The Hon Andrew Broad MP

Assistant Minister to the Deputy Prime Minister
Federal Member for Mallee

Ref: MS18-003156

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

Vehicle Standards (Australian Design Rule 23/03, 42/05, 90/00, 91/00, 93/00, 94/00, 95/00 and 96/00)

I refer to the letter of 29 November 2018 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) regarding Vehicle Standards Determinations (Australian Design Rules (ADRs) 23/03, 42/05, 90/00, 91/00, 93/00, 94/00, 95/00 and 96/00).

The Committee has requested further information from me about scrutiny issues identified in relation to these Determinations. I would like to provide the following advice to the Committee in response to these issues raised in paragraph 1.27 of the Delegated Legislation Monitor No. 14 of 2018.

I appreciate the Committee's concerns about access for documents incorporated by reference into legislative instruments. In this respect, the majority of the ADRs listed above offer alternative pathways to comply with the ADRs, which do not require the use of the incorporated documents or standards. For example, ADR 90/00 has two alternatives for compliance, including Paragraph 5 which provides an option that does not require the use of incorporated documents or external standards. Similar arrangements apply to ADRs 91/00, 92/00, 93/00, 94/00 and 95/00.

You would be aware that the Committee that the Council of Australian Governments (COAG) Industry and Skills Council is currently exploring how the accessibility and pricing of standards could be improved, particularly those referenced in legislation. This work is also dependent upon the publishing and licensing agreement Standards Australia has with SAI Global to distribute standards. The private commercial agreement is currently being negotiated between the two parties to determine if it will continue beyond 2018.

In addition, the Commonwealth Standards and Conformance Advisory Group (CSCAG) hosted by the Department of Industry, Innovation and Science is considering longer term solutions for public access to incorporated standards free of charge and is expecting to reach a solution in 2019.

In the short term, SAI Global has advised CSCAG that online viewing of Australian Standards for non-commercial use through Australian libraries is now available. Where this does not provide for access, the Department of Infrastructure, Regional Development and Cities will consider options for making the listed incorporated documents available for viewing free of charge. However, given that the incorporated documents are highly technical standards, which specify requirements, equipment and recommendations for testing new road vehicles, it is expected that there would be little demand for such a service. Generally, manufacturers and vehicle test facilities have for a number of years accessed these identical standards as part of their professional library.

With COAG and/or CSCAG working on resolving this issue in the longer term through a whole of government approach, I hope that the above arrangements will satisfy the Committee's concerns, without changes being necessary to the Explanatory Statements for these particular ADRs.

I trust this information supports the Committee in finalising its consideration of the Determinations.

Yours sincerely

Andrew Broad

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-025347

5 DEC 2018

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to your letter of 15 November 2018 from Ms Anita Coles, Committee Secretary on behalf of the Standing Committee on Regulations and Ordinances (the Committee), requesting additional information as referred to in the Committee's Delegated Legislation Monitor 13 of 2018 about the *National Health (Listing of Pharmaceutical Benefits) Amendment Instrument 2018 (No. 9) (PB 74 of 2018)* (the Instrument).

The Committee has requested advice specifically about whether the current edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) can be accessed free-of-charge through my Department, or through public libraries.

The DSM-5 is a publication purchased by my Department and is for use by internal staff members only. This publication is the intellectual property of the publisher and access to this publication is therefore restricted.

My Department has confirmed that the National Library of Australia and the respective State Libraries of Victoria, New South Wales and South Australia have a copy of the DSM-5 in their collection.

You may be interested to know that the National Library's Trove online system (publicly available at trove.nla.gov.au) allows any person to identify other public libraries in Australia which provide DSM-5 in their collection.

In addition, I also understand that this edition is publicly available in Australian universities and tertiary colleges.

I trust that this information is of assistance.

Yours sincerely

Greg Hunt

The Hon. David Littleproud MP

Minister for Agriculture and Water Resources
Federal Member for Maranoa

21 DEC 2018

Senator John Williams
CHAIR
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Williams

On your behalf, the Senate Standing Committee on Regulations and Ordinances secretariat has requested an explanation or information about measure Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East) Order 2018 and the Australian Meat and Live-stock Industry (Export of Sheep by Sea to Middle East – Northern Winter) Order 2018.

