LAWFULNESS OR VALIDITY OF JULY 2021 AMENDMENTS TO THE ARENA REGULATIONS

MEMORANDUM OF ADVICE

30 September 2021

Introduction

1 By memorandum dated 22 September 2021, we have been briefed by Environmental Justice Australia to advise as to the lawfulness or validity of the *Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021* (Cth) made on 23 July 2021 (**Second Regulations**) purportedly pursuant to the *Australian Renewable Energy Agency Act 2011* (Cth) (**Act**). We understand you may wish to make this advice public.

2 The immediate context for this advice is that the Second Regulations purport to empower the Australian Renewable Energy Agency (**ARENA**) to fund non-renewable energy technologies, which would appear to be at odds with the statutory purposes for which the ARENA was established and thus potentially beyond the regulation making power in s 74 of the Act.

3 Also of immediate relevance to this advice is that the Second Regulations bear many similar, and some identical, features to the *Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021* (Cth) made 13 May 2021 (**First Regulations**), which were disallowed by the Senate on 22 June 2021. Thus, a real question arises as to whether the Second Regulations are invalid for contravening s 48 of the *Legislation Act 2003* (Cth), which prohibits the making of a regulation that is 'the same in substance' as a regulation that has been disallowed in the previous six months.

4 In summary, and in response to the questions asked of us, we advise:

4.1 Judicial review of the Second Regulations is available on the basis that they, or provisions of them, are unlawful or invalid for being beyond the authority conferred by s 74 of the Act;

4.2 Judicial review of the Second Regulations is available on the basis that they, or provisions of them, are ineffective for being 'the same in substance' as the previously disallowed First Regulations, and thus contravening s 48 of the *Legislation Act*.

5 Before explaining the basis for that advice, we provide a brief summary of the factual and procedural background to the Second Regulations, and an overview of the relevant legislative provisions.

Background

6 The Second Regulations need to be understood against the background of the Act and the First Regulations, each of which is surveyed here.

The Act

7 The main object of the Act is described in s 3 as follows:

> **Object**
>
> The main object of this Act is to:
>
> (a) improve the competitiveness of renewable energy technologies; and
>
> (b) increase the supply of renewable energy in Australia.

8 In the Second Reading Speech, the object was put in slightly different terms, but to similar effect, the object being to: 'drive down the costs of renewable energy'.[1]

9 The means by which the Act pursues this object is, in the words of the Explanatory Memorandum, 'by providing financial assistance for renewable energy technologies'.[2] The ARENA was thus created to 'streamline and centralise the administration of … [financial] support for renewable energy' and have 'oversight of … renewable energy grant funding'.[3]

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[1] House of Representatives, *Parliamentary Debates*, 12 October 2011 (**Second Reading Speech**) p 11555 (Ferguson).
[2] Explanatory Memorandum to the Australian Renewable Energy Agency Bill 2011 (Cth) (**Explanatory Memorandum**) p 3.
[3] Second Reading Speech p 11555.

10 The ARENA is a body corporate established by s 7 of the Act. The ARENA's functions are described in s 8, which provides:

> **The ARENA's functions**
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> The ARENA has the following functions:
>
> (a) to provide financial assistance for:
>
> (i) research into renewable energy technologies; or
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> (ii) the development, demonstration, commercialisation or deployment of renewable energy technologies; or
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> (iii) the storage and sharing of information and knowledge about renewable energy technologies;
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> (b) to enter into agreements for the purpose of providing financial assistance as mentioned in paragraph (a) and to administer such agreements;
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> (c) to collect, analyse, interpret and disseminate information and knowledge relating to renewable energy technologies and projects;
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> (d) to provide advice to the Minister relating to renewable energy technologies, including advice about the following:
>
> (i) improving the competitiveness of renewable energy technologies;
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> (ii) increasing the supply of renewable energy in Australia;
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> (iii) improving the development of skills in the renewable energy technology sector;
>
> (iv) increasing the use of renewable energy technologies;
>
> (e) to liaise with State and Territory governments and other authorities for the purpose of facilitating renewable energy projects for which financial assistance is, or is proposed to be, provided as mentioned in paragraph (a);
>
> (f) any other functions that are prescribed by the regulations;
>
> (g) any other functions conferred on the ARENA by this Act or any other Commonwealth law;
>
> (h) to do anything incidental to, or conducive to, the performance of the above functions.

11 The function in s 8(a)(i) and (ii) – that is, the provision of financial assistance to renewable energy technologies – was anticipated to be the 'main function'.[4]

12 In any event, *all* functions in s 8(a) to (e) are orientated towards renewable energy technologies or projects. It is thus important to note the definition of 'renewable energy technologies' in s 4, which provides:

> ***renewable energy technologies*** includes:
>
> (a) hybrid technologies; and
>
> (b) technologies (including enabling technologies) that are related to renewable energy technologies.

[4] Explanatory Memorandum pp 4, 16.

13 While the definition of 'renewable energy technologies' is inclusive, not exhaustive, the Explanatory Memorandum makes clear that the term 'renewable energy technology' had an accepted core meaning, being 'technologies that use, or enable the use of, one or more renewable energy sources, where a renewable energy source is one that is generated from natural resources that can be constantly replenished.'[5] (The Explanatory Memorandum and Second Reading Speech provide examples of renewable energy sources including solar, biomass, biofuel, ocean and geothermal, while wind projects were also contemplated.[6]) Similarly, the Second Reading Speech reveals that careful consideration was given to the definition of 'renewable energy technologies', and it was considered 'appropriate[]' to extend the definition to include hybrid technologies to 'allow ARENA to support more renewable energy projects than would be possible without hybridisation'.[7] The main function of the ARENA in funding renewable energy technologies is confirmed by the consequential amendments enacted in concert with the Act,[8] which transferred certain funding agreements to the ARENA, all of which related to renewable energy technologies.[9] The purpose of the consequential amendments was explained to be to 'provide for a quick and seamless transfer of existing programs and projects to ARENA and will allow for ARENA to commence operation with minimal disruption and loss of momentum in support for renewable energy technology innovation.'[10]

14 At this juncture, it is appropriate to emphasise the specificity of both the Act's main object and the means by which the object is pursued.

15 The object is specifically to 'drive down the costs of renewable energy'.[11] The Act does not, for example, have any purpose connected to 'clean' or 'cleaner' energy more broadly, nor to 'low emissions' energy sources.

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[5] Explanatory Memorandum p 3.
[6] Second Reading Speech p 11556; Explanatory Memorandum p 3.
[7] Second Reading Speech p 11556.
[8] *Australian Renewable Energy Agency (Consequential Amendments and Transitional Provisions) Act 2011* (Cth).
[9] *Australian Renewable Energy Agency (Consequential Amendments and Transitional Provisions) Act 2011* (Cth) sched 2 s 2(1)(a).
[10] House of Representatives, *Parliamentary Debates*, 12 October 2011, 11559 (Ferguson). See also Explanatory Memorandum to the Australian Renewable Energy Agency (Consequential Amendments and Transitional Provisions) Bill 2011 (Cth) p 1: 'The purpose of this Bill is to deal with the transitional and consequential matters required for the Australian Renewable Energy Agency (ARENA) to take over responsibility for funding and administration of existing renewable energy and related technology innovation projects' (emphasis added).
[11] Second Reading Speech p 11555.

16 The means by which the Act pursues its object is by the provision of financial assistance to renewable energy technologies. This subsidy type of policy intervention was not the only means available to Parliament to pursue its object. It could, for example, have provided for rebates directly to consumers of renewable energy or it could have imposed a tax on non-renewable energy.

17 The deliberate nature of the decision not to pursue those means in the Act is confirmed in the Second Reading Speech, which made clear that the government of the day's *distinct objective* of lowering of emissions generally (not just through the use of renewable energy technologies) was to be achieved by two *distinct legislative means*: first, 'the introduction of a carbon price to reduce greenhouse gas emissions, by encouraging more efficient use of energy and driving investment in cleaner energy sources';[12] and, second, the creation of the 'Clean Energy Finance Corporation … [to] invest in the commercialisation and deployment of renewable energy, energy efficiency and clean energy technologies.'[13] For present purposes it is important to emphasise that, unlike the then anticipated carbon price, the Act was not directed to improving energy efficiency more generally, nor did it involve concepts of 'clean' (or 'cleaner') energy. Similarly, unlike the Clean Energy Finance Corporation, the ARENA's mandate does not include 'clean energy technologies'. Rather, the central concern of the Act is *renewable* energy, and the means by which it addresses that concern is by financial assistance to *renewable energy technologies*. The importance of this specificity of object and means will be explained in due course.

