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

MB22-001198

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111 Parliament House
CANBERRA ACT 2600

Dear Senator Smith

I refer to correspondence of 30 September 2022 on behalf of the Standing Committee for the Scrutiny of Bills (Committee) regarding the Atomic Energy Amendment (Mine Rehabilitation and Closure) Bill (the Bill). I respond to issues raised in the Committee's commentary on the Bill in Scrutiny Digest 5/22 below.

The purpose of the Bill is to amend the *Atomic Energy Act 1953* (the AE Act) to preserve regulatory arrangements at the Ranger Uranium Mine in the Northern Territory (NT) until such time as the mine operator has achieved the requisite standard of environmental rehabilitation. These arrangements have been in place since the late 1970s when the mine was approved.

The regulatory framework for Ranger is unique. Directly approved by the Australian Government when uranium was considered a strategic national resource, Ranger is the only mine in Australia to be authorised under an Authority issued under the AE Act. This means the provisions of the Bill apply only to Ranger to support Ranger's rehabilitation and closure.

1. Why is merits review not available in relation to a decision to vary, or revoke, an authority under proposed section 41CK(1) to (5) or proposed subsection 41CR(1)?

Proposed sections 41CK (1) to (5) set out the Minister's limited power to vary a Part III Authority by making technical or procedural decisions that—

- have a very narrow scope, in that decisions can only be made in respect of an authority to the mine operator to rehabilitate Ranger to the required standard, and are thus beneficial to all affected parties;
- affect a limited number of stakeholders (e.g. the authority is granted to a single entity and there is only one authority in existence at any one time); and
- involves extensive inquiry processes and can only be taken after extensive consultation with those stakeholders (e.g. the holder of the authority and the Land Council).

The variation provisions do not permit me or a future Resources Minister to vary the substantive rehabilitation obligations imposed on the mine operator, nor the roles and responsibilities of other stakeholders which are set out in the Environmental Requirements which have been annexed to the current section 41 Authority since 1999. By only permitting variations to an authority in very narrow, specific circumstances, the Government is providing Ranger's operator the certainty it needs to deliver a potentially billion-dollar rehabilitation program, and Traditional Owners' confidence that their longstanding role in the oversight of this rehabilitation will be preserved. The Bill does not permit a Minister to impose conditions generally and can only occur after significant consultation with Ranger's stakeholders.

Further, any variation or revocation can only occur if an agreement with Ranger's Traditional Owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) is in effect and the variation is not inconsistent with the Commonwealth's obligations under that agreement. This existing control is not impacted by the Bill, and maintains the longstanding relationship between an authority conferred under the AE Act and an agreement made under the ALRA.

Section 41CR seeks only to preserve the application of the existing provisions in section 41A of the AE Act to the section 41 Authority that is currently in force. Without proposed section 41CR the current provisions which allow the holder of the section 41 Authority to apply for it to be revoked – and even then only when the authority holder has completed rehabilitation – will be repealed. Merits review in this circumstance is therefore not appropriate.

In light of my narrow scope to vary a Part III Authority and the other limitations summarised above, I do not consider the availability of merits review necessary. I further note that this is consistent with the Administrative Review Council's publication "What decisions should be subject to merits review?" available at https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999. In particular—

- the extensive consultation process involved in making a decision to vary or revoke an authority is a factor against merits review (see paragraphs 4.53 to 4.55 of the guide);
- the limited scope of decision means that there may not be an effective remedy (see paragraphs 4.49 to 4.51 of the guide); and
- in the context of the limited scope for decisions and extensive consultation, the costs of review would not be justified (see paragraphs 4.56 to 4.57 of the guide).

2. Will documents incorporated by reference (in accordance with section 41CU) be freely and readily available to all persons?

This section does not purport to allow the incorporation of legislative provisions by reference to other documents. Rather, it allows the text of an authority to include or make reference to other documents relevant to Ranger's rehabilitation. Many of these are or will be publicly available.

