EXPLANATORY STATEMENT

Issued by authority of the Minister for the Environment

National Greenhouse and Energy Reporting Act 2007

National Greenhouse and Energy Reporting Amendment (2016 Measures No. 1) Regulation 2016

Section 77 of the *National Greenhouse and Energy Reporting Act 2007* (the "NGER Act") provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The *National Greenhouse and Energy Reporting Regulations 2008* (the "NGER Regulations") have previously been made under this section.

The *National Greenhouse and Energy Reporting Amendment (2016 Measures No. 1) Regulation 2016* (the "Regulation") makes minor technical amendments to the NGER Regulations to clarify and streamline reporting requirements in relation to scope 1 emissions and electricity production. In addition, the Regulation reduces administrative and regulatory burdens imposed by the NGER Regulations, particularly in relation to the registration, deregistration and suspension of greenhouse and energy auditors.

General

An exposure draft of the Regulation was released for public consultation between 27 January and 19 February 2016. There were no submissions made in relation to this draft.

Details of the Regulation are outlined in Attachment A.

A statement of the Regulation's compatibility with human rights is set out in Attachment B.

There are no statutory pre-conditions that need to be satisfied before the power to make the Regulation may be exercised.

The Office of Best Practice Regulation (OBPR) certified that the Regulation did not require the preparation of a Regulation Impact Statement. The OBPR reference number for this matter was 19604.

Under sub-section 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

ATTACHMENT A

Details of the *National Greenhouse and Energy Reporting Amendment (2016 Measures No. 1) Regulation 2016*

Section 1 – Name of regulation

Section 1 provides that the title of the Regulation is the *National Greenhouse and Energy Reporting Amendment (2016 Measures No. 1) Regulation 2016*.

Section 2 – Commencement

Section 2 provides that the Regulation commences the day after it is registered.[1]

Section 3 – Authority

Section 3 provides that the Regulation is made under the NGER Act.

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the Regulation is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Regulation has effect according to its terms.

Schedule 1 – Amendments

Emissions from carbon capture and storage (items 1 and 3)

Item 3 replaces the references to "greenhouse gas substances" in regulation 4.12 with references to "greenhouse gases". This latter term reflects better the latest methods for measuring emissions from carbon capture and storage, as will be set out in the forthcoming 2016 update to the *National Greenhouse and Energy Reporting (Measurement) Determination 2008*.

As there are no other references to "greenhouse gas substances" in the NGER Regulations, item 1 removes the definition of this term from regulation 1.03.

Emissions from fuel combustion – international bunker fuels (item 2)

Regulation 4.07 sets out the information that must be reported when reporting scope 1 emissions from fuel combustion. Regulation 4.08 provides that information relating to statistical uncertainty must be reported when reporting certain scope 1 emissions from fuel combustion.

Item 2 clarifies that regulations 4.07 and 4.08 do not apply to emissions from the combustion of international bunker fuels (fuels used in shipping) for transport. This matches the original policy intent to exclude any reporting of international bunker fuels (in accordance with international emissions reporting guidelines), and brings

[1] Note that item 25 of Schedule 1 further clarifies timing issues relating to the majority of the other items in Schedule 1. Further details on item 25 are provided below.

these two regulations into alignment with regulation 4.22, which already excludes international bunker fuels from the related reporting of energy consumption.

Reporting electricity generation – threshold (items 4 and 7)

Division 4.4 of the NGER Regulations sets out detailed reporting requirements in relation to different sorts of emissions and energy. When it comes to electricity generated from small units, the NGER Regulations currently provide that:

- Electricity produced by small electricity generating units should not be reported (regulations 4.19 and 4.20).
- Energy consumed in the production of electricity by small electricity generating units does need to be reported, but it does not need to be separately itemised as energy consumed in direct combustion for electricity generation (regulation 4.22).
- Scope 1 emissions from the combustion of fuel in the production of electricity by small electricity generating units do need to be reported (regulation 4.07).

