The Hon Michael McCormack MP

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

Ref: MS19-001422

- 8 AUG 2019

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 25 July 2019 regarding the assessment by the Senate Standing Committee on Regulations and Ordinances of:

- Air Navigation (International Airline Licence Exemption) Determination 2019 [F2019L00375]; and
- Air Navigation (Exemption for Commercial Non-Scheduled Flights) Determination 2019 [F2019L00378].

It is considered necessary and appropriate to use delegated legislation to enact the identified exemptions to the *Air Navigation Act 1920* (the Act) as it facilitates the Government's ability to revisit and adjust the administrative detail in relation to these matters without undue delay.

The Air Navigation (International Airline Licence Exemption) Determination 2019 currently exempts all international airlines from needing to apply for an international airline licence to overfly Australia, in accordance with the principles set out in the International Air Transit Agreement. Having this exemption set out in the Determination enables the Australian Government to quickly respond to circumstances which may require the exemption to overfly Australia for certain international airlines to be amended at short notice, such as when there are international concerns about the origin or destination of particular flights.

It should be noted that all international airlines operating scheduled services that arrive and depart from an Australian international airport are required to hold an international airline licence in accordance with the Act and Air Navigation Regulation 2016.

The Air Navigation (Exemption for Commercial Non-Scheduled Flights) Determination 2019 currently exempts operators of certain categories of non-scheduled flights from having to seek the prior permission of the Secretary to operate such services. Having this exemption set out in the Determination enables the Government to respond quickly to circumstances which may require the relevant categories of non-scheduled flights to be amended from time to time to accommodate changing market demand or ongoing emergency situations.

It should be noted that operators of all other categories of non-scheduled flights are required to seek the prior approval of the Secretary before commencing such flights, in accordance with the Act. In addition, while the Determination exempts operators of the relevant categories of non-scheduled flights from seeking the prior permission of the Secretary to operate such services, operators remain subject to reporting requirements as set out in the Act.

The Government recognises there would be value in progressing a broader review of the Act. The Government will progress this review in due course, and give further consideration to the Committee's comments at that time.

Thank you for raising this matter and I trust this information is of assistance.

Yours sincerely

Michael McCormack

The Hon Michael McCormack MP

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

Ref: MC19-003486

20 AUG 2019

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Connie

Thank you for your letter of 25 July 2019 regarding the Air Services Regulations 2019.

The Air Services Regulations 1995 were due to sunset on 1 April 2019 and provided a legal basis for Airservices Australia (Airservices) to undertake its core functions. The aim of the new Air Services Regulations 2019 (the Regulations) was to remove spent and redundant provisions from the 1995 Regulations and make other minor administrative amendments.

Significant matters in delegated legislation

The Senate Standing Committee on Regulations and Ordinances (the Committee) has requested advice as to why it was considered necessary and appropriate to set out Airservices's powers and functions relating to the requisitioning of aircraft and determination of claims for compensation in delegated, rather than primary, legislation.

As the Committee has acknowledged, the *Air Services Act 1995* (the Act) clearly contemplates that provisions relating to the requisitioning of aircraft and claims for compensation would be set out in the Regulations. This appears to have been considered to be appropriate at the time by the Senate Standing Committee for the Scrutiny of Bills (SSCSB) in its scrutiny of the bill for inappropriate delegation of legislative power. This stands in contrast to SSCSB's objection on this ground to a clause that would allow the setting of a penalty by delegated legislation (see SSCSB's Tenth Report of 1995, pp 178-179), which was subsequently removed from the bill before its passage (see the supplementary explanatory memorandum to the Air Services Bill 1995 circulated in the House of Representatives).

It would be administratively burdensome to amend the Act for this purpose alone when these functions are legitimately and lawfully able to be managed through the Regulations. In future reviews of the Act, we will review this decision and consider elevating this power into the primary legislation.

Privacy

The Committee has also requested advice as to why it was considered necessary and appropriate in the Regulations to include personal information in the register of statutory liens established under section 64 of the Act, and in a notice of an entry in the register, published in the Gazette.

As noted by the Committee, statutory liens are part of the public record and are used to inform potential creditors and buyers of any existing security interests that may subsist in an object. In the aviation context, it is common for the owner of an aircraft to be different to the person operating the aircraft (who would typically be responsible for the service charge). In such cases, the unpaid service charge would be a debt owed by the operator/lessee/hirer/charterer, but the lien would apply to the aircraft, which is the property of the owner/lessor. It is important then for the register to reflect the person who owes the debt, as there may be a range of possible persons whose conduct could have given rise to the statutory lien on the aircraft vesting in Airservices. Publishing information about the aircraft which is the subject of the lien without identifying the debtor may result in ambiguity as to who actually owes the debt, and could prejudice the owner and other users of the aircraft.

Further, publishing the details of the person who owes the debt to Airservices is important so that all persons who have an interest have sufficient information to take action to adequately protect their interests. Such action frequently needs to be taken expeditiously, so publication of these details on the register and in the Gazette is the fairest and most expeditious way to ensure those with an interest receive this information. Merely publishing information about the aircraft would not be sufficient—persons with an interest would have to search the aircraft register of the relevant country (which will frequently not be Australian) to find out who the owner/registration holder is, and then inquire with that person to find out who the debtor is, which would be a long and onerous process.

