Monitor 13 of 2023 - Ministerial Response

Contents

The Hon Jason Clare MP
Minister for Education

Reference: MC23-004923

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Room S1.111
Parliament House
CANBERRA ACT 2600

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

Dear Chair Linda

Thank you for the Scrutiny of Delegated Legislation Committee's (the Committee) correspondence of 19 October 2023 regarding scrutiny concerns with the Australian Education Regulations 2023 (the Regulations) and the Higher Education Support (Other Grants) Amendment (National Priorities Pool Program and Regional Partnerships Project Pool Program) Guidelines 2023 (the Guidelines).

In relation to the Regulations and the Guidelines, for each of the matters the Committee raised with me by its correspondence of 6 September 2022 and 14 September 2023, the Committee now asks whether the explanatory statements for the Regulations and the Guidelines can be amended to include the information set out in my response of 4 October 2023. I undertake to update the explanatory statements to include that information. The Department of Education will prepare amended explanatory statements for the Regulations and the Guidelines for my approval.

I thank the Committee for its consideration, and I trust this information is of assistance.

[redacted]

JASON CLARE

1 / 11 / 2023

The Hon Jason Clare MP
Minister for Education

Reference: MC23-004924

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Room S1.111
Parliament House
CANBERRA ACT 2600

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

Dear Chair Linda

Thank you for your correspondence of 19 October 2023 regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation's concerns with the Australian National University (Governance) Statute 2023 and accompanying explanatory statement.

I can advise the Department of Education has liaised with the Australian National University on the matters raised by the Committee. The University has confirmed it will undertake to update the explanatory statement for the Australian National University (Governance) Statute 2023 as requested by the Committee, please see enclosed correspondence.

I thank the Committee for its consideration, and I trust this information is of assistance.

[redacted]

JASON CLARE

1 / 11 / 2023

Encl. – Correspondence from the ANU.

Australian National University

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25 October 2023

The Hon Jason Clare MP
Minister for Education
C/- Tertiary Policy Branch
Higher Education Division
Department of Education

Australian National University (Governance) Statute 2023
Follow up response to Senate Standing Committee for the Scrutiny of Delegated Legislation

Dear Minister

I refer to the *Delegated Legislation Monitor*, No. 12 of 2023, of the Senate Standing Committee for the Scrutiny of Delegated Legislation which, among other instruments, considered the response from the Australian National University with regard to the *Australian National University (Governance) Statute 2023*.

The University's responses regarding the Committee consideration detailed below.

Delegation of administrative powers and functions; adequacy of explanatory materials

The University notes the request from the Committee to for the instrument's explanatory statement to be updated to provide further information on the Delegation Framework and the safeguards and limitations contained within ANU policy on the exercise of delegation powers in the instrument and confirm the University will undertake to amend the explanatory statement to provide this further detail.

No-invalidity clauses

The University notes the confirmation from the Committee that In light of the undertaking to amend the instrument and its explanatory statement, the Committee has concluded its examination of the instrument in relation to this issue.

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 further raised.

Yours sincerely

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

THE HON CHRIS BOWEN MP
MINISTER FOR CLIMATE CHANGE AND ENERGY

MC23-033024

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

sdlc.sen@aph.gov.au

Dear Ms Imtoual

Thank you for your correspondence of 19 October 2023 regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation – Competition and Consumer (Gas Market Code) Regulations 2023 [F2023L00994].

Please find attached my response to address the Committee's questions. I trust that providing this information will assist the Committee in its consideration of the Regulations.

Yours sincerely

[redacted]

CHRIS BOWEN

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Competition and Consumer (Gas Market Code) Regulations 2023

Responses to Standing Committee for the Scrutiny of Delegated Legislation's Monitor 12 of 2023

Significant penalties in delegated legislation

The committee is seeking the minister's further advice as to whether the significant penalties in this instrument can be moved into primary legislation and, if not, whether further justification can be provided for the inclusion of such significant penalties in delegated legislation.

