EXPLANATORY STATEMENT

Issued by authority of the Minister for Energy and Emissions Reduction

National Greenhouse and Energy Reporting Act 2007

National Greenhouse and Energy Reporting Amendment (2019 Measures No.1) Regulations 2019

Background

The *National Greenhouse and Energy Reporting Act 2007* (**the Act**) provides a framework for the reporting of greenhouse gas emissions, energy production and consumption and other information in Australia. Section 77 of the 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 Regulations**) have previously been made under this section.

Section 22XS of the Act empowers the Minister to make legislative rules to implement the Safeguard Mechanism. The Safeguard Mechanism was established through the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (**the Safeguard Rule**). The Safeguard Rule specifies the administrative detail of how Safeguard provisions are implemented and the administrative processes for demonstrating compliance with Safeguard obligations.

Subdivision G of Division 4 of Part 6 of the Act provides a framework for audits of compliance with obligations under the Act or Regulations. Paragraph 75A(2)(b) of the Act provides that the regulations may set out requirements as to qualifications, knowledge, expertise, competence, independence and other matters that must be satisfied before auditors can be placed on the register of greenhouse and energy auditors (**the Register**). Subsection 75A(5) of the Act also provides that regulations may set out the form and content of the register of greenhouse and energy auditors; publication of the register; the form and content of applications for registration and the manner in which applications are to be made; fees to be paid in connection with registration; requirements to be met in order to maintain registration; review of registration; suspension of registration in prescribed circumstances; deregistration in prescribed circumstances; inspection of the performance of registered greenhouse and energy auditors in carrying out Part 6 audits; and other matters in connection with registration.

Purpose and Operation

The purpose of the *National Greenhouse and Energy Reporting Amendment (2019 Measures No. 1) Regulations 2019* (**the amending Regulations**) is to:

- Make consequential amendments to the Regulations to clarify reporting requirements for certain facilities, to formalise changes made on 4 March 2019 to the Safeguard Rule;

- Amend provisions relating to greenhouse and energy audits, including:

- Requiring the Register to contain information about conditions of registration of auditors, as well as details on the suspension and deregistration of auditors;

- Removing the ability for persons to apply to be Category 1 auditors from the date of commencement of the amending Regulations;

- Allowing the Clean Energy Regulator (**the Regulator**) to take into account various matters when determining whether an auditor is a fit and proper person;

- Amending existing legislation knowledge provisions to only require knowledge of the *Carbon Credits (Carbon Farming Initiative) Act 2011* and subordinate instruments (**CFI legislation**), where relevant to auditors' work;

- Introducing a requirement for auditors, where relevant to their work, to have knowledge of the *Renewable Energy (Electricity) Act 2000* and subordinate legislation (**renewable energy legislation**),

- Clarifying and increasing the requirements for auditors to maintain registration in relation to insurance requirements and participation requirements; and

- Reducing red tape by removing unnecessary reporting requirements for auditors;

- Make minor updates to matters to be identified in reports of emissions from decommissioned underground coal mines and natural gas distribution networks.

Details of the amending Regulations are outlined in Attachment A.

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

Consultation

An exposure draft of the amending Regulations was released for public consultation from 2 to 28 August 2019, together with an exposure draft of associated changes to the *National Greenhouse and Energy Reporting (Auditor Registration) Instrument 2018*; registered auditors were also consulted informally in May 2018 regarding a number of changes to the audit framework. Submissions to the August 2019 consultation expressed concern that proposed supplementary auditor rotation requirements for Emissions Reduction Fund audits could increase the cost of audits and would be difficult to implement. The amending Regulations therefore leave auditor rotation requirements unchanged; the Government will continue to monitor whether general auditor rotation requirements are fit for purpose. No submissions made comments on Schedule 1 (Safeguard Mechanism amendments) or Schedule 3 (Other amendments- decommissioned underground mines and natural gas distribution) of the amending Regulations.

Regulatory Impact

The amendments in Schedule 1 of the amending Regulations are consequential to the amendments to the Safeguard Rule made by the *National Greenhouse and Energy Reporting*

(Safeguard Mechanism) Amendment Rule (No. 1) 2019, for which a regulation impact statement was prepared and assessed as compliant and consistent with best practice by the Office of Best Practice Regulation (OBPR ID 22431). The amendments in Schedule 1 of the amending Regulations impose no additional regulatory impact from that imposed and assessed in amending the Safeguard Rule. The measures implemented in Schedules 2 and 3 of the amending regulations were assessed to have nil or minor regulatory impacts (OBPR ID 25366 and 25174).