Finally, in the aviation sector, it is common for aircraft to be owned and operated by companies. Therefore, in most circumstances, publishing the name and address of the person owing the debt would not involve the publishing of personal information.

Issue of evidential certificates

The Committee has further requested advice as to why it was considered necessary and appropriate in the Regulations to permit Airservices to issue evidentiary certificates under section 41 and the circumstances in which it was intended that evidentiary certificates would be issued, including the nature of any relevant proceedings.

Certificates issued under section 41 have been used primarily in proceedings to which Airservices is not a party, like coronial inquests, where Airservices has certified the Aeronautical Information Publication that was published at the time of an incident or accident. Such proceedings typically have a long lead time, and as the information is updated regularly Airservices is best placed to certify what was previously published. The same is true in relation to navigational aids, which may be temporarily taken off line, updated or decommissioned. Particularly in proceedings where Airservices is not a party, the ability for Airservices to provide this information in an evidentiary certificate is extremely helpful for all parties, who are not put to proof on matters that they may not be in a position to know.

In drafting the Regulations, the Office of Parliamentary Counsel consulted with the Administrative Law Section in the Attorney General's Department to ensure this section was fit for purpose in relation to the application of the *Evidence Act 1995*.

Immunity from civil liability

Lastly, the Committee has requested advice as to why it was considered necessary and appropriate in the Regulations to confer immunity from civil liability on the persons and entities listed in subsection 42(2) of the instrument and extend this immunity to the Commonwealth, and to Airservices along with its employees and agents.

As the Committee has recognised, it is relatively clear why it is necessary to confer immunity from civil liability on certain persons and entities (in particular, persons performing fire and rescue operations). The immunity protects Airservices and its employees from liability that might otherwise arise from the good faith exercise of its statutory powers and obligations. These powers are necessary to protect persons and property and it would not be in the public interest and the proper exercise of those powers if they are performed under the spectre of opportunistic legal action.

In terms of other functions, Airservices often responds to requests for 'mutual aid' from domestic fire agencies (or from airport operators for a range of non-aviation related incidents). These include responding to emergency first aid incidents, responding to car crashes, or domestic fire incidents, bush fires and the like. The Regulations acknowledged and confirmed these 'additional functions' as falling within the scope of Airservices statutory function (section 20), and there are clear public policy benefits in Airservices using its spare capacity in this way.

Accordingly, the public policy benefit in encouraging the provision of aid in emergency circumstances is reflected in the immunity from action for Airservices and its employees when such aid is provided in good faith.

In regards to the other categories of persons mentioned, I accept the concerns of the Committee and as a result I have instructed my Department to remake section 42 of the Regulations to limit the immunity from civil liability to Airservices and its employees.

I have also instructed my Department to update the explanatory statement to include further explanation in line with the reasoning outlined in relation to the other matters above.

As the Regulations provide the legal framework for Airservices to function and are essential for Airservices to continue to provide air traffic and other emergency services, it is important that the Regulations not be disallowed in the interim period pending these changes. My Department will notify the Committee when these changes have been implemented.

If you require further information on this matter, the contact officer in my Department is Melissa Cashman who can be contacted via email at Melissa.Cashman@infrastructure.gov.au or telephone on 02 6274 6741.

Thank you for raising these matters and I trust this information is of assistance.

Yours sincerely

Michael McCormack

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC19-009434

7 AUG 2019

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Connie

I am writing in response to your letter of 25 July 2019. The letter refers to the Committee's Delegated Legislation Monitor 3 of 2019 (the monitor) and seeks my advice about matters raised concerning the *Archives (Records of the Parliament) Regulations 2019* (the Regulations) [F2019L00282].

The purpose of the Regulations was to remake the Archives (Records of the Parliament) Regulations (the former Regulations) with the same effect to ensure their continued operation. Modifications have been made to ensure fitness for purpose and consistency with current drafting practices, update various provisions to reflect the current terms of the *Archives Act 1983* (Archives Act) and the *Parliamentary Service Act 1999*, and remove obsolete or unnecessary provisions. In the monitor, the Committee notes that the explanatory statement to the Regulations does not explain why it is considered necessary and appropriate to make modifications by delegated legislation and whether the matters in the present instrument could instead be enacted via primary legislation.

Subsection 20(1) of the Archives Act provides for the making of regulations to modify and apply the provisions of Divisions 2 and 3 of Part V to all or any of the records of the Parliament and Parliamentary Departments. Subsection 20(2) ensures that regulations covering the records of the Parliament will not be made without consultation between the Minister, the President of the Senate and the Speaker of the House of Representatives.

The former Regulations modified and applied the provisions of Divisions 2 and 3 of Part V to records in the possession of the Senate, the House of Representatives and the Parliamentary Departments in order to provide a basis for the sound and professional management of the records of the Parliament. They balance the need for the Parliament and Parliamentary institutions to retain control of their records with the role of the National Archives of Australia (National Archives) to identify and retain records of archival significance in perpetuity and make them publicly accessible. The objective of the current Regulations is to provide for the preservation, management and use of the records of the Parliament in a manner that reflects:

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i. the position of the Parliament within the Commonwealth;
ii. the special recognition and treatment that should be given to particular records of the Parliament; and
iii. the different powers and functions of the Parliament and the Executive Government of the Commonwealth.