As mentioned in the previous response to the Committee on 27 September 2023, the Competition and Consumer (Gas Market Code) Regulations 2023 (**the Code**) is made under Part IVBB of the *Competition and Consumer Act 2010* (**the Act**). Penalties for breaches of the Code are already located in the primary legislation, specifically in Part VI of the Act. Where penalty amounts are specifically included in the Code, this is a reduction in the penalty that otherwise applies under the primary legislation.

Where the amount of a civil penalty is not provided in a gas market instrument, the amount of the penalty is calculated in accordance with section 76 of the Act. Items 7C and 7D of the table in subsection 76(1A) of the Act set maximum amounts that a Court can award for penalties relating to breaches of civil penalty provisions of a gas market instrument.

Under item 7C, if the amount of a pecuniary penalty is not specified in a gas market instrument, the default maximum civil penalty for an individual is $2,500,000, while the maximum for a body corporate is the greater of:

- $50 million;
- if the court can determine the value of the benefit obtained, three times the value of that benefit; and
- if the court cannot determine the value of the benefit obtained, 30% of the body corporate’s adjusted turnover during the breach turnover period for the offence, act or omission.

If penalty amounts are not prescribed in the Code, the maximum penalty amounts calculated in accordance with section 76 of the Act, which are significantly higher than those currently within the Code, will apply. While the prescribed penalty amounts in the Code are significant, inclusion of these amounts in the Code means that the maximum penalties for the relevant provisions are lower than if the primary legislation penalty amounts were to apply.

The Explanatory Memorandum to the Treasury Laws Amendment (Energy Price Relief Plan) Bill 2022 explained (at paragraph 1.117), in relation to the approach to penalties for gas market instruments, that:

> This approach is necessary because gas market instruments are the key mechanism through which the gas market is regulated, and the welfare of Australians is protected.

> …
>
> It is expected that the maximum penalty would only be made available if appropriate; otherwise, a lower penalty will be prescribed for a civil penalty provision in a gas market instrument.

This approach is reflected in the terms of the Code.

Availability of independent merits review, judicial review, and no-invalidity clauses

The committee requests the minister's advice as to:

- *whether the explanatory statement can be amended to include the justification provided for exclusion of merits review in relation to decisions that are preliminary or procedural in nature, including decisions under section 75;*
- *whether additional detail can be provided to the committee regarding how the justification for excluding decisions made under the instrument from merits review on the basis of policy decisions of a high political content meets the threshold in the ARC guide;*
- *in light of the exclusion of merits review for these decisions, how the requirement for a 14-day notice period is a sufficient safeguard; and*
- *whether the explanatory statement can be amended to include the additional detail provided regarding why the no-invalidity clauses are necessary and appropriate.*

The response of the Committee is acknowledged and the Explanatory Statement will be amended to include justifications on the exclusion of merits review in relation to decisions that are preliminary or procedural in nature, including decisions under section 75, as well as detail on the justification for no-invalidity clauses.

The previous response to the Committee on 27 September 2023 referred to the Administrative Review Council's guide, '*What decisions should be subject to merits review?*' (**ARC guide**), which provides (at paragraphs 4.22 – 4.33) that policy decisions of a high political content may justify the exclusion of merits review.

Relevantly, decisions made under the Code affecting the Australian economy fall within this exception (paragraph 4.23 of the ARC guide). Decisions considered to be of high political content in the previous response to the Committee (under subsections 61(1), 63(1) and 68(1)) are part of the exemptions framework in the Code. These decisions are economically consequential for the east coast gas market and the cost of energy for consumers in that market, which ranges from domestic households to industrial gas users. A key objective of the exemptions framework is to incentivise suppliers to commit more gas supply to the east coast to address gas supply shortfalls that have been forecast by the Australian Energy Market Operator and the Australian Competition and Consumer Commission.

The scale and market impact of decisions made under the Code, such as a decision to grant an exemption under subsection 61(1), are of high political content based on the considerations involved in making those decisions. For instance, the granting of an exemption under subsection 61(1) may be appropriate following the Minister's consideration of matters of sufficiently high political content under subsection 61(4), including:

- the extent to which the exemption would promote:
    - a workably competitive market for regulated gas;
    - the affordability and availability of regulated gas on reasonable terms; and
    - the sufficiency or adequacy of investment in, and supply and production of, regulated gas;
- the effect or expected effect of other related decisions or government policies;
- the impact on trade and exports, and on international relations; and
- the impact on the economy.