My department will prepare replacement Explanatory Statements that will address your concerns, in due course.

I thank you for your consideration of these instruments and advice about improving their clarity.

Yours sincerely

DAVID LITTLEPROUD MP

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7630 Email: minister@agriculture.gov.au

THE HON ANGUS TAYLOR MP
MINISTER FOR ENERGY

MC18-028132

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Parliament House
CANBERRA ACT 2600

20 DEC 2018

Dear Chair John

I refer to correspondence of 6 December 2018, from Ms Anita Coles on behalf of the Committee, concerning the Committee's request for information about scrutiny issues identified in the *Delegated Legislation Monitor 15 of 2018* in relation to the Greenhouse and Energy Minimum Standards (Three Phase Cage Induction Motors) Determination 2018 F2018L01572. I appreciate the time the Committee has taken to bring this matter to my attention

I note the Committee's concerns about the copyright notice in the Greenhouse Energy Minimum Standards (GEMS) determination in question, and its potential impact on the ability of commercial users to access and use the determination.

The use of a copyright notice in this determination is necessary in order to reflect the fact that copyright in the International Electrotechnical Commission (IEC) standards referenced in the document is not owned by the Commonwealth, it is vested in the IEC. The IEC is a not-for-profit, quasi-governmental organisation whose funding comes in part from income from sales of IEC standards. The IEC relies on commercial sales through local licensees, such as SAI Global Limited in Australia, in order to continue its important work in relation to the production of harmonised standards.

The Australian Government accepts that commercial users who have ascertained that they are likely to be covered by the determination (which is possible using the readily publicly available aspects of the determination) would be expected to purchase the referenced IEC standards in order to comply with the GEMS Scheme. The Government recognises that it is not ideal that instruments of this kind incorporate material that may lead users to need to purchase additional documents. As the Committee has noted, the COAG Industry and Skills Council Standards Accessibility (ISCA) Working Group continues to work on solutions to ensure greater access to standards.

However, while the ISCA Working Group work is ongoing, I would draw to the Committee's attention that the Government is not aware of any complaints from the regulated community about its ability to comply with the determination, or about the cost of purchasing the standards referenced in the instrument. In making this Determination the Government consulted with stakeholders, including the regulated community, and the New Zealand Energy Efficiency and Conservation Authority. The adoption of the IEC Standard was a response to stakeholder input. The regulated community has consistently indicated it is comfortable with, and supports, this arrangement.

In making this determination, the Government is seeking to balance the need to provide those affected by, or interested in, the determination the ability to ascertain if a product is covered by (or excluded from) the operation of the instrument with the need to protect the legitimate rights of copyright holders to be able to protect their interests in copyright material.

The Government thanks the Committee for its continuing attention to this issue. In the light of the Committee's most recent comments, I will ask the Department of the Environment and Energy to review the copyright notice used in this determination, to ensure that notices used in determinations made in the future are as clear as they can be in relation to permitted use of referenced material.

Thank you for raising this matter with me.

Yours sincerely

ANGUS TAYLOR

The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Leader of The Nationals
Federal Member for Riverina

Ref: MC18-008617

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Parliament House
CANBERRA ACT 2600

21 DEC 2018

John

Dear Senator Williams

Thank you for the Committee's letter of 29 November 2018 regarding instruments listed in the Senate Standing Committee on Regulations and Ordinance's *Delegated Legislation Monitor No. 14 of 2018*, for which I am responsible as Minister for Infrastructure, Transport and Regional Development.

The Committee requested further advice in relation to English Language Proficiency Assessments Exemption 2018 [F2018L01214] and Number of Cabin Attendants (Alliance Airlines) Direction 2018 [F2018L01244] regarding whether decisions by the Civil Aviation Safety Authority (CASA) should not be subject to independent merits review.