In March 2017, the Parliamentary Administration Advisory Group initiated a working group to conduct a review of the current Regulations based on the experience of the Parliamentary Departments. This group has worked collaboratively with the National Archives with a view to forming a common set of recommendations in consultation with the department to inform the drafting of current regulations and determined the best approach was to modify the operation of the Archives Act by delegated legislation.

In accordance with subsection 20(2) of the Archives Act, the President of the Senate and the Speaker of the House have been consulted on the current Regulations and endorsed the package on 11 February 2019. I understand broader consultation was not undertaken on the current Regulations as they have substantially the same effect as the former Regulations. For this same reason, and because it is important that delegated legislation remain well adapted and fit for its purpose, I am of the view that the current Regulations do not raise any issues of significant contention such as to require enactment via primary legislation.

However, I recognise that the Committee is generally concerned to ensure that amendments to the operation of legislation are made by amendment to that legislation. An independent Functional and Efficiency Review of the National Archives is currently underway and will consider and make recommendations on, amongst other things, the legislative framework for the National Archives. I propose that consideration of the outcomes of this Review also include further consideration of the Committee's concern about the delegated legislation provision in subsection 20(1) of the Archives Act.

Thank you for the Committee's correspondence on this matter.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION, FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS19-001632

- 8 AUG 2019

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

I am writing in response to your letter on behalf of the Senate Regulations and Ordinances Committee (the Committee) dated 25 July 2019 to the Minister for Housing and Assistant Treasurer, drawing to his attention scrutiny concerns in relation to the *ASIC Corporations (Warrants: Out-of-use notices) Instrument 2019/148* [F2019L00290] (Instrument 2019/148). The Minister has asked that I respond on his behalf.

In that letter, the Committee sought advice as to:

- why it was necessary and appropriate to use delegated legislation to extend the exemptions in the instrument for a further 10 years; and
- the appropriateness of enacting the exemptions in primary legislation.

The use of delegated legislation and appropriateness of primary law changes

The modifications provided for in Instrument 2019/148 are not appropriate for enactment in primary legislation as they provide relief that is of a highly specific nature that does not justify addressing them through changes to the primary law.

Instrument 2019/148 utilises powers given by Parliament to Australian Securities and Investments Commission (ASIC) that allow ASIC to modify the operation of the *Corporations Act 2001* (the Act) to provide a tailored and flexible regulatory environment that is fit for purpose for certain financial products. In particular, Instrument 2019/148 makes minor and technical modifications to the notification requirements under the Act for these financial products.

Further, the matters contained in Instrument 2019/148 only affect a relatively small subset of financial products. The instrument provides administrative relief in circumstances where strict compliance with the Act produces an unintended or unforeseen result. On this basis, it is appropriate for ASIC to provide relief through its modification powers, as the matters contained in this particular instrument are of a highly specific and individual nature which is more appropriate for delegated legislation rather than primary legislation.

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As a consequence, if the matters in Instrument 2019/148 were to be inserted into the Act, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of financial products. This would result in additional cost and unnecessary complexity for other users of the Act.

The appropriateness of Instrument 2019/148 being in force for 10 years

On the basis that it is appropriate for ASIC to use its modification powers on this occasion, and as the matters contained in Instrument 2019/148 are unlikely to change in the near future, it is both necessary and appropriate for the instrument be in force for the 10 year period allowed under the *Legislation Act 2003*. This avoids the need to constantly remake an instrument where the matters contained in the instrument are unlikely to change in the near future.

Additional Information –operation of Instrument 2019/148

Instrument 2019/148 provides that an issuer of warrants will only need to satisfy the notification requirements under the Act when all the warrants, to which the product disclosure statement (PDS) relates, are no longer available to be given to new clients in a recommendation, issue or sale situation.

Instrument 2019/148 does not exempt an issuer of warrants from the notification requirements under the Act. Rather, it delays the need to notify ASIC until all warrant products under a PDS cease to be available to new clients. Instrument 2019/148 is of a minor and technical nature, and provides relief to a relatively small subset of PDSs. It ensures that the PDS notification requirements operate as intended.

I also note to the Committee that Instrument 2019/148 is a disallowable legislative instrument. This affords the Parliament a level of scrutiny over the matters contained within it.

I trust this information will be of assistance to you.

Yours sincerely

Senator the Hon Jane Hume

SENATOR THE HON JANE HUME
ASSISTANT MINISTER FOR SUPERANNUATION, FINANCIAL SERVICES AND FINANCIAL TECHNOLOGY

Ref: MS19-001666

- 8 AUG 2019

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

I am writing in response to your letter on behalf of the Senate Regulations and Ordinances Committee (the Committee) dated 25 July 2019 to the Minister for Housing and Assistant Treasurer, drawing to his attention to scrutiny concerns relating to the *Corporations Amendment (Name Exemption) Regulations 2019* (the Regulations). The Minister for Housing and Assistant Treasurer has asked me to respond on his behalf.

In that letter, the Committee sought advice as to why it was necessary and appropriate to use the Regulations to modify the *Corporations Act 2001* (the Act) and whether the matters in the Regulations could instead be enacted in the Act.

