

SUPPLEMENTARY EXPLANATORY STATEMENT

Offshore Electricity Infrastructure Act 2021

Offshore Electricity Infrastructure Amendment Regulations 2024

Purpose

This Supplementary Explanatory Statement supplements the initial explanatory statement to the *Offshore Electricity Infrastructure Amendment Regulations 2024* (the Amendment Regulations) in accordance with paragraph 15J(1)(c) of the *Legislation Act 2003*. The purpose of this Supplementary Explanatory Statement is to provide additional clarifying material for the Amendment Regulations.

This Supplementary Explanatory Statement also responds to a request of the Secretariat for the Senate Standing Committee for the Scrutiny of Delegated Legislation to provide additional explanatory material in relation to the availability of merits review for certain decisions under the Amendment Regulations.

Amendment to the Explanatory Statement for the Amendment Regulations

SCHEDULE 1 – GENERAL AMENDMENTS

Offshore Electricity Infrastructure Amendment Regulations 2024

Item 47 – At the end of Division 6 of Part 2

1. Item 47, for the paragraph commencing with ‘(c) New subsection 33A(5) [...]’.

Omit ‘(c)’, and after the final full stop of that paragraph, insert:

Merits review is not available in respect of a decision by the Registrar under new subsection 33A(5), which is procedural decision. The decision of the Registrar in this instance involves an assessment of whether a report is compliant with the prescriptive requirement set out in subsection 33A(2). If the report is not compliant, then paragraph 33A(5)(ii) provides that the Registrar may request a licence holder to make revisions or amendments to ensure compliance with subsection 33A(2). Accordingly, the Registrar’s decision under subsection 33A(5) does not attract substantive consequences and could lead to unnecessary delays in the process.

This is consistent with the Administrative Review Council’s guide, “*What decisions should be subject to merits review?*” that procedural decisions are not suitable for merits review.

Item 52

2. Item 52, below “Part 4 – Financial security”, insert:

Section 117 of the OEI Act requires licence holders to provide financial security to the Commonwealth while a licence is in force. The financial security regime provided for in the OEI Act is designed to effectively mitigate the risk that costs, expenses and liabilities associated with the activities of licence holders fall on the Australian taxpayer.

The provision of financial security by licence holders is to ensure that the interests of the Commonwealth are sufficiently protected during the construction, operation and decommissioning of offshore electricity infrastructure and to avoid the Commonwealth incurring unnecessary financial risk related to the actions or omissions of licence holders.

Subsection 117(1) of the OEI Act provides that, at all times when a licence is in force and a management plan is in place, the licence holder is to provide the Commonwealth with sufficient financial security to pay any costs, expenses and liabilities that may arise in connection with:

- a) the decommissioning of infrastructure;
- b) the removal of equipment and other property from the licence area; and
- c) the remediation of the licence area and vacated areas, and any other area affected by activities carried out under the licence.

Sections 117 and 119 of the OEI Act provide for a range of matters relating to financial security to be prescribed in the Regulations.

Part 4 of the Amendment Regulations prescribes matters relating to financial security that licence holders may be required to provide which include discretionary ministerial decision-making powers, specifically, in new sections 102, 104, 105 and subsection 107(5).

Merits review is not available in relation to decisions made under these sections. These decisions reflect financial decisions with significant public interest elements. Specifically, the decisions under these sections involve the evaluation of complex and competing facts and policies, as financial security is intended to protect the Commonwealth from financial risk exposure in the event that debts, expenses or liabilities are incurred as a result of non-compliance, unpaid fees, levy or late payment penalties.

This is consistent with the Administrative Review Council Guide, *What decisions should be subject to merits review?*

3. Item 52, section 102, after the last paragraph, insert:

Determinations made by the Minister under this section are financial decisions with significant public interest elements and are effectively government financial policy decisions, rather than about the merits of applications or projects.

As such, merits review is not available for determinations under this section, as it would be unsuitable, inefficient and costly. The requirement for the Minister to consider written submissions when making a final decision is sufficient to ensure that determinations made under this section take into account all relevant factors.

4. Item 52, section 104, after the last paragraph, insert:

Merits review is not available for determinations made under this section because they are financial decisions which involve the evaluation of complex and competing facts and policies and are made following consultation with the Regulator, and potentially subject to the review of an independent auditor.

5. Item 52, section 105, after the last paragraph, insert:

Merits review is not available for determinations made under this section because they are financial decisions which involve the evaluation of complex and competing facts and policies and are made following consultation with the Regulator, and potentially subject to the review of an independent auditor.

6. Item 52, section 107(5), after the last paragraph, insert:

Merits review is not available for determinations made under this section because they are financial decisions which involve the evaluation of complex and competing facts and policies, and do not involve an element of consideration based on merit.

7. Item 52, section 125, after the full stop of the second paragraph, insert:

A decision not to grant a safety zone application will only be made where a notice has already been given under new section 124 informing the applicant of the proposed decision to refuse to grant a safety zone application and providing an opportunity for the applicant to make a submission in response. The Regulator has the power to request further information about a safety zone application at any time, under new section 121. A licence holder who is not the applicant, but who might be affected by a safety zone application, must also be notified of an application and be provided with an opportunity to make a written submission about the application (new section 120). As such, merits review in relation to a notice given under new section 125 would be unnecessary, as the decision is procedural in nature, and more efficient and cost-effective consultation avenues are available to applicants.

8. Item 52, section 139, after the full stop of the second paragraph, insert:

A decision not to grant a protection zone application will only be made where a notice has already been given under new subsection 138(1) informing the applicant of the proposed decision to refuse to grant a protection zone application and providing an opportunity for the applicant to make a submission in response. The Regulator has the power to request further information about a protection zone application at any time, under new section 136. The Regulator is also obliged to invite the public to make submissions on a protection zone application under new section 134. As such, merits review in relation to a notice given under new section 139 would be unnecessary, as the decision is procedural in nature, and more efficient and cost-effective consultation avenues are available.