For example, the closure criteria used to determine if the mine operator has achieved its rehabilitation obligations are or will be specified in the mine operator's publicly available Mine Closure Plan. These criteria are developed after extensive consultation with stakeholders, including organisations representing Traditional Owners and the Supervising Scientist, and must be approved by the Australian and NT governments. Section 41CU will allow a future Part III Authority to reference approved closure criteria (which are described in the most recently approved Mine Closure Plan) as the basis for determining if the mine operator has satisfied its rehabilitation obligations. In this example, the operation of section 41CU does not create uncertainty in the law or make it so that the mine operator who is obliged to obey the law would have inadequate access to its terms. Rather, the ability to incorporate a document by reference is an administrative decision which would provide for more transparency and efficiency in decision-making.

There is much transparency in Ranger's regulatory framework. Decisions made by me or a future Resources Minister can only occur after extensive consultation with — or in some cases with the agreement of — Ranger's key stakeholders, including the mine operator, Northern Land Council, the Supervising Scientist and the NT Government.

I trust this information addresses the Committee's concerns. I thank the Committee for its consideration of the Bill.

Yours sincerely

Madeleine King MP

12/10/2022

SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT

MS22-011384

Senator Dean Smith
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Senate Standing Committee for the Scrutiny of Bills
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scrutiny.sen@aph.gov.au

Dear Chair, Dean

I write in response to the observations of the Senate Standing Committee for the Scrutiny of Bills (the Committee) on the Biosecurity Amendment (Strengthening Biosecurity) Bill 2022 (the Bill) in the *Scrutiny Digest 6 of 2022* (the Digest).

The Committee has sought advice on matters identified during the Committee's assessment of the Bill. Below is advice on these matters that has been prepared in consultation with officials from the Department of Health and Aged Care, noting that the Minister for Health and Aged Care, the Hon Mark Butler MP also has responsibility for the *Biosecurity Act 2015* (the Biosecurity Act).

a) Why it is both necessary and appropriate to include no-invalidity clauses in the proposed sections 196A and 393B;

Proposed sections 196A and 393B will strengthen Australia's ability to effectively manage and respond to emerging biosecurity risks, including risks arising from Foot and Mouth Disease (FMD). Growth in the volume and complexity of trade, effects of climate change, and expanding pest and disease spread all contribute to an increasingly complicated biosecurity risk environment.

To meet these challenges, the biosecurity system must be able to adapt and respond to the evolving risk environment in which it operates. Facilitating the ability to determine entry requirements for incoming travellers and preventative biosecurity measures ensures crucial safeguards can be in place to manage and respond to biosecurity risk.

The inclusion of the no-invalidity clause aligns with similar instruments in the Biosecurity Act such as a Biosecurity Response Zone Determination (see sections 365 and 368), Temporary Biosecurity Monitoring Zone Determination (see sections 384 and 387) or Biosecurity Activity Zone Determination (see sections 395 and 396), all of which are crucial in providing a rapid response to a pest or disease.

The clear intention is that the making of these determinations will be consultative, with the Agriculture Minister consulting with the Director of Biosecurity, Director of Human Biosecurity and the head of each State or Territory body that is responsible for the administration of biosecurity matters in all but exceptional circumstances. Biosecurity threats are often urgent and emerging, with a limited window of time to respond effectively. As seen most recently with FMD, the threat that a serious pest or disease could enter Australia poses an extreme biosecurity risk with potentially catastrophic consequences for the nation's $70 billion dollar agriculture industry and the 1.6 million jobs that rely on it. For this reason, in the event of a possible extreme and time critical situation where there is a need to act urgently to respond to a pest or disease, any arguable defects in the consultation process with all of the specified bodies should not invalidate a determination made to combat serious threats to Australia, its economy, environment and way of life. Further, as the process involves consultation with State and Territory bodies, the no-invalidity clause provides a mechanism to reduce jurisdictional uncertainties and facilitate activities where matters cross State and Territory boundaries.

It is important to note that the no-invalidity clause only applies in relation to a failure by the Agriculture Minister to comply with the consultation processes in proposed subsections 196A(9) and 393B(7). It does not affect a person's right to seek judicial review in relation to the exercise of power in making an entry requirements determination or a preventative biosecurity measures determination. As such, this provision does not limit access to the courts or access to judicial review. Avenues to challenge executive decision-making remain.