The Regulations enable Westpac to continue to omit the word 'Limited' from the end of its company name and ensure Westpac's registration as a public company limited by shares is preserved for the purposes of the Act. Generally, delegated legislation is appropriately used to deal with specific, technical and machinery issues or where necessary to provide flexibility to keep pace with industry developments.

The relief provided to Westpac, which has been in place since 2002, was reviewed as part of the sunsetting regime under the *Legislation Act 2003* and the decision was made that it was still required. In this case the former Assistant Treasurer, the Hon Stuart Robert MP, did not consider it was necessary to amend the Act, which applies broadly, to enable the continuation of relatively minor relief that only affects one entity. The relief provided by the Regulations in modifying the Act is analogous to individual relief the Australian Securities and Investments Commission routinely grants under its modification and exemptions powers with respect to other provisions under the Act.

Although the *Corporations Regulations 2001* are not subject to sunsetting, the relief can be reviewed at any time should the need arise. Further, the Regulations are subject to disallowance and are therefore subject to appropriate Parliamentary scrutiny, including by the Committee.

Yours sincerely

Senator the Hon Jane Hume

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THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY

Ref: MS19-001643

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

I am writing in response to a letter from the Senate Regulations and Ordinances Committee requesting information in relation to issues raised in *Delegated Legislation Monitor 3 of 2019* regarding the *Corporations Amendment (Proprietary Company Thresholds) Regulations 2019*.

The Committee sought advice as to why it was necessary and appropriate to use delegated legislation to double the thresholds in the *Corporations Act 2001* (the Act) for 'large' proprietary companies, instead of amending primary legislation. Using delegated legislation was appropriate as the matter was a specific amendment designed to ensure the application of primary legislation remained flexible to adapt to market developments and applies in a way consistent with the intended policy and the enabling provisions in the primary Act.

The threshold for a 'large' proprietary company determines the size at which a company must comply with a variety of additional reporting obligations, for example, to lodge an annual financial report with the Australian Securities and Investments Commission. The specific regulation-making power was introduced in the Act as it was recognised that the thresholds may need to be re-assessed over time to ensure that the primary legislation continues to operate as intended so that reporting requirements remained targeted at economically significant proprietary companies.

It was considered necessary to double the thresholds based on a number of factors over time such as increases in nominal GDP and the characteristics of the population of proprietary companies. This aligns with the underlying purpose and intent of the regulation-making power.

Thank you for your letter.

Yours sincerely

THE HON JOSH FRYDENBERG MP
5 / 8 /2019

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THE HON JASON WOOD MP
ASSISTANT MINISTER FOR CUSTOMS, COMMUNITY SAFETY AND MULTICULTURAL AFFAIRS

Ref No: SB19-001031

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on
Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Chair

Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019 [F2019L00352]

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 1 August 2019, in which the committee requested advice with respect to the Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019 (the Regulations).

The Regulations were made on 21 March 2019 and amended the Customs (Prohibited Imports) Regulations 1956 (the PI Regulations) to introduce new regulation 4DA to prohibit the importation of tobacco products into Australia without a permit, with limited exemptions. The Regulations are part of a broader Commonwealth Government initiative to address recommendations of the October 2017 Black Economy Taskforce Final Report in which the Government announced a number of measures to combat illicit tobacco trade in Australia, including proposing a prohibition on the importation of tobacco without a permit into Australia from 1 July 2019.

Broad delegation of power

Subregulation 4DA(10) of the PI Regulations provides the statutory power for the Minister, by writing, to authorise APS employees in the Department of Home Affairs to be an 'authorised person' for the purposes of administering regulation 4DA. On 1 July 2019, I authorised a range of SES officers, and officers occupying Executive Level 2 (EL 2) positions in the Customs Group of the Department, to grant, refuse or revoke permission to import tobacco products.

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I assure the committee that I signed this instrument because I am satisfied that the officers occupying the EL 2 positions are appropriately skilled to perform these functions. All of these officers hold managerial roles for Customs policy teams that administer highly technical customs and border management matters. The skills and experience that are required to perform such functions are sufficient to provide me with confidence that these officers can administer a delegation of power to consider import permits for tobacco.

I note that the committee has requested my advice as to the appropriateness of amending the instrument to require that the Minister be satisfied that persons to whom powers are delegated possess the qualifications, attributes and expertise appropriate to the delegated powers. I further note that the Department has previously provided advice to the committee in relation to this question.

As advised by the Department in its response to the committee, the delegation provided for in the Regulations is necessary to ensure that the permit regime does not hamper the legitimate trade in tobacco products. Tobacco products are a relatively high volume import and the Government expects a consistently high level of demand for import permits. Authorising officers at the EL 2 level allows improved responsiveness to permit applications to facilitate legitimate trade.

The authorisation to officers occupying EL 2 positions represents an appropriate balance between the Government's desire to ensure responsiveness to legitimate traders and our responsibility to provide appropriate oversight and judgement of tobacco import applications. I note officers at this level are required to make balanced decisions using professional judgement and subject matter expertise, while being sensitive to broader contexts.

I further note that this level of authorisation is consistent with other permit administration functions in the PI Regulations, including for more sensitive goods such as firearms and non-firearms weapons.