Regulation-making power and the 2016 Regulations

18 Section 74 of the Act contains the regulation making power, which the Explanatory Memorandum stated was 'self-explanatory'.[14] The provision states:

> **Regulations**
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> The Governor-General may make regulations prescribing matters:
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> (a) required or permitted by this Act to be prescribed; or
>
> (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

[12] Second Reading Speech p 11555 (emphasis added). The Explanatory Memorandum, at p 10, also anticipated the future passage of 'legislation … establishing the Clean Energy Finance Corporation'.
[13] Second Reading Speech p 11555 (emphasis added).
[14] Explanatory Memorandum p 19.

19 Pursuant to that power the *Australian Renewable Energy Agency Regulation 2016* (Cth) (**2016 Regulations**) prescribed an additional function for the ARENA for the purposes of s 8(f) of the Act, which was, in essence, 'to assist the Clean Energy Finance Corporation in governance, management and administration of the Clean Energy Innovation Fund in relation to clean energy technologies within the meaning of the *Clean Energy Finance Corporation Act 2012*'.[15] Although we have not been asked to advise as to the lawfulness or validity of the 2016 Regulations, we note in passing that they are arguably inconsistent the Act's delimitation of the ARENA's functions to renewable energy and also with the apparent intention of the *Clean Energy Finance Corporation Act* to establish the Clean Energy Finance Corporation as the sole administrator of its money.[16] It may be, however, that the 2016 Regulations could be read down to limit the ARENA's function in assisting the Clean Energy Finance Corporation to matters related to renewable energy and renewable energy technologies.

20 In any event, the effect of the 2016 Regulations should not be overstated. On their face, they might appear to considerably extend the ARENA's remit beyond 'renewable energy technologies' (as defined in the Act) to 'clean energy technologies' (as defined in the *Clean Energy Finance Corporation Act*).[17] However, the 2016 Regulations did not purport to allow the ARENA to *provide financial assistance* for clean energy technologies, that remained the central statutory responsibility of the Clean Energy Finance Corporation.[18] Rather, the ARENA's role was merely facilitative, a fact which is consistent with s 73A of the Act, which allows the ARENA to disclose information to the Clean Energy Finance Corporation, and with various provisions of the *Clean Energy Finance Corporation Act* that envisage limited forms of cooperation between the two agencies.[19]

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[15] *Australian Renewable Energy Agency Regulation 2016* (Cth) r 5(1).
[16] See *Clean Energy Finance Corporation Act 2012* (Cth) especially ss 9, 53 and 58.
[17] The *Clean Energy Finance Corporation Act 2012* (Cth) defines 'clean energy technologies' in s 60 to include 'renewable energy technologies' but also to include 'energy efficiency technologies' and 'low emissions technologies'.
[18] See *Clean Energy Finance Corporation Act 2012* (Cth) s 58.
[19] See *Clean Energy Finance Corporation Act 2012* (Cth) ss 9(1)(b), 50, 75(1)(b) and (2)(a).

First Regulations

21 On 13 May 2021, the Governor-General made the First Regulations. The First Regulations were registered on 18 May 2021 and came into effect on 19 May 2021.

22 The explicit object of the First Regulations was to 'expand[] the operating remit of the Australian Renewable Energy Agency … [to] permit ARENA to invest in a wider range of clean energy technologies to deliver programs announced in the 2020-21 Budget'.[20]

23 The First Regulations purported to prescribe an additional function for the ARENA for the purposes of s 8(f) of the Act, which was, to provide five categories of financial assistance: (i) Freight Energy Productivity Program financial assistance; (ii) Future Fuels financial assistance; (iii) Industrial Energy Transformation Studies Program financial assistance; (iv) Regional Australia Microgrid Pilots Program financial assistance; and (v) Technology Investment Roadmap financial assistance.[21]

24 Each of those categories of financial assistance was defined in the First Regulations, which definitions reveal that the function purportedly conferred on the ARENA extended considerably beyond financial assistance for renewable technologies, and operated in large part to make the ARENA a source of financial assistance for technologies that *reduce emissions* without necessarily using renewable technology (the distinction being an important one to Parliament, as was foreshadowed above at [14]).

25 On 17 June 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation reviewed the First Regulations. The Committee came to the following view:

> 'the committee is concerned that the instrument is expanding the remit of the ARENA beyond what was envisaged by Parliament when the Act was passed … there is nothing in the explanatory memorandum to the bill preceding the Act to suggest that it was contemplated that the ARENA would have the ability to foster anything other than renewable energy technologies … The committee is concerned that the instrument deals with the significant matter of expanding the jurisdiction of the ARENA from investing in renewable energy technologies to programs relating to energy efficiency and low-emissions technology.'[22]

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[20] Explanatory Statement to the *Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021* (Cth) (**Explanatory Statement to the First Regulations**) p 1.
[21] First Regulations sched 1, item 6.
[22] Letter from Senate Standing Committee for the Scrutiny of Delegated Legislation to the Hon Angus Taylor, Minister for Energy and Emission Reduction, 17 June 2021, p 2.

26 On 22 June 2021, the First Regulations were disallowed by the Senate. The debate in the Senate made clear that the objection to the First Regulations was that they would 'allow the Renewable Energy Agency to instead fund what it calls low-emissions technology but, when you look at the fine print, is carbon capture and storage and hydrogen powered not by clean energy … but by dirty energy. It's yet more support for the fossil fuel sector.'[23]

Second Regulations

27 One month after the disallowance of the First Regulations, on 23 July 2021, the Governor-General made the Second Regulations. The Second Regulations were registered on 29 July 2021 and came into effect on 30 July 2021.

28 The object of the Second Regulations, as stated in the Explanatory Statement, is to 'expand[] ARENA's functions'[24] to include the provision of ten new categories of financial assistance, five of which are provide for in s 6 and give of which are provided for in s 7 of the Second Regulations. Broadly speaking, s 6 'prescribes a function of providing financial assistance in relation to five targeted programs announced in the 2020-21 Budget'[25] and s 7 'prescribes a function of providing financial assistance in relation to … five priority low emissions technologies'.[26]

29 Section 6(1) of the Second Regulations purports to prescribe an additional function for the ARENA for the purposes of s 8(f) of the Act in often similar, and occasionally identical, terms as had been used in item 6 of schedule 1 of the First Regulations. Section 6(1) purports to confer upon the ARENA the function of providing five categories of financial assistance, each of which is discussed below (including with reference to the First Regulations):

29.1 Freight Efficiency Assistance Grants entail five sub-categories of financial assistance to the road transport sector, only two of which necessarily involve the use of renewable energy.[27] This is styled as a category of financial assistance that is entirely new to the Second Regulations. In fact, the sub-categories in paragraphs (a)(i), (b) and (c) of

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[23] Senate, *Parliamentary Debates*, 22 June 2021, 65 (Waters).
[24] Explanatory Statement to the *Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021* (Cth) (**Explanatory Statement to the Second Regulations**) p 1.
[25] Explanatory Statement to the Second Regulations, p 1.
[26] Explanatory Statement to the Second Regulations, p 1.
[27] The two sub-categories of financial assistance necessarily involving the use of renewable energy are in par (a)(ii) and (c)(ii) in Second Regulations s 6(7) definition of 'Freight Efficiency Assistance Grants'.

the definition of 'Freight Efficiency Assistance Grants' substantially mirror the category of financial assistance in the First Regulations labelled 'Freight Energy Productivity Program financial assistance'. In particular, the sub-category (a)(i) (of which sub-categories (b) and (c) are essentially subsidiaries) in the Second Regulations' definition of 'Freight Efficiency Assistance Grants' reproduces *verbatim* the category of financial assistance that appeared in paragraph (a)(i) of the First Regulations' definition of 'Freight Energy Productivity Program financial assistance'.

29.2 Freight Energy Productivity Trial Program financial assistance relates to test projects using renewable energy for truck drivetrain, component and logistical technologies. This category of financial assistance adopts a similar title to a category of financial assistance in the First Regulations,[28] but is substantially redefined so as to only include test projects that 'involve the use of renewable energy'.[29] Importantly, however, the arguably suspect aspects of this category of financial assistance in the First Regulations were not abandoned in the Second Regulations. Rather, as has been explained above at [29.1], they have simply migrated to the new category of 'Freight Efficiency Assistance Grants'.

29.3 Future Fuels financial assistance was, in the First Regulations, directed to the use of 'clean energy technologies',[30] which were not limited to 'renewable energy technologies' but extended to 'energy efficiency technologies' and 'low-emission technologies'.[31] In the Second Regulations this category of financial assistance is more specifically directed to three types of vehicles: (a) electric vehicles; (b) vehicles powered by biofuels; and (c) vehicles powered by clean hydrogen.[32] However, the substantial degree of co-extensivity between this category of financial assistance in the First and Second Regulations is evidenced by the 'Example' at the foot of the definition, which remains largely unchanged between the First and Second Regulations.