For these reasons, I consider it to be both necessary and appropriate to include a no-invalidity clause in both of the proposed sections 196A and 393B.

b) Whether the bill could be amended to provide that determinations made under proposed sections 196A, 196B or 393B are subject to disallowance to ensure that they receive appropriate parliamentary oversight:

The important role that the parliamentary disallowance process plays in ensuring oversight of Commonwealth law is acknowledged. However, it is appropriate for determinations made under proposed sections 196A, 196B and 393B to be exempt from disallowance because they are decisions that are scientific and technical in nature, critical to the effective management of biosecurity risks and may enable emergency action manage a threat or harm from a biosecurity risk.

Importantly, appropriate constraints are imposed on the powers to make determinations made under 196A or 393B. For example, each biosecurity measure or entry requirement in a determination must be appropriate and adapted to its purpose. Those purposes are expressly set out in proposed subsections 196A(1) and 393B(1). The assessment of whether requirements or biosecurity measures in a determination are appropriate and adapted is informed, structured and underpinned by scientific and technical processes, data and expertise.

Crucially, these determinations are made on the basis of expert technical and scientific assessments that determine whether a particular pest or disease poses an unacceptable level of biosecurity risk, and the requirements and/or biosecurity measures necessary to prevent, or reduce the risk of, the pest or disease entering, or establishing itself or spreading in, Australian territory. Subjecting these determinations to disallowance has the potential to jeopardise the effectiveness of decision-making and risk management processes.

Further, the provisions include additional protections to ensure that the relevant instruments are only in place for the minimum time that they are needed. For example, proposed subsection 196B(3) requires that an instrument made under proposed subsection 196B(1)the Agriculture Minister must vary or revoke a determination made under subsection 196B(1) if satisfied that the relevant pest or disease no longer poses an unacceptable biosecurity risk or that a requirement is no longer appropriate and adapted for its purpose. This effectively acts as a constraint on the Agriculture Minister's exercise of power as it compels variation or revocation if a pest or disease no longer poses a risk or a requirement is no longer appropriate and adapted. Similarly, a time limit applies to determinations under section 393B(5), acting as an additional protection to ensure that the power is only used where necessary.

Australian businesses, individuals and global trading partners rely upon Australia's favourable biosecurity status and the Commonwealth's ability to effectively manage biosecurity risk in a timely manner. Where there is an imminent, substantial threat or actual outbreak of such pest or disease entering Australia, emergency action would be required to manage the threat or harm from the spread of the pest or disease within Australian territory. These determinations play a crucial role in that response and will be fundamental in the effective management of disease. Uncertainty or unanticipated removal of measures would frustrate the intended objective of protecting our industry and economy. The possibility of disallowance would create uncertainty for impacted industries, the individuals that implement these decisions and the broader community and may jeopardise Australia's plant and animal health, the nation's $70 billion dollar agriculture industry and the 1.6 million jobs that rely on it.

A 15 sitting day disallowance period would give rise to considerable uncertainty around business requirements, among other things, as disallowance would take effect immediately upon the passing of the motion. Importantly, if an instrument were to be disallowed, no instrument that is the same in substance may be made within six months after date of the disallowance, unless either House of Parliament rescinds its resolution of disallowance. This would not only create uncertainty but create a significant gap in Australia's biosecurity framework, leaving the potential for pests and diseases to enter and spread within Australia. For example, disallowance of a determination providing necessary measures in response to a biosecurity risk of national significance such as FMD, would leave a substantial gap in Australia's biosecurity framework, and the relevant disease may well be established in Australia before the six-month period has elapsed and a new determination is able to be made.

The resulting uncertainty, delays or potential inability to impose appropriate measures for 6 months would increase costs to industry, risk damaging relationships with Australia's trading partners and undermine community trust in the government to effectively manage emerging and existing biosecurity risks.

There are also other mechanisms available to Parliament to ensure accountability through processes including Senate Estimates, Committee processes, Question Time and Questions on Notice.