CASA has further considered the regulatory scheme for the making of the relevant approvals in light of the Committee's comments and agrees with the Committee's views that decisions would be subject to a merits review by the Administrative Appeals Tribunal (AAT).

CASA has further advised that it has submitted a revised explanatory statement for the English Language Proficiency Assessments Exemption 2018 to reflect this position.

In relation to the Number of Cabin Attendants (Alliance Airlines) Direction 2018 – CASA 66/18, CASA has advised that it has recently changed its practice concerning the form of these directions and will revoke instrument CASA 66/18 and re-make it without a requirement for changes to the operations manual to be approved by CASA.

Thank you for bringing your concerns to my attention and I trust this is of assistance.

Yours sincerely

Michael McCormack

The Hon Michael McCormack MP
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PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Families and Social Services

MC18-009182

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

John

Dear Senator Williams

Thank you for the email of 29 November 2018 from Ms Anita Coles, Committee Secretary, on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee), concerning the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2018 (the Amending Regulations).

The Committee has asked for advice on the following two matters:

- whether information disclosed under new section 22D of the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations) could include personal information; and
- if so, what safeguards are in place to protect the personal privacy of individuals in relation to that information.

My response to the Committee follows below.

The National Rental Affordability Scheme (NRAS) provides an annual incentive payment in relation to a rental property for 10 years if particular conditions are satisfied. These conditions include that the property is rented to a tenant with a low to moderate income and that the rent charged to the tenant is not more than 80 per cent of the market rent.

The information that will be disclosed under the new section 22D of the NRAS Regulations, where the section is used, will include personal information of the tenant of the rental property associated with the transferred NRAS allocation.

To receive an annual financial incentive for an NRAS allocation, under the NRAS Regulations the approved participant must provide a Statement of Compliance to the Department of Social Services in relation to the rental property associated with the allocation. The Statement of Compliance must include information about the tenant's income, demographic information about the tenant and information about the residential tenancy agreement entered into by the tenant.

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When a tenant commences renting a property covered by NRAS, the tenant is provided with a form that explains the need for the approved participant to collect personal information from the tenant for the purposes of NRAS and the need for that information to be disclosed to the Department. Tenants are asked to consent to the collection, use and disclosure of their personal information for NRAS purposes.

Where an NRAS allocation is transferred from one approved participant to another approved participant, the incoming approved participant will be required by the NRAS Regulations to lodge a Statement of Compliance for the rental property associated with the allocation. As part of this process, the incoming approved participant is required to supply information to the department that includes the personal information of the tenant of the rental property.

In the absence of a requirement such as section 22D, the outgoing approved participant could refuse to provide relevant information to the incoming approved participant. Such conduct would undermine the effectiveness of various processes for the transfer of allocations under the NRAS Regulations. If the gaining approved participant does not have the necessary information about the tenant to lodge as part of its Statement of Compliance, it will not receive an incentive for the allocation. This may result in the rental property no longer being rented as part of NRAS, because without the incentive the owner of the rental property is unlikely to continue to rent the property for 80 per cent of the market rent.

Section 22D of the NRAS Regulations limits the type of information that can be covered by a request from the Secretary of the Department to information relevant to the administration of NRAS. The Secretary will only request the outgoing approved participant to provide personal information of a tenant to the incoming approved participant to the extent necessary to enable the incoming approved participant to lodge a complete Statement of Compliance under the NRAS Regulations to demonstrate that the conditions of the allocation have been met.

The Department has amended the form of consent given by tenants of NRAS properties in relation to the collection and use of personal information to cover the possible operation of section 22D of the NRAS Regulations. The Department will also provide advice to approved participants to confirm that their privacy policies provide sufficient coverage of the process for the transfer of NRAS allocations and the operation of section 22D of the NRAS Regulations.

I trust this information addresses the Committee's concerns.