These considerations contribute to the Code's objective to incentivise the adequate supply and long-term investment of reasonably priced gas in the domestic market. The approach aims to ensure that gas prices are driven by Australian market fundamentals and costs, rather than international factors. The exemptions framework will allow Australia to deliver on energy supply commitments to trading partners and reduce the risk of triggering the Australian Domestic Gas Security Mechanism. By reducing this risk, Australia will maintain its investments and reputation as a trusted trading partner.

Suppliers seeking an exemption from the price rules in the Code will be expected to offer commitments to meet the policy intent and justify the exemption from the Code's pricing rules. While the types of conditions are not defined in the Code, it is expected they will relate to additional domestic volumes, price commitments, investment in new production, how gas is offered to the domestic market and other related matters. Decisions made in relation to these exemptions, and such commitments, are expected to be important to address gas supply shortfalls.

The exemptions framework also reflects the importance of providing producers with policy certainty to engage in long term investments. The Code allows producers to enter into multi-year enforceable commitments with the Commonwealth Government, thus providing certainty around price regulation. That certainty, and the economic impact of the Code, may be diminished if relevant decisions are subject to merits review.

The department engaged in extensive consultation during the development of the Code, including a period of public exposure on the draft Code and consultation with industry. Based on the feedback received during consultation, the 14 business day notice period was considered sufficient. This is because 14 business days allows almost three calendar weeks for an applicant to properly consider the impact of any proposed conditions and make a decision on whether to accept those conditions, or withdraw their application for an exemption, variation or revocation. This timeframe strikes the appropriate balance between

the rights of the applicant and the need for market-sensitive exemptions to be promptly implemented.

Privacy, conferral of discretionary powers and adequacy of explanatory materials

The committee is seeking further advice from the minister as to whether the explanatory statement can be updated to include additional information on the factors to be considered when determining what is 'contrary to the public interest'.

The response of the Committee is acknowledged and the Explanatory Statement will be amended to include the requested information.

The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House

MC23-068811

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

By email: Scrutiny.Sen@aph.gov.au

Dear Ms Imtoual

Thank you for your correspondence of 9 October 2023 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation Committee, requesting further information in relation to the National Portrait Gallery of Australia Regulations 2023 (Regulations). I am pleased to provide further advice in response to the matters raised by the Committee about the Regulations and thank the Committee for identifying these issues.

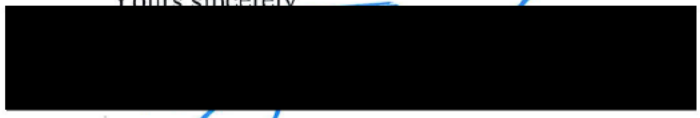
The Regulations replace the National Portrait Gallery of Australia Regulations 2013 which are repealed by the Regulations and would have otherwise sunset on 1 October 2023 in accordance with the *Legislation Act 2003*. The Regulations, which support the *National Portrait Gallery of Australia Act 2012*, include provisions which allow the effective operation of the Gallery in relation to matters such as security, service of alcohol, oversight by the Director and relevant related offences.

The Committee has sought advice on three issues around the operation of the powers of authorised officers, and a related strict liability offence and I have provided additional information to address the questions they raise in Attachment A. The response has been informed by advice from the National Portrait Gallery of Australia.

I note that given the issues raised by the Committee it has given notice of a motion to disallow the instrument as a precautionary measure to allow additional time to consider the information received.

I trust this information addresses the concerns identified by the Committee.

Yours sincerely



TONY BURKE

31 / 10 / 2023

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ATTACHMENT A

Senate Standing Committee for the Scrutiny of Delegated Legislation Committee
National Portrait Gallery of Australia Regulations 2023 (F2023LO1184)

Delegated Legislation Monitor 11 of 2023 tabled in the Senate on 9 October.

