

# Monitor 9 of 2022 – Ministerial Responses

## Contents

### Chapter 1: New and ongoing matters

Australian Capital Territory National Land (Lakes) Ordinance 2022.....	1
--	---

### Chapter 2: Concluded matters

Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 .....	28
---	----



## **The Hon Kristy McBain MP**

Minister for Regional Development, Local Government and Territories  
Member for Eden-Monaro

Ref: MS22-001977

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

Dear Senator

I refer to the Senate Standing Committee for the Scrutiny of Delegated Legislation and its questions on the Australian Capital Territory National Land (Lakes) Ordinance 2022 (the Ordinance), as detailed in Delegated Legislation Monitor 5 of 2022. I appreciate the opportunity to respond to the questions raised by the Committee.

The Ordinance is concerned with areas of Lake Burley Griffin (the Lake) in the Australian Capital Territory forming part of National Land, to which the Commonwealth holds responsibility. Responsibility for the remaining portions of the Lake, namely Molonglo Reach and Kingston Harbour, rests with the Australian Capital Territory (ACT) Government. This longstanding arrangement results in dual sets of laws governing the Lake.

To provide consistency in safety and enjoyment, and to streamline administration and law enforcement over the Lake, the Australian and ACT Government have sought to harmonise their respective laws where possible. In this regard, the Ordinance was developed with close reference to the *Lakes Act 1976* (ACT) (ACT Lakes Act), being the primary ACT law governing the Lake. The Ordinance thus addresses day-to-day management issues relating to the safe and effective operation of the Lake, parallel to ACT legislation. The Ordinance, along with two other National Land ordinances, replaced the National Land Ordinance 1989, which sunsetted in April 2022.

The Ordinance is made under section 12 of the *Seat of Government (Administration) Act 1910* (SGA Act), which empowers the Governor-General to make ordinances for the peace, order and good government of National Land. This power is plenary, and has historically been used by the Australian Government to make laws for the ACT in delegated legislation. The use of this power is thus distinguishable from the general principle that significant matters be enacted in primary legislation, as opposed to delegated legislation.

In addition, amending the SGA Act to include detailed matters of National Land may inadvertently change the basic framework of the legislative scheme, which is fundamental to the administration of Commonwealth laws in the ACT.

The National Capital Authority (NCA) is responsible for managing National Land in the ACT and has operational responsibility for the Ordinance. The Ordinance supports the NCA's management of National Land by providing for the grant of permits to use the Lake, regulating boating and other water-activities, facilitating the enforcement of safety and environmental protection requirements, and providing for the reporting and investigation of boating accidents and closure of the Lake for maintenance and approved events.

The NCA is also responsible for ensuring Canberra, as Australia's National Capital, is planned and managed in accordance with its national role and significance. I note the central importance of protecting and managing Lake Burley Griffin as an integral part of Canberra's presentation and part of the Griffin legacy. The Ordinance is a critical enabling tool for this ongoing role.

My detailed response to the Committee's questions are enclosed. I thank the Committee for its attention to these matters, and trust this information will assist in finalising consideration of the Ordinance

Yours sincerely

Kristy McBain MP

8 / 11 / 2022

cc The Hon Catherine King MP, Minister for Infrastructure, Transport, Regional Development and Local Government

**Response to Senate Standing Committee for the Scrutiny of Delegated Legislation**  
**Coercive powers**

**Question 1: why entry, search and seizure powers are necessary and appropriate, including how the public interest is served by their inclusion in delegated legislation, rather than primary legislation?**

Entry, search and seizure powers conferred by the Lakes Ordinance 2022 are necessary for the effective and safe operation of the Lake, especially the protection of Lake users and environment, and for the protection of valued and valuable public assets. While the Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers<sup>1</sup> (the AGD Guide) notes that coercive powers should be contained in primary legislation, it also contemplates such powers being included in legislative instruments in certain circumstances. This includes where the objectives of the parent legislation will be frustrated unless the powers are created under regulation.

The Ordinance addresses day-to-day management issues related to the safe and effective operation of the Lake. The inclusion of such detailed matters in the principal legislation, being the SGA Act, may inadvertently change the basic framework of the legislative scheme, which is fundamental to the administration of Commonwealth laws in the ACT. Furthermore, the power granted to the Governor-General to make ordinances for the peace, order and good government of National Land is plenary and has historically been used by the Australian Government to make laws for the ACT. A similar Ordinance-making power was enacted by the Australian Parliament in section 19A of the *Norfolk Island Act 1979*, enacted in 2015, and these type of plenary power provisions have existed in the *Christmas Island Act 1958* and the *Cocos (Keeling) Islands Act 1956* as far back as 1973.

Ordinances made for the external territories are unlike other types of delegated legislation at the Commonwealth level. Such ordinances generally deal with state-type matters, including matters relating to the protection of life, which are not normally dealt with in other types of Commonwealth delegated legislation. Consequently, deviation from strict compliance with Commonwealth guidance framed in the context of general Commonwealth-level delegated legislation is justifiable.

I note the above rationale is not captured in the same level of detail in the explanatory statement accompanying the Ordinance. As such, I propose to prepare and register a revised explanatory statement that provides a more detailed explanation of the unique legal and administrative arrangements governing the Lake, and which justify the inclusion of coercive powers in the Ordinance.

**Question 2: whether the provisions comply with Chapters 7 and 8 of the Attorney General's Department's Guide to Framing Commonwealth Offences?**

Refer to the response for question 3.

---

<sup>1</sup> Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011

**Question 3: the circumstances in which the search and seizure powers will be exercised?**

Entry, search and seizure powers conferred by the Lakes Ordinance 2022 are necessary for the effective and safe operation of the Lake, especially the protection of Lake users and environment, and for the protection of valued and valuable public assets. The following are example circumstances in which such powers are intended to be exercised:

- Where a vessel is moored on the lake in unsafe circumstances (sinking, listing dangerously, in a state of disrepair) or in a manner that poses safety or environmental risks
- Where a vessel comes adrift from its mooring and is freely floating in the lake, creating a navigation hazard
- Where activity on a vessel is unsafe and poses a risk to safety, or where a vessel is being operated under the influence of drugs or alcohol
- Where a vessel is being operated in an unsafe way, is deficient and lacking in appropriate safety equipment, or does not have the required licences or permits to operate on the lake
- In other contentious circumstances, such as seizing known dangerous equipment or goods.

In each of the above situations, there is a clear need for inspectors (as defined by section 150 of the Ordinance) to be able to respond swiftly to minimise endangerment to life, environment and property. Such risks outweigh the intrusiveness of such powers and warrant their availability in the Ordinance. Furthermore, the entry, search and seizure powers available under section 126 are constrained by the need for consent or the issue of a warrant, except where it is necessary to protect life or property. This is consistent with the AGD Guide<sup>2</sup>.

In practice, the inspector powers are primarily exercised by sworn officers of ACT Policing, under their strict legal parameters and operating procedures. These powers are consistent and aligned with ACT legislation, which is critical to effective law enforcement across the Lake. For example, where an unmanned vessel comes adrift from its mooring, it would be impracticable and potentially dangerous for ACT Policing to be constrained from immediately seizing the vessel, in order to assess whether or not it is floating on National Land.