29.4 Industrial Energy Transformation Studies Program financial assistance was, in the First Regulations, directed to studies for improving business

[28] First Regulations sched 1 s 6(a)(i).
[29] Second Regulations s 6(7) definition of 'Freight Energy Productivity Trial Program financial assistance'.
[30] First Regulations sched 1, item 4, definition of 'Future Fuels Fund financial assistance'.
[31] First Regulations sched 1, item 4, definition of 'clean energy technologies'.
[32] Second Regulations s 6(7) definition of 'Future Fuels financial assistance'.

investment in 'clean energy technologies',[33] which technologies were defined as 'energy efficiency technologies', 'low-emission technologies' and 'renewable energy technologies'.[34] In the Second Regulations, this category of financial assistance is narrower, and cleaved completely from renewable energy technologies, such that it relates only to 'energy efficiency technologies'.[35]

29.5 Regional Australia Microgrid Pilots Program financial assistance was, in the First Regulations, directed at microgrids that use 'renewable energy or low-emission technologies'.[36] In the Second Regulations this category of financial assistance is narrowed to be directed only at 'renewable energy microgrids'.[37]

29.6 Technology Investment Roadmap financial assistance is a discrete category of financial assistance that appeared in the First Regulations but not any analogous provision of the Second Regulations. However, as the words in parentheses in the title of the Second Regulations indicate – those words being 'Implementing the Technology Investment Roadmap' – this purpose of the First Regulations has by no means been abandoned. Rather, as is explained below, it is given effect to in a more detailed provision of the Second Regulations, s 7.

30 As has been explained, there are a number of similar or identical features as between the categories of financial assistance envisaged by item 6(a) of schedule 1 to the First Regulations and s 6(1)(a) of the Second Regulations. There are also identical facilitative provisions in the following paragraphs (b) – (d) of each regulations, although certain limits or oversight mechanisms are introduced in the Second Regulations including a cap on spending,[38] a time limit for spending,[39] and a reporting obligation on the Minister.[40]

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[33] First Regulations sched 1, item 4, definition of 'Industrial Energy Transformation Studies Program financial assistance'.
[34] First Regulations sched 1, item 4, definition of 'clean energy technologies'.
[35] Second Regulations s 6(7) definition of 'Industrial Energy Transformation Studies Program financial assistance'.
[36] First Regulations sched 1, item 4, definition of 'Regional Australia Microgrid Pilots Program financial assistance' (emphasis added).
[37] Second Regulations s 6(7) definition of 'Regional Australia Microgrid Program financial assistance'.
[38] Second Regulations s 6(2) and (3).
[39] Second Regulations s 6(4) and (5).
[40] Second Regulations s 6(6).

31 Section 7(1)(a) of the Second Regulations purports to prescribe an additional function for the ARENA for the purposes of s 8(f) of the Act in often similar, and occasionally identical, terms as had been attempted by item 6(a)(v) of schedule 1 of the First Regulations. That function is to provide five categories of financial assistance, each of which is discussed below (using the language of the Second Regulations s 7(5)):

31.1 Priority aluminium and steel technologies financial assistance – this category of financial assistance in the Second Regulations relates to 'technologies relating to manufacturing low emissions aluminium or steel'.[41] While the term 'low emissions' is not defined, it is intended to encompass anything lower than 'a baseline of the average emissions produced by the relevant activity or sector'.[42] Similarly, while 'low emissions aluminium' and 'low emissions steel' are not defined, they 'are intended to refer to aluminium or steel production using renewable energy or fossil fuels with substantial carbon capture and storage.'[43] This category of financial assistance narrows that which appeared in corresponding provision of the First Regulations in that the First Regulations related to the manufacture of 'materials'[44] whereas the Second Regulations are limited to aluminium and steel.[45] It should also be noted that the First Regulations related to manufacturing by 'clean energy technologies', which included 'low-emission technologies' but also included 'energy efficiency technologies'.[46] By contrast, the Second Regulations relate only to 'technologies relating to manufacturing low emissions'.[47] However this change appears to be one of form rather than substance, as technologies that improve energy efficiency would also normally lower emissions from the 'baseline'[48] and thus fall within the concept of 'low-emission technologies' used in the Second Regulations.

31.2 Priority carbon capture and storage technologies financial assistance – this category of financial assistance in the Second Regulations relates to

[41] Second Regulations s 7(5)(a) and 7(6) table item 1 column 2.
[42] Explanatory Statement to the Second Regulations p 12.
[43] Explanatory Statement to the Second Regulations p 15 (emphasis added).
[44] First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(iv).
[45] Second Regulations s 7(5)(a) and 7(6) table item 1 column 2.
[46] First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(iv) read with definition of 'clean energy technologies'.
[47] Second Regulations s 7(5)(a) and 7(6) table item 1 column 2.
[48] Explanatory Statement to the Second Regulations p 12.

'technologies relating to carbon capture and storage'.[49] 'Carbon capture and storage' assumes the definition it has in the *National Greenhouse and Energy Reporting Act 2007* (Cth).[50] This category of financial assistance in the Second Regulations repeats that under the First Regulations for 'carbon capture and storage',[51] but removes the alternative funding category of 'carbon capture and utilisation' that had appeared in the First Regulations.[52]

31.3 Priority clean hydrogen technologies financial assistance – this category of financial assistance in the Second Regulations relates to 'technologies relating to clean hydrogen'.[53] The term 'clean hydrogen' is not defined but is 'intended to refer to hydrogen produced using renewable energy or fossil fuels with substantial carbon capture and storage'.[54] This category of financial assistance in the Second Regulations repeats that under the First Regulations for 'clean hydrogen'.[55]

31.4 Priority energy storage technologies financial assistance – this category of financial assistance in the Second Regulations relates to 'technologies relating to energy storage'.[56] The term 'energy storage' is not defined. This category of financial assistance in the Second Regulations repeats that under the First Regulations for 'energy storage'.[57]

31.5 Priority soil carbon technologies financial assistance – this category of financial assistance in the Second Regulations relates to 'technologies relating to soil carbon'.[58] The term 'soil carbon' is not defined 'but is intended to refer to carbon sequestration and other land management

[49] Second Regulations s 7(5)(a) and 7(6) table item 2 column 2.
[50] Second Regulations s 5 definition of 'carbon capture and storage'.
[51] See and compare First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(i) and Second Regulations s 7(5)(b) and 7(6) table item 2 column 2.
[52] First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(i).
[53] Second Regulations s 7(5)(a) and 7(6) table item 3 column 2.
[54] Explanatory Statement to the Second Regulations p 12, 16 (emphasis added), referring to the definition of 'clean hydrogen' in the COAG Energy Council, *Australia's National Hydrogen Strategy* (2019) p xiv.
[55] See and compare First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(ii) and Second Regulations s 7(5)(c) and 7(6) table item 3 column 2.
[56] Second Regulations s 7(5)(a) and 7(6) table item 4 column 2.
[57] See and compare First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(iii) and Second Regulations s 7(5)(d) and 7(6) table item 4 column 2.
[58] Second Regulations s 7(5)(a) and 7(6) table item 5 column 2.

activities that encourage increases in soil carbon.'[59] This category of financial assistance in the Second Regulations repeats that under the First Regulations for 'soil carbon'.[60]

32 There are also identical facilitative provisions appearing in the Second Regulations in s 7(1)(b) to (d),[61] although certain limits or oversight mechanisms are introduced in the Second Regulations including a precondition to the grants of financial assistance in this category that they reasonably be believed to 'be of use in achieving' specified goals, such as 'reducing the mean cost of manufacturing low emissions … steel in Australia to below … $900 per tonne'.[62] The Second Regulations also introduce, in respect of this category of financial assistance, an advice mechanism to the Minister,[63] a reporting mechanism to the Minister,[64] and a reporting obligation on the Minster.[65]

33 In relation to the apparent similarities between the First and Second Regulations, the Explanatory Statement to the Second Regulations asserted:

> These Regulations are different in substance to the disallowed Regulations. Specifically, they have made material changes to the nature and scope of the new functions and programs intended to be supported by ARENA, as well as changing aspects of the context in which they will be deployed and reported on.[66]

34 As to the issue of similarity between the First and Second Regulations, the Senate Standing Committee for the Scrutiny of Delegated Legislation reported on 11 August 2021 to the following effect:

> It is unclear to the committee whether the second ARENA instrument may be considered to be the 'same in substance' as the first ARENA instrument and therefore invalid. The minister's letter of 3 August 2021 stated that the advice set out in that letter is relevant to both the first and second ARENA instruments, which implies similarity between the instruments.[67]

35 On 3 August 2021, the Senate debated a motion to disallow the Second Regulations, which motion was not passed. Further motions to disallow are currently before both the House of Representatives and the Senate.

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[59] Explanatory Statement to the Second Regulations p 16 (emphasis added).
[60] See and compare First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(v) and Second Regulations s 7(5)(d) and 7(6) table item 5 column 2.
[61] These facilitative provisions correspond to First Regulations sched 1 item 6(b) to (d).
[62] Second Regulations s 7(6) table item 1 column 3.
[63] Second Regulations s 7(1)(e).
[64] Second Regulations s 7(1)(f) see also s 7(3).
[65] Second Regulations s 7(4).
[66] Explanatory Statement to the Second Regulations p 2.
[67] Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor No 12 of 2021*, 11 August 2021, [1.34].