Scrutiny concerns raised and response

1. Coercive Powers – Subsection 12(1) – Power to appoint an authorised officer to regulate entry or conduct in the National Portrait Gallery of Australia (Gallery) and the powers issued to these officers especially in relation to subsection 15(2) – Authorised officers may use reasonable force to apprehend a person.

The Committee requests further details about these provisions in the National Portrait Gallery Regulations 2023 (2023 Regulations) which provide appointed authorised officers with the ability to exercise a range of discretionary powers some of which the Committee has identified may be coercive. The Committee raises a number of specific questions about these provisions which are responded to below.

- ***Why the provisions are necessary and appropriate, including how the public interest is served by their inclusion in the instrument;***

Section 12 relates to the appointment and identification of authorised officers which is necessary to ensure the Director of the Gallery is able to authorise suitably qualified staff to regulate entry into Gallery land and Gallery buildings (Gallery premises), the conduct of persons on Gallery premises and for purposes relating to the removal of persons from Gallery premises.

It is in the public interest that the Gallery can appoint authorised officers and that authorised officers are provided appropriate powers to maintain public safety and order and to protect the rights of staff and patrons on Gallery premises so that they are able to enjoy and take part in cultural life.

The appointment of authorised officers and the powers afforded to these officers (including those set out in section 15 regarding apprehension, removal and custody of persons on Gallery premises) are necessary to ensure that the valuable cultural material (including the Gallery's extensive collection of works of art) on Gallery premises are protected. The Gallery has a collection of over 3,177 works of art valued at over $43.39 million (30 June 2023). Works of art held by the Gallery form the national collection of portraits, many of which are invaluable in terms of their cultural significance and importance to Australia, and the Australian public. Many of the works of art are also valued at significant amounts of money. The appointment of authorised officers and the powers afforded to them also support the Director of the Gallery's duty to ensure the safety and wellbeing of the many and diverse visitors to the Gallery (as a public institution) as well as members of staff.

The provisions which outline the powers of an authorised officer, including section 15, provide appropriate limitations and safeguards to ensure authorised officers act reasonably and in line with public expectations of officers tasked with maintaining the security and safety of a public venue. Notably, the need for such powers provides for appropriate management of increased and heightened risks which have threatened the safety and security

of the Gallery, such as recent "art" activism threats.

In late 2022, there were a number of incidents in Australian cultural institutions (including the National Gallery of Australia) where protestors sought to undertake acts of civil disobedience, including attempting to glue themselves to, and/or vandalise, works of arts. The Gallery experienced increased risks during the sovereign citizen protests in Canberra in February 2022, particularly in relation to the use of bathroom facilities by protesters. The situation was mediated by authorised officers without the need to exercise any additional powers.

The Gallery has also experienced heightened protester risks in relation to private event hire including a recent Minerals Council event and previously an animal petting zoo event which may have attracted animal rights activists. Increased risks are addressed with the hiring organisers and often require the employment of additional security staff who are briefed on the situation. None of the increased protest risks eventuated.

Sections 12 and 15 of the 2023 Regulations are consistent with similar provisions in regulations that support other National Collection Institutions such as the National Museum of Australia Regulations 2019 (sections 12 and 15) and National Gallery Regulations 2018 (sections 12 and 14).

- ***Further detail about what constitutes 'such force as is reasonably necessary' under section 15 of the instrument;***

Section 15 provides authorised officers with the power to apprehend a person to remove them from the Gallery or hold them in custody pending police arrival where they interfere with, or damage, Gallery material or property or fail to comply with a direction of the authorised officer issued in line with their duties to maintain the safety of the public and the collection. Subsection 15(2) makes it clear that when apprehending a person, the authorised officer can only use such force as is reasonably necessary.