Section 150 of the Ordinance also defines the Delegate for Lakes to be an inspector and therefore able to exercise the coercive powers available in Part 8 of the Ordinance. The Delegate for Lakes is currently appointed as the person holding the position of Manager, Lake and Dam in the NCA. This is a specialist position assigned to a person holding technical expertise in water and related asset management. The availability of those powers to the Delegate for Lakes is particularly relevant for scenarios that do not invoke a direct law enforcement issue, such as seizing a vessel that is sinking or listing dangerously. Given the role of ACT Policing, the NCA does not consider it necessary to appoint additional inspectors from within the agency.

<sup>2</sup> Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011



For the above reasons, I consider it appropriate and necessary for the Ordinance to provide entry, search and seizure powers, to be exercised in situations of emergency and serious danger to public health. I accept that the explanatory statement accompanying the Ordinance should include additional details to describe the above rationale. As such, I undertake to include this information in a revised explanatory statement.

**Question 4: whether the individuals exercising the powers under section 150 will be required to have the appropriate skills, qualifications and experience to exercise the relevant powers?**

Refer to the response for question 5.

**Question 5: whether any safeguards or limitations apply to the exercise of these powers, and, if so, whether the safeguards are contained in law or policy?**

Under section 150, members of the Australian Federal Police (AFP) are automatically defined to be inspectors for the purposes of the Ordinance. The NCA broadly relies on the AFP (operating as ACT Policing) for enforcement on the lake, including the exercise of entry, search and seizure powers as necessary for the protection of the public and environment. In addition, the Ordinance defines the Delegate for Lakes to be an inspector. As mentioned, the Delegate for Lakes is currently appointed as the person holding the position of Manager, Lake and Dam in the NCA. This is a specialist position assigned to a person holding technical expertise in water management. The current holder of this position has relevant qualifications and several years' experience in water management roles. Further details regarding the qualifications and experiences held by the current serving Manager, Lake and Dam, is set out below under Question 16.

The NCA does not currently have any plans to appoint any additional inspectors. However, should a need arise for this, the NCA will apply strict criteria to the appointment, including a requirement to hold relevant coxswain qualifications (intended for personnel working as officials, pilots, deckhands, engineers and surveyors in Australian domestic waters).

As already mentioned, the coercive powers available under section 126 of the Ordinance are constrained by the need for consent or the issue of a warrant, except where it is necessary to protect life or property. Furthermore, where a boat is seized pursuant to section 140, the Commonwealth may be liable to pay compensation for any loss or damage incurred by the owner of the boat due to the seizure.

As the key bodies overseeing the Lake, the NCA and ACT Policing work closely to ensure enforcement and compliance matters are managed with a high level of coordination. This can involve daily communications between relevant officers and contact points. The NCA is in the course of developing internal policy guidance and relevant external communications on how it will exercise these powers. The NCA will also develop an internal framework to govern and monitor the exercise of coercive powers. Regular reports on regulatory activities will be prepared for the NCA Board. In addition, it should be noted that the entry, search

and seizure powers available under the Ordinance (and in its predecessor instruments) have infrequently been invoked.

### Significant penalties

#### **Question 6: the justification for including custodial penalties in sections 47, 48, 102, 104 and 105 of the instrument, as opposed to primary legislation?**

While it is generally more appropriate to create offence provisions imposing terms of imprisonment in Acts of Parliament rather than in subordinate legislation, it is not appropriate to create these offence provisions in the SGA Act or other territory governance laws. Imposing penalties in the SGA Act may change the basic framework of the Act's legislative scheme and unintentionally limit the scope of the Ordinance making power.

The plenary power provided in the SGA Act authorises the making of ordinances that create offences and does not limit the size or nature of the penalties that can be imposed with respect to National Land. For this reason, the power is distinguishable from the general Commonwealth policy that delegated legislation should not impose penalties of imprisonment or fines exceeding 50 penalty units (see paragraph 3.3 of the AGD Guide).

In addition, as discussed in response to Question 1 above, ordinances made for the external territories are unlike other types of delegated legislation at the Commonwealth level. Such ordinances often deal with state-type matters which are not normally dealt with in other types of Commonwealth delegated legislation.

I note the above rationale is not captured in the same level of detail in the explanatory statement accompanying the Ordinance. As such, I propose to prepare and register a revised explanatory statement that provides a more detailed explanation of the unique legal and administrative arrangements governing the Lake, and which justify the inclusion of coercive powers in delegated legislation.

#### **Question 7: whether the Attorney-General's Department was consulted in relation to the inclusion of custodial penalties in the instrument, in accordance with Part 3.3 of the Attorney-General's Department's Guide to Framing Commonwealth Offences?**

The Attorney-General's Department's Administrative and Criminal Law sections were consulted in February 2022. With respect to the custodial penalties, the Attorney-General's Department recommended that the explanatory materials should justify why the fine to imprisonment ratio for sections 102 to 105 (drug and alcohol offences) do not follow the ordinary rule. Section 4B of the *Crimes Act 1914* provides that if an offence specifies a penalty of imprisonment, but no fine, the maximum fine for an individual is 5 penalty units multiplied by the maximum prison term in months.

The offences in sections 102 to 105 were drafted to be consistent with the penalty units for the corresponding offences in Division 9.5 of the ACT Lakes Act. This is explained in the

explanatory statement, including by referencing the equivalent sections of the ACT Lakes Act.



**Strict liability and absolute liability**

**Question 8: why it is necessary and appropriate for the instrument to contain offences of strict and absolute liability, with reference to the principles set out in part 2.2.6 of the Attorney-General's Department's Guide to Framing Commonwealth Offences, particularly in relation to offences that include custodial penalties; offences in the Road Transport (Alcohol and Drugs) Act 1977 (ACT) applied by section 106 of the instrument; and offences that do not relate to lake safety?**

Strict liability removes the requirement that the prosecution prove the fault element of an offence, which would otherwise attach to a physical element of that offence. Such offences can be seen as limiting the presumption of innocence, as they do not require the establishment of a mental element (such as positive intent) for the physical act constituting the offence.

Strict liability is imposed only where necessary and proportionate to the conduct being regulated. These reasons include public safety and the public interest, and ensuring that the regulatory scheme is observed where the sanction of criminal penalties is justified. They also arise in a context where a defendant can reasonably be expected, because of his or her involvement in marine activities, to know what the requirements of the law are, and the mental, or fault, element can justifiably be excluded. In addition, where the inclusion of strict liability offences is justified, the AGD Guide provides that the offence should not be punishable by imprisonment or a fine of more than 60 penalty units.

The Ordinance contains 65 strict liability offences and no absolute liability offences. The criteria discussed above apply for each strict liability offence in the Ordinance. In particular:

- With the exception of offences in sections 102 and 104, the penalties for the strict liability offences across the ordinance do not include imprisonment or exceed 60 penalty units
- Strict liability is likely to significantly enhance the effectiveness of the enforcement regime in deterring the relevant conduct, which in each case may significantly endanger public health and environmental damage
- It is necessary to ensure the integrity of the regulatory regime over the Lake
- There are legitimate grounds for penalising persons lacking fault because he or she will be placed on notice to guard against the possibility of any contravention
- There is general public support and acceptance for both the measure and the penalty
- The offences and penalties are broadly aligned with the ACT Lakes Act, and therefore provide a consistent enforcement framework across the entirety of the Lake.