Are the Second Regulations beyond the power in s 74 of the Act?

36 There are a number of ways in which regulations may be found to exceed the authority of an empowering provision in the enabling statute.[68] In the present case, it is reasonably arguable that the Second Regulations, or parts of them, are beyond power because:

36.1 They deal with a subject outside the scope of the empowering provision (so-called 'simple ultra vires'); and/or

36.2 They are repugnant to the Act.

37 There may be further arguments that the Second Regulations, or parts of them, are beyond power because they were made for a purpose not permitted by the Act or are unreasonable. However, such bases to challenge the Second Regulations might require specific evidence beyond the fact of the regulations themselves and for that reason we do not consider those potential bases for challenge further here.

38 While it is convenient to consider simple ultra vires and repugnancy individually, these are 'particular applications of the general rule that subordinate legislation, to be valid, must be shown to be within the powers conferred by the statute'.[69]

Simple ultra vires

39 In *Morton v Union SS Co of New Zealand Ltd*, the High Court said:

> Regulations may be adopted for the more effective administration of the provisions actually contained in the Act, but not regulations which vary or depart from the positive provisions made by the Act or regulations which go outside the field of operation which the Act marks out for itself.[70]

40 To similar effect, in *Shanahan v Scott*, four members of the High Court said:

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[68] See the seven bases of challenge identified in Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (5th ed, 2017) [12.9]. See also the six bases of challenge identified in Perry Herzfeld and Thomas Prince, *Interpretation* (2nd ed, 2020) [13.40]. Note the controversy discussed at [13.270] as to whether disproportionality is a separate basis of challenge.

[69] *Mixnam's Properties Ltd v Chertsey Urban District Council* [1964] 1 QB 214, 237–8 (Diplock LJ) quoted in *Minister for Primary Industries and Energy v Austral Fisheries Pty Ltd* [1993] FCA 46; (1993) 40 FCR 381, 382 (Lockhart J).

[70] *Morton v Union SS Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402, 410 (the Court, emphasis added).

> … such a power[71] does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provisions. But such a power will not support attempts to widen the purposes of the Act, to add new or different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends.[72]

41 From *Morton* and *Shanahan*, it is possible to derive two distinct limits on regulation making powers:

41.1 Enabling provisions will not authorise regulations which 'widen the purposes' or 'extend the scope' of the enabling Act;[73]

41.2 Enabling provisions will not authorise regulations which 'vary' the means by which the Act pursues its purposes.[74]

42 The latter limit is better conceived of as a species of repugnancy, rather than a description of simple ultra vires, so only the former will be considered here (but see below at [67]–[74] as to repugnancy).[75]

43 Before considering whether the Second Regulations are beyond the power afforded by s 74 of the Act it is worth noting the distinction between general and specific enabling provisions. General enabling provisions, such as that in s 74(b) of the Act, empower regulations to prescribe matters 'necessary', 'convenient' or 'expedient' for the carrying out or giving effect to of the enabling statute. Specific enabling provisions, such as that in s 74(a) of the Act, empower regulations to prescribe specific matters. Here, the specific enabling provision in s 74(a) empowers regulations to prescribe 'other functions' for the ARENA, as that is a specific matter adverted to in s 8(f) of the Act.

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[71] The enabling provision under consideration in that case – s 43(1) of the *Marketing of Primary Products Act 1935* (Vic) – contained both a general and specific authority. See the excerpt of the provision in the headnote at *Shanahan v Scott* [1957] HCA 4; (1957) 96 CLR 245, 245. As to the, sometimes overstated, distinction between general and specific enabling provisions see below at [43]–[44].

[72] *Shanahan v Scott* [1957] HCA 4; (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb and Fullagar JJ, emphasis added).

[73] *Shanahan v Scott* [1957] HCA 4; (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb and Fullagar JJ). See also *Carbines v Powell* [1925] HCA 16; (1925) 36 CLR 88, 91 (Isaacs J) applied in *Willocks v Anderson* [1971] HCA 28; (1971) 124 CLR 293, 299 (the Court).

[74] *Shanahan v Scott* [1957] HCA 4; (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb and Fullagar JJ).

[75] The distinction between simple ultra vires and repugnancy is not always clear, and some discussions of repugnancy deploy authorities and expressions that are better understood to relate to simple ultra vires. See, eg, *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46; (2012) 251 CLR 1, [54] (French CJ).

44 It has been suggested[76] that specific enabling provisions – because they are unqualified by the language of 'necessary', 'convenient' or 'expedient' – are not subject to the same limits as general enabling provisions. That suggestion is, with respect, misguided. While the scope of an enabling provision will always require consideration of its text, the fact that the text of a specific enabling provision does not include express limits will rarely be decisive. That is because specific enabling provisions will contain *implied* limits derived from the scope and subject matter of the Act. So, for example, in *R v Toohey; Ex parte Northern Land Council*, the High Court considered that a power in the *Planning Act 1979* (NT) to 'specif[y] … an area which is to be treated as a town'[77] did not empower a regulation that specified an area well beyond what was then Darwin as a 'town'. That was because the specific power was subject to an implied limit derived from the planning purposes of the enabling statute.[78] Similarly, in *Deing v Tarola*, the Victorian Supreme Court considered that a power in the *Control of Weapons Act 1990* (Vic) to prescribe certain items (the possession of which would be criminal) did not empower a regulation that prescribed a studded item of clothing. That was because the specific power was subject to an implied limit derived from the purpose of the statute to regulate 'weapons'.[79] The reasoning in both of these cases, and others,[80] relied upon the statement of principle in *Shanahan* that enabling provisions generally do not permit regulations to extend the scope or general operation of the statute.[81]

45 We can now turn to whether the specific enabling provision in s 74(a) of the Act,[82] read with the reference to the 'other functions' in s 8(f), permitted the making of the Second Regulations, or whether they were ultra vires for seeking to extend the scope of the Act.

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[76] *R v Goreng-Goreng* [2008] ACTSC 74; (2008) 2 ACTLR 238, [75]–[79] (Refshauge J).
[77] *Planning Act 1979* (NT) quoted in *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170, 175 (Gibbs J).
[78] *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170, 187 (Gibbs CJ).
[79] *Deing v Tarola* [1993] 2 VR 163, 165 (Beach J).
[80] For other cases applying the principles from *Shanahan* to specific enabling provisions see *Australian Maritime Officers' Union and Another v Assistant Minister for Immigration and Border Protection and Another* [2015] FCAFC 45; (2015) 230 FCR 523, [62], [64] (the Court).
[81] *R v Toohey; Ex parte Northern Land Council* [1981] HCA 74; (1981) 151 CLR 170, 187 (Gibbs CJ); *Deing v Tarola* [1993] 2 VR 163, 165 (Beach J).
[82] We note that s 6(1)(e) of the Second Regulations, which obliges the Minister to report to Parliament, was purportedly authorised by s 74(b) of the Act. See Explanatory Statement to the Second Regulations p 10.

46 For the following reasons, we consider that the 'other functions' permitted to be prescribed by s 74(a) read with s 8(f) of the Act do not extend to providing financial assistance to technologies other than renewable energy technologies.

47 *First*, the 'main object' of the Act is to 'improve the competitiveness of renewable energy technologies' and to 'increase the supply of renewable energy in Australia'.[83] The ascertainment of statutory purpose will start with this stated object.[84] The statement of such a 'main object' is not inconsistent with the Act having other, perhaps subsidiary, purposes.[85] However, there is no suggestion in the text or context of the Act that it has a purpose unconnected to renewable energy. Indeed, the text of the Act only ever refers to *renewable* energy, as do both the Second Reading Speech[86] and the Explanatory Memorandum.[87] Thus, stated at the appropriate 'level[] of generality',[88] the purpose of the statute is to 'drive down the costs of renewable energy'[89] and not, more generally, to reduce emissions.