In line with the objective nature of a 'reasonableness test', considering what constitutes 'such force as is reasonably necessary' requires objective consideration of the particular circumstances of the situation. Authorised officers are expected to exercise their powers in accordance with the required training authorised officers undergo and the Gallery's internal policies and procedures under which authorised officers must operate – authorised officers are therefore expected to have regard to these in determining the level of force that is reasonably necessary to apprehend the person. The level of force reasonably necessary is determined under the general principle that only the minimum physical force necessary to restrain a person (if needed) should be applied which is reflected in the security policies that authorised officers have regard to in exercising their powers under the regulations.

Under the Gallery's internal procedures, authorised officers are staff members who are required to have the necessary training to undertake their functions. In the appointment of authorised officers, appropriate security checks and police checks are undertaken by the contractor company (Certis) to ensure that nominated staff members are suited to undertake the duties of an authorised officer. Staff also receive induction training on the Gallery's relevant policies and procedures and additional customer service training including the requirements of entry to the Gallery and standards of behaviour.

There are some examples of refused entry to the Gallery for public health reasons during

COVID periods where people refused to wear masks. The Gallery has not received any complaints relating to authorised officer conduct or the need for police intervention in any incident management to date. Authorised officers have not had to engage the power of apprehension in any form to date.

- ***Further detail about what qualifications, skills and training an authorised officer should have, and the minimum level of seniority required to be appointed to the role, given the coercive powers they will be empowered to exercise;***

Authorised officers appointed by the Gallery are trained and expected to act appropriately in accordance with their responsibilities. Physical security and security services are contracted through Certis who undertake the appropriate security checks and police checks to ensure that the appointed authorised officers are suitable individuals to undertake the duties.

Authorised officers report to the Site Security Manager who then reports to the Manager of Facility and Security (APS Executive Level 1). The overarching manager is the Gallery Chief Operating Officer (Executive Level 2). There is a process to enable officers to be able to assess and respond to an incident appropriately (as outlined below).

The Gallery has a Protective Security Management Plan 2016 in place which draws on its Protective Security Policy and Protective Security Operations Manual. All critical incidents are managed in accordance with the Gallery's Emergency Planning and Response Procedures Manual (Planning and response manual) with all incidents, critical or otherwise, reported immediately to the Security Control Room. Scenarios and appropriate critical incident responses are outlined in the Planning and response manual.

The Protective Security Management Plan includes an explanation of the reasonable grounds that an authorised officer must base their belief on before exercising a particular power, as well as providing authorised officers a number of scenarios for consideration which offer a more in-depth understanding of the interaction of the different powers available to them and how to most effectively apply protective security requirements.

As part of assessing its security risks and operations, the Gallery has an independent bi-annual protective security risk review conducted by an independent consultant which may make recommendations about the training and oversight of authorised officers.

- ***Whether any safeguards or limitations apply to the exercise of powers by an authorised officer, and, if so, whether the safeguards are contained in law or policy.***

The provisions that enable authorised officers to exercise powers under the 2023 Regulations (as set out in Division 2 of Part 4, including prohibiting entry to the Gallery (section 13), directing individuals or groups to leave the Gallery (section 14) or apprehending a person (section 15)) are subject to the authorised officer having 'reasonable grounds' for their belief that exercising the relevant power is necessary.

Before exercising their powers, authorised officers must therefore apply an objective test to their belief i.e., base their belief on what a reasonable person would objectively believe in the position of the authorised officer. This serves as a safeguard in limiting authorised officers' powers under the 2023 Regulations by mitigating the risk against any arbitrary and subjective exercise of such powers.

The Gallery has training and the security policies and procedures in place that include undertaking an object assessment of the behaviour and conduct of individuals in forming a reasonable belief. Authorised officers will also have regard to the Gallery's Service Charter which sets out expectations of how the Gallery will deliver its services to visitors. The Charter contains visitor conduct guidance including that visitors are expected to comply with the Gallery policies to ensure the safety of works of art, respect the rights of others visitors, respect staff, volunteers and contractors and treat property with due care.

Any concerns about an authorised officer's conduct can be raised directly with the Gallery who investigate the circumstances and appropriate conduct through the processes contained in the Charter.