The committee has raised that "at a minimum, that delegates be required to possess expertise appropriate to the delegated powers". I consider that EL 2 level managers within the Customs Group of the Department possess such expertise.
I draw the committee's attention to the Australian Public Service Commission Work Level Standard – Executive Level 2 (https://www.apsc.gov.au/work-level-standard-executive-level-2). I specifically note that this Standard provides that "An Executive Level 2 would exercise a significant degree of independence and perform an important leadership role. Employees at this level will be responsible for influencing and developing strategy, policies, priorities and operational practices in support of agency objectives based on high level decision-making and judgement. EL 2 employees provide a high level of advice to senior management and Ministers as well as coordinating and assuming responsibility for highly complex or sensitive projects or work programs that have strategic, political and/or operational significance".

For consistency across Customs laws and policy frameworks, and for the efficient administration of its regulations and programs, I do not consider it appropriate to amend the instrument as described by the committee. The established framework appropriately applies the law and allows for the efficient and effective administration of those laws.

Merits review

The instrument permits the Minister or an authorised person to grant permissions to import tobacco products, and to revoke such permissions if satisfied in relation to specified matters. The committee notes that such decisions would appear to involve a relatively significant element of discretion (in particular, the committee notes that the Minister or authorised person 'may consider any relevant matter' when deciding whether to grant a permission). Further, the committee notes that such decisions may affect the rights and interests of individuals, and that the decisions would therefore appear to be suitable for independent merits review.

As the committee has noted, the decisions relating to the grant and revocation of permissions are not subject to independent merits review.

The committee has sought my detailed advice as to the characteristics of decisions relating to the grant or revocation of a permit to import tobacco products that would justify excluding merits review. I note that the Department has also previously provided advice to the committee in relation to this question.

The Government has introduced the tobacco import reforms, including the introduction of the permit regime, as a core element of the Black Economy – combatting illicit tobacco package in the 2017/18 Budget. These measures address the significant revenue evasion associated with the import of illicit tobacco. The Department and the Australian Taxation Office estimate that $600 million in tobacco duties was lost due to the trade of illicit tobacco in 2015-16, equating to 5.6 per cent of the lawful market.

As the Department has advised the committee, decisions relating to the granting of, or refusing to grant, permission to import tobacco can be made based on a range of factors. These factors would include an applicant's history of paying the required duty and GST for imported goods, particularly tobacco; an applicant's record of complying with Australian customs requirements; or previous breaches of import permit conditions. For example, importers with outstanding debts to the Commonwealth for the import of tobacco products would likely be refused permission to import until, at the very least, all debts are settled.

Similarly, decisions relating to the revocation of import permits would take into account the conditions applied on import permits. The conditions include that all duties and taxes payable to the Commonwealth be paid in accordance with the *Customs Act 1901*. A breach of this condition may result in the revocation of the permit, in particular where an importer has not paid the required duties and taxes on multiple occasions.

The process followed by the Department would ensure that an applicant, or permission holder, in respect of whom an adverse decision is proposed to be made, would be fully informed of the basis for that decision prior to the decision being made, in line with natural justice principles.

In both of these circumstances, I consider that the broad discretion is necessary to enable me to respond to the constantly changing methodologies associated with the trade in illicit tobacco. The broad discretion is also justified due to the wide range of individuals and organisations throughout the supply chain who are involved in tobacco importation. I also consider that both of these circumstances justify the exclusion of these decisions from merits review. If individual decisions were subject to merits review, this may adversely affect the overall strategy that the Government has put in place to combat the illicit tobacco trade.

Given the significant revenue collected on imported tobacco, and the economic and social costs of black economy activities associated with tobacco sales, decisions relating to the granting and revoking of permits are of such significance to the Australian economy that this justifies exclusion from merits review. In support of this, in 2018-19, the four largest tobacco importers accounted for 98 per cent of the total amount of tobacco imported into Australia. This is worth an estimated $1.1 billion in revenue collected by the Australian Government. I therefore consider that it would be unsuitable to open up decisions relating to such potentially large amounts of revenue to merits review.

I also note that the exclusion of merits review of decisions relating to the granting and revoking of permits is consistent with the significant majority of prohibitions in the PI Regulations. Of the nearly twenty individual regulations that prohibit the importation of certain goods, merits review is only available in relation to decisions made under six of these regulations, most of which are health-related (drugs, steroids, therapeutic substances and human embryos).

I further note that individuals may seek permission to import certain types of tobacco products for their personal use. In relation to individual importers, I consider that merits review of a decision to refuse or revoke a permission may be disproportionate to the significance of such decisions, noting individuals can legally purchase tobacco products domestically. In such circumstances, the AAT would in effect be making a decision in relation to the type of tobacco products that an individual would prefer to smoke.

Replacement Explanatory Statement

In line with the committee's request of 8 July 2019, I have approved a replacement Explanatory Statement for the Regulations, which sets out the consultation that occurred in relation to the Regulations. The Department will inform the committee when the replacement Explanatory Statement has been registered on the Federal Register of Legislation.

I thank the committee for bringing these issues to my attention.

Yours sincerely

JASON WOOD

EXPLANATORY STATEMENT

Issued by the Assistant Minister for Customs, Community Safety and Multicultural Affairs

Customs Act 1901

Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019

The *Customs Act 1901* (the Customs Act) concerns customs related functions and is the legislative authority that sets out the customs requirements for the importation, and exportation, of goods to and from Australia.