48 *Second*, the means by which Parliament elected to pursue that purpose was the provision of financial assistance to renewable energy technologies (not other technologies). The Explanatory Memorandum stated that the way the Act achieves its main object is 'by providing financial assistance for renewable energy technologies'.[90] It is fair to describe the financial assistance of renewable energy technologies as the central statutory function of the ARENA, and indeed s 8(a)(i) and (ii) were described as the 'main function' in the Explanatory Memorandum.[91] The importance of attending to the *means* and not just the *ends* pursued by the Act is highlighted by *Paull v Munday*, where it was held that a statutorily valid end could not be pursued by regulations prescribing invalid means.[92]

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[83] Section 3 (emphasis added).
[84] *Unions v New South Wales* [2019] HCA 1; (2019) 264 CLR 595, 627 [79] (Gageler J).
[85] The potential complexities relating to statutory purpose are discussed in *Carr v Western Australia* [2007] HCA 47; (2007) 232 CLR 138, [5]–[7] (Gleeson CJ).
[86] See, eg, Second Reading Speech p 11555: 'ARENA will have oversight of around $3.2 billion in existing renewable energy grant funding' (emphasis added).
[87] See, eg, Explanatory Memorandum p 1: 'The Bill provides … long term funding certainty to ARENA and to the renewable energy industry' (emphasis added).
[88] *Victims Compensation Fund v Brown* [2003] HCA 54; (2003) 77 ALJR 1797, [33] (Heydon J, McHugh ACJ, Gummow, Kirby and Hayne JJ agreeing).
[89] Second Reading Speech p 11555.
[90] Explanatory Memorandum p 3.
[91] Explanatory Memorandum p 4.
[92] *Paull v Munday* (1976) 9 ALR 245, 251 (Gibbs J): 'A power to do one thing cannot be validly exercised by doing something different even if the effect of what is done is the same as that which would have resulted from doing what was permitted.'

49 *Third*, textually, the specific provision of a function relating to financial assistance in s 8(a), and the express limitation of that function to renewable energy technologies, conveys an intention that the 'other functions' permitted to be prescribed by s 74(a) read with s 8(f) do not extend to 'financial assistance' unconnected to renewable energy technologies. If Parliament had intended to empower the Executive to prescribe other categories of financial assistance, one would have expected to see a further sub-paragraph to s 8(a) to the following effect: 'to provide financial assistance for … other technologies prescribed by the regulations'. The absence of such a provision simply confirms that Parliament envisaged that the ARENA would *only* provide financial assistance for renewable technologies.

50 *Fourth*, it is clear from the text and context that Parliament closely considered the ambit of technologies that should be eligible for financial assistance,[93] and in doing so settled upon a definition of 'renewable energy technologies' that extended beyond what might ordinarily be thought to fall within that definition, so as to include 'hybrid technologies' and 'technologies … that are related to renewable technologies' (such as 'enabling technologies'). To permit the regulation-making power in s 74(a) to extend the scope of activities that may be eligible beyond 'renewable energy technologies' would be to do a grave injustice to Parliament's careful delimitation of technologies eligible for financial assistance.

51 *Fifth*, each of the paragraphs and sub-paragraphs in s 8(a)–(e) pertain to renewable energy technologies, thus establishing a genus encompassing the different species of function, namely: financial assistance; agreement-making; informational analysis; ministerial advice; and liaising with government. This confirms that 'the field of operation which the Act marks out for'[94] the ARENA was the field of renewable energy technologies, not any and all things that might be thought to assist in lowering emissions.

52 *Sixth*, the conferral of a function on the ARENA relating to technologies other than renewable energy technologies creates three gaps in the coverage of the Act,[95] which indicate that such a conferral was not intended to be available in the exercise of the power in s 74(a). The first gap in coverage arises by reason

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[93] See above at [12]–[13], [17].
[94] *Morton v Union SS Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402, 410 (the Court, emphasis added).
[95] See and compare *State of Queensland v Maryborough Solar Pty Ltd* [2019] QCA 129, [19] (Fraser JA, McMurdo and Boddice JJA agreeing).

of the fact that the ARENA's advising function in s 8(d) is intended to be subject to 'a very limited power of direction'[96] by which the Minister can require the ARENA to provide advice 'relating to renewable energy technologies'.[97] The fact that s 13 refers only to s 8(d) – and not, for example, 'any other matter prescribed by the regulations' – indicates that Parliament did not intend the ARENA to have any advising function beyond that relating to renewable energy technologies. The second gap in coverage arises from the fact that the statutory criteria for eligibility to sit on the ARENA board in s 30(2)(a) only anticipate the desirability of 'experience or knowledge' with respect to one particular type of technology, being 'renewably energy technology'. The extension of the ARENA's functions to other technologies would create an unintended risk that the Board would lack an 'appropriately qualified specialist'[98] on such technologies, which is what Parliament intended to guard against by s 30(2). The third gap in coverage arises from the fact that the mandatory content of the ARENA's annual report in s 70(c)(iii) is tailored to the provision of financial assistance for renewable energy technologies, and would have no work to do where the financial assistance relates to other technologies.

53 *Seventh*, that the Act was focused on fostering renewable energy technologies and not other methods for lowering emissions is confirmed by the fact that, when the Act was passed, Parliament intended *other statutes* to do other important work of incentivising the lowering of emissions more generally, including through other types of technologies. As has been explained above at [17], the Second Reading Speech, made clear that the government of the day's *distinct objective* of lowering of emissions generally (not just through the use of renewable energy technologies) was to be achieved by two *distinct legislative means*: first, 'the introduction of a carbon price to reduce greenhouse gas emissions, by encouraging more efficient use of energy and driving investment in cleaner energy sources';[99] and, second, the creation of the 'Clean Energy Finance Corporation … [to] invest in the commercialisation and deployment of renewable energy, energy efficiency and clean energy technologies.'[100] For present purposes it is important to emphasise that, unlike the Parliament's then

[96] Explanatory Memorandum p 5.
[97] The importance of this aspect of the statutory scheme is underscored by the fact that directions under s 13 are one of the few things that *must* be included in the ARENA's annual report. See section 70(b).
[98] Explanatory Memorandum p 10.
[99] Second Reading Speech p 11555 (emphasis added). The Explanatory Memorandum, at p 10, also anticipated the future passage of 'legislation … establishing the Clean Energy Finance Corporation'.
[100] Second Reading Speech p 11555 (emphasis added).

anticipated carbon price, the Act was not directed to improving energy efficiency more generally, nor did it involve concepts of 'clean' (or 'cleaner') energy. Similarly, unlike the Clean Energy Finance Corporation, the ARENA's mandate does not include 'clean energy technologies'. Rather, the central concern of the Act is *renewable* energy, and the means by which it addresses that concern is by financial assistance to *renewable energy technologies*.

54 *Finally*, to the extent that there is any ambiguity, a narrower reading of what is permitted by s 74(b) 'is further reinforced in our view by consideration of the relationship between the Executive and Legislative branches of government'.[101]

55 In light of our conclusion, for the above enumerated reasons, that the 'other functions' permitted to be prescribed by s 74(a) read with s 8(f) of the Act do not extend to providing financial assistance to technologies other than renewable energy technologies, it is now convenient to offer our views as to the validity of the ten financial assistance functions purported to be conferred upon the ARENA by s 6(1)(a)(i)–(v) and 7(1)(a) of the Second Regulations.

56 Section 6(1)(a)(i) Freight Efficiency Assistance Grants: In the definition of this category of financial assistance, three[102] of the five targets do not include any necessary connection to renewable energy generally, nor to renewable energy technologies specifically. These provisions purport to extend the scope of the Act to the fostering of non-renewable means of achieving 'energy productivity', 'fuel efficiency' and/or 'energy efficiency'. For the reasons explained above at [46]–[54], these provisions would be **invalid** for being beyond the power conferred by s 74 unless they could be read down as limited to authorising financial assistance for *renewable* energy technologies. The remaining two[103] targets of financial assistance in this definition necessarily entail a connection to renewable energy. Although these targets do not include reference to 'renewable energy *technologies*', these provisions would be **valid** as being

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[101] See and compare *Australian Maritime Officers' Union and Another v Assistant Minister for Immigration and Border Protection and Another* [2015] FCAFC 45; (2015) 230 FCR 523, [74] (the Court) where a power to adjust a particular scheme was held not to permit regulations that would have radically recalibrated it.

[102] Second Regulations s 6(7) definition of 'Freight Efficiency Assistance Grants' para (a)(i), (b) and (c)(i).

[103] Second Regulations s 6(7) definition of 'Freight Efficiency Assistance Grants' para (a)(ii) and (c)(ii).

within the power conferred by s 74 insofar as they could be read to be limited to financial assistance related to renewable energy technologies.[104]

57 Section 6(1)(a)(ii) Freight Energy Productivity Trial Program financial assistance: The definition of this category of financial assistance makes clear that it is limited to projects that 'involve the use of renewable energy'.[105] Although the definition of this category of financial assistance does not include reference to 'renewable energy *technologies*', these provisions would be **valid** as being within the power conferred by s 74 insofar as they could be read to be limited to financial assistance related to renewable energy technologies.