Yours sincerely

Paul Fletcher

16/12/2018

28 JAN 2019

The Hon Stuart Robert MP
Assistant Treasurer

Ref: MS19-000063

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Senator Williams

Thank you for your letter on behalf of the Senate Regulations and Ordinances Committee (the Committee) dated 6 December 2018, drawing my attention to the Committee's comments in Delegated Legislation Monitor 15 of 2018 seeking further advice on the *ASIC Corporations (Amendment) Instrument 2018/752.*

My response in relation to this instrument is at Attachment A.

I hope that this information will assist the Committee's consideration of this instrument.

Yours sincerely

Stuart Robert

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7230

ATTACHMENT A

ASIC Corporations (Amendment) Instrument 2018/752 (the Amending Instrument)

The Committee has requested advice as to when the recommendations of the Financial Systems Inquiry are likely to be implemented by government.

A working group of the Council of Financial Regulators (CoFR) is currently reviewing the broader regulatory parameters for non-cash payment facilities following the recommendations of both the Financial System Inquiry and the Productivity Commission Inquiry into Competition in the Australian Financial System – the latter completed in June 2018. A consultation paper was published by CoFR in September 2018.

The Review is considering the appropriate level of regulation for stored value facilities and thresholds for applying prudential regulation, along with broader issues for improving and clarifying the application of regulatory requirements in this market sector (which includes appropriate parameters for regulation under the financial services licensing regime).

The timeframes for completion of the review and for any subsequent law reform to implement recommendations are uncertain, but the working group is expected to provide recommendations to CoFR during the first half of 2019.

The Committee has requested advice as to why it is considered necessary and appropriate to effectively extend the operation of the exemptions in the ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 until 1 April 2026.

The ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 (the Primary Instrument) is intended to provide certainty to market participants while the policy settings underpinning the regulation of non-cash payment facilities are considered.

ASIC has advised that it is not of the view that the Primary Instrument will remain operating in the current form for the whole period (i.e. until April 2026). ASIC stated in the Explanatory Statement and the Media Release that accompanied the Amending Instrument that its intention is to conduct a substantive review of the Primary Instrument upon completion of the broader Government policy review.

ASIC advises that the removal of the cessation date in the Primary Instrument, thereby allowing it to remain in force until April 2026, is intended to allow sufficient flexibility for completion of the CoFR review, broader Government policy consideration and the ASIC review of the provisions of the Primary Instrument while still providing certainty for market participants.

The committee also seeks the Assistant Treasurer's advice as to the appropriateness of amending the ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211 to extend the date on which it is to cease to have effect (for example by a further one to two years), rather than removing the cessation date altogether.

ASIC considered that removing the cessation date was the best approach to address the timing uncertainty of the broader policy consideration and ASIC's review of the Primary Instrument. ASIC was concerned that potential outcomes of the broader policy consideration by Government may include regulations that replace or render unnecessary some or all of the existing ASIC exemptions under the Primary Instrument. If a substantive review of the Primary Instrument is undertaken by ASIC prior to completion of the broader policy consideration by Government, any changes could risk not reflecting the policy position ultimately adopted by Government . This would cause additional and uncessary costs and burdens to persons affected by the Primary Instrument as they would be put to the additional task of reviewing, understanding and implementing first changes to the Primary Instrument, then subsequently changes stemming from the broader policy position adopted by Government.

THE HON CHRISTOPHER PYNE MP
MINISTER FOR DEFENCE
LEADER OF THE HOUSE
MEMBER FOR STURT

MS18-004041

21 JAN 2019

Senator John Williams (Chair)
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Williams Waaba

Thank you for the correspondence of 6 December 2018 from Ms Anita Coles, Committee Secretary, Senate Standing Committee on Regulations and Ordinances, requesting additional advice about scrutiny issues identified in relation to the Inspector-General of the Australian Defence Force Amendment Regulations 2018 (the Amending Regulations).

I understand that the Committee is seeking additional advice about the privacy implications of the Amending Regulations, and in particular the justification for empowering an Assistant IGADF to disclose information to 'any other person' or any person affected by a submission or the inquiry, as distinct from powers to disclose information to specified statutory office holders or authorities for the purpose of implementing inquiry findings and recommendations. These concerns relate to new subparagraphs 28G(2)(a)(vi) and (vii) of the Inspector-General of the Australian Defence Force Regulation 2016 (the Principal Regulation), which have been inserted by the Amending Regulations.