Section 28 of the 2023 Regulations also provides for applications to be made to the Administrative Appeals Tribunal (AAT) for an authorised officer's decision under section 13 to prohibit a person from entering Gallery premises. The AAT appeal mechanism in section 28 does not reference section 14 (to direct a person to leave premises) or section 15 (the removal of a person from premises). This is because section 13 states that a decision to prohibit entry may be triggered by previous exercise of the powers under section 14 or section 15. Should a person or persons be prohibited from entering Gallery premises – including after previously being directed to leave under section 14 or previously being apprehended and removed from premises under section 15 - they may make an application for review of the decision to the AAT. That is, the practical effect is that the same series of actions are able to be contested through exercise of the review right in section 32. This merits review mechanism provides an additional safeguard of the exercise of these powers.

2. Conferral of Discretionary Powers – Paragraphs 13(1)(d) and 14(1)(c) - Authorised officers may prohibit entry to the Gallery and direct a person to leave where they reasonably believe the actions will cause offence to members of the public or staff members.

The Committee requests the following further details about these provisions:

- ***What factors should be taken into account by the authorised officer when deciding if the conduct of a person or group on Gallery land or in a Gallery building will cause, or is likely to cause, 'offence' to members of the public or staff members; and***
- ***Examples of the types of conduct that may be considered 'offensive' under the instrument.***

Authorised officers would have regard to the Gallery's Service Charter and the relevant security policies and procedures in determining objectively what actions will cause or likely cause offence to members of the public or staff. For example, the Gallery's Service Charter provides that a visitor can expect 'an accessible, welcome and safe environment' and 'appropriate and well maintained building and environs' – authorised officers should have regard to the extent to which objectively, any conduct or behaviour by a person or group will (or will likely) adversely affect these expectations. What constitutes conduct that will cause or will likely cause 'offence' is considered on a case-by-case basis and depends on the specific circumstances.

Factors that authorised officers would reasonably take into account in deciding if conduct is likely to cause 'offence' include the likely consequence that the action will cause harm or risk

the health and safety of another person, staff or the Gallery collection; the extent to which the action will disrupt the usual activities of the Gallery and whether the manner of conduct is likely to offend, insult humiliate or intimidate those in the public place.

Examples of conduct that would likely cause 'offence' include reports of disruption to the Gallery material or premises, use of offensive language, antisocial behaviours (which causes or are likely to cause harassment, alarm or distress to other persons), vandalism, threats physical or inappropriate or undue aggression directed at staff (including authorised officers) and members of the public.

Recent examples of offensive behaviour that have occurred in the Gallery include incidents of racial slurs being directed toward authorised officers.

In line with the Gallery's internal policies and procedures, authorised officers are expected to report offensive behaviour and any action undertaken to senior management of the Gallery so that these circumstances can be monitored and relevant procedures, including conditions of entry, can be reviewed as needed.

3. Strict Liability – Subsection 12(6) – Authorised officer commits a strict liability offence if they fail to return their identity card within 14 days of ceasing being an officer.

The Committee requests the following further details about these provisions:

- ***Why it is necessary and appropriate for subsection 12(6) of the instrument to provide for an offence of strict liability in relation to failing to return an authorised officer identity card within 14 days, with reference to the Attorney-General's Guide to Framing Commonwealth Offences;***

The decision to provide for a strict liability offence was taken having regard to the Attorney-General's Guide to Framing Commonwealth Offences (September 2011 edition), and in particular section 2.2.6 regarding strict liability and absolute liability:

- The lack of a fault element is justified and necessary to ensure effective and specific deterrence against individuals (who are no longer appointed authorised officers) retaining access to identity cards and being capable of holding themselves out as authorised officers, particularly given the range and significance of powers afforded to authorised officers under the regulations.
- A strict liability offence in respect of the specific conduct constituting an offence in subsection 12(6) is appropriate to safeguard the integrity of Gallery – access to identity cards by individuals who are not appointed authorised officers could weaken the security of the Gallery and compromise the safety of the public, staff and the Gallery's collection.
- Importantly, subsection 12(7) allows the defendant to prove that they did not commit an offence if they can demonstrate that there was a reasonable possibility that their identity card was lost or destroyed (i.e. the provision allows a defence of honest and reasonable mistake of fact to be raised).
- The offence in subsection 12(6) is not punishable by imprisonment or a fine of more than 60 penalty units (as relevant to an individual) – the offence carries only 1 penalty unit.