A "small electricity generating unit" is defined according to two thresholds – small generation capacity and small electricity output. There is an inconsistency between the threshold as currently set in regulations 4.19(2)(a), 4.20(3)(a) and 4.22(1)(a)(i). The threshold should operate such that a generating unit that has either small generation capacity or small electricity output satisfies the threshold (rather than needing to be both small generation capacity and small electricity output).

Items 4 and 7 amend regulations 4.19(2)(a) and 4.20(3)(a) respectively to bring the expression of the threshold for small generation units into alignment with the expression used in regulation 4.22(1)(a)(i): that is, expressed in the form "the unit has capacity to produce less than 0.5 megawatts of electricity or generates 100,000 kWh or less of electricity in the reporting year".

These amendments reduce reporting burden, particularly for National Greenhouse and Energy Reporting ("NGER") reporters with back-up electricity generation units that are hardly used in a given year (very small electricity production) but do have large generation capacity.

Electricity produced (items 5 and 6)

Regulation 4.20 requires reporters to report information in relation to electricity production. In particular, it requires reporters to identify the amount produced "for use outside the operation of a facility for supply to an electricity transmission or distribution network" (paragraph 4.20(2)(c)).

In some situations where electricity is supplied to an isolated network, not connected to a main or national grid, some reporters have confused the reporting of that electricity as "for use outside the facility other than supply to an electricity transmission network or distribution network", as they interpret "network" to mean only the main or national grid.

Items 5 and 6 insert a note after paragraph 4.20(2)(c) to clarify that electricity produced for supply to grids other than the main electricity grid (i.e. other than the National Electricity Market and the South West Interconnected System) is still "supply to an electricity transmission or distribution network".

Reporting aggregated amounts from facilities (item 8)

Regulation 4.25 allows reporters to aggregate emissions and energy data from small facilities for the purpose of reporting under the NGER Scheme. It is mostly used by reporters with a large number of small facilities. While the regulation intends to make reporting easier for reporters, it still requires reporters to list the addresses (and latitude and longitude) of each small facility each year – information which is of very little or no use to NGER data users.

Item 8 removes the reporting requirement of providing such facility details under regulation 4.25, and includes a new provision that only requires reporting the number of small facilities aggregated by the reporter. The requirement to report the State or Territory in which each facility aggregate is located remains.

Fuels and other energy commodities (item 9)

Schedule 1 of the NGER Regulations identifies how fuel or energy commodities have been produced – that is, if they are a primary or secondary fuel or energy commodity. A primary fuel or energy commodity is extracted or captured from natural sources with minimal processing, while a secondary fuel or energy commodity is produced from one form to another form for consumption.

Regulation 1.03 specifies that "natural gas distributed in a pipeline" is a secondary fuel and "coal seam methane that is captured for combustion" is a primary fuel.

This has created confusion among reporters about how to classify "coal seam methane that is captured for combustion" when it is processed but not put in a supply pipeline. The post-processed secondary fuel is now neither "natural gas distributed in a pipeline" nor "coal seam methane that is captured for combustion".

Item 9 amends (in Schedule 1, table item 18) the fuel commodity type for "coal seam methane that is captured for combustion" to "nomination required". This allows coal seam methane gas that is captured and processed for combustion to be classified as a secondary fuel type.

Scope 1 emissions from particular sources – wastewater (items 10-11)

The amount of industrial wastewater produced in kilolitres is a "matter to be identified" and reported under Schedule 3 of the NGER Regulations, as part of reporting on scope 1 emissions from wastewater handling.

Items 10-11 amend the "matter to be identified" under Source 2 of Part 6 of Schedule 3 (for method 1, or for methods 2 and 3, respectively) to "tonnes of commodity produced", making the matter to be identified consistent with the base activity data required for the calculation of $COD_{w,i}$ set out in sub-section 5.42(5) of the *National Greenhouse and Energy Reporting (Measurement) Determination 2008*, and

removing the need for reporters to perform a calculation to derive kilolitres of wastewater.

Meaning of eligible referee (items 12-15)

"Part 6 audits" under the NGER Regulations include both greenhouse and energy audits and ERF audits.