58 Section 6(1)(a)(iii) Future Fuels Fund financial assistance: In the definition of this category of financial assistance, two[106] of the three targets do not include any necessary connection to renewable energy generally, nor to renewable energy technologies specifically. These provisions purport to extend the scope of the Act to the fostering of non-renewable means of powering 'electric vehicles' and 'vehicles powered by clean hydrogen'. For the reasons explained above at [46]–[54], these provisions would be **invalid** for being beyond the power conferred by s 74 unless they could be read down as limited to authorising financial assistance for *renewable* energy technologies. The remaining one[107] target of financial assistance in this definition necessarily entails a connection to renewable energy. Although this target does not include reference to 'renewable energy *technologies*', this provision would be **valid** as being within the power conferred by s 74 insofar as it could be read to be limited to financial assistance related to renewable energy technologies.[108]

59 Section 6(1)(a)(iv) Industrial Energy Transformation Studies program financial assistance: The definition of this category of financial assistance does not include any necessary connection to renewable energy generally, nor to renewable energy technologies specifically. This provision purports to extend the scope of the Act to the fostering of non-renewable 'energy efficiency

[104] For example, s 6(1)(a)(i) might validly confer a function on the ARENA to provide financial assistance for: renewable energy technologies that increase 'the proportion of energy in the road transport sector that is renewable energy'; and the 'providing of information to the road transport sector about … using renewable energy [technologies] in heavy freight vehicle fleets'.
[105] Second Regulations s 6(7) definition of 'Freight Energy Productivity Trial Program financial assistance' para (b).
[106] Second Regulations s 6(7) definition of 'Future Fuels Fund financial assistance' para (a) and (c).
[107] Second Regulations s 6(7) definition of 'Future Fuels Fund financial assistance' para (b).
[108] For example, s 6(1)(a)(i) might validly confer a function on the ARENA to provide financial assistance for renewable energy technologies that are intended to reduce barriers to the on-road use of vehicles powered by biofuels.

technologies'. For the reasons explained above at [46]–[54], this provision would be **invalid** for being beyond the power conferred by s 74 unless it could be read down as limited to authorising financial assistance for *renewable* energy technologies 'relating to energy efficiency'.

60 Section 6(1)(a)(v) Regional Australia Microgrid Pilots Program Financial assistance: The definition of this category of financial assistance makes clear that it is limited to projects that relate to the use of 'renewable energy microgrids'.[109] Given that such microgrids would fall within the Act's definition of 'renewable energy technologies', this provision would be **valid** as being within the power conferred by s 74.

61 Section 7(1)(a), (5)(a) and (6) priority aluminium steel technologies financial assistance: This category of financial assistance does not include any necessary connection to renewable energy generally, nor to renewable energy technologies specifically. This provision purports to extend the scope of the Act to the fostering of non-renewable 'technologies relating to manufacturing low emissions aluminium or steel' (including 'using … fossil fuels'[110]). For the reasons explained above at [46]–[54], this provision would be **invalid** for being beyond the power conferred by s 74 unless it could be read down as limited to authorising financial assistance for *renewable* energy technologies 'relating to manufacturing … aluminium or steel'.

62 Section 7(1)(a), (5)(b) and (6) priority carbon capture and storage technologies financial assistance: This category of financial assistance does not include any necessary connection to renewable energy generally, nor to renewable energy technologies specifically. This provision purports to extend the scope of the Act to the fostering of non-renewable 'technologies relating to carbon capture and storage'. For the reasons explained above at [46]–[54], this provision would be **invalid** for being beyond the power conferred by s 74 unless it could be read down as limited to authorising financial assistance for *renewable* energy technologies 'relating to carbon capture and storage'.

63 Section 7(1)(a), (5)(c) and (6) priority clean hydrogen technologies financial assistance: This category of financial assistance does not include any necessary connection to renewable energy generally, nor to renewable energy technologies specifically. This provision purports to extend the scope of the Act

[109] Second Regulations s 6(7) definition of 'Regional Australia Microgrid Program financial assistance'.
[110] Explanatory Statement to the Second Regulations p 15 (emphasis added).

to the fostering of non-renewable 'technologies relating to clean hydrogen' (including 'using … fossil fuels'[111]). For the reasons explained above at [46]–[54], this provision would be **invalid** for being beyond the power conferred by s 74 unless it could be read down as limited to authorising financial assistance for *renewable* technologies 'relating to clean hydrogen'.

64 Section 7(1)(a), (5)(d) and (6) priority energy storage technologies financial assistance: This category of financial assistance does not include any necessary connection to renewable energy generally, nor to renewable energy technologies specifically. This provision purports to extend the scope of the Act to the fostering of non-renewable 'technologies relating to energy storage'. For the reasons explained above at [46]–[54], this provision would be **invalid** for being beyond the power conferred by s 74 unless it could be read down as limited to authorising financial assistance for *renewable* energy technologies 'relating to energy storage'.

65 Section 7(1)(a), 5(e) and (6) priority soil carbon technologies financial assistance: This category of financial assistance does not include any necessary connection to renewable energy generally, nor to renewable energy technologies specifically. This provision purports to extend the scope of the Act to the fostering of non-renewable 'technologies relating to soil carbon'. For the reasons explained above at [46]–[54], this provision would be **invalid** for being beyond the power conferred by s 74 unless it could be read down as limited to authorising financial assistance for *renewable* technologies 'relating to soil carbon'.

66 To recapitulate, we consider that the vast majority of the financial assistance functions purported to be conferred by s 6(1)(a) and 7(1)(a) are beyond the power conferred by s 74 of the Act on a simple ultra vires analysis. We do not consider it necessary to offer a discrete opinion as to the validity of the provisions outside of s 6(1)(a) and 7(1)(a), as the remainder of the Second Regulations simply implement and facilitate the functions purportedly conferred in those two paragraphs.

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[111] Explanatory Statement to the Second Regulations p 12, 16 (emphasis added), referring to the definition of 'clean hydrogen' in the COAG Energy Council, *Australia's National Hydrogen Strategy* (2019) p xiv.

Repugnancy

67 Regulations will be invalid as beyond a regulation-making power[112] where they are repugnant or inconsistent with the empowering Act or another law.[113] 'Repugnancy or inconsistency may be manifested in various ways'.[114] For present purposes, it is necessary to note only two species of repugnancy.

68 *First*, where a 'statute deals completely and thus exclusively with the subject matter of the regulation in question with the consequence that the regulation detracts from or impairs that operation of the statute', the regulation will be invalid for repugnancy.[115] An 'important consideration'[116] in this analysis will be the 'detail' with which the statute deals with a particular subject matter.[117] This is because a regulation may 'fill[] out' a statutory scheme – indeed, the filling out function is sometimes considered the essence of regulations[118] – but 'not change its nature or way of operating'.[119]

69 In the present case, the Act can be seen 'to cover "completely and exclusively" the criteria for the'[120] eligibility of technologies to receive financial assistance – that is, the technologies must be 'renewable energy technologies' as inclusively defined in s 4(1) of the Act. It is to be recalled that at the time the Act was enacted, it was well known that there were technologies other than renewable energy technologies – such as 'clean energy technologies'[121] – for

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[112] The analysis is different if a statute explicitly authorises the making of regulations to amend primary legislation – so called 'Henry VIII clauses'. See, generally, *ADCO Constructions Pty Ltd v Goudappel* [2014] HCA 18; (2014) 254 CLR 1, [2], [34] (French CJ, Crennan, Kiefel and Keane JJ), [61] (Gageler J). Such clauses are not considered further in this advice as nothing in the Act could be interpreted as a Henry VIII clause.
[113] *Federal Capital Commission v Laristan Building and Investment Co Pty Ltd* [1929] HCA 36; (1929) 42 CLR 582, 588 (Dixon J).
[114] *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46; (2012) 251 CLR 1, [54] (French CJ).
[115] *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46; (2012) 251 CLR 1, [134] (Gummow J).
[116] *Morton v Union SS Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402, 410 (the Court), cited with approval in *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46; (2012) 251 CLR 1, [54] (French CJ). See also *State of Queensland v Maryborough Solar Pty Ltd* [2019] QCA 129, [17] (Fraser JA, McMurdo and Boddice JJA agreeing).
[117] *Morton v Union SS Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402, 410 (the Court).
[118] Perry Herzfeld and Thomas Prince, *Interpretation* (2nd ed, 2020) [13.30].
[119] *R v Goreng-Goreng* [2008] ACTSC 74; (2008) 2 ACTLR 238, [74] (Refshauge J).
[120] *Plaintiff M47/2012 v Director-General of Security* [2012] HCA 46; (2012) 251 CLR 1, [136] (Gummow J), citing *Cullis v Ahern* [1914] HCA 59; (1914) 18 CLR 540, 543; *Clyde Engineering Co Ltd v Cowburn* [1926] HCA 6; (1926) 37 CLR 466, 489–90; Mark Leeming, *Resolving Conflicts of Laws* (2011) [3.8].
[121] Second Reading Speech p 11555 (emphasis added).

reducing emissions. 'In this statutory context, the fact that no such' technologies were provided for in the Act 'necessarily implies a legislative intention' that those technologies are not eligible for financial assistance under the Act.[122]

70 To adopt and adapt what was said by the High Court in *Morton v Union SS Co of New Zealand Ltd*,[123] the Act has given 'specific attention to the question' of which technologies should be eligible to receive the ARENA's financial assistance and 'it has made specific provision' that the eligibility should be limited to renewable energy technologies. The Second Regulations effect 'a distinct and independent addition' of further technologies – primarily, so called 'low emissions technologies' – to the technologies for 'which the legislature has provided'. It 'marks a new step in policy'[124] and therefore should have been included in primary legislation.