For the above reasons, I consider the exemptions from the disallowance process for the specified determinations are appropriately justified and I do not consider that the Bill should be amended to remove the exemptions from disallowance.

c) ***Whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and***

I acknowledge that additional guidance as to the terms and conditions on which financial assistance may be granted to a state or territory is not provided on the face of this Bill. However, this is consistent with the model in section 32C of the *Financial Framework (Supplementary Powers) Act 1997* for grants of financial assistance to a state or territory. While the Bill would provide an overarching framework to allow for the making, varying or administration of a grant of financial assistance, it is intended that any agreements with states or territories in relation to such grants would contain appropriate terms and conditions that are tailored to the specified activities. I also note that these financial relations between the Commonwealth and states and territories would be governed by the *Federal Financial Relations Act 2009* and the *COAG Reform Fund 2008*. In addition, I note that the Council on Federal Financial Relations (CFFR) comprising the Commonwealth Treasurer as Chair and all state and territory treasurers, is responsible for overseeing the financial relationship between the Commonwealth and state and territory governments. The Bill does not depart from this existing framework for overseeing such financial relations, and it is not intended that this Bill would add additional regulatory burden to these processes.

Instead, this Bill contains an exhaustive list of activities in relation to which the Agriculture Minister or the Health Minister may make, vary or administer arrangements or grants of financial assistance. This Bill also contains lengthy criteria for the activities these arrangements or grants relate to. This is set out in detail in proposed subsection 614B(1), and each of these activities are directly referrable to identifying, preventing, preparing for and managing biosecurity risks. Additional limitations are provided for in proposed subsection 614B(2) by setting out the types of risks posed by pests and diseases that are intended to be covered by the activities set out in proposed subsection 614B(1). This would ensure that the arrangements or grants under this new framework would have a direct link to addressing the likelihood of pests or diseases emerging or spreading and the potential for harm to human, animal and plant health, the environment and the economy.

d) ***Whether the bill can be amended to include a requirement that written agreements with the states and territories about grants of financial assistance made under proposed section 614C are:***

- ***tabled in the Parliament within 15 sitting days after being made; and***
- ***published on the internet within 30 days after being made.***

The Federation Funding Agreements (FFA) framework and Principle 8 of the FFA Principles implemented by the CFFR require funding agreements between the Commonwealth and state and territory governments to be published on the CFFR website to promote accountability and transparency. For this reason, an additional requirement to publish written agreements on the internet would inappropriately duplicate an existing requirement.

In addition, proposed section 614G of the Bill provides a separate reporting requirement to allow for the transparency and accountability of arrangements and grants of financial assistance. Proposed section 614G would require certain information relating to the arrangements or grants to be included in the annual report of the Agriculture Department or Health Department. Annual reports are tabled in Parliament and subject to parliamentary scrutiny by the Joint Committee of Public Accounts and Audit. This requirement would be in addition to other regular reporting practices, such as where expenditure-related information is published during the Federal Budget process. I therefore consider the proposed framework in the Bill provides sufficient transparency and accountability in relation to arrangements and grants of financial assistance.

e) ***Advice as to why it is necessary and appropriate not to provide that independent merits review will be available in relation to a decision made under either section 632 or section 633 of the Biosecurity Act.***

An alternative mechanism for relief is already available within section 27 of the Biosecurity Act which enables persons who are dissatisfied with the Director of Biosecurity's decision under sections 632 and 633 to institute proceedings in a relevant court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

Section 27 of the Act specifically addresses the issue of compensation for acquisition of property. It prevents the Commonwealth from acquiring property from a person otherwise than on just terms. In such cases, the Commonwealth would be liable to pay reasonable compensation to that person. Further, it provides that, in the event of a disagreement between the parties as to the amount of compensation, the person may institute proceedings in a relevant court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

As there is an existing mechanism under section 27, it would appear duplicative to provide for independent merits review of decisions made under sections 632 and 633. This is because a court, in making a decision under section 27, would be able to authoritatively determine whether, and to what extent, compensation should be paid by the Commonwealth for any acquisition of property.

For the above reasons, I do not consider it necessary to provide that independent merits review will be available in relation to a decision made under either section 632 or section 633 of the Biosecurity Act, as it is appropriate for the existing mechanism in section 27 to apply.

I thank the Committee for raising these issues for my attention and trust this response is of assistance.

Yours sincerely

MURRAY WATT 10 / 11 / 2022

Dear, I would be happy to have my department brief the committee, if that would assist.

Senator the Hon Katy Gallagher

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

REF: MC22-004232

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

Dear Chair Dear

I am writing in response to the Senate Scrutiny of Bills Committee's request of 28 October 2022, seeking further information on the Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022.