It is important to recognise that only an Assistant IGADF who is also a judicial officer may disclose information to 'any other person' or 'a person affected by a submission or the inquiry'. This same power is not available to an Assistant IGADF who is not a judicial officer (that is, an Assistant IGADF who is appointed under section 6), and in such a case would only be available to be exercised by the Inspector-General ADF personally.

By their nature, inquiries established under the Principal Regulation may cover a broad range of subjects and have a broad range of outcomes, and a relatively flexible power to disclose information is necessary to address all of the possible scenarios that could arise. It is reasonable and appropriate that Assistant IGADFs who are also judicial officers have this power. They are sitting judges with expertise, skill, and judgement gained through their judicial responsibilities, so are capable, skilled and highly suitable to consider privacy implications of disclosures made under the new section 28G and 28H of the Principal Regulation.

As with any statutory discretion, the power to disclose information is not unfettered. It must be applied lawfully, reasonably, and for a proper purpose, having regard to relevant considerations. This would include appropriate consideration of the privacy principles underlying the *Privacy Act 1988*, balancing other important factors such as transparency, fairness, and accountability.

It is also noted that appointment of a judicial officer as an Assistant IGADF under new Division 4A will only be made by the Inspector-General ADF in limited circumstances. For example, such an appointment might be made where the matters for inquiry are complex and involve legal questions concerning aspects of military justice or other sensitive issues. Past practice within the Office of the Inspector-General ADF has been to draw on the small cadre of ADF reserve officers who hold judicial appointments to undertake high-level, complex inquiries involving legal questions. New Division 4A is intended to formalise that practice by creating a dedicated statutory framework for such inquiries so that the judicial officer appointed as the Assistant Inspector-General has the appropriate degree of procedural and decisional autonomy to carry out the inquiry commensurate with, and compatible with, their judicial status.

I trust this response addresses the Committee's remaining concerns about the Amending Regulations.

Yours sincerely

Christopher Pyne MP

The Hon Karen Andrews MP

Minister for Industry, Science and Technology

Min ID: MC18-004023

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111, Parliament House
CANBERRA ACT 2600

regords.sen@aph.gov.au

Dear Senator

I refer to the Senate Standing Committee on Regulations and Ordinances (the Committee) Secretary's correspondence of 6 December 2018 concerning requests for further advice relating to:

1. *Industry Research and Development (Artificial Intelligence Capability Program) Instrument 2018;*
2. *Industry Research and Development (Automotive Engineering Graduate Program) Instrument 2018*; and
3. *Industry Research and Development (Industry 4.0 Testlabs for Australia Program) Instrument 2018.*

I provide the following advice to assist the Committee conclude its deliberations in relation to these instruments.

***Industry Research and Development (Artificial Intelligence Capability Program) Instrument 2018* (AI Instrument)**

The Committee has requested more detailed advice as to the constitutional authority for the Artificial Intelligence Capability Program (the AIC Program) prescribed in s 5 of the AI Instrument.

Implied nationhood power

The Committee has requested more detailed advice as to why the implied nationhood power would support the AIC Program. The Committee has requested that the response point to specific relevant jurisprudence.

In particular, the Committee noted Mason J's statement in *Victoria v Commonwealth* [1975] HCA 52; 134 CLR 338 (the AAP Case) (at 398), where his Honour states that:

> It would be inconsistent with the broad division of responsibilities between the Commonwealth and the States achieved by the distribution of legislative powers to concede to this aspect of the executive power a wide operation effecting a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution, thereby enabling the Commonwealth to carry out within Australia programmes standing outside the acknowledged heads of legislative power **merely because these programmes can be conveniently formulated and administered by the national government.**
>
> (Emphasis added by the Committee.)