71 To the extent that the Second Regulations purport to dramatically 'depart from'[125] or 'vary'[126] that eligibility touchstone – most obviously, by changing the focus to so-called 'low emissions technologies' – they would be **invalid** for repugnancy.[127] The specific provisions that would be invalid on this analysis would be the same as those identified above at [56]–[65].

72 *Second*, where a regulation would 'render[] otiose', 'eviscerate' or 'denud[e] … of any content' provisions of primary legislation that regulation will be invalid for repugnancy.[128]

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[122] See and compare *Colquhoun v Capitol Radiology Pty Ltd* [2013] VSCA 58; (2013) 39 VR 296, [42]–[43] (the Court).
[123] *Morton v Union SS Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402, 412 (the Court).
[124] *Morton v Union SS Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402, 412 (the Court). See also *R v Commissioner of Patents; Ex Parte Martin* (1953) 89 CLR 381, 407 (Fullagar J, Webb, Kitto and Taylor JJ agreeing); *State of Queensland v Maryborough Solar Pty Ltd* [2019] QCA 129, [17] (Fraser JA, McMurdo and Boddice JJA agreeing).
[125] *Morton v Union SS Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402, 410 (the Court, emphasis added); *Shanahan v Scott* [1957] HCA 4; (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb and Fullagar JJ, emphasis added).
[126] *Morton v Union SS Co of New Zealand Ltd* [1951] HCA 42; (1951) 83 CLR 402, 410 (the Court, emphasis added); *Shanahan v Scott* [1957] HCA 4; (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb and Fullagar JJ, emphasis added).
[127] See and compare *Australian Maritime Officers' Union and Another v Assistant Minister for Immigration and Border Protection and Another* [2015] FCAFC 45; (2015) 230 FCR 523, [67]–[68] (the Court) where a power to adjust a particular scheme was held not to permit regulations that would have radically recalibrated it.
[128] *Australian Maritime Officers' Union and Another v Assistant Minister for Immigration and Border Protection and Another* [2015] FCAFC 45; (2015) 230 FCR 523, [67]–[68] (the Court).

73 In the present case, we consider that a number of provisions of the Act are directed towards maintaining the independence of the ARENA and, relatedly, its autonomy in determining where its financial assistance is directed. At the most fundamental level, the criteria for the provision of financial assistance is limited only by 'merit'.[129] At the level of individual projects, the Minister may 'request' consideration of financial assistance for specified projects but the ARENA is obliged only to 'consider' such requests.[130] At the higher level of general strategy, the ARENA is empowered (and required) to develop a 'general funding strategy', which must 'state the ARENA's principal objectives and priorities for the provision of financial assistance under this Act during the financial year'.[131] While the Minister ultimately holds the power of approval of the general funding strategy,[132] this power does not entail variation (that, again, being solely the province of the ARENA).[133] Similar provisions empower (and require) the ARENA to make guidelines and workplans, with the Minister having even less involvement in these.[134] The extrinsic materials confirm the importance of the ARENA's independence, with the opening sentences of the Explanatory Memorandum emphasising that 'ARENA will <u>independently</u> administer Australian Government funding' and stating that the ARENA's governance structures 'balance the advantages of <u>independent</u> … management … with efficient, appropriate and accountable use of Australian Government funds'. [135] The Second Reading Speech also emphasised the 'appropriate balance between ARENA's <u>independence</u> and proper accountability'.[136]

74 The Second Regulations deprive the ARENA of its independence and autonomy to a significant degree, by enlisting the ARENA in the government's program of funding not *renewable* energy technologies, but *low emissions* technologies. The Explanatory Statement to the Second Regulations is explicit in acknowledging this objective.[137] Similarly, in government publications referred

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[129] Section 9(b). See also the reference to 'effective[ness]' in s 9(a).
[130] Section 11.
[131] Section 19(3)(c).
[132] Section 20.
[133] Section 22.
[134] Sections 24–28.
[135] Explanatory Memorandum p 1 (emphasis added).
[136] Second Reading Speech p 1157 (emphasis added). See also House of Representatives, *Parliamentary Debates*, 12 October 2011, p 1158 (Ferguson): 'As described when introducing the ARENA Bill, ARENA is to be an <u>independent</u> Commonwealth Authorities and Companies Act 1997 authority' (emphasis added).
[137] Explanatory Statement to the Second Regulations, p 2. Stating the aim of allowing the ARENA to 'play a fuller role in the delivery of the Government's … approach to the reduction of greenhouse gas emissions'.

to and endorsed in the Explanatory Statement, the Second Regulations are explained 'to align' the ARENA's investments with government priorities.[138] Given the detail with which s 6(1)(a) and 7(1)(a) (read with their definitional provisions) of the Second Regulations prescribe the targets of the ARENA's financial assistance, we consider that those provisions may be **invalid** in their entirety for repugnancy with the aspects of the statutory scheme establishing the ARENA's independence and autonomy in its decisions to provide financial assistance.

Do the Second Regulations contravene s 48 of the *Legislation Act*?

75 Section 48 of the *Legislation Act* provides:

> **Remaking disallowed legislative instruments**
>
> (1) A legislative instrument or a provision of a legislative instrument (the ***later instrument or provision***) that is the same in substance as a legislative instrument or a provision of a legislative instrument (the ***disallowed instrument or provision***) that has been disallowed (or is taken to have been disallowed) under subsection 42(1) or (2) must not be made within 6 months after the day of disallowance.
>
> (2) However, the later instrument or provision may be made within that time if the ***relevant House of the Parliament*** approves, by resolution, the making of a legislative instrument or provision the same in substance as the disallowed instrument or provision.
>
> (3) For the purposes of subsection (2), the relevant House of Parliament is the House of Parliament in which notice was given of the motion to disallow the disallowed instrument or provision.
>
> (4) A legislative instrument or provision made in contravention of this section has no effect. [underlined emphasis added]

76 Three matters may be observed at the outset. First, the use of the words 'or a provision' means that the s 48 can render an individual provision ineffective while leaving the remainder of a legislative instrument intact. Secondly, the use of the words 'in substance' mean that provisions which appear *formally different* from those in a recently disallowed instrument may nevertheless fall foul of s 48. Thirdly, the evident purpose of s 48 is to prevent Parliament from having to revisit matters with which it has already dealt, and to prevent the Executive from achieving its goals by repeatedly regulating in the face of disallowance so as to 'keep the regulations in force except for brief periods [between disallowance

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[138] *Technology Investment Roadmap: First Low Emissions Technology Statement* p 33. This document is referred to at various places in the Explanatory Statement to the Second Regulations: see, eg, p 1, 2, 3, 5. See also Grant King, *Examining Additional Sources of Low Cost Abatement: Expert Panel Report* (**King Review**) p 86. The King Review is referred to in the Explanatory Statement to the Second Regulations at p 5.

and the remaking of the regulations], despite the Senate's disapproval of their content'.[139]

77 Consistently with those observations, regulations which differ significantly in form from previously disallowed regulations have nevertheless been held to offend s 48 on the basis that they are 'the same in substance'. In *Victorian Chamber of Manufacturers v Commonwealth*, Latham CJ explained:

> 'the section prevents the re-enactment by action of the Governor General, within six months of disallowance, of any regulation which is substantially the same as the disallowed regulation in the sense that it produces substantially, that is, in large measure, though not in all details, the same effect as the disallowed regulation. The adoption of this view prevents the result that a variation in the new regulation which is real, but quite immaterial in relation to the substantial operation of the legislation, would exclude the application of s 49 [the predecessor to s 48 of the *Legislation Act*].'[140]

78 Latham CJ's remarks have since been applied with the effect that a regulation which has 'quite different legal consequences' to an earlier disallowed regulation will not offend s 48.[141] It should be acknowledged that a different view has been advanced that s 48 'should be construed as requiring that, in order that a legislative instrument be invalid, it be, in substance or legal effect, identical to the previously disallowed measure'.[142] We do not consider that view further here, as it has been subject to persuasive criticism[143] and we consider it to be plainly wrong.

79 In light of the understanding of s 48 in *Victorian Chamber of Manufacturers*, it is now possible to explain our views as to the specific provisions of the Second Regulations that may contravene s 48 (we do not consider the facilitative machinery provisions).

80 Section 6(1)(a)(i) Freight Efficiency Assistance Grants – While this is styled as a category of financial assistance that is entirely new to the Second Regulations,

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[139] Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (5th ed, 2017) [13.34]. See also *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* [1931] HCA 34; (1931) 46 CLR 73, 129.