With respect to the strict liability offences in sections 102 and 104, these mirror offences in the ACT Lakes Act. The relevant offences are:

- Section 102 – Person operating boat with low level concentration of alcohol; with medium level concentration of alcohol (maximum 6 months imprisonment); and with high level concentration of alcohol (maximum 12 months imprisonment)

- Section 104 – Person operating boat with a prescribed drug (maximum 3 months imprisonment)

Laws concerning driver impairment are established and recognised across Australian jurisdictions and courts as laws where ordinary presumptions about intent give way to strict liability. Both the above offences are concerned with operating a boat while under the influence of alcohol or drugs. The penalties have been set for consistency with equivalent offences in the ACT Lakes ACT and the *Road Transport (Alcohol and Drugs) Act 1977* (ACT) (ACT Alcohol and Drugs Act). This promotes consistent messaging on safety across the ACT.

Penalties of imprisonment for driving under the influence of alcohol or drugs is widely known and accepted by the community as an appropriate deterrent to ensure the protection of the community. The Ordinance applies equivalent standards to boat users on the Lake for the same purpose.

Section 102 of the Ordinance creates a strict liability offence when a person under 18 years old operates a boat on a lake with a special level concentration of alcohol in the person's blood or breath. It is possible to obtain a boat licence at the age of 16 years so even though the legal drinking age is 18, this provision is required when someone under 18 operates a boat whilst under the influence of alcohol. I believe this provision is important and reasonable because of the safety implications of a young person operating a boat whilst intoxicated, for themselves, other passengers and other users of the lake. The maximum penalty for the offence is low, at 8 penalty units.

With respect to subsection 104(2) regarding the operation of a boat under the influence of a prescribed drug, the Committee has raised that this appears to apply absolute liability. I do not agree with this interpretation. Absolute liability arises where the defence of mistake of fact under section 9.2 of the *Criminal Code Act 1995* (Cth) is unavailable. Subsection 104(2) does not make the defence of mistake of fact unavailable in relation to the relevant element of the strict liability offence, which is provided under section 104(1)(b). Rather, the subsection bars a defendant from relying upon one particular 'mistake of fact' which might potentially be raised as a defence to the element of the strict liability offence under section 104(1)(b) – the subsection does not extend more broadly beyond that one particular 'mistake of fact' to make unavailable any and all defences of 'mistake of fact' that could potentially be raised. Specifically, where the defendant mistakes a prescribed drug for a controlled drug (the defendant 'believed that the prescribed drug was a controlled drug'), the defendant cannot rely on this particular mistake of fact as a defence to the offence in section 104 (i.e. the element of the offence established by section 104(1)(b)). It would be against the public interest to allow a defendant to rely on such a mistake. As already explained above, the subsection does not bar a defendant from arguing any other mistakes of fact that might arise.

Separate to sections 102 and 104, the strict liability offences in the Ordinance reflect the offence being regulatory in nature and of a type suitable for construction as a strict liability offence. In each case, the offender can be expected to be aware of the offence and their actions. They are also justifiable on the basis that enforcement officers would be in a

position to readily assess the truth of a matter and determine that an offence has been committed.

These regulatory offences are:

- Section 14(1) – General restriction on boats, including the launching of boats from areas not prescribed
- Section 15 – Restrictions on swimming and diving (15(1) – swimming or diving in an area not prescribed for swimming or diving; 15(3) – swimming or diving between Kings Avenue Bridge and Commonwealth Avenue Bridge)
- Section 16 – Buoys, wharves and jetties (16(3) –anchoring a buoy without approval by the Minister; 16(4) – erecting a wharf or jetty without approval by the Minister)
- Section 17(2) – Restriction on kind of boat that may use wharf or jetty
- Section 19 – Mooring offences (19(1) – mooring without a permit; 19(2) – mooring not in a prescribed mooring area; 19(4) – mooring to something that is not approved; 19(5) – mooring that does not comply with permit conditions).
- Section 20(3) – Speed limits
- Section 21 – Restriction on kinds of boats (21(2) – operating a kind of boat not prescribed by the rules; 21(3) – operating a boat for a purpose not prescribed by the rules)
- Section 22(2) – Failure to comply with signs
- Section 23(6) – Failure to comply with closure of lake area for safety, maintenance etc.
- Section 24(3) – Entering or remaining on parts of the Lake closed for events
- Section 26 – Restrictions on power boats (26(1) operating a power boat when not authorised; 26(2) causing someone else to operate a power boat when not authorised)
- Section 28(1) – Operating a power boat near a swimming area
- Section 29(1) – Anchoring boats at night
- Section 31(1) – Operating a houseboat
- Section 32(1) – Camping or caravanning in a lake area
- Section 33 – Waterskiing and other prohibited activities (33(1) – operating a boat that is towing/wakeboarding/wakesurfing; 33(2) – towing/wakeboarding/wakesurfing)
- Section 34 – Commercial activity, without an agreement or permit
- Section 39 – Interfering with navigation aids
- Section 41 – Interfering with safety equipment
- Section 45 – Breaching a condition of exemption
- Section 49 – Exceeding power rating for boat
- Section 61 – Conduct on power boats (61(1) – extending body outside a power boat when operating it; 61(2) extending body outside a power boat; 61(5) – operating a power boat while a person is hanging onto the outside of it; 61(6) – hanging onto the outside of a power boat)
- Section 64(1) – Failure to comply with required visible distance of lights
- Section 65(1) – Failure to comply with required lights for power boats

- Section 66 – Failure to comply with required lights for sailing boats and boats being rowed (66(3) – sailing boats 7 to 20 metres in length; 66(4) – sailing boats at least 20 metres in length; 66(5) – all-around lights must not be displayed on mast with combined unit)
- Section 67(2) – Failure to comply with required lights for rowing boats, dragon boats, kayaks and canoes
- Section 71 – Emergency lights (71(1) – master of a boat commits an offence if boat does not have lighting on board for immediate use; 71(2) – master of a boat commits an offence if required lighting on boat is not shown)
- Section 75(1) – Lifejackets for recreational boats for children under 12 years
- Section 76 – Wearing a lifejacket on certain recreational boats (76(2) – not wearing an appropriate lifejacket on a recreational boat; 76(3) – operating a recreational boat where someone is not wearing an appropriate lifejacket)
- Section 77 – Failure to comply with direction of master to wear lifejacket
- Section 79(3) – Owner and operator of boat to ensure lifejackets are available
- Section 80(3) – Failure by owner/operator to provide information about life jackets when directed (reasonable excuse defence applicable)
- Section 82(2) – Failure by owner/operator to ensure safety equipment is available
- Section 83(2) – Failure by owner/operator to provide information about safety equipment when directed (reasonable excuse defence applicable)
- Section 89(2) – Failure to comply with direction for safe use of lake
- Section 90(5) – Failure to comply with direction by a designated person on a commercial vessel
- Section 91(3) – Failure to comply with direction to light or mark obstruction
- Section 92(2) – Failure to remove and dispose of obstruction to navigation when directed
- Section 108 – Failure by master to stop after an accident (reasonable excuse defence applicable)
- Section 110 – Obligation to produce licence and give particulars when involved a boating accident (reasonable excuse defence applicable)
- Section 111(4) – Failure to give Minister report about a boating accident
- Section 118(8) – Failure to comply with a notice to provide information, produce documents or answer questions
- Section 134(3) – Failure to comply with request to take reasonable steps to allow an inspector to board
- Section 135(2) – Failure to follow an inspector's instructions to steer boat after boarding
- Section 136(2) – Failure to take reasonable steps to provide information to an inspector after boarding
- Section 137(2) – Failure by master to answer the question posed by an inspector
- Section 138(2) – Failure by master to produce records or a document to an inspector
- Section 151(3) – Identity cards for inspectors



The use of strict liability is appropriate and favourable when offences need to be dealt with quickly to maintain the regulatory scheme. For example, if a person is operating a boat without a licence, immediate action is required. Additionally, strict liability offences are necessary for breaches of licencing conditions. Where a person holds a licence, they have implicitly agreed to the conditions attached to that licence and the holder is aware of their obligations. Similarly, a strict liability offence for failing to comply with a direction or answer questions is justified, as the person involved will be cognisant of what is required. Compliance with these provisions of the Ordinance is important to ensure marine safety and the integrity of licence obligations.