ATTACHMENT A

Details of the *National Greenhouse and Energy Reporting Amendment (2019 Measures No. 1) Regulations 2019*

Section 1—Name of regulation

Section 1 provides that the title of the amending Regulations is the *National Greenhouse and Energy Reporting Amendment (2019 Measures No. 1) Regulations 2019*.

Section 2—Commencement

Section 2 provides that the amending Regulations commence on the day after their registration.

Section 3—Authority

Section 3 provides that the amending Regulations are made under the *National Greenhouse and Energy Reporting Act 2007*. The power to make regulations under section 77 of the NGER Act includes the power to amend or revoke regulations that have already been made, with any doubt about this resolved by subsection 33(3) of the *Acts Interpretation Act 1901.*

Section 4—Schedules

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

Amendments

Schedule 1—Safeguard Mechanism amendments

Items 1, 2, 3 and 4

These are consequential and editorial changes to facilitate changes made to the Safeguard Rule. They incorporate relevant defined terms from the Safeguard Rule.

Item 5

Item 5 inserts new reporting requirement for facilities with a production-adjusted baseline determination or certain benchmark-emissions baseline determinations. The new production reporting requirements will facilitate annually adjusted baselines by enabling the Regulator to automatically update such baselines each year, to reflect the latest production data. Facilities with annually adjusted baselines will report production data through the National Greenhouse and Energy Reporting Scheme (**NGER Scheme**) in the same way they currently report greenhouse gas emissions and energy information. Facilities on fixed baselines would not be covered by the new requirements.

Reporters will not need to report production information for baseline determinations that do not use 'prescribed (annually adjusted) production variables', including instances where a facility produces an output that is listed in Schedule 2, but uses a different production

variable for its baseline setting through provisions in Section 5 of the Safeguard Rule. Additionally, reporters will not need to report production information during a reported-emissions, calculated-emissions or fixed benchmark-emissions baseline determination period. This is because the baseline remains fixed for the duration of the baseline determination period.

Item 5 also inserts new provisions to allow for facilities to elect to report production quantities. If a facility produces one or more prescribed (annually adjusted) production variables, the facility may voluntarily report the quantities of each prescribed (annually adjusted) production variable produced in the financial year. Any reported quantities must be measured using any units specified in Schedule 2 of the Safeguard Rule and meet any measurement requirements or procedures specified in Schedule 2 of the Safeguard Rule. This may include instances when none are relevant to the baseline emissions numbers, or one is relevant to baseline emissions numbers.

Item 6

Item 6 inserts transitional provisions to clarify that the amendments apply to a report provided under the Act on or after the commencement day as a new Division 7.4. As no prescribed (annually adjusted) production variables have yet been included in the Safeguard Rule, no existing facilities are impacted by these changes. When prescribed (annually adjusted) production variables are made, it is possible a facility can move straight to a production-adjusted baseline determination using a prescribed (annually adjusted) production variable and associated default emissions intensity level for the 2018-19 financial year. If facilities decide to take this option, for the baseline to be calculated for 2018-19 they will need to include their production for the 2018-19 financial year in their report or, if their report has already been submitted, resubmit their report so that it includes this information. Accordingly, these amendments do not have any relevant retrospective effect on reporters.

Schedule 2—Audit framework amendments

Item 1 makes a minor clarification to the definition of *alternative audit*, reflecting the fact that ERF audits are carried out under the *Carbon Credits (Carbon Farming Initiative) Act 2011* rather than the Act.

Item 2 amends the definition of *NGER legislation* (of which auditors must demonstrate knowledge under Regulation 6.14) at Regulation 1.03 to include the Safeguard Rule.

Item 3 inserts a new definition at Regulation 1.03 of *renewable energy legislation* for the purposes of the new Regulation 6.14 (see item 11 below), meaning the *Renewable Energy (Electricity) Act 2000* or *Renewable Energy (Electricity) Regulations 2001*

Items 4, 5 and 6 insert a new requirement under Regulation 6.06 that the Register must contain information about any conditions that have been imposed on the auditor's registration. New subregulation 6.06(2) will also require the Register to contain information about an auditor who has ceased to be registered through either suspension or deregistration.

Item 7 inserts a new requirement under subregulation 6.07(1) that the Regulator must publish conditions that have been imposed on an auditor's registration. This will allow regulated entities to know the legislation schemes for which a given auditor is able to conduct audits.

Item 8 makes a minor amendment to subregulation 6.07(2) to clarify that an auditor whose registration is suspended is taken not to be registered for the purposes of Subdivision 6.3.2.