The earlier comments of Mason J (at 397-398) in the AAP Case provide context to this statement. His Honour said that:

> … [I]n my opinion there is to be deduced from the existence and character of the Commonwealth as a national government and from the presence of ss 51(xxxix) and 61 a capacity to engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation.
>
> **It is in the exercise of this capacity that the Commonwealth has established the Commonwealth Scientific and Industrial Research Organization to undertake scientific research on behalf of the nation.** The Science and Research Act 1951, as amended, is an exercise of the power conferred by s 51 (xxxix) and s 61 or perhaps of implied power. **So also the Commonwealth may expend money on inquiries, investigation and advocacy in relation to matters affecting public health, notwithstanding the absence of a specific legislative power other than quarantine** - see the Pharmaceutical Benefits Case (1945) 71 CLR, at p 257. No doubt there are other enterprises and activities appropriate to a national government which may be undertaken by the Commonwealth on behalf of the nation. The functions appropriate and adapted to a national government will vary from time to time.
>
> (Emphasis added.)

I would also draw the Committee's attention to the comments of Brennan J in *Davis v Commonwealth* (1988) 166 CLR 79 (at 110-111):

> The Constitution summoned the Australian nation into existence, thereby conferring a new identity on the people who agreed to unite 'in one indissoluble Federal Commonwealth', melding their history, embracing their cultures synthesizing their aspirations and their destinies. The reality of the Australian nation is manifest, though the manifestations of its existence cannot be limited by definition. **The end and purpose of the Constitution is to sustain the nation. If the executive power of the Commonwealth extends to protection of the nation against forces which would weaken it, it extends to the advancement of the nation whereby its strength is fostered.** There is no reason to restrict the executive power of the Commonwealth to matters within the heads of legislative power. So cramped a construction of the power would deny to the Australian people many of the symbols of nationhood – a flag or anthem eg – or the benefit of many **national initiatives in science**, literature and the arts.
>
> (Emphasis added.)

The Committee has also noted the decision of *Pape v Federal Commissioner of Taxation* [2009] HCA 23; 238 CLR 1 (Pape). The Committee has noted that Pape indicated that the implied nationhood power does not give the Commonwealth a general power to address problems of national concern (citing French CJ at 48-49). It is useful to quote from that extract, where his Honour said:

> The extent of powers inherent in the fact of nationhood and of international personality had not been fully explored. They included the power to explore on foreign lands or seas or **in areas of scientific knowledge or technology** [citing the AAP Case at 362]. But to say of a matter that it was of national interest or concern did not attract power to the Commonwealth.
>
> (Emphasis added.)

The cases do not say that for a program to be supported by the implied nationhood power it must **only** be able to be carried on by the Commonwealth for the benefit of the nation.

I am satisfied that the AIC Program is supported by the implied nationhood power. The AIC Program is a national initiative in science that advances and strengthens the nation's ability to participate in the broader global digital economy through its artificial intelligence (AI) and machine learning capability. The AIC Program would advance and strengthen the interest of the nation in a particular area of science knowledge (that is, AI knowledge). It is not merely convenient for the Commonwealth to fund this activity, rather it is necessary for it to do so in order to facilitate national and international adoption of standards on AI. As I noted in my earlier response to the Committee, the development of the AI Standards requires a high degree of national coordination and integration, and the AIC Program is directed towards meeting the need for national coordination and national leadership in relation to the development of the standards. These activities are directed at advancing the nation through the development of nationally consistent scientific standards that will enable Australian stakeholders to engage with the broader global digital economy.

The Committee has asked whether there are any other heads of power that would support the AIC Program. There may be other heads of power that provide support for the expenditure. As I am of the view that the implied nationhood power comprehensively supports the AIC Program, it is not necessary to consider other heads of power.

***Industry Research and Development (Automotive Engineering Graduate Program) Instrument 2018* (Automotive Instrument)**

The Committee has requested more detailed advice as to the constitutional authority for the Automotive Engineering Graduate Program (the Automotive Program) prescribed in s 5 of the Automotive Instrument.

Corporations power

The Committee has asked for further, more detailed, advice as to how the Automotive Program would be supported by the corporations power in s 51(xx) of the Constitution. The Committee has requested that the response point to specific relevant jurisprudence.