Category 1 auditors must be able to demonstrate knowledge of certain provisions of the NGER Act and associated instruments, as well as of auditing more generally. Category 2 auditors must, in addition to the Category 1 criteria, be able to demonstrate knowledge and experience in audit team leadership and the provision of assurance.

To support a person's application to be registered as a greenhouse and energy auditor (Category 1 or 2), applications must include written references confirming the applicant's relevant competencies. Regulation 6.18 defines who is an "eligible referee" for these purposes.

Currently, the Clean Energy Regulator (the "Regulator") cannot accept a reference report from a prospective auditor's employer. This is because under regulation 6.18 an eligible referee is defined as an audited body or a person who has paid the applicant to undertake audit work. This means auditors can only approach their clients for references, which can sometimes be difficult and time consuming.

Item 14 allows an "audit team leader" (as defined in regulation 1.03), or a person responsible for a relevant audit, to be an eligible referee for an application for Category 1 registration. That amendment refers, for clarity, to an "audit team member", a term for which item 12 inserts a new definition in regulation 1.03. This new definition encompasses all Part 6 audits, as is intended by the use of that term in regulations 6.47, 6.54, 6.60 and 6.61.

There is also a definition of "audit team member" in the NGER Act, but it does not encompass all Part 6 audits, in that it refers to greenhouse and energy audits but does not apply to ERF audits. Item 13 accordingly removes, from the note to regulation 1.03, the reference to the definition of "audit team member" in the NGER Act.

Item 15 provides that applicants for Category 1 registration must still have at least one of their written references provided by an audited body or a person who has paid the applicant to undertake audit work (i.e. non employers).

Suspension and deregistration of auditors (items 16-19, 21-24)

Regulations 6.28 – 6.37 provide for action by the Regulator for non-conformance by greenhouse and energy auditors. Current provisions allow the Regulator to suspend and/or deregister auditors when non-conformance has been identified.

Item 19 inserts a new sub-heading for regulation 6.34, which breaks the regulation into two parts – deregistration generally and deregistration as a Category 2 auditor.

Currently, if an auditor is found to be non-compliant in one category of auditor registration, and he or she is deregistered, that deregistration applies to all categories

of their registration. Item 21 inserts new sub-regulations that allow the Regulator to deregister a person as a Category 2 auditor while their registration as a Category 1 auditor remains unaffected. A deregistered Category 2 auditor who is not also a Category 1 auditor may, if they wish, seek registration as a Category 1 auditor through a fresh application.

If the Regulator considers a Category 1 or dual category auditor should be completely deregistered, then the general deregistration process can be followed (as set out in sub-regulation 6.34(1), as modified).

In all instances, the Regulator should make clear, in its notice to a deregistered auditor, whether the auditor is to be deregistered by category only or completely deregistered.

Item 22 inserts a new sub-regulation that clarifies what happens if an auditor disputes the Regulator's notice of intention to deregister. The current regulation 6.35 is silent on this possibility.

Similarly, item 17 inserts a new sub-regulation that clarifies what happens if an auditor disputes the Regulator's notice of intention to suspend. New sub-regulation 6.30(3A) applies when the notice does not contain action that the auditor can take to avoid suspension. Existing sub-regulation 6.30(3) will continue to apply if the notice does contain action that the auditor can take.

Item 16 brings regulation 6.28 into conformity with the parallel regulation 6.33.

Currently, the Regulator is required to keep registered those auditors who are not contactable. Item 23 inserts a new regulation 6.35A that allows the Regulator, after reasonable efforts and the passage of time, to deregister an auditor who cannot be contacted. This is a reasonable administrative action and reduces administrative burden for the Regulator.

Item 18 updates paragraph 6.33(a) to reflect the face that auditors may now be deregistered under new regulation 6.35A.

Item 24 ensures that deregistration under regulation 6.35A is a decision that is reviewable by the Administrative Appeals Tribunal.

Suspension before deregistration of auditors (items 20-21)

Sub-regulation 6.34(2) previously provided that, for certain types of non-compliance, an auditor's registration must first have been suspended by the Regulator before a notice of intention to deregister could be issued.