Subsection 12(6) (and more generally section 12) was also drafted to ensure consistency with regulations supporting some other National Collecting Institutions (for example, section 12 of the National Library Regulations 2018 and section 12 of the National Museum of Australia Regulations 2019).

- ***how this provision is likely to achieve the 'public health and safety objective of preventing unauthorised supply of liquor'.***

Subsection 12(6) is intended to achieve the public safety and security objectives as outlined above. This refers to importance of the offence in ensuring safe Gallery access and visitation, protection of staff and the Gallery's collection by minimising the opportunity of misuse of identity cards.

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

MS23-001781

Ms Fattimah Imtoual
Committee Secretary (A/g)
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Dear Ms Imtoual

I refer to your email of 19 October 2023 seeking further information on the *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2023* (the Environment Regulations).

In the *Delegated Legislation Monitor 12 of 2023* (Delegated Legislation Monitor), tabled in the Senate on 19 October 2023, the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) requested further information relating to the Environment Regulations. Specifically, the Committee has sought additional information regarding the availability of judicial review, and whether the explanatory statement can be amended to include further details about the calculation of fees referred to in sections 57 and 58.

Availability of judicial review

The Environment Regulations contain four no-invalidity clauses (in subsections 9(3), 13(3), 33(4) and 33(9)). These clauses each provide that the National Offshore Petroleum Safety and Environmental Management Authority's (NOPSEMA) failure to comply with set timeframes for making certain decisions does not affect the validity of those decisions. The Committee considers there are other provisions in the Environment Regulations which allow NOPSEMA to extend its own timeframes. The Committee has requested my advice as to:

- Whether the no-invalidity clauses in the Environment Regulations can be removed, noting there are existing provisions that allow NOPSEMA to extend the time they have to make certain decisions; or
- If this is not possible, a further justification as to the necessity of the no-invalidity clauses.

Response

Equivalent no-invalidity clauses have been included in offshore environmental management regulations since the original regulations commenced on 1 October 1999. It is acknowledged that NOPSEMA can extend its own timeframes to make a decision. However, in the unlikely event that NOPSEMA fails to meet decision-making timeframes (for example, via a technical administrative oversight), it is my view that an offshore resources project proponent should not

be penalised by having NOPSEMA's decision to accept their offshore project proposal or environment plan determined to be invalid. This is particularly the case given that decisions made by NOPSEMA often relate to environmental approvals for multi-million-dollar projects. Certainty and clarity is essential for projects of this magnitude, and this should not be put at risk as a result only of a technical administrative oversight.

In addition, a titleholder may commence activities based on a decision by NOPSEMA to accept an environment plan. If the decision is subsequently determined to be invalid, the titleholder may have been undertaking activities without an accepted environment plan in force, which is an offence under section 17 of the Environment Regulations. As noted above, this outcome would be manifestly unreasonable in the context of a technical administrative oversight.

As stated in previous response to the Committee of 27 September 2023, 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 30 day period that further time is required to make a decision. The no-invalidity clauses will therefore only be required to have effect on an extremely infrequent basis. However, it is my view that the no-invalidity clauses should remain as a safeguard to ensure the validity of decisions and provide certainty for persons conducting offshore petroleum and greenhouse gas storage activities.

Legal certainty; clarify 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 it incurred in considering the relevant proposal or in assessing the relevant financial assurance arrangements. The Committee considers this would be helpful information to include in the explanatory statement to the Environment Regulations. The Committee has requested my advice as to whether the explanatory statement can be amended to include further detail about how the fees will be calculated and the availability of an internal review process.

Response

Per the Committee's request, I agree to amend the explanatory statement to include the additional information about fees. A replacement explanatory statement will be published on the Federal Register of Legislation.

Yours sincerely

Madeleine King MP

2/11/2023