Trading corporations

In relation to relevant jurisprudence regarding whether an entity is a 'trading corporation' I draw the Committee's attention to the following extracts from *R v Federal Court of Australia; Ex parte WA National Football League* (1979) 143 CLR 190 (Adamson's Case).

Chief Justice Barwick stated that 'once it is found that trading is a substantial and not a merely peripheral activity not forbidden by the organic rules of the corporation, the conclusion that the corporation is a trading corporation is open' (at 208).

Justice Murphy (at 239) stated that:

> Even though trading is not the major part of its activities, the description, "trading corporation" does not mean a corporation which trades and does nothing else or in which trading is the dominant activity. A trading corporation may also be a sporting, religious, or governmental body. As long as the trading is not insubstantial, the fact that trading is incidental to other activities does not prevent it being a trading corporation. For example, a very large corporation may engage in trading which though incidental to its non-trading activities, and small in relation to those, is nevertheless substantial and perhaps exceeds or is of the same order in amount as the trading of a person who clearly is a trader. Such a corporation is a trading corporation and is the subject of the legislative power in s 51 (xx.).

Justice Mason relevantly stated that in this context the concept of trading is not limited 'to buying and selling at a profit', rather, his Honour said that 'it extends to business activities carried on with a view to earning revenue' (at 235).

Regulating constitutional corporations

The Committee has said that it is not apparent that the requirements in the *Industry Research and Development Act 1986* (IRD Act) would be sufficient to distinguish that Act from the legislation under consideration in *Williams v Commonwealth* [2014] HCA 23; 252 CLR 416 (Williams No 2).

The Committee noted that the legislation considered in Williams No 2 contemplated making arrangements subject to terms and conditions, and funding arrangements are generally subject to terms and conditions on which the relevant funding is provided.

In Williams No 2, the High Court was concerned with s 32B of the *Financial Management and Accountability Act 1997* (the FMA Act).

The High Court stated (at [51]-[50]) that:

> The impugned provisions seek to provide authority for the Commonwealth to make agreements and payments. For the purposes of considering the argument, it may be assumed that the opposite party to an agreement made for the purposes of the National School Chaplaincy and Student Welfare Program and the recipient of payments made under that program can be, even *must* be, a trading or financial corporation.
>
> A law which gives the Commonwealth the authority to make an agreement or payment of that kind is not a law with respect to trading or financial corporations. The law makes no provision regulating or permitting any act by or on behalf of any corporation. The corporation's capacity to make the agreement and receive and apply the payments is not provided by the impugned provisions. Unlike the law considered in *New South Wales v The Commonwealth* (*Work Choices Case*) [(2006) 229 CLR 1; [2006] HCA 52], the law is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.

However, the relevant provisions of the IRD Act are substantially different to the provisions considered by the High Court in Williams No 2. Section 34 of the IRD Act corresponds to s 32B of the FMA Act considered by the High Court in Williams No 2. However, the FMA Act contained no provision in terms equivalent to those of s 35 of the IRD Act.

Section 35(2)(b) of the IRD Act expressly requires a constitutional corporation which is a party to an arrangement for the purposes of the Program to comply with the terms and conditions specified in a written agreement between the Commonwealth and the corporation. Further, s 35(3) provides that that agreement must provide for the circumstances in which the corporation must repay amounts to the Commonwealth. The Commonwealth will enter into grant agreements with corporations approved for funding under the program. These grant agreements include an obligation to repay amounts to the Commonwealth in certain circumstances as well other terms and conditions that the grant recipient is required to comply with in relation to the program.

In light of this distinction between the FMA Act and the IRD Act and the terms and conditions specified in grant agreements, I am satisfied that the Automotive Program is supported by the corporations power in s 51(xx) of the Constitution, particularly when considered with the ability of the Commonwealth, empowered through s35 of the IRD Act, to authorise or regulate the activities, functions, relationships or business through compliance with terms and conditions.