There is also a community expectation that people will be aware of and comply with their marine safety obligations. Such obligations are not confined to the Lake, but apply consistently in neighbouring New South Wales. For example, a person who drives a powered vessel for recreational purposes at a speed of 10 knots or more must be aged 12 years or over and have a current general boat licence. To be granted a general boat licence a person is required to undertake a mandatory knowledge test, including marine safety requirements, and provide evidence of practical boating experience. Accordingly, when in charge of a powered vessel, vessel operators are expected to be aware of their marine safety responsibilities and the obligations they owe to their passengers and the wider Lake community.

In addition, a Lake User Guide is currently being developed by the NCA. The Lake User Guide will function as an accessible document that outlines the day-to-day management of the Lake and responsibilities of Lake users. It is intended to be freely available and plain-English. The Lake User Guide is expected to be finalised and available in the first quarter of 2023. In the interim, the NCA's Lake Burley Griffin Recreation Policy remains freely accessible on the NCA's website.

The use of strict liability was carefully considered in developing the offence framework for the Lakes Ordinance. The inclusion of these offences promotes the consistent use of the Lake and protection of Lake users.

#### **Reverse burden of proof**

**Question 9: why it is necessary and appropriate to reverse the evidential burden of proof for the relevant offences, with reference to the relevant guidance in the Attorney-General's Department's Guide to Framing Commonwealth Offences?**

**Question 10: why it is necessary and appropriate to reverse the legal burden of proof in sections 29, 60, 75, 78, 89 and 103 of the instrument, with reference to the relevant guidance in the Attorney-General's Department's Guide to Framing Commonwealth Offences?**

The nature of the offences in sections 29, 61, 75, 78, 89 and 103 all relate to serious matters of safety, primarily aimed at the protection or preservation of life – both of the person involved, and of others such as bystanders or emergency services first-responders who may be involved in attending to the matter. For these laws to achieve their critical public purpose

of safety and preservation of life, they have been framed so as to place a burden on the defendant to prove a matter of defence. The elements of the defences in connection with sections 29, 61, 75, 78, 89 and 103 are within the reasonable power of the defendant to establish, and the defendant will be the only person able to provide evidence of any reason for refusing or failing to comply with the relevant duty or obligation. It would be significantly more difficult for the prosecution to disprove than for the defendant to establish the matter. Further detail is set out below.

#### Section 29 (Anchoring boats at night)

Subsection 29(1) states that a person commits an offence of strict liability if the person anchors a boat on a lake at night, noting subsection 29(2) provides that an offence does not apply if anchoring a boat at night is authorised by a regulated activity permit. In this circumstance, the underlying safety issues (set out below) would be addressed and monitored through the regulated activity permit process.

For many reasons, including potentially dangerous water surface conditions (particularly where there are high winds and shallow waters leading to hazardous wave conditions), low water temperature, low air temperature, low or no active or passive surveillance of the lake at night, lack of lighting on the lake, and challenging accessibility to the various areas of the lake for emergency services, anchoring a boat on the lake at night poses a significant risk to public safety, and a corresponding risk to emergency services first responders, which is very difficult for a public authority to control or mitigate.

Two defences are provided, each of which involve a reverse burden of proof.

Subsection 29(3) states that it is a defence if the defendant proves that the boat was anchored to allow fishing by a hand-held rod and line and that the defendant or someone else was fishing by a hand-held rod and line for most of the time the boat was anchored.

Subsection 29(4) states that it is a defence if the defendant proves that the boat was anchored for the purpose of viewing a fireworks display and that the defendant or someone else was on the boat for that purpose when the boat was anchored.

In the case of both offence-specific defences, the matter is a matter peculiarly within the knowledge of the defendant. In the case of fishing, the defendant will have peculiar knowledge of that matter and the details of that matter – who was fishing, what equipment was used, where the fishing took place, how long the fishing took place for, what was being fished for, photographs and videos of the fishing activity taking place, and other features of that matter. Likewise, in the case of viewing fireworks, the defendant will have peculiar knowledge of that matter and the details of that matter – the fireworks display in question, how long the boat was anchored for, when the boat returned to shore, photographs and videos of the fireworks display taking place, and other features of the matter.

By contrast, if the matter formed an element of the offence, then to continuously enforce the law and thereby continuously achieve the safety objectives of subsection 29(1), the prosecution may need to rely upon continuous surveillance of all boating activities on the lake at night. Such constant surveillance would give rise to other broader questions of law and public policy, issues of cost and resourcing, and in any event would be challenging to



undertake effectively to the necessary level given the size of the lake, lack of light, and other factors. Without such constant surveillance, the defendant in each case is likely to be the only one with any reliable knowledge of the relevant matters.

The AGD Guide provides that imposing a burden of proof on the defendant in respect of that element may place the defendant in a position in which he or she would also find it difficult to produce the information needed to avoid conviction. In this case, the burden is a legal burden, requiring proof of the matter, which is discharged on the balance of probabilities. However, in the case of fishing and in the case of viewing fireworks displays, it is suggested that information will be readily available to the defendant to prove the matter on the balance of probabilities and therefore the issue raised in the Guide in this respect is not expected to be a difficulty in the context of the specific matters at hand.

Also, the AGD Guide states that creating a defence is more readily justified if the matter in question is not central to the question of culpability for the offence, if the offence carries a relatively low penalty, or if the conduct proscribed by the offence poses a grave danger to public health or safety (paragraph 4.3.1).

In the case of section 29(4), the matters raised in relation to the defence are not matters central to the question of culpability for the offence. The defendant does not have a burden placed upon the defendant to prove that the person did not anchor a boat on the lake at night. Rather, the defendant has a burden of proof to show the person was anchored for either one of two reasons – fishing or viewing a fireworks display.

The penalty is relatively low, at 38 penalty units. This is significantly lower than the 60 penalty unit cap referred to in the AGD Guide for strict liability offences, and is consistent with the principles and recommendations of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) in its report on the application of strict and absolute liability in 2002 (Strict and Absolute Liability Report).<sup>3</sup>

On the basis the conduct proscribed by section 29 pose a significant danger to public health and safety, I consider the application of a strict liability offence to be proportionate and appropriate. Furthermore, section 29 is generally consistent with the terms of section 25 of the ACT Lakes Act. Both are strict liability offences, both allow fishing as a defence, with the Commonwealth Ordinance imposing a penalty of 38 penalty units as against the Territory Act imposing a penalty of 50 penalty units.

#### Section 60 (Dangerous conduct)

Section 60 does not involve any offence-specific defences which reverse the burden of proof.