Subsection 270(1) of the Customs Act provides, in part, that the Governor-General may make regulations not inconsistent with the Act prescribing all matters, which by the Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for giving effect to the Act.

Section 50 of the Customs Act provides, in part, that the Governor-General may, by regulation, prohibit the importation of goods into Australia and that the power may be exercised by prohibiting the importation of goods absolutely or by prohibiting the importation of goods unless specified conditions or restrictions are complied with.

The purpose of the *Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019* (the Amendment Regulations) is to amend the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations) to prohibit the importation of tobacco products into Australia without a permit, with limited exemptions. The Prohibited Imports Regulations set out various goods the importation of which is prohibited absolutely or prohibited unless certain conditions, restrictions, requirements are complied with, such as the granting of a licence or permission.

The Amendment Regulations are part of a broader Commonwealth Government initiative to address recommendations of the October 2017 Black Economy Taskforce Final Report in which the Government announced a number of measures to combat illicit tobacco trade in Australia, including proposing a prohibition on the importation of tobacco without a permit into Australia from 1 July 2019.

The Prohibited Imports Regulations include two prohibited import controls for certain tobacco products. Regulation 4D provides that the importation of unmanufactured tobacco leaf is prohibited unless the person importing the tobacco holds the relevant dealer or manufacturer licence, or an import permission has been given by the Commissioner of Taxation. Regulation 4U and Schedule 12 prohibit the importation of chewing tobacco, and snuffs intended for oral use, in an amount weighing more than 1.5 kilograms, without the relevant permission. All other types of tobacco products currently can be imported into Australia without a permit.

The Amendment Regulations strengthen border controls by inserting a new regulation in the Prohibited Imports Regulations, to prohibit the importation of tobacco products into Australia without the relevant permission and subject to certain conditions. Tobacco products imported without a valid permit would be a prohibited import and able to be seized without a warrant at the border.

The Amendment Regulations will not affect the existing import controls for certain tobacco products under regulations 4D and 4U of the Prohibited Imports Regulations. Certain specialty tobacco products, including cigars, will also be exempt from the new prohibition as they are low risk goods for duty evasion.

The Department of Home Affairs developed the Tobacco Regulations in consultation with the Department of Health, the Treasury, the Australian Taxation Office and the Australian Competition and Consumer Commission. The Department also held extensive consultation on the amendments with the tobacco industry and retailer bodies through the Illicit Tobacco Industry Group.

There is broad support across government and industry for the prohibited import control created by the Amendment Regulations.

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Regulations commence on 1 July 2019.

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ATTACHMENT A

Details of the *Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019*

Section 1 – Name of Regulation

1. This section provides that the title of the Amendment Regulations is the *Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019* (the Amendment Regulations).

Section 2 – Commencement

2. This section sets out, in a table, the date on which each of the provisions contained in the Amendment Regulations commence.

3. Table item 1 would provide for the whole of the instrument to commence on 1 July 2019.

Section 3 – Authority

4. This section sets out the authority under which the Amendment Regulations are made, which is the *Customs Act 1901* (the Customs Act).

Section 4 - Schedules

5. This section is the formal enabling provision for the Schedule to the Amendment Regulations, and provides that, each instrument that is specified in a Schedule to the Amendment Regulations, is amended or repealed as set out in the applicable items in the Schedule concerned, and that any other item in a Schedule to this instrument has effect according to its terms.

6. The instrument being amended is the *Customs (Prohibited Imports) Regulations 1956.*

Schedule 1 - Amendments

Customs (Prohibited Imports) Regulations 1956

Item 1 After regulation 4D

7. This item inserts new regulation 4DA Importation of tobacco products after existing regulation 4D Importation of Unmanufactured tobacco leaf.

8. The purpose of this item is to insert a new regulation in the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations), to prohibit the importation of tobacco products without the relevant permission being granted prior to importation and subject to certain conditions.

9. Under new subregulation 4DA(1), subject to subregulation (9), the importation into Australia of tobacco products is prohibited, unless:

   (a) a permission to import the tobacco products has been granted in writing by the Minister or an authorised person and the permission is produced to the Collector; or
   (b) the Minister has approved the importation under subregulation (9).

10. The term "tobacco products" is defined in subsection 4(1) of the Customs Act, as introduced by the *Customs Amendment (Collecting Tobacco Duties at the Border) Act 2018*. This definition provides that: ***tobacco products*** means goods classified to heading 2401, 2402 or 2403 of Schedule 3 to the *Customs Tariff Act 1995* (except goods classified to subheading 2402.90.00 or 2403.99.10 of that Schedule).

11. Subregulation 4DA(2) provides that certain tobacco products are exempt from the import prohibition imposed under subregulation 4DA(1). This subregulation ensures that the import prohibition on tobacco products does not apply to:

   (a) tobacco of a kind specified in regulation 4D;
   (b) chewing tobacco and snuffs intended for oral use;
   (c) cigars;
   (d) tobacco products:
      (i) that are prescribed by by-law for the purposes of item 15 of Schedule 4 to the *Customs Tariff Act 1995*; and
      (ii) that are imported by passengers, or members of the crew, of ships or aircraft; and
      (iii) on which duty is not payable.