I trust the additional information attached to this letter addresses the Committee's question.

I have copied this letter to the Treasurer and the Minister for Emergency Management.

Yours sincerely

Katy Gallagher

9/10/22

Response to issues raised by the Senate Scrutiny of Bills Committee in relation to the Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022

2.40 The Committee welcomes the Minister's advice that the explanatory material accompanying a legislative instrument which adjusts the maximum disbursement amount that may be debited from the Disaster Ready Fund Special Account will include the reasons for the adjustment.

2.41 To enhance the Parliament's scrutiny of such instruments, the Committee requests that the Minister undertakes to include, at a high-level, information about the following matters in the explanatory statement for an instrument made under proposed subsections 34(2) and (3):

- **an overview of the responsible Ministers' consultation with the Minister for Emergency Management;**
- **a summary of the Future Fund Board's advice with any sensitive information removed;**
- **how the Future Fund Board's advice was taken into account;**
- **if the responsible Ministers depart from the Future Fund Board's advice, the reasons for this; and**
- **other relevant factors considered.**

In my earlier response to the Committee (on 7 October 2022), I advised that an explanatory statement that would accompany any legislative instrument that proposes to amend the maximum disbursement amount would include an overview of the Ministers' consultation with the Board and how the Board's advice was taken into consideration. I further advised that the explanatory material would set out a broad range of relevant factors being considered, rather than being limited to the advice of the Board in respect of its investment functions and obligations.

Further to my previous advice I provide an undertaking that I have directed the relevant areas of my department to ensure that the following information be included in the explanatory material accompanying an instrument (if any) made under proposed subsections 34(2) and (3).

- an overview of the responsible Ministers' consultation with the Minister for Emergency Management;
- a summary of the Future Fund Board's advice with any sensitive information removed;
- how the Future Fund Board's advice was taken into account;
- if the responsible Ministers depart from the Future Fund Board's advice, the reasons for this; and
- other relevant factors considered.

I trust that this satisfies the Committee's request.

The Hon Catherine King MP

Minister for Infrastructure, Transport, Regional Development and Local Government
Member for Ballarat

Ref: MC22-010005

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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via: scrutiny.sen@aph.gov.au

Dear Chair ~~Dear~~,

Thank you for the Senate Standing Committee for the Scrutiny of Bills consideration of the *Maritime Legislation Amendment Bill 2022* (the Bill) on 26 October 2022.

This letter responds to a request by the Senate Committee in Scrutiny Digest 6/22 for a detailed justification on:

1. the appropriateness of proposed offence-specific defences in the Bill that reverse the evidentiary burden of proof to the defendant; and
2. the use of penalties that exceed the recommended penalty maximum in the Commonwealth Guide to Framing Criminal Offences for strict liability offences.

1. Reversal of the evidentiary burden

Context: Proposed insertion of subsections 10AA(4) and 10AA(5), and 21(5A) in the Bill.
To give effect to new regulations under the International Convention on the Prevention of Pollution for Ships (the MARPOL Convention), the Bill proposes a number of amendments to the *Protection of the Sea (Prevention of Pollution by Seas) Act* 1983 (the Act).

Section 10A of the Act prohibits the carriage of heavy grade oil by Australian ships in the Antarctic Area. Section 10AA in the Bill would extend the prohibition to the carriage of heavy grade oil by Australian ships in Arctic waters. 10AA(4) and 10AA(5) set out exceptions to the offence, including in certain emergency and safety circumstances (10AA(4)) and residue left in a pipeline or tank (10AA(5)).

Section 21 of the Act prohibits the discharge of noxious substances by ships into the sea. Section 21 sets out exceptions to the offence including in the event of an emergency and the discharge of certain substances under specific conditions.

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The Bill adds another exception to this offence, subsection 21(5A), which excepts regulated persistent floaters in Category Y provided certain MARPOL procedures have been followed.

In accordance with the existing exceptions under the Act, these proposed new offence exceptions place the evidentiary burden of proof on the defendant. The amendments do not shift the legal burden of proof.