#### Section 61 (Conduct on power boats)

Section 61 was not referred to in question 2 but involving reversal of the burden of proof. The section imposes a series of strict liability offences that relate to positions of a person on

---

<sup>3</sup> Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Application of Absolute and Strict Liability Offences in Commonwealth Legislation* (2002) 284

or attached to a power boat that is not a personal watercraft. The positions include extending a part of a person's body outside the perimeter of the boat (subsections 61(1) and 61(2)), being on the bow of the power boat in a position that puts a person at an increased risk of falling overboard (subsections 61(3) and 61(4)), and being on or hanging onto a swim ladder or swim platform attached to a power boat or the transom of the power boat (subsections 61(5) and 61(6)). In each case, a strict liability offence arising from the person's conduct applies to both the person and to the operator of the power boat.

Each position referred to in each subsection of section 61 involves a situation which, irrespective of intention or fault, inherently gives rise to an unnecessary risk of injury either to the person or to others. In each case, the offences relate to the stage of operation of the power boat which most gives rise to that inherent risk of injury, which is when the power boat is being propelled by its engine. In each case, the risk posed by the conduct of the person is very difficult if not impossible for a public authority to control or mitigate.

Subsection 61(7) states that subsections 61(1) to (6) do not apply to a person who is anchoring, mooring or casting off, or to a person who is fishing from a boat that is anchored, moored or drifting, or to a person who is involved in an activity relating to securing the safety of a person or property. These exceptions relate either to stages of operation of the power boat which may necessarily call for the person to be in the regulated position to properly operate the power boat in circumstances where the risk of injury is not inherent, because the power boat is not being propelled by its engine, or where the balance of public interest calls for the activity (i.e. it relates to securing the safety of a person or property).

In the case of subsection 61(7), the defendant bears an evidential burden of proof (a reverse burden of proof), where the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist. This is a lesser burden than a legal burden of proof.

In the case of all offence-specific defences under subsection 61(7), the matter is a matter peculiarly within the knowledge of the defendant (see paragraph 4.3.1 of the AGD Guide). The defendant only needs to adduce or point to evidence that suggests a reasonable possibility that the matter exists or does not exist. For example, if the regulated conduct arose adjacent to shore or adjacent to a mooring, evidence could be adduced to that effect to support the offence-specific defence under subsection 61(7)(a) - anchoring, mooring or casting off.

By contrast, if the matter formed an element of the offence, then to continuously enforce the law and thereby continuously achieve the safety objectives of section 61, the prosecution may need to rely upon continuous surveillance of all boating activities on the lake at all time during the day and night. Such constant surveillance would give rise to other broader questions of law and public policy, issues of cost and resourcing, and in any event would be challenging to undertake effectively to the necessary level given the size of the lake and other factors. Without such constant surveillance, the defendant in each case is likely to be the only one with any reliable knowledge of the relevant matters.

In the case of subsection 61(7), each offence-specific defence relates to a matter that is not central to the question of culpability for the offence (see paragraph 4.3.1 of the AGD Guide). Culpability for the offence relates, as has been stated above, to a person being in a position which, irrespective of intention or fault, inherently gives rise to an unnecessary risk of injury either to the person or to others due to the nature of the position and due to the power boat being propelled by its engine. By contrast, the defences relate either to stages of operation of the power boat which may necessarily call for the person to be in the regulated position to properly operate the power boat in circumstances where the risk of injury is not inherent.

The penalty is relatively low at 15 penalty units. This is significantly lower than the 60 penalty unit cap referred to in the AGD Guide for strict liability offences, and is consistent with the principles and recommendations of the Scrutiny of Bills Committee's Strict and Absolute Liability Report.

I consider the conduct proscribed by the offence to pose a grave danger to public health or safety. For example, sitting on the bow of a power boat under operation gives rise to the risk that if the person is bumped off the bow, the person may travel under the power boat and be injured by the engine's propeller. As such, I consider a strict liability offence to be necessary and appropriate.

#### Section 75 (Children under 12 years)

Section 75 states that a person commits an offence of strict liability if the person operates a recreational boat on a lake, the boat is less than 8 metres in length and is under way, and a child under 12 years old is in an open area of the boat and is not wearing an appropriate lifejacket.

Given the many examples of people being thrown from boats that are under way for all manner of reasons (unexpected waves, hitting the wake of another boat, accidentally hitting the throttle with the steering wheel in a locked position, collision with another vessel, unexpected change of direction), and given the particular vulnerability of smaller children, failing to supply a child with an appropriate lifejacket inherently gives rise to an unnecessary risk of injury either to the child, or to others who may be called upon, including emergency services first-responders, to render aid where the child has been thrown from a boat.

One defence is provided, which involves a reverse burden of proof. Section 75(2) states that it is a defence to a prosecution of a person for an offence against subsection (1) if the person proves that the person took all reasonable steps to ensure that the child was wearing an appropriate lifejacket. This defence allows for the situation where notwithstanding the person taking all reasonable steps, the child was not wearing an appropriate lifejacket. An example may be where the lifejacket failed because it had a latent defect.

As the regulated conduct relates to a person allowing a recreational boat operated by that person to be under way in circumstances where a child is in an open area of the boat not wearing an appropriate lifejacket, the matter will be a matter peculiarly within the

knowledge of the defendant (see paragraph 4.3.1 of the AGD Guide). If the conduct formed an element of the offence, the prosecution would need to prove that the person did not take all reasonable steps to ensure that the child was wearing an appropriate lifejacket (or disprove that the person did not do so). It is suggested that in most cases, absent some unlikely witness evidence or surveillance footage (e.g. from a surveillance camera), it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. Such a situation would not advance the purposes of public safety that underpin section 75.

In the case of section 75(2), the matters raised in relation to the defence are not matters central to the question of culpability for the offence (see paragraph 4.3.1 of the AGD Guide). The defendant does not have a burden placed upon the defendant to prove that the child was not in an open area of the boat, or was wearing an appropriate lifejacket. Rather, the defendant has a burden of proof to show that the person took all reasonable steps to ensure that the child was wearing an appropriate lifejacket.

The penalty is relatively low at 23 penalty units. This is significantly lower than the 60 penalty unit cap referred to in the Guide for strict liability offences, and is consistent with the principles and recommendations of the Scrutiny of Bills Committee's Strict and Absolute Liability Report.

The conduct proscribed by the offence poses a grave danger to public health or safety. Many examples of children and adults being thrown from moving boats are readily found and the results of these incidents, which are almost always more dynamic and complicated than a child simply being placed in the water without a lifejacket, are often tragic. Such circumstances also may have unexpected consequences for other users of the lake, who may need to take emergency avoidance action. As such, I consider it necessary and appropriate to prescribe a strict liability offence in section 75.

In addition, section 75 is broadly consistent with the terms of section 42 of the ACT Lakes Act. Both are strict liability offences, both state the same defence, both impose a legal burden of proof on the defendant, with the Commonwealth Ordinance imposing a penalty of 23 penalty units as against the Territory Act imposing a penalty of 30 penalty units.

#### Section 78 (Failure to wear lifejackets – defence)

Section 78 provides a defence to a prosecution of a person for an offence against subsection 76(2) or section 77 if the person proves that the person was not operating the boat and that there was no available appropriate lifejacket on the boat when the person was required to wear an appropriate lifejacket. The burden is a legal burden of proof.

Subsection 76(2) makes it an offence of strict liability if the person is on a recreational boat to which this section applies and the person is not wearing an appropriate lifejacket. Section 77 makes it an offence of strict liability if the person is on a recreational boat on a lake, the master of the boat directs the person to wear an appropriate lifejacket on the boat, and the person fails to comply with the direction.