12. The purpose of the exemptions in paragraphs (a) and (b) is to carve out from the new import prohibition tobacco products the importation of which is currently controlled under the Prohibited Imports Regulations.

13. For the exemption in paragraph (a) note 1 to subregulation 4DA(2) explains that existing regulation 4D prohibits the importation of unmanufactured tobacco and certain tobacco refuse without permission from the Commissioner of Taxation. Regulation 4D of the

Prohibited Imports Regulations currently provides that the importation of unmanufactured tobacco leaf specified in tariff subheading 2401.10.00 of the *Customs Tariff Act 1995* is prohibited unless the person importing the tobacco holds the relevant dealer licence or a manufacturer licence or a permission to import the leaf has been given by the Commissioner of Taxation.

14. For the exemption in paragraph (b), Note 2 to subregulation 4DA(2) explains that existing regulation 4U prohibits the importation of certain chewing tobacco and snuffs intended for oral use without permission from the Minister. The importation of chewing tobacco, and snuffs intended for oral use, in an amount weighing more than 1.5 kilograms is prohibited by regulation 4U and Schedule 12 to the Prohibited Imports Regulations, without the relevant permission.

15. The exemption provided in paragraph (c) has the effect that the new import restriction does not apply to the importation any amount of cigars. Importers of cigars continue to be able to import this good via any legitimate means. Cigars are a speciality product that are not currently a source of revenue loss for the Commonwealth.

16. Subregulations 4DA(3) to 4DA(8) provides the details of the processes for applying for, and dealing with, import permissions for tobacco products the importation of which would otherwise be prohibited under subregulation 4DA(1).

17. Subregulation 4DA(3) provides that an applicant for a permission under subsection (1) to import tobacco products must:

    (a) lodge a written application with the Minister or an authorised person; and
    (b) give to the Minister or an authorised person any information that the Minister or authorised person reasonably requires for the purpose of making a decision on the application.

18. In these regulations the Minister means the Minister responsible for administering the Customs Act and "authorised officer" is defined for the purposes of this regulation in new subregulation 4DA(10).

19. Subregulation 4DA(4) to 4DA(6) details the process for dealing with an application for permission.

20. Subregulation 4DA(4) provides that in considering whether to grant a permission, the Minister or authorised person may consider any relevant matter.

21. Matters relevant to the consideration of whether or not to grant a permission may include, but are not be limited to information relating to the applicant's identity, business information and other necessary information to facilitate internal and external checks, as occurs for other prohibited import permits administered by the Department of Home Affairs.

22. Subregulation 4DA(5) provides that the Minister or authorised person must not grant a permission unless the applicant gives all the information required by the Minister or authorised person under paragraph 4DA(3)(b).

23. Subregulation 4DA(6) provides that the Minister or authorised person may grant a permission subject to conditions or requirements specified in the permission, to be complied with by the holder of the permission.

24. Subregulation 4DA(7) addresses the revocation of permission to import tobacco products. This subregulation provides that the Minister or authorised person may, in writing, revoke a permission if:

    (a) the holder of the permission does not comply with a condition or requirement of the permission; or
    (b) the Minister or authorised person is satisfied that revocation is necessary:
        (i) for the protection of the revenue; or
        (ii) for ensuring compliance with the Customs Acts.

25. The purpose of this subregulation is to provide a mechanism for a permission to be revoked in the prescribed circumstances.

26. Subregulation 4DA(8) addresses the notice of decision to refuse or revoke permission to import tobacco products. This subregulation provides that if the Minister or authorised person decides:

    (a) not to grant a permission; or
    (b) to revoke a permission;

    the Minister or authorised person must give the applicant or holder of the permission written notice of the decision as soon as practicable after making the decision.

27. Under new subregulation 4DA(9) the Minister may the importation of specified tobacco products. This subregulation provides that the Minister may, by legislative instrument, approve the importation into Australia of a tobacco product that meets one or more of the following:
    (a) the tobacco product is specified in, or included in a class of tobacco products specified in, the approval;
    (b) the tobacco product is imported by a person, or class of persons, specified in, the approval;
    (c) the tobacco product does not exceed a value or amount specified in the approval;
    (d) the tobacco product is imported in a way, or by a means, specified in the approval

28. The purpose of this instrument is to establish a mechanism for granting ongoing permissions for certain tobacco products where it is considered that applying for a case-by-case permission is not necessary.

29. For example, it is proposed that duty paid tobacco products imported by aircraft passengers or crew members arriving in Australia, who are aged 18 years or older would be listed on this instrument as approved tobacco products. The purpose of this approval would be to ensure that international travellers entering Australia can continue to import

into Australia duty paid tobacco without the need to apply for and obtain an import permit, which would be an unnecessary burden in this context.

30. This instrument also gives the Minister flexibility to add additional tobacco products to the instrument in the future, where certain tobacco products, such as emerging tobacco products, may be identified which should not be subject to the import prohibition introduced by new subregulation 4DA(1). This flexibility would also allow the Minister to quickly address changing patterns of illicit tobacco importation.

31. Subregulation 4DA(10) provides that in this regulation *'authorised person'* means an APS employee in the Department who is authorised in writing by the Minister to be an authorised person for the purposes of this regulation.