Justification for the reversal of burden of proof

It is important and appropriate that the defendant bear the evidentiary burden of proof in these circumstances. The matters to be proved in each of these proposed exceptions 10AA(4), 10AA(5) and 21(5A) are matters that would be in the peculiar knowledge of the defendant, and it would be significantly more costly for the prosecution to disprove, than the defendant establish the matter.

Australian regulators face a significant challenge in monitoring and surveilling the actions of Australian flagged ships at sea, particularly beyond Australian waters and in distant seas such as the Arctic Ocean. The entire regulatory regime relies in large part on the information and evidence logged by ship operators to demonstrate their compliance with international regulations.

For example, for a ship operator to demonstrate that their discharge of a persistent floater category Y residue was not an offence (proposed amendment 21(5A)), they would show their waste records in their MARPOL record book, which they are required to keep. These records would have an entry that is certified by an authorised officer that the emptying and washing of the tank was conducted in accordance with MARPOL regulations. Receipts for waste disposal which they obtain from port operators when they use waste disposal reception facilities are also kept by ship operators to verify the information in their logbook.

Similarly, if a ship experiences an emergency situation (such as that excepted under proposed 10AA(4)), the information that evidences this claim includes the data and entries recorded in the ship's logbook at that time.

This information is not readily available to regulators until the submission of the required documentation at a Port State Control inspection. Visibility of compliance relies on the cooperation of ship operators and their compulsion to demonstrate their compliance. It would be significantly more costly for regulators to pursue this information and bear the burden of proof that a discharge was not in accordance with international law, than for a ship operator to demonstrate their compliance with international law.

Australian authorities must be able to demonstrate strict compliance of Australian flagged vessels with international legal obligations under the MARPOL Convention. We consider the reversal of the burden of proof to defence exceptions under these provisions integral to demonstrating this compliance.

2. Strict liability for offences over the recommended penalty unit maximum

The Bill contains offences that are strict liability offences and carry pecuniary penalties that exceed the recommended maximum of 60 penalty units for an individual and 300 penalty units for a corporation in the Commonwealth Guide to Framing Criminal Offences. These offences are commensurate and consistent with the existing offences and their penalties in the *Protection of the Sea (Prevention of Pollution by Seas) Act* 1983.

In 2011, the Commonwealth Government, by way of amendment, significantly increased the penalties for maritime pollution. This was considered necessary following two maritime pollution incidents in 2011. The increased penalties are to deter non-compliance with Australia's international legal responsibilities under MARPOL and to bring Commonwealth penalties in line with the significantly higher penalties in State law. Article 4(4) of MARPOL requires that penalties be adequately severe to discourage violations of the Convention and that penalties are equally severe irrespective of where they occur.

The cost of cleaning up a maritime pollution incident and mitigating damage to the environment can be significantly large and is expected to be much more than the penalties imposed to deter non-compliance.

The proposed penalty of 500 penalty units for the strict liability offence of carriage of heavy grade oil by Australian ships in the Arctic is proportionate to the seriousness of the degree of harm that the offence may cause to the sensitive marine environment and is considered necessary to provide a sufficient deterrence to avoid future harm.

I trust the information above addresses the Senate Committee's concerns. I thank the Committee for raising these matters and providing the opportunity to respond.

Yours sincerely

Catherine King MP

8 /11 /2022

THE HON CHRIS BOWEN MP
MINISTER FOR CLIMATE CHANGE AND ENERGY

MS22-002143

Senator Dean Smith
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Dear Chair

I refer to correspondence of 28 October 2022 on behalf of the Senate Standing Committee for the Scrutiny of Bills (Committee), seeking further information regarding the *Offshore Electricity Infrastructure Legislation Amendment Bill 2022* (the Bill) as set out in the Committee's Scrutiny Digest 6 of 2022.

The Committee seeks further information on proposed section 33BA of item 11 of Schedule 1 to the Bill, which would create an offence of strict liability for persons that use an Australian offshore electricity installation that is subject to customs control. In particular, I note the Committee requests detailed advice – with reference to the principles set out in the *Guide to Framing Commonwealth Offences*[1] (the Guide) – on why the Australian Government considers it necessary and appropriate to:

- apply strict liability to the offence set out at proposed section 33BA; and
- impose a penalty of 500 penalty units for failing to comply with proposed subsection 33BA.