These provisions address the well-known and well-understood risk to public safety posed by boat users not wearing appropriate lifejackets. The risk posed is a risk to the person themselves, even if the person is a strong swimmer. This is because the lifejacket is intended to assist the person where due to accident or other misadventure the person is not conscious or is compromised due to the circumstances. The risk is also a risk posed to emergency services first-responders. Failure to wear a lifejacket may lead to the first responders needing to undertake complex rescue operations, including underwater operations requiring specialist skills and equipment, potentially at night and in adverse weather conditions.

In the case of all offence-specific defence under section 78, the matter is a matter peculiarly within the knowledge of the defendant (see paragraph 4.3.1 of the AGD Guide). For example, whether there was an appropriate lifejacket onboard (such as one that is the correct size and in good condition) is a matter for which the defendant is well-placed to demonstrate. By contrast, if the matter formed an element of the offence, then to continuously enforce the law and thereby continuously achieve the safety objectives of section 78, the prosecution may need to rely upon continuous surveillance of all boating activities on the lake. Such constant surveillance and interference would give rise to other broader questions of law and public policy, issues of cost and resourcing, and in any event would be challenging to undertake effectively.

In the case of section 78, the matters raised in relation to the defence are not matters central to the question of culpability for the offence (see paragraph 4.3.1 of the AGD Guide). The defendant does not have a burden placed upon the defendant to prove that the defendant was wearing an appropriate lifejacket. Rather, the defendant has a burden of proof to show either that the person was not operating the boat, or that there was no available appropriate lifejacket on the boat when the person was required to wear an appropriate lifejacket.

The penalty is relatively low at 23 penalty units. This is significantly lower than the 60 penalty unit cap referred to in the AGD Guide for strict liability offences, and is consistent with the principles and recommendations of the Scrutiny of Bills Committee's Strict and Absolute Liability Report.

In the case, it is suggested that the conduct proscribed by the offence poses a grave danger to public health or safety. Many examples of people being thrown from moving boats into the water are readily found and the results of these incidents are often tragic. Failure to wear a lifejacket where there is an appropriate lifejacket can and often does place the person and emergency services first-responders in grave danger.

Sections 76(2), 77, and 78 are equivalent to sections 43, 44, and 45 of the ACT Lakes Act. All are strict liability offences, each has an equivalent defence, each impose a legal burden of proof on the defendant, with the Commonwealth Ordinance imposing a penalty of 23 penalty units as against the Territory Act imposing a penalty of 30 penalty units.

Section 89 (Safe use of lake areas or associated works)

Subsection 89(1) states that an inspector may direct a person using a lake area, or an associated work, to do or not to do something if the inspector reasonably believes that the direction is necessary to ensure the safety of a person, to ensure compliance with this Ordinance, or to prevent damage to the Lake, any property or the associated work.

Subsection 89(2) makes it an offence of strict liability if the person is given a direction by an inspector under subsection 89(1) and at the time the direction is given, the inspector (if the inspector is not a police officer) produces the inspector's identity card to the person, the inspector warns the person that failing to comply with the direction is an offence, and the person fails to comply with the direction. There is no defence to the offence established by subsection 89(2).

Subsection 89(3) establishes that a person will have committed an offence under section sub89(2) even if, by complying with the inspector's direction, that person is committing an offence against another provision of the Ordinance. To counterbalance this necessary outcome, subsection 89(4) states that it is a defence to a prosecution of a person for an offence against another provision in the Ordinance if the person proves they were complying with a direction given under subsection 89(1) at the time the offence was committed.

Understood in this way, the need for the defence arises from an initial failure of the defendant to comply with a direction of an inspector in circumstances where the person has been warned that failure to comply will be an offence. Further, the purpose of the direction cannot be general, but must concern matters of important public safety or interest – safety of a person, compliance with the Ordinance, and prevention of damage to property. The AGD Guide provides that creating a defence is more readily justified if the matter in question is not central to the question of culpability for the offence, if the offence carries a relatively low penalty, or if the conduct proscribed by the offence poses a grave danger to public health or safety (paragraph 4.3.1).

In the case of section 89, the matters raised in relation to the defence are not matters central to the question of culpability for the offence. The defendant does not have a burden placed upon them to prove they did not commit an offence against another provision of the Ordinance. Rather, the defendant has a burden of proof to show that they were complying with a direction given under subsection 89(1) at the time the offence was committed. The penalty is relatively low at 23 penalty units. This is significantly lower than the 60 penalty unit cap referred to in the AGD Guide for strict liability offences, and is consistent with the principles and recommendations of the Scrutiny of Bills Committee's Strict and Absolute Liability Report.

Also, as has already been mentioned above, section 89 limits its scope to matters of important public safety or interest – safety of a person, compliance with the Ordinance, and prevention of damage to property, and therefore the reversal of the burden of proof is justified by this context. The safety objectives of subsection 89(1) may not be as readily achieved if the structure of the provisions (particularly subsection 89(3)) allowed a person to refuse to comply with a direction of an inspector on the basis that such compliance may lead to the person committing an offence against another provision of the Ordinance.



Operationally, such a structure would require an inspector to first consider whether the direction may lead the person being directed to commit an offence against another provision of the Ordinance. Given the situations of safety that section 89 is directed to, such an arrangement may materially hinder a proper and timely exercise by the inspector of the inspector's powers.

Section 89 is equivalent to section 54 of the ACT Lakes Act. Both are strict liability offences, each has an equivalent defence, each impose a legal burden of proof on the defendant, with the Commonwealth Ordinance imposing a penalty of 23 penalty units as against the Territory Act imposing a penalty of 30 penalty units.

Section 103 (Defence – lower concentration of alcohol from allowable source)

Subsection 102(1) states that a person commits an offence of strict liability if the person has been operating a boat on a lake and the person has, within the relevant period of operating the boat, the prescribed concentration of alcohol in the person's blood or breath.

The offence created by subsection 102(1) is intended to promote public safety given the well-known risks of operating vehicles or machinery under the influence of alcohol. The strict liability offence is intended to discourage a person from putting themselves and others at such a risk. In the context of boat operation when compared with motor vehicle operation, the risk is increased due to the additional inherent risks associated with accidents occurring on a body of water.

Section 103 provides a range of defences to subsection 102(1) in certain circumstances. This includes where the person committing the offence is operating a boat for a commercial purpose, and where the concentration of alcohol in the person's blood or breath within the relevant period was less than 0.02 g in 100 mL of the person's blood or 210 L of the person's breath. In addition, it is a defence to a prosecution for the offence under subsection 102(1) if the defendant proves the intoxication was caused by the consumption of an alcoholic beverage that formed part of a religious observance, or by the consumption or use of a substance that was not, wholly or partly, consumed or used for its alcohol content (e.g. food or medicine).

In the case of sections 102 and 103, the matters raised in relation to the defence are not matters central to the question of culpability for the offence (see paragraph 4.3.1 of the AGD Guide). The defendant does not have a burden placed upon the defendant to prove that the defendant did not consume alcohol. Rather, the defendant has a burden of proof to show matters concerning the circumstances of that consumption. For example, connection with religious observance, or the consumption arose from food or medicine.

It is well-known that operating vehicles or machinery under the influence of alcohol places a person and others at significant risk of their lives. In the context of boat operation, when compared with motor vehicle operation, the risk is increased due to the additional inherent risks associated with accidents occurring on a body of water. As such, I consider it appropriate to apply a strict liability offence in section 102.

