastly different entitlements.

In relation to internal review for decisions made under Part 4 of the Regulations, the Explanatory Statement for the Regulations notes that Part 9 of the *Commonwealth Guidelines for Legal Financial Assistance 2012* relating to review of decisions will apply to decisions made under Part 4 of the Regulations. This would allow an applicant to apply for internal review of a legal financial assistance decision made under Part 4 within 28 days after notification of the decision.

Adequacy of explanatory materials

The Department will amend the Explanatory Statement to the Regulations to include additional information about the exclusion of merits review for decisions under sections 6 and 7 and Part 4 of the Regulations.