Items 20-21 remove sub-regulation 6.34(2) and references to it, and allow the Regulator to move directly to begin the process of deregistering an auditor where certain types of non-compliance have been demonstrated.

The Regulator must still provide a notice of intention to deregister the auditor, just as they would if intending to suspend a registration under regulation 6.29, and that notice must include reasons for the proposed deregistration. The auditor may respond to the notice and the Regulator must consider that response before making its decision.

Furthermore, decisions to suspend or to deregister must be based on grounds which are identical across regulations 6.29 and 6.34, and those decisions are reviewable by the Administrative Appeals Tribunal.

For these reasons, these amendments do not operate to remove an auditor's rights to natural justice. Those rights continue to be observed by the Regulator, in accordance with its good decision making guide and regulatory best practice. The Commercial and Administrative Law Branch of the Attorney-General's Department (AGD) was consulted on these proposed amendments, and was of the view that they were appropriate measures which ensured procedural fairness.

The Regulator still has the option to initiate suspension of an auditor's registration prior to deregistration, and auditor-initiated suspensions (as provided for in regulation 6.31) are also retained.

Application provisions (item 25)

Item 25 clarifies the dates on which various amendments in Schedule 1 of the Regulation apply to NGER reporters, greenhouse and energy auditors and the Regulator. It does this by inserting new provisions into Part 7 of the NGER Regulations.

Amendments made by items 1-11 (dealing with reporting of various emissions and electricity production) apply from 1 July 2016 in relation to NGER reports for the year 2016-17 and subsequent years.

Amendments made by items 14 and 15 (dealing with eligible referees for auditors) apply to applications for auditor registration made on or after the day those items commenced (that is, the day after the Regulation is registered). The amendments do not apply to auditor applications made before the items commenced.

Amendments made by items 16-24 (dealing with suspension and deregistration of auditors) apply from commencement (that is, the day after the Regulation is registered), even if the reasons why an auditor is to be suspended or deregistered arose before commencement. If the Regulator considers incidences of auditor non-compliance to be severe enough to warrant deregistration in the first instance, then such non-compliance should be taken into consideration, regardless of whether it occurred prior to the commencement of these amendments (which don't significantly alter, to the detriment of auditors, the criteria under which auditors may be suspended or deregistered).

ATTACHMENT B

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Greenhouse and Energy Reporting Amendment (2016 Measures No. 1) Regulation 2016

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *National Greenhouse and Energy Reporting Amendment (2016 Measures No. 1) Regulation 2016* (the "Regulation") makes minor technical amendments to the *National Greenhouse and Energy Reporting Regulations 2008* (the "NGER Regulations") to streamline various reporting and auditor administration requirements in relation to the National Greenhouse and Energy Reporting Scheme.

Human rights implications

This Legislative Instrument does not engage any of the applicable human rights or freedoms.

Sub-regulation 6.34(2) of the NGER Regulations previously provided that, for certain types of non-compliance, an auditor's registration must first have been suspended by the Clean Energy Regulator (the "Regulator") before a notice of intention to deregister could be issued.

Items 20-21 of Schedule 1 to the Regulation remove sub-regulation 6.34(2) and references to it, and allow the Regulator to move directly to begin the process of deregistering an auditor where certain types of non-compliance have been demonstrated.

The Regulator must still provide a notice of intention to deregister the auditor, just as they would if intending to suspend a registration under regulation 6.29, and that notice must include reasons for the proposed deregistration. The auditor may respond to the notice and the Regulator must consider that response before making its decision. Furthermore, decisions to suspend or to deregister must be based on grounds which are identical across regulations 6.29 and 6.34, and those decisions are reviewable by the Administrative Appeals Tribunal.

For these reasons, these amendments do not operate to remove an auditor's rights to natural justice. Those rights continue to be observed by the Regulator, in accordance with its good decision making guide and regulatory best practice. The Commercial and Administrative Law Branch of the Attorney-General's Department was consulted on these proposed amendments, and was of the view that they were appropriate

measures which ensured procedural fairness. Currently registered greenhouse and energy auditors were also consulted on this Regulation and made no submissions in response to that consultation.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

The Hon Greg Hunt MP

Minister for the Environment