The proposed section 33BA mirrors existing offences for the unauthorised use of sea and resources installations in sections 33A and 33B of the *Customs Act 1901* (Customs Act). The Government's decision to extend the same penalties and standard of liability to proposed section 33BA reflects the Government's view that offshore electricity infrastructure (OEI) poses similar – if not the same – risks to the integrity of Australia's border as sea and resources installations.

For the reasons outlined in detail below, the Government considers it both necessary and appropriate – in line with the principles outlined in the Guide – to impose strict liability on the unauthorised use of all installations located in Commonwealth waters, and for the penalties across all three offences to be set at a maximum of 500 penalty units.

[1] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011

Imposition of strict liability offence

The Guide notes that strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime.[2] As noted in the Explanatory Memorandum (EM) to the Bill, the intention of introducing the offence in proposed section 33BA is to enhance the effectiveness of the border control regime the Australian Border Force (ABF) relies upon to secure Australia's borders.[3] Proposed section 33BA, in particular, is required to mitigate unique border security risks that OEI can pose to the Australian border, as a result of the proposed deeming provision in section 5C.

The Bill amends section 5C of the Customs Act to deem an offshore electricity installation installed in the Commonwealth offshore area – as defined in the *Offshore Electricity Infrastructure Act 2021* (OEI Act) – to be part of Australia for customs purposes. One practical consequence of this amendment is that vessels engaged in domestic commerce (which, for ease of reference, I will refer to as 'domestic vessels') are not subject to extensive border controls that apply to foreign vessels travelling to or from OEI facilities.

The use of domestic vessels for OEI operations heightens the risk of OEI being used to traffic undeclared goods or persons onto the Australian mainland. This could occur, for example, if a foreign vessel makes an unauthorised visit to an OEI facility and loads undeclared goods or persons onto that OEI. In this case, a domestic vessel could convey the undeclared goods or persons onto the Australian mainland, without being subject to ABF assessment and/or intervention. Proposed section 33BA mitigates this risk by deterring the unauthorised use of OEI in Commonwealth waters and ensuring the ABF can maintain effective customs control over the OEI.

The Guide also recognises public health and safety, the environment and the protection of the general revenue as regulatory interests that may justify the imposition of strict liability.[4] Maintaining effective customs control over OEI ensures the ABF can uphold various regulatory objectives that are served through strong border control, including those mentioned in the Guide. For example, establishing strict liability for the offence in proposed section 33BA:

- *Public health and safety* – ensures all goods and persons that pose a threat to the public health and safety of the Australian community are declared to the ABF, for appropriate risk assessment and clearance;

- *Environment* – ensures all goods that pose a threat to Australia's biosecurity are declared to the ABF, and the Department of Agriculture, Fisheries and Forestry, for risk assessment and clearance; and

- *Revenue protection* – ensures all goods imported into Australia are declared to the ABF, so that duties and taxes payable on those goods are collected prior to being delivered into home consumption.

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[2] *Ibid*, 24

[3] *Offshore Electricity Infrastructure Legislation Amendment Bill 2022*, Explanatory Memorandum, 18

[4] *Supra note 1* at 23 – 24

The Guide also recognises there are legitimate grounds for penalising persons lacking fault, including circumstances where a person is placed on notice to guard against the possibility of contravention.[5] The Government considers OEI operators to have sufficient notice of the regulatory requirements they must observe to lawfully operate OEI facilities in Commonwealth waters, including the consequences of breaching proposed section 33BA. This is because OEI operators are subject to a comprehensive regulatory framework that demands a significant degree of due diligence, planning and investment.

The Government expects OEI operators, for example, to be aware of their obligations under proposed section 33BA before an overseas offshore electricity installation becomes an Australian offshore electricity installation. Proposed section 33BA only applies to the unauthorised use of an Australian offshore electricity installation.

Under proposed section 5BA, an OEI operator must first seek permission from the Comptroller-General of Customs to install an overseas offshore electricity installation in the Commonwealth offshore area, before the installation becomes an Australian offshore electricity installation under proposed paragraph 5C(1)(b).

The OEI operator is therefore required to undertake a considerable degree of regulatory planning and operational organisation, including prior interaction with the ABF, before they are in a position to commit an offence under proposed section 33BA. As such, limited scope exists for an OEI operator to breach proposed section 33BA through unintended action, or as an unforeseeable consequence of their offshore activities. Requiring the Government to prove fault in these circumstances would serve limited purpose.

