Monitor 6 of 2024 – Ministerial Responses

Contents

Chapter 2: Concluded matters

THE HON ANDREW GILES MP

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MC24-014668

Ms Hannah Dibley
Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

Dear Committee Secretary

Thank you for your correspondence of 17 May 2024 concerning the continuing consideration of the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (the Amendment Regulations) by the Senate Standing Committee for the Scrutiny of Delegated Legislation in the Committee's Delegated Legislation Monitor 5 of 2024.

I acknowledge the Committee's request at paragraph 1.50 of Monitor 5 of 2024 to consider amendments of the Amendment Regulations' Explanatory Statement. Having regard to the Committee's views from paragraph 1.47 of the Monitor, I accept the Committee's recommendations and will arrange for my Department to prepare updates of the Explanatory Statement for my consideration and approval as soon as possible. Specifically, I confirm that it is my intention for the Explanatory Statement to be revised to include further information in relation to:

- factors relevant to the Minister's consideration of whether a condition is 'not reasonably necessary' for the protection of the community; and
- which decisions of the Minister to grant a Bridging (Removal Pending) visa (BVR) to a non-citizen are subject to independent merits review;

in line with the information I provided on these matters for the Committee's consideration in my letter of 3 April 2024 (MC24-003529).

I note the Committee has also requested advice on the following matters:

- the outcome of roundtable discussions with the Australian Human Rights Commission, Commonwealth Ombudsman's Office and the Australian Red Cross, as well as the basis on which these organisations were identified as relevant stakeholders; and
- whether consideration could be given to further amending the Migration Regulations to address feedback provided as part of this consultation process.

The Department held roundtable discussions with the Australian Human Rights Commission, the Commonwealth Ombudsman's Office and the Australian Red Cross on 17 November 2023, 13 December 2023 and 24 January 2024. These organisations are key stakeholders with which the Department engages regularly on a range of immigration matters. As such, the purpose of the roundtables was to share information with these stakeholders about the implications of the High Court's decision in NZYQ, and the Government's response—including the implementation of the legislative amendments made by the *Migration Amendment (Bridging Visa Conditions) Act 2023* on 17 November 2023, and subsequently by the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* and the Amendment Regulations on 8 December 2023.

The roundtable discussions focused on the legislative framework established in response to the High Court's decision in NZYQ, rather than seeking feedback from stakeholders on other potential legislative reforms. The roundtables provided an opportunity for representatives from my Department to provide information about the legislation and the general approach to managing members of the NZYQ-affected cohort following their release from immigration detention. The Department also addressed questions relating to specific conditions imposed on the BVRs of individuals in this cohort to manage risks to the Australian community (including which conditions carry criminal penalties); questions about the implementation of conditions relating to electronic monitoring devices and curfews; and support provided to individuals in the NZYQ cohort following their release from immigration detention, including through the Status Resolution Support Services.

I appreciate the time the Committee has taken to consider the Amendment Regulations and my previous response to the matters raised by the Committee in Monitor 1 of 2024 (MC24-003529). My Department will engage with the Committee secretariat in relation to the updates I have undertaken to make to the Explanatory Statement. I have also copied this letter to the Minister for Home Affairs and Minister for Cyber Security, the Hon Clare O'Neil MP.

I trust this information is of assistance to the Committee in its deliberations.

Yours sincerely

ANDREW GILES

31 / 5 / 2024

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

MS24-000608

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Dear Ms Dibley

I refer to your email of 28 March 2024 seeking further information in relation to the *Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023* (the GHG Regulations).

In the *Delegated Legislation Monitor 4 of 2024*, tabled in the Senate on 28 March 2024, the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) requested additional information about, and clarification of, certain provisions in the GHG Regulations. Specifically, the Committee sought my advice on whether further justification can be provided as to how decisions under subsections 25(1) and 32(2) of the GHG Regulations are appropriate for exclusion from merits review. In addition, the Committee asked for my advice as to whether the explanatory statement can be further amended to include the detailed examples I provided of other relevant matters that may be taken into account under subsections 25(3) and 42(3) of the GHG Regulations in response to the Committee's concerns raised in the *Delegated Legislation Monitor 2 of 2024*.

A response to the matters raised is enclosed with this letter. I agree to further amend the explanatory statement to include the detailed examples provided of other relevant matters that may be taken into account by the responsible Commonwealth Minister under subsections 25(3) and 42(3) of the GHG Regulations. A replacement explanatory statement will be published on the Federal Register of Legislation.

Yours sincerely

Madeleine King MP

16 / 5 /2024

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

Attachment A

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

In its *Delegated Legislation Monitor 4 of 2024* tabled in the Senate on 28 March 2024 (Delegated Legislation Monitor No. 4), the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) considered my response to matters raised in its *Delegated Legislation Monitor 2 of 2024*, tabled in the Senate on 28 February 2024 (Delegated Legislation Monitor No. 2). The Committee has requested further information about the appropriateness of the exclusion of decisions under subsections 25(1) and 32(2) of the *Offshore Petroleum and Greenhouse Gas Storage (Greenhouse Gas Injection and Storage) Regulations 2023* (the GHG Regulations) from merits review. The Committee has also requested that I advise whether the explanatory statement can be further amended to include the detailed examples of other relevant matters that may be taken into account under subsections 25(3) and 42(3) of the GHG Regulations.

