THE HON ANGUS TAYLOR MP
MINISTER FOR ENERGY AND EMISSIONS REDUCTION

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Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Chair Connie

I refer to your letter of 17 June 2021, regarding concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (**the Committee**) in relation to the *Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021* (**the first 2021 Regulation**).

The first 2021 Regulation was enacted to expand the Australian Renewable Energy Agency's (**ARENA's**) mandate and support it to deliver $192.5 million of 2020-21 Budget programs, which will create more than 1,400 jobs and deliver 16.5 million tonnes of emissions reductions (**the targeted 2020-21 Budget programs**).

On 22 June 2021, the Australian Labor Party and Australian Greens voted to delay the implementation of these emissions reduction measures.

On 30 July 2021, the *Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021* (**the second 2021 Regulation**) entered into force. The second 2021 Regulation (among other things) expands ARENA's mandate to support the five Technology Investment Roadmap priority stretch goals and the targeted 2020-21 Budget programs.

The Government has committed to invest $20 billion in new energy technologies by 2030, to drive at least $80 billion of total public and private investment over the decade. This investment will support at least 160,000 new jobs and will be guided by the Technology Investment Roadmap process, and delivered by agencies like ARENA, the Clean Energy Finance Corporation, the Clean Energy Regulator and CSIRO.

While the Committee's correspondence was in relation to the first 2021 Regulation, my advice is also relevant to the second 2021 Regulation.

Extensive consultation conducted since 2019

The regulations are the administrative implementation of a policy development process that was consulted on as far back as 2019, well before the regulations were made.

The decision to expand ARENA's mandate has received widespread public support, including from ARENA itself. More than 28 businesses, peak bodies, and climate change groups including the Business Council of Australia, the AiGroup, the National Farmers Federation, ClimateWorks Australia and the Investor Group for Climate Change have also endorsed the expanded mandate.

In September 2019, I appointed an expert panel to provide me with advice on options to unlocking low cost carbon abatement opportunities, in a process that became known as the King Review. The final report of the King Review, released on 14 February 2020, recommended (among other things) that 'existing institutions, for example ARENA and the CEFC, should be provided with an expanded, technology neutral remit so they can support key technologies across all sectors.' In preparing the final report of the King Review, the expert panel consulted with a wide range of industry, research and non-government organisations across a number of sectors.

The Government incorporated the findings of the King Review in its development of the Technology Investment Roadmap. Extensive consultation was undertaken on the Roadmap, with around 500 written submissions received in response to a discussion paper, while more than 150 key stakeholders participated in targeted industry workshops and more than 400 people participated in a public webinar.

In parallel with the release of the Roadmap and the first, annual Low Emissions Technology Statement (**LETS**) in September 2020, the Government announced that ARENA would be provided with an additional $1.4 billion in guaranteed baseline funding through the 2020-21 Budget to support the next generation of technologies that would reduce emissions across all sectors of the economy.

The Government also provided a further $192.5 million for ARENA to deliver the targeted 2020-21 Budget programs, including:

- $71.9 million to support new electric vehicle charging and hydrogen-refuelling infrastructure;
- $24.5 million to support higher productivity and lower emissions in Australia's heavy vehicle fleets;
- $47.0 million to support large energy-using businesses to identify opportunities to adopt new technologies and increase productivity; and
- $52.6 million for microgrids in regional Australia.

In total, $1.62 billion of new funding was provided to ARENA. The Government also clearly signaled its intent to provide ARENA with additional funding to deliver other targeted programs in the future.

The regulations provide ARENA with the necessary power to fully implement the new workload the Government has funded and assigned to it. In this sense the regulation should be seen as machinery in nature, being the administrative implementation of a policy development process dating back to 2019 with substantial consultation throughout the process.

Authorising legislation allows for non-renewable functions

ARENA was established by the *Australian Renewable Energy Agency Act 2011* (**the Act**) and commenced operations in 2012. Section 3 sets out the 'main' object (as distinct from a 'sole' object) of the Act. The deliberate use of the word main is an explicit recognition that other objects are being pursued. The choice of the word main is not standard for objects clauses, meaning there is an explicit acceptance of secondary objects: for example, the reduction of greenhouse gas emissions, which is the central purpose of the regulations and fundamental to the constitutional basis for the Act.

Section 3 must be read in the context of the constitutional basis of the Act, articulated at paragraph 14(b), as a measure to contribute to Australia's international greenhouse gas emissions reduction obligations under the United Nations Framework Convention on Climate Change and the Paris Agreement.

Investment in renewable energy is not the only option to reduce emissions to meet those international obligations. For example, the International Energy Agency recently found that more than half of the emissions reductions required to achieve global net zero will come from technologies that are not yet commercial. Through the use of the word 'main' in section 3, Parliament clearly envisaged that there would be other objects of the Act beyond those related to renewable energy, but consistent with the broader emissions reduction obligation.