Finally, the Guide states that strict liability cannot be justified solely on the basis of resourcing requirements (for example, to achieve cost savings), but such considerations may nonetheless be relevant with other criteria.[6] The Government considers the imposition of strict liability in proposed section 33BA to also complement the resourcing challenges that law enforcement agencies face in Australia's offshore environment. As noted in the EM, offshore electricity installations may be installed far from the Australian coast, and in remote locations without an ABF presence.[7]

The Commonwealth offshore area covers an expansive region across Australia's maritime jurisdiction. It is not practical for the ABF to establish a consistent physical presence across this entire area, or at every Australian offshore electricity installation licensed under the OEI Act. In this environment, effective border control must rely on a range of legislative and non-legislative measures to secure the Australian border, and the imposition of strict liability in proposed subsection 33BA is one such measure. Strict liability removes the requirement for ABF officers to prove fault in an environment that can be difficult for ABF officers to access and monitor on an ongoing basis. For these reasons, the Government considers strict liability to be both necessary and appropriate for the offence set out at proposed section 33BA.

Penalty magnitude

I note the Committee's separate concern that the offence in proposed section 33BA is subject to a maximum of 500 penalty units, exceeding the maximum 60 penalty units the Guide considers appropriate for strict liability offences.[8]

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[5] *Ibid,* 23
[6] *Ibid,* 24
[7] *Supra note 3* at 18
[8] *Supra note 1* at 23 – 24

As the Government noted in its response to the Senate Standing Committee for the Scrutiny of Bills Report, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, a higher maximum fine may be used for strict liability offences, where the commission of the offence '*will pose a serious and immediate threat to public health, safety or the environment*'.[9]

As noted in the EM, the Bill seeks to guard against the illegal trafficking of prohibited goods across Australia's border.[10] Importantly, the consequences of undeclared goods (or persons) entering Australia, due to the unauthorised use of OEI, can be dangerous or damaging to the Australian community. This includes, for example:

- The introduction of prohibited or controlled goods into the Australian community, such as illicit drugs, controlled substances and other dangerous goods that are regulated under federal, state or territory laws;

- The introduction of biosecurity risks that pose a serious hazard to Australian biosecurity, including pests and animal and plant diseases; and

- The circumvention of existing and/or future human biosecurity controls at the border, to prevent the introduction or spread of communicable diseases (for example, yellow fever or COVID-19).

The Guide states that a maximum penalty should aim to provide an effective deterrent to the commission of the offence and should reflect the seriousness of the offence within the relevant legislative scheme.[11] The Guide also notes that a higher maximum penalty will be justified where there are strong incentives to commit the offence.[12]

The Government considers a maximum of 60 penalty units to be an ineffective deterrent against committing the offence in proposed subsection 33BA. As noted above, unauthorised use of an offshore installation can provide illicit actors a pathway to traffic undeclared goods or persons into the Australian community through Australia's offshore environment. This can be a lucrative trade for some commodities, such as illicit drugs and jewellery, which can well exceed the financial disincentives from an offence punishable by 60 penalty units (currently $13,320 under the *Crimes Act 1914*). In contrast, the maximum penalty for breaching section 33A, 33B or proposed section 33BA is 500 penalty units (currently $111,000). The Government considers this penalty to be a more effective deterrent, in light of the risks that all offshore installations can pose to Australia's border security.

Please note that this response has been prepared on the basis of input from the Department of Home Affairs, as the Committee's request for further information relates to proposed amendments to the *Customs Act 1901*.

I trust the above advice addresses the Committee's questions in relation to the Bill, and I appreciate your consideration of this matter.

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[9] Government Response to the Senate Standing Committee for the Scrutiny of Bills Report, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 2002, 4. See also *supra note 1* at 23 [footnote 22]

[10] *Supra note 3* at 11

[11] *Supra note 1* at 38

[12] *Ibid*

I have copied this letter to the Minister for Home Affairs, the Hon Clare O'Neil MP.

Yours sincerely

CHRIS BOWEN

Enc

Cc: The Hon Clare O'Neil MP
Minister for Home Affairs