Response to the Committee's request regarding the appropriateness of the exclusion of certain provisions from merits review

In its Delegated Legislation Monitor No. 4, the Committee has requested my advice in relation to whether further justification can be provided as to:

- how decisions under subsection 25(1) are appropriate for exclusion from merits review on the basis that they are preliminary decisions or fall within any other grounds contemplated in the Administrative Review Council (ARC) Guide, *What decisions should be subject to merits review*; and
- how decisions under subsection 32(2) are appropriate for exclusion from merits review on the basis that they are law enforcement decisions or fall within any other grounds contemplated in the ARC Guide.

Response:

I thank the Committee for its consideration of the appropriateness of decisions under subsections 25(1) and 32(2) of the GHG Regulations being subject to merits review. This will be helpful to inform my department's consideration of the appropriateness for the exclusion or application of merits review to decisions in the regulatory regime for greenhouse gas (GHG) injection and storage in the Review of the Offshore Carbon Capture and Storage Regime (the Review). Noting the Committee's ongoing concerns in relation to the exclusion from merits review of decisions under subsections 25(1) and 32(2) of the GHG Regulations, my strong preference is to not apply a piecemeal approach to implementing merits review for these decisions as this could lead to inconsistency with the availability of merits review for other decisions in the regulatory regime for GHG injection and storage. Rather, my preference is to undertake a comprehensive, holistic consideration to ensure that a consistent policy approach for the application of merits review to decisions in the regulatory regime for GHG injection and storage is applied, in line with the ARC Guide. The forthcoming Review is the appropriate opportunity to undertake this holistic consideration. I have concerns that if I were to pre-empt

the outcomes of the Review by instituting merits review for only a small number of decisions in the GHG Regulations, this would give rise to inconsistency.

In my comments in response to the Committee's Delegated Legislation Monitor No. 2, I provided, as requested, further justification for excluding decisions under subsections 25(1) and 32(2) from merits review. This was done with reference to the grounds in the ARC Guide.

While noting that the upcoming Review will examine the availability of independent merits review, I wish to reiterate my previous comments provided in relation to subsections 25(1) and 32(2). The GHG Regulations confer a number of discretionary decisions on the responsible Commonwealth Minister which are excluded from merits review. This includes decisions in relation to the approval or refusal of a draft site plan (subsection 25(1)) and withdrawal of an approved site plan in specified circumstances (subsection 32(2)).

The discretionary decision-making power under subsection 25(1) of the GHG Regulations is preliminary in nature and therefore is appropriate for exclusion from merits review having regard to the factors set out in the ARC guide.

A decision made by the responsible Commonwealth Minister under subsection 25(1) of the GHG Regulations as to whether a draft site plan should be approved or refused is a preliminary decision prior to the making of the substantive decision under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the OPGGS Act) whether an applicant for a GHG injection licence will receive an offer document advising that the Minister is prepared to grant the licence. Therefore, as a decision by the Minister under subsection 25(1) of the GHG Regulations is merely preliminary to the later substantive decision that is made under the Act, it is appropriate under the ARC Guide that this decision is excluded from independent merits review.

I also reaffirm my earlier advice that the GHG Regulations recognise the potential significant consequences that the responsible Commonwealth Minister's preliminary decision in relation to a draft site plan may have on the later substantive decision made under the OPGGS Act by imposing an obligation on the Minister to give an applicant an opportunity to provide additional information or vary a site plan where they are not satisfied the plan meets the relevant criteria. This involves giving the applicant an opportunity to vary the draft site plan, or provide further information, if the responsible Commonwealth Minister reasonably believes that varying the plan or providing the additional information could so satisfy the responsible Commonwealth Minister.

In relation to decisions under subsection 32(2) of the GHG Regulations, I reaffirm my earlier advice that the grounds for withdrawal of approval of a site plan set out in paragraph 32(1)(b) relate to non-compliance by a GHG injection licensee with the requirements of the GHG Regulations or a direction given by the responsible Commonwealth Minister under the OPGGS Act. I reiterate that these incidents of non-compliance are sufficiently serious to be punishable by offence and/or civil penalty provisions. The basis for a decision by the responsible Commonwealth Minister to withdraw approval of a site plan under section 32 of the GHG Regulations only arises from serious non-compliance with the law on the part of the licensee. The relevant offence and civil penalty provisions have been framed in accordance with the Attorney-General's Department's: *A Guide to Framing Commonwealth Offences,*

Infringement Notices and Enforcement Powers. A decision by the Minister under subsection 32(2) of the GHG Regulations to withdraw approval of a site plan therefore has the character of an enforcement decision, and as such it is appropriate that these decisions are excluded from merits review.

Response to the Committee's request regarding the explanatory statement

In its Delegated Legislation Monitor No. 4, the Committee requests my additional advice as to whether the explanatory statement can be further amended to include the detailed examples I provided in my response to the Committee in relation to the Committee's concerns in Delegated Legislation Monitor No. 2. These examples were of 'other relevant matters' that may be taken into account under subsections 25(3) and 42(3) of the GHG Regulations in deciding whether to approve a draft site plan or a variation to a site plan.

Response:

I am happy to oblige the Committee by arranging for a further replacement explanatory statement. I note that the detailed examples are not intended to limit the decision-making power. A further replacement explanatory statement will be published on the Federal Register of Legislation.