Sections 102 and 103 are a simplified version of the similar regime set out in Part 6 of the ACT Lakes Act, dealing with drug and alcohol offences. All are strict liability offences.

**Question 11: why it is necessary and appropriate to reverse the legal burden of proof in sections 29, 60, 75, 78, 89 and 103 of the instrument, as opposed to the evidential burden of proof?**

As discussed above, the nature of the offences in sections 29, 61, 75, 78, 89 and 103 all relate to serious matters of safety, primarily aimed at the protection or preservation of life – both of the person involved, and of others such as bystanders or emergency services first-responders who may be involved in attending to the matter. This is the case in relation to anchoring boats at night (section 29), unsafe conduct on boats (section 61), children not wearing appropriate lifejackets (section 75), others not wearing appropriate lifejackets (section 78), failing to comply with directions from inspectors concerning matters of safety, compliance, or prevention of damage (section 89), and operation of a boat by a person under the influence of alcohol (section 103).

For these laws to achieve their critical public purpose of safety and preservation of life, they have been framed so as to place a burden on the defendant to prove a matter of defence. The elements of the defences in connection with sections 29, 61, 75, 78, 89 and 103 are within the reasonable power of the defendant to establish, and outside of the reasonable power of the prosecution to disprove.

For example, under subsection 29(3) and 29(4), the defences to a person anchoring a boat on the lake at night are that either the person was fishing, or the person was viewing a fireworks display. Those elements of the defence could readily be established by the defendant discharging the legal burden, involving proof on the balance of probabilities. By contrast, if the burden was an evidentiary burden which was actually met by the defendant, then to enforce the law and thereby uphold the purposes of the law, the prosecution must then disprove those matters beyond reasonable doubt. This task will pose significant challenges to the prosecution given the nature of the circumstances, the lack of surveillance of the lake, and the unlikelihood of probative evidence being available.

Therefore, even though a person may have engaged in the inherently unsafe conduct (in this case anchoring a boat on a lake a night), the prosecution may find it extremely difficult to perform the role necessary to support the operation and public safety purpose of that law. The Ordinance has aligned, where possible, with the burden of proof for like offences in the ACT Lakes Act:

Ordinance		ACT Lakes Act	
s 29	Legal burden	s 25	Legal burden
s 61	Evidential burden	No direct comparison	No direct comparison
s 75	Legal burden	s 42	Legal burden
s 78	Legal burden	ss 43-45	Legal burden
s 89	Legal burden	s 54	Legal burden
s 103	Legal burden	s 72	Legal burden

**Question 12: why it is necessary and appropriate to apply provisions reversing the legal burden of proof in the Road Transport (Alcohol and Drugs) Act 1977 (ACT) to persons who operate a boat on a lake within the meaning of the instrument?**

The Commonwealth does not have legislation equivalent to the ACT Alcohol and Drugs Act regulating the Lake. In this respect, the Commonwealth has followed the approach adopted under section 73 of the ACT Lakes Act, which also applies the ACT Alcohol and Drugs Act. Reference to this legislation also facilitates the operation of the Ordinance from an evidentiary perspective (e.g. section 102(4)) and permits an entity who has a function under that Act to exercise the function in relation to the person (section 106(3)). This approach is critical to promoting harmonisation of regulation and enforcement across the Lake.

**Discretionary powers**

**Question 13: what factors the minister may consider in exercising their discretion under subsections 10(2), 16(2), 18(2) and 27(3) of the instrument?**

The subsections referred to by the Committee relate to:

- The amount of compensation to be paid by the Commonwealth due to land being injuriously affected (s10(2))
- Approvals to anchor a buoy, or erect a wharf or jetty, on the Lake (s16(2)),
- The issue of mooring permits (s18(2))
- Approvals to operate a domestic commercial vessel or other power boat on the Lake (s27(3)).

On the basis the above decisions are largely operational in nature and relate to the day-to-day use of the Lake, they have been delegated to officers of the NCA (including Australian Public Service employees not part of the Senior Executive Service (SES)) under an instrument of delegation signed by the former Assistant Minister for Regional Development and Territories on 1 April 2022.

In forming decisions regarding the above matters, NCA delegates refer to criteria set out in internal operating procedures and policies. This ensures that decisions are made in a consistent manner, with reference to evidence (supplied by applicants), based on merit, and subject to internal review mechanisms. For example, when determining applications to anchor a buoy or erect a wharf or jetty, the following factors are taken into account:

- The location at which the buoy, wharf or jetty is proposed to be installed and the resulting impacts on the environment, community and natural aesthetics of the surrounding area
- The installation or construction proposal, including details on who will undertake the work (generally required to be an NCA approved contractor), and whether the vessel/s involved in the work has appropriate Australian Maritime Safety Authority certifications and insurances.

As an additional example, with respect to applications for permits to moor vessels operate power boats on the Lake, NCA delegates will consider:

- The location at which the vessel is proposed to be moored (currently confined to Lotus Bay, Yarralumla Bay and Orana Bay)
- whether or not the applicant holds a current boat licence
- the specifications of the boat (including motor torque)
- the availability of safety equipment on the boat.

Applicants seeking decisions on the above matters are required to complete and submit the relevant NCA application form (available on the NCA website), along with any supporting evidence required. The application forms require applicants to provide information that is relevant to the criteria used by the NCA to assess whether or not to provide its approval. NCA officers review and assess applications against internal operating procedures and policies. Where further information is required from the applicant, the NCA may contact the applicant to seek this. Once the application form has been assessed, the NCA informs the applicant in writing of the decision, including by providing the reasons for reaching this position.

Delegation of the Minister's above powers is necessary and appropriate to allow decisions to be made efficiently, so as to ensure the effective use of the Lake. As mentioned, these are matters concerning the day-to-day operation of the Lake, which need to be administered efficiently for the public benefit. Furthermore, the delegation of such powers to non-SES officials at the NCA is appropriate, given officer expertise in water management, planning, and asset maintenance. Due to the delegation powers under the former National Land Ordinance 1989, the NCA also has a long-standing practice of delegating some functions to their officers below SES-level. Given the size and resources of the agency, any new restrictions on this practice would be a significant operational impediment and could risk the effective administration of the Ordinance. A copy of the delegation instrument can be made available to the Committee, upon request.

**Question 14: what factors the Delegate for Lakes may consider when deciding whether to charge for admission to a lake area or in determining the amount of the admission to be charged, and whether a maximum cap on the charge can be set?**

The NCA's Venue Hire – Fees and Charges policy document outlines the charges that may apply to an event involving closure of part of the lake. Charges are in line with the Australian Government Charging Framework<sup>4</sup>, administered by the Department of Finance.

**Question 15: whether any safeguards or limitations apply to the exercise of these discretionary powers, and whether such safeguards are contained in law or policy?**

As referred to above at Question 13, the NCA has established internal operating procedures and policies that guide the exercise of discretionary powers. The processes that are in place are strictly applied and ensure that applications are considered on their merits, with

---

<sup>4</sup> Department of Finance, *Australian Government Charging Framework – RMG 302*, July 2015



reference to a consistent set of factors, and quality-assured through a process of review before finalisation.

Where an applicant is dissatisfied with the outcome of their application, they may contact the NCA for an internal review. The review of the application is conducted by a more senior NCA officer to the one that assessed the original application. Further information may be requested of the applicant as part of the review process. Once the review is completed, the NCA informs the applicant in writing of the decision, including by providing the reasons for reaching this position.