Social welfare power

The Committee has also asked whether the Automotive Instrument would be supported by the student benefits aspect of the social welfare power in s 51(xxiiiA) of the Constitution and the appropriateness of amending s 6 of the Automotive Instrument to specify that the Instrument relies on that power.

The program covered by the Automotive Instrument may be capable of being supported by the student benefits aspect of the social welfare power in s 51(xxiiiA) of the Constitution. However, in my view it is not necessary to amend s 6 of the Automotive Instrument to specify that the Instrument relies on that power. This is because, section 33(3) of the IRD Act provides that the Instrument must specify the legislative power or powers in respect of which the instrument is made. This leaves it open for the Minister to be satisfied that the powers relied upon are sufficient to provide legislative authority for the program, not that an instrument provides an exhaustive list of powers that could be relied upon. The powers relied upon in the Automotive Instrument (being the corporations power as well as the Territories power, the executive power and the express incidental power) provide sufficient legislative authority for the program.

Accordingly, I do not consider it is necessary to amend s 6 of the Automotive Instrument to include another head of constitutional power that may provide support for the Automotive Instrument.

***Industry Research and Development (Industry 4.0 Testlabs for Australia Program) Instrument 2018* (Testlabs Instrument)**

The Committee has requested more detailed advice as to the constitutional authority for the Industry 4.0 Testlabs for Australia Program (the Testlabs Program) prescribed in s 5 of the Testlabs Instrument.

Corporations power

Section 6 of the Testlabs Instrument specifies the Parliament's power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth (see s 51(xx) of the Constitution).

The Committee has noted the High Court's decision in *Williams v Commonwealth* [2014] HCA 23; 252 CLR 416 (Williams No 2), and in particular, the Court's statement (at [50]) that:

> *A law which gives the Commonwealth the authority to make an agreement or payment of that kind is not a law with respect to trading or financial corporations. The law makes no provision regulating or permitting any act by or on behalf of any corporation. The corporation's capacity to make the agreement and receive and apply the payments is not provided by the impugned provisions. Unlike the law considered in New South Wales v The Commonwealth (Work Choices Case) [(2006) 229 CLR 1; [2006] HCA 52], the law is not one authorising or regulating the activities, functions, relationships or business of constitutional corporations generally or any particular constitutional corporation; it is not one regulating the conduct of those through whom a constitutional corporation acts or those whose conduct is capable of affecting its activities, functions, relationships or business.*

This conclusion must be understood in the context of the specific terms of s 32B of the *Financial Management and Accountability Act 1997* (the FMA Act), which was under consideration in Williams No 2.

As noted above, the High Court stated at [50] that this legislation was not a law with respect to trading or financial corporations because it made no provision regulating or permitting any act by or on behalf of any corporation.

However, the relevant provisions of the *Industry Research and Development Act 1986* (IRD Act) are substantially different to the provisions considered by the High Court in Williams No 2. Section 34 of the IRD Act corresponds to s 32B of the FMA Act considered by the High Court in Williams No 2. However, the FMA Act contained no provision in terms equivalent to those of s 35 of the IRD Act.

Section 35(2)(b) of the IRD Act expressly requires a constitutional corporation which is a party to an arrangement for the purposes of the Program to comply with the terms and conditions specified in a written agreement between the Commonwealth and the corporation. Further, s 35(3) provides that that agreement must provide for the circumstances in which the corporation must repay amounts to the Commonwealth. The Commonwealth will enter into grant agreements with corporations approved for funding under the program. These grant agreements include an obligation to repay amounts to the Commonwealth in certain circumstances as well other terms and conditions that the grant recipient is required to comply with in relation to the program.

In light of this distinction between the FMA Act and the IRD Act, and the terms and conditions specified in grant agreements, I am satisfied that the corporations power in s 51(xx) of the Constitution supports the Testlabs Program and is appropriate when considered with the ability of the Commonwealth, empowered through s35 of the IRD Act, to authorise or regulate the activities, functions, relationships or business through compliance with terms and conditions.

I trust that this advice will be of assistance to the Committee.

Yours sincerely

Karen Andrews

24 / 1 /2019