Paragraph 8(f) of the Act further provides, without limitation to renewable energy, that additional functions may be prescribed through regulations made under section 74 of the Act. Paragraph 8(g) allows for any other functions conferred on ARENA by this Act or any other Commonwealth law, also expressed without any link or limitation to renewable energy.

It is important to note that the authority to prescribe additional functions in paragraph 8(f) of the Act is couched in the broadest possible terms: any other functions that are prescribed by the regulations. This is also borne out in the Explanatory Memorandum to the Bill that preceded the Act, which clarifies that under paragraph 8(f) it will also be possible for regulations to be made conferring additional functions on ARENA. Presumably if Parliament had intended for the exercise of paragraph 8(f) to be limited to the subject matter of renewable energy alone, it would have made this clear in the text of the Act or in the Explanatory Memorandum.

In the absence of clear drafting to limit additional functions to renewable energy technologies, there is no reason to read an implied limitation into paragraph 8(f) on textual grounds. Nor should the objects clause at section 3 of the Act be seen as necessitating any implied limitation on paragraph 8(f). Section 3 provides that the main object of the Act is related to the subject matter of renewable energy.

At a higher level of generality, the Act, when it was enacted in 2011, envisaged an agency that would be funded to perform its functions until its statutory appropriation effectively expired on

30 June 2020. The wider context, for instance as set out in the second reading speech for the Bill that preceded the Act, was that ARENA was part of the Government's program for clean energy and emissions reductions from the start. The Act left open the possibility of ARENA continuing as part of this program beyond 2020, by necessity using new funding and in ways that might require the conferral of additional functions under paragraph 8(f). The regulations are fully consistent with this intent and concern new funding provided to ARENA and not its appropriation under section 64 of the Act.

It is also not the case that the regulations extend the operation of the Act, such that Henry VIII clauses would need to be considered. The regulations do not modify, either directly or indirectly, any of the provisions of the Act. Instead, they confer new functions on ARENA under a power that expressly allows for this to occur. In this regard it can be seen as filling out the detail of an Act rather than extending it.

In conferring the power to prescribe functions by regulations, Parliament recognised that any functions so conferred would need to be consistent with Commonwealth legislative heads of power under the Constitution and would be a disallowable legislative instrument under the *Legislation Act 2003*. This avoids any reason or need to artificially read down the general words which provide for the power to confer functions by regulations and impose limitations not present in the text of paragraph 8(f).

Finally, and importantly, this is not the first time paragraph 8(f) has been used to prescribe additional functions unrelated to renewable energy. The *Australian Renewable Energy Agency Regulation 2016* (the 2016 Regulation), as enacted under paragraph 8(f) and section 74 of the Act, granted to ARENA a new function of working with the CEFC to administer the Clean Energy Innovation Fund (the CEIF). The CEIF is a $200 million investment fund that specialises in furthering early-stage clean energy companies and technologies (not just renewable energy technologies). It is noteworthy that the 2016 Regulation, which first took ARENA beyond the subject matter of renewable energy, has been in place without challenge for over five years. It was not subject to any criticism by the then Senate Standing Committee on Regulations and Ordinances in its Delegated Legislation Monitors when made.

For these reasons, I advise that there is no sound reason to find an implied limitation in the otherwise general words of paragraph 8(f). It follows that the regulations are not beyond power and should not be held to be invalid in any way.

Delegated legislation the most appropriate form of implementation

You have also expressed a view that the first 2021 Regulation might effect a change significant enough to have required implementation through primary rather than secondary legislation.

While the changes effected by the regulations were capable, as a matter of law, of being made through legislation or regulation, there are strong policy reasons to enact them through regulations. Chief amongst these was timeliness in delivering on Government commitments and addressing greenhouse gas emissions in Australia.

As outlined above, the regulations provide ARENA with the power to fully implement programs announced in the 2020-21 Budget and to support the five stretch goals identified in

the first LETS. The programs commenced on 1 July 2021, while the LETS has been in effect since September 2020. It was necessary for ARENA to be given the power to implement these Government priorities as soon as possible, and regulations were identified by the Department of Industry, Science, Energy and Resources as the most effective means of doing so.

The subject matter of the regulations is also well-suited to being implemented through secondary legislation. The four targeted programs are time limited programs for the expenditure of a fixed budget, and as such are not open-ended or permanent.

Finally, the Government has committed to publish new LETS on an annual basis. The priorities articulated in the LETS will necessarily evolve over time in response to developments in technology, among other things. It follows that the regulations will need to be updated from time-to-time to reflect future LETS.

For these reasons, I advise it was both necessary and appropriate to use regulations rather than legislation to effect these changes.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

ANGUS TAYLOR