Items 9 and 12 will prevent applicants from applying for registration as Category 1 auditors from the date these amendments are made. This will not affect currently registered Category 1 auditors. This is the first step in the proposed phase-out of Category 1 auditors. Category 1 auditors do not have a legislated role in conducting audits under schemes administered by the Regulator. Clean Energy Regulator schemes require Category 2 auditors to perform assurance engagements. While Category 1 auditors can be team members, there is no requirement for team members to be registered.

Item 10 inserts new provisions at subregulation 6.12(2) to allow the Regulator to have regard to any disciplinary action by a relevant professional body; or, in relation to auditor registration of any other Commonwealth or a law of a State or Territory, to which the auditor has been subject; or to any other relevant matter. This will assist with assessing an auditor's status as a fit and proper person to ensure that auditors meet the high standards expected of persons charged with the responsibility for ensuring other persons' compliance with legislated requirements. The decision whether to de-register an auditor under Regulation 6.35 on the Regulator's initiative due to the auditor ceasing to be a fit and proper person is a reviewable decision under paragraph 6.73(c) of the Regulations.

Item 11 inserts a new Regulation 6.14 to require auditors to have the requisite knowledge of the renewable energy legislation (as defined by item 3 above). This will ensure that auditors will have the required knowledge to conduct audits under the renewable energy scheme (see regulations 22UB and 22UH of the *Renewable Energy (Electricity) Regulations 2001*). Rather than requiring an applicant to have knowledge of all legislation schemes listed in subsection (1), the new Regulation 6.14 requires auditors to have knowledge of the CFI legislation (as defined by Regulation 1.03) and the renewable energy legislation only if they intend to carry out audits under those pieces of legislation. It is intended that where an auditor does not have knowledge of a particular scheme, this will be reflected through the Regulator imposing a condition under subparagraph 6.61(4)(c)(i). The decision to impose conditions on an auditor's registration is a reviewable decision (see paragraph 6.73(e) of the Regulations). It is expected that all auditors will have knowledge of the NGER legislation as the audit framework resides within this legislation. Item 13 supports item 11 above by requiring applications for auditor registration to state the schemes for which the auditor intends to carry out audits. Item 14 inserts a note at the end of subregulation 6.23(2) referring to the changes above.

Items 15 and 16 make amendments to Regulation 6.37 allowing auditors registered as both Category 1 and Category 2 auditors to apply for deregistration relating to their registration as a Category 1 or Category 2 auditor only. This will allow auditors flexibility in managing their registration, particularly where an auditor does not have the necessary skills, knowledge or experience relevant for a Category 2 auditor. This will be reflected in the conditions imposed on the auditor's registration. The decision to impose conditions on an auditor's registration is a reviewable decision (see paragraph 6.73(e) of the Regulations).

Items 17 to 22 amend the requirements to be met to maintain registration. Failure to meet these requirements may result in suspension of the auditor's registration or deregistration. Decisions to suspend or deregister an auditor are reviewable decisions (see Regulations 6.73(a) and (b)).

Item 17 substitutes new requirements in subregulations 6.60 (1) and (2) to ensure that audit team leaders have adequate and appropriate professional indemnity insurance while preparing for, undertaking and preparing a report in relation to Part 6 audits. This aligns with insurance requirements for company auditors administered by the Australian Security and Investments Commission (ASIC). Inadequate insurance exposes the Regulator, the auditor and those participating in schemes to unnecessary risk. Previous insurance amounts were low and have not increased since the audit framework was established. The minimum insurance amounts now increase with the value of the audit.

Items 18, 19 and 20 support changes to auditor knowledge requirements above by allowing the Regulator to impose conditions restricting the types of audits which may be carried out by an auditor.

Item 21 makes a change to Regulation 6.64 (Registered auditor must continue to be fit and proper person) corresponding to that made by item 10 above to Regulation 6.12 (Applicant must be a fit and proper person).

Item 22 replaces subregulation 6.66(1) to increase an auditor's required participation in Part 6 or alternative audits from at least one audit in every three year period following registration to at least three audits in every three year period. The minimum requirements for audit participation have been increased to safeguard the Register and provide skilled and active auditors. Item 26 inserts new Regulation 7.14 clarify the transitional application of this provision.

Item 23 is an editorial revision to accommodate item 21 above.

Item 24 repeals Regulation 6.68, which required auditors to notify the Regulator if they accepted the position of audit team leader from a person other than the Regulator. This reduces unnecessary reporting requirements for auditors and reduces the regulatory burden for the Regulator.