[140] *Victorian Chamber of Manufacturers v Commonwealth* [1943] HCA 21; (1943) 67 CLR 347, 364 (Latham CJ, emphasis added). See also 389 (McTiernan J), 405–6 (Williams J).

[141] *Maritime Union of Australia v Assistant Minister for Immigration and Border Protection* [2014] FCA 993; (2014) 44 ALD 272, [82] (Burchett J). This issue was not considered on appeal: *Australian Maritime Officers' Union and Another v Assistant Minister for Immigration and Border Protection and Another* [2015] FCAFC 45; (2015) 230 FCR 523.

[142] *Perrett v Attorney-General of the Commonwealth of Australia* [2015] FCA 834; (2015) 232 FCR 467, [28]–[29] (Dowsett J, emphasis added).

[143] See Dennis Pearce and Stephen Argument, *Delegated Legislation in Australia* (5th ed, 2017) [13.35]; Ivan Powell, 'The Concept of the "Same in Substance": What Does the Perrett Judgment Mean for Parliamentary Scrutiny?' (2016) 86.

in fact the sub-categories in paragraphs (a)(i), (b) and (c) of the definition substantially mirror the category of financial assistance in the First Regulations labelled 'Freight Energy Productivity Program financial assistance'. In particular, the sub-category (a)(i) (of which sub-categories (b) and (c) are essentially subsidiaries) in the Second Regulations' definition of 'Freight Efficiency Assistance Grants' reproduces *verbatim* the category of financial assistance that appeared in paragraph (a)(i) of the First Regulations labelled 'Freight Energy Productivity Program financial assistance'. Accordingly, paragraphs (a)(i), (b) and (c) would likely be **ineffective** as a result of s 48 of the *Legislation Act* because they are 'the same in substance' as the analogous provision in the disallowed First Regulations.

81 Section 6(1)(a)(ii) Freight Energy Productivity Trial Program financial assistance – While this category of financial assistance employs a similar title to a category in the First Regulations, the parameters of the definition (and thus the projects eligible for financial assistance) have been substantially changed to include only test projects for trucks that 'involve the use of renewable energy'.[144] The change in definition here is sufficiently substantial that this provision would likely be **effective**, and not infringe s 48 of the *Legislation Act*, because it is not 'the same in substance' as the analogous provision in the disallowed First Regulations.

82 Section 6(1)(a)(iii) Future Fuels financial assistance – In the First Regulations, this category of financial assistance was directed to the use of 'clean energy technologies for vehicles'.[145] In the Second Regulations it is more specifically directed to three types of vehicles: (a) electric vehicles; (b) vehicles powered by biofuels; and (c) vehicles powered by clean hydrogen.[146] Notwithstanding this change, the substantial degree of co-extensivity between this mode of financial assistance in the First and Second Regulations is evidenced by the 'Example' at the foot of the definition, which remains largely unchanged between the First and Second Regulations. On balance, this provision would likely be **ineffective** as a result of s 48 of the *Legislation Act* because it is 'the same in substance' as the analogous provision in the disallowed First Regulations.

83 Section 6(1)(a)(iv) Industrial Energy Transformation Studies Program financial assistance – This category of financial assistance was, in the First Regulations,

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[144] Second Regulations s 6(7) definition of 'Freight Energy Productivity Trial Program Financial assistance'.
[145] First Regulations sched 1, item 4, definition of 'Future Fuels Fund financial assistance'.
[146] Second Regulations s 6(7) definition of 'Future Fuels financial assistance'.

directed to studies for improving business investment in 'clean energy technologies', [147] which technologies were defined as 'energy efficiency technologies', 'low-emission technologies' and 'renewable energy technologies'. [148] In the Second Regulations, this category of financial assistance is narrowed to 'energy efficiency technologies', [149] but entirely contained within the previously disallowed category of financial assistance. On balance, this provision would likely be **ineffective** as a result of s 48 of the *Legislation Act* because it is 'the same in substance' as the analogous provision in the disallowed First Regulations.

84 Section 6(1)(a)(v) Regional Australia Microgrid Pilots Program financial assistance – This category of financial assistance was, in the First Regulations, directed at microgrids that use 'renewable energy *or low-emission technologies*'.[150] In the Second Regulations this category of financial assistance is narrowed to be directed at 'renewable energy microgrids',[151] albeit that this narrowing leaves the new category of financial assistance entirely subsumed within the disallowed category of financial assistance. On balance, this provision would likely be **ineffective** as a result of s 48 of the *Legislation Act* because it is 'the same in substance' as the analogous provision in the disallowed First Regulations.

85 Section 7(1)(a), (5)(a) and (6) priority aluminium and steel technologies financial assistance – This category of financial assistance narrows that which appeared in corresponding provision of the First Regulations in that the First Regulations related to the manufacture of 'materials'[152] whereas the Second Regulations are limited to aluminium and steel.[153] It should also be noted that the First Regulations related to manufacturing by 'clean energy technologies' which included 'low-emission technologies' but also included 'energy efficiency technologies'.[154] By contrast, the Second Regulations relate only to

[147] First Regulations sched 1, item 4, definition of 'Industrial Energy Transformation Studies Program financial assistance'.
[148] First Regulations sched 1, item 4, definition of 'clean energy technologies'.
[149] Second Regulations s 6(7) definition of 'Industrial Energy Transformation Studies Program financial assistance'.
[150] First Regulations sched 1, item 4, definition of 'Regional Australia Microgrid Pilots Program financial assistance' (emphasis added).
[151] Second Regulations s 6(7) definition of 'Regional Australia Microgrid Program financial assistance'.
[152] First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(iv).
[153] Second Regulations s 7(5)(a) and 7(6) table item 1 column 2.
[154] First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(iv) read with definition of 'clean energy technologies'.

'technologies relating to manufacturing low emissions'.[155] However this change appears to be one of form rather than substance. This provision would likely be **ineffective** as a result of s 48 of the *Legislation Act* because it is 'the same in substance' as the analogous provision in the disallowed First Regulations.

86 Section 7(1)(a), (5)(b) and (6) priority carbon capture and storage technologies financial assistance – This provision in the Second Regulations repeats that under the First Regulations for 'carbon capture and storage',[156] but removes the alternative funding category of 'carbon capture and utilisation' that had appeared in the First Regulations.[157] Both regulations define 'carbon capture and storage' with reference to the *National Greenhouse and Energy Reporting Act 2007* (Cth). This provision would likely be **ineffective** as a result of s 48 of the *Legislation Act* because it is 'the same in substance' as the analogous provision in the disallowed First Regulations.

87 Section 7(1)(a), (5)(c) and (6) priority clean hydrogen technologies financial assistance – This provision in the Second Regulations repeats that under the First Regulations for 'clean hydrogen'[158] without any alteration. This provision would likely be **ineffective** as a result of s 48 of the *Legislation Act* because it is 'the same in substance' as the analogous provision in the disallowed First Regulations.

88 Section 7(1)(a), (5)(d) and (6) priority energy storage technologies financial assistance – This category of financial assistance in the Second Regulations repeats that under the First Regulations for 'energy storage'[159] without any alteration. This provision would likely be **ineffective** as a result of s 48 of the *Legislation Act* because it is 'the same in substance' as the analogous provision in the disallowed First Regulations.

89 Section 7(1)(a), 5(e) and (6) priority soil carbon technologies financial assistance – This category of financial assistance in the Second Regulations

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[155] Second Regulations s 7(5)(a) and 7(6) table item 1 column 2.
[156] See and compare First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(i) and Second Regulations s 7(5)(b) and 7(6) table item 2 column 2.
[157] First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(i).
[158] See and compare First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(ii) and Second Regulations s 7(5)(c) and 7(6) table item 3 column 2.
[159] See and compare First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(iii) and Second Regulations s 7(5)(d) and 7(6) table item 4 column 2.

repeats that under the First Regulations for 'soil carbon'[160] without alteration. This provision would likely be **ineffective** as a result of s 48 of the *Legislation Act* because it is 'the same in substance' as the analogous provision in the disallowed First Regulations.

90 To recapitulate, there are a number of similar, and some identical, features as between the categories of financial assistance envisaged by item 6(a) of schedule 1 to the First Regulations and s 6(1)(a) and 7(1)(a) of the Second Regulations. While there are differences between the two regulations, we consider significant provisions of the Second Regulations to contravene s 48 of the *Legislation Act* because they are 'the same in substance' as provisions in the First Regulations.

Conclusion

91 For the above reasons, we advise in the terms set out at [4] above. We would be happy to discuss any questions arising from this advice.

Fiona McLeod AO SC

Julian R Murphy

DATE: 30 September 2021

[160] See and compare First Regulations sched 1 item 4 definition of 'Technology Investment Roadmap financial assistance' (a)(v) and Second Regulations s 7(5)(d) and 7(6) table item 5 column 2.