In addition, the Government is currently developing the Australian Capital Territory Legislation Amendment (Ordinances and Reserved Laws) Bill 2022, which is proposed to amend the *Administrative Appeals Tribunal Act 1975* Act to clarify that administrative decisions made under ACT ordinances are subject to merits review in the Administrative Appeals Tribunal. The Bill would also amend the *Administrative Decisions (Judicial Review) Act 1977* to clarify that administrative decisions made under ACT ordinances are subject to judicial review in the Federal Court and Federal Circuit Court.

**Question 16: whether staff members of the National Capital Authority will be required to have the appropriate skills, qualifications and experience to exercise the powers and functions conferred on the Delegate for Lakes?**

The Delegate for Lakes is appointed as the person holding the position of Manager, Lake and Dam, at the NCA. This position is a highly technical and specialist position, that is not currently assigned to a member of the SES. The Manager, Lake and Dam, may not delegate his or her functions. As part of the role, the Manager, Lake and Dam, must have appropriate skills to allow for the effective conduct of that position. The current holder of this position has a Bachelor of Engineering degree and several years' highly relevant experience in water management roles. Further details regarding the qualifications and experiences expected to be held by NCA staff members are set out below.

Position	Officeholder qualifications and experience
Manager, Lake and Dam	This is a specialist role which requires expertise in water and related asset management. The current officeholder has a Bachelor of Engineering, General Construction Induction Training (White Card) and Asbestos Awareness Training. Other specific job-related training.
Officer, Lake and Dam	Tertiary qualifications are required in this role as well as General Construction Induction Training (White Card), Asbestos Awareness Training and other specific job-related training.
Project Manager, Lake and Dam	Engineering qualifications are required for this role as well as General Construction Induction Training (White Card), Asbestos Awareness Training and other specific job-related training.

Lake maintenance contractors	All staff are required to have current boat handling qualifications (Coxswain Licence) as well as all other relevant work activity training (white card and asbestos awareness, working at heights, working in confined space, first aid, chainsaw handling, etc).
------------------------------	--

A summary of existing staff qualifications can be provided as further evidence if required.

### Clarity of drafting

#### **Question 17: what is the meaning of 'dangerous conduct' in relation to section 60 of the instrument?**

'Dangerous to the public' includes anything that causes, or is likely to cause injury or death to a person, damage to property, damage to the environment or threaten public safety. Specific examples that are contemplated to encompass dangerous conduct include:

- Travelling at excessive speed
- Travelling within minimum distances to other boats or lake users
- Operating a boat under the influence of drugs or alcohol
- Operating a boat in a manner not fit for the intended purpose of the boat, e.g. carrying more passengers than the boat is designed for
- Operating a boat in an unsafe manner, e.g. taking sharp turns, driving in a manner likely to cause injury to others in the boat or other lake users.

I note the Committee's concern that the explanatory statement accompanying the Ordinance does not provide guidance on the proper interpretation of 'dangerous to the public'. Further guidance to support the interpretation of this phrase will be incorporated into a revised explanatory statement to the Ordinance.

### Availability of independent merits review

#### **Question 18: whether the Attorney-General's advice has been sought, or will be sought, regarding the progress of amendments to the Administrative Appeals Tribunal Act 1975 to ensure the availability of merits review in relation to the instrument?**

The Government is currently developing the Australian Capital Territory Legislation Amendment (Ordinances and Reserved Laws) Bill 2022, which is proposed to amend the *Administrative Appeals Tribunal Act 1975* Act to clarify that administrative decisions made under ACT ordinances are subject to merits review in the Administrative Appeals Tribunal. The Bill would also amend the *Administrative Decisions (Judicial Review) Act 1977* to clarify that administrative decisions made under ACT ordinances are subject to judicial review in the Federal Court and Federal Circuit Court.

The Department of Infrastructure, Transport, Regional Development, Communications and the Arts is working in partnership with the Attorney-General's Department to progress the



development of the Bill. The Government expects the Bill to be ready for introduction into Parliament in the coming months.

**Compliance with Legislation Act 2003**

**Question 19: whether the Australian Standard AS 1799.1-2021, Small craft, Part 1: General requirements for power boats is incorporated by reference in the instrument, and, if so, how it may be freely obtained?**

The Australian Standard AS 1799.1 2021, Small craft, Part 1: General requirements for power boats is incorporated by reference in the Ordinance at sections 49 and 85. A copy of the Standards is available for public viewing at the offices of the NCA during business hours, upon request.

**Legal certainty**

**Question 20: which regulations, if any, apply under section 106 of the instrument?**

There is one regulation in force, the Road Transport (Alcohol and Drugs) Regulation 2000 (ACT), as well as several notifiable instruments.

**Question 21: whether an individual subject to an offence under a provision of the Road Transport (Alcohol and Drugs) Act 1977 (ACT) or regulation made under it is subject to the penalty units set under Commonwealth or Australian Capital Territory law?**

The penalty units set under ACT laws would apply in these instances.

**Question 22: whether, in drafting the instrument, consideration has been given to redrafting the relevant provisions of the *Road Transport (Alcohol and Drugs) Act 1977 (ACT)* and any other relevant Australian Capital Territory laws for inclusion in the instrument to ensure consistency with the Australian Capital Territory legislative framework and clarity over what obligations apply to an individual?**

The Ordinance incorporates specific provisions of the ACT Alcohol and Drugs Act to provide a consistent framework for the enforcement of drug and alcohol related offences. These drug and alcohol provisions are based on Part 6 of the ACT Lakes Act.

The application of the ACT Alcohol and Drugs Act is intended to enable law enforcement officers, in dealing with the operators of vessels, to utilise the same procedures and equipment as they currently do in policing drug and alcohol matters in areas of the Lake that are both Territory and National Land. This is critical to providing a consistent compliance regime across the entirety of the lake, while ensuring that complexities of enforcement are minimised.

Section 106 of the Ordinance provides the further information required to be able to charge or fine a person with offences relating to driving or operating a boat while under the

influence of alcohol and/or drugs. As with the custodial penalties, this will bring the legislation in line with road transport legislation and will assist in keeping all users of the Lake safe by providing a level of deterrence for dangerous conduct on ACT waterways.

The Ordinance references the ACT Alcohol and Drugs Act to ensure that substance-related offences are harmonised across the Lake. This approach was adopted in favour of redrafting the relevant provisions, as it minimises the risk of mistranslation and ensures consistency in interpretation.



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

Ref: MS22-002684

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

  
Dear Senator

Thank you for your correspondence on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation regarding the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021*. Thank you also for meeting with me on 24 November 2022 to discuss the committee's concerns with the instrument.

I have considered further the Committee's request to time-limit the operation of the instrument to three years to allow for greater parliamentary oversight.

Given the specific circumstances, in this instance I will seek to amend the instrument to time-limit the exemptions to a period of three years when practical to do so. I intend for this three-year period to operate prospectively from amendment because of the passage of time since the commencement of the instrument. This is important for stakeholders subject to these exemptions, who did not have the opportunity to comment on such a provision as part of the ordinary consultation process.

I am giving this undertaking as a show of good faith and respect for the work of the Committee, and to settle this long-standing matter. However, when considering future legislation amendments, I will still have regard to the respective legal hierarchies, existing frameworks and stakeholder needs of those delegated instruments. As such, I would again appreciate the opportunity to meet with the Committee to discuss the role of delegated legislation within the Treasury portfolio and the approach going forward.

Thank you again for your letter.

Yours sincerely

The Hon Stephen Jones MP