Item 25 is an editorial revision for consistency.

Item 26 inserts provisions to clarify the application of amendments relating to items above. In particular:

- Amendments to the legislation knowledge required of auditors only apply to applications made on or after the day the amending Regulations commence (with old requirements applying to applications made before commencement).
- The fit and proper person requirements apply to applications made on or after the day the amending Regulations commence, and to applications made but not decided upon before commencement of the amending Regulations. This is because these requirements will apply to all auditors, including those already registered.
- The participation requirements for audits within a 3 year period are specified for existing auditors, but periods that end within 12 months of commencement are not included.

Schedule 3—Other amendments

Part 1 makes minor updates to matters to be identified for Method 1 for emissions from decommissioned underground coal mines to align with changes which were made to the Measurement Determination on 21 June 2018 by the *National Greenhouse and Energy Reporting (Measurement) Amendment (2018 Update) Determination 2018*.

Part 2 inserts matters to be identified for reporting using the new facility-specific Method 3 for emissions from natural gas distribution that was introduced on 28 June 2019 by the *National Greenhouse and Energy Reporting (Measurement) Amendment (2019 Update) Determination 2019*.

Part 3 inserts a provision to provide that Schedule 3 amendments apply in relation to reports to be submitted for the 2019-20 reporting year (due 31 October 2020). This application will not disadvantage any person for the following reasons:

- The amendments in Part 1 of this Schedule (Decommissioned mines) are minor in nature, bringing terminology used in Source 3 of Part 1 of Schedule 3 to the Regulations into alignment with changes made to the Measurement Determination by the *National Greenhouse and Energy Reporting (Measurement) Amendment (2018 Update) Determination 2018.*
- The amendments in Part 2 of this Schedule (Unaccounted for gas) formalise matters to be identified in reports using the facility-specific Method 3 for natural gas distribution that was introduced on 28 June 2019 by the *National Greenhouse and Energy Reporting (Measurement) Amendment (2019 Update) Determination 2019.* These matters were developed in consultation with affected reporting entities, including the entity which first raised the issue addressed by the amendments, via the industry body representing Australian gas distribution businesses (Energy Networks Australia).

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 (2019 Measures No. 1) Regulations 2019

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 Disallowable Legislative Instrument

The *National Greenhouse and Energy Reporting Amendment (2019 Measures No. 1) Regulations 2019* (the amending Regulations) amends the *National Greenhouse and Energy Reporting Regulations 2008* (the Regulations) to:

- make consequential amendments to the Regulations to clarify reporting requirements for certain facilities, to formalise changes made on 4 March 2019 to the *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (the Safeguard Rule);
- amend provisions relating to greenhouse and energy audits (Schedule 2 of the amending Regulations)
- make minor amendments to matters to be identified in reports of emissions from decommissioned underground coal mines and natural gas distribution networks (Schedule 3 of the amending Regulations).

Human rights implications

This Legislative Instrument engages the privacy principle enshrined within Article 17 of the International Covenant on Civil and Political Rights (ICCPR) which stipulates that no individual should be subject to arbitrary and unlawful interference with their privacy.

The Schedule 1 amendments relating to reporting requirements are reasonable because they are based on self-reporting under existing legislation (the *National Greenhouse and Energy Reporting Act 2007*) and the information is aggregated to de-identify individual information. The additional production data collected will also be subject to the secrecy provisions of the *Clean Energy Regulator Act 2011* and the *Privacy Act 1988*. This data will enable baselines to be automatically adjusted on an annual basis, according to changes in production in the relevant baseline determination formula.

The legislative instrument engages the right to privacy because information relating to the conditions of registration of auditors will be published (Schedule 2 amendments). The limitation proposed in the instrument has a direct connection with the amending Regulations' objective as the amending Regulations make a series of amendments relating to the registration of auditors under the *National Greenhouse and Energy (Reporting) Act 2007*. Giving public access to information about the conditions placed upon certain auditors is reasonable, necessary and proportionate in helping potential clients determine which auditors are most applicable for their particular circumstances. This requirement will assist auditors by

ensuring that they are only approached by potential clients for audit work that the auditor's registration permits them to perform.

Similar to Schedule 1, the Schedule 3 amendments relating to matters to be identified are reasonable because they are based on self-reporting under existing legislation and the information collected will be subject to the secrecy provisions of the *Clean Energy Regulator Act 2011* and the *Privacy Act 1988*.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as the limitation on protection of privacy is reasonable, necessary and proportionate, and is compatible with human rights principles.