32. It is appropriate for the Minister to be able authorise an APS employee in the Department as an authorised person due to the large volume of permissions that will need to be dealt with under this regulation. Decisions in relation to granting, revoking or refusing a permission will need to be made on a regular basis. Delegation to an APS level employee is necessary to ensure applications can be assessed in a timely manner.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019

These Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

Overview of the Regulations

The purpose of the *Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019* (the proposed Regulations) is to amend the *Customs (Prohibited Imports) Regulations 1956* (the Prohibited Imports Regulations) to prohibit the importation of tobacco products into Australia without a permit, with limited exemptions. The Prohibited Imports Regulations set out various goods the importation of which is prohibited absolutely or prohibited unless certain conditions, restrictions, requirements are complied with, such as the granting of a licence or permission.

Background

The Australian Government announced in the 2018-19 Budget that it would tighten tobacco border controls by introducing a prohibited import control for tobacco products through the *Black Economy Package – Combatting Illicit Tobacco.*

The Prohibited Import Regulations currently include two prohibited import controls for certain tobacco products. Regulation 4D provides that the importation of unmanufactured tobacco leaf is prohibited unless the person importing the tobacco holds the relevant dealer or manufacturer licence, or an import permission has been given by the Commissioner of Taxation.

Regulation 4U and Schedule 12 prohibit the importation of chewing tobacco, and snuffs intended for oral use, in an amount weighing more than 1.5 kilograms, without the relevant permission granted by the Minister administering Division 1A of Part V of the *Trade Practices Act 1974.* All other types of tobacco products can be imported into Australia without a permit.

From 1 July 2019, the proposed Regulations will build on the two existing tobacco prohibited import controls, by making it a requirement that all tobacco products will be prohibited imports under the Prohibited Imports Regulations. As such, tobacco products will only be able be imported into Australia with a valid import permit (except for international travellers using duty free allowances and specified tobacco items such as cigars and smokeless tobacco). Tobacco products imported without a valid permit would be a prohibited import and would be able to be seized at the border without a warrant.

Human rights implications

These proposed Regulations support the Government's commitment to improve health outcomes for Australians and combat illicit tobacco. It is consistent with the *Tobacco Strategy 2012-2018* (endorsed by all Australian Health Ministers) to reduce the affordability of tobacco products by combating illicit tobacco. It is also consistent with the World Health Organization's *Framework Convention on Tobacco Control,* which commits nations to implement policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke.

The right to enjoy the highest standard of physical and mental health.

Article 12 of the International Covenant on Economic, Social and Cultural Rights serve to protect a person's right to the highest standards or physical and mental health.

Trade in illicit tobacco is extremely profitable, particularly as a result of ongoing excise increases. Once illicit tobacco has entered the domestic supply chain, there are few disincentives for those who engage in the illicit tobacco trade due to the difficulties in proving that an offence has been committed under current laws.

Illicit tobacco undermines public health measures to reduce the prevalence and uptake of smoking, bypassing important controls and standards relating to manufacturing, plain packaging and health labelling. Illicit tobacco can be manufactured in sub-standard processes, uses potentially poisonous ingredients, and inherently poses environmental and contamination risks.

Australian Border Force activities have detected poisons such as formaldehyde, and found rat faeces, inside illicit tobacco—posing a health and biosecurity risk to Australia.

By making all tobacco products a prohibited import, these proposed Regulations engage and enhance the right to enjoy the highest standard of physical and mental health. The measure will serve as a deterrent against the increasing illicit tobacco market, serving to further reduce the amount of illicit tobacco in Australia.

Further, the measure will improve physical and mental health outcomes, as the amount of illicit tobacco in Australia will be reduced, limiting public exposure to the potential harms associated with illicit tobacco. The measure will support the effectiveness of related health policies, such as tobacco plain packaging requirements.

Conclusion

These proposed Regulations are compatible with the applicable rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.* The proposed Regulations positively engage with the right to the highest standard of physical and mental health because they improve the health and safety standards in Australia by targeting the operability of the illicit tobacco trade.

THE HON JASON WOOD MP
ASSISTANT MINISTER FOR CUSTOMS, COMMUNITY SAFETY AND MULTICULTURAL AFFAIRS

Senator the Hon Bridget McKenzie
Deputy Leader of The Nationals
Minister for Agriculture
Senator for Victoria

Ref: MS19-001055

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear ~~Senator Fierravanti-Wells~~ Connie,

Thank you for your letter of 25 July 2019, requesting information about the use of Minister's rules to exempt amounts derived from the forced disposal of livestock from the assessment of income for the purposes of Farm Household Allowance (FHA), rather than amending primary legislation.

Exempting income from the forced disposal of livestock was a recommendation made by the panel of the independent review into the Farm Household Allowance program. The panel's view was that treating income from forced disposal as income for FHA purposes, particularly during drought or other events, could act as a disincentive for good economic decision-making, animal welfare and natural resource management.

Having regard to the ongoing and entrenched drought conditions faced by Australian farmers, the Australian Government considered it important to implement the recommendation as soon as possible. The fastest way the exemption could be delivered to FHA recipients was through the *Farm Household Support (Forced Disposal of Livestock) Minister's Rules 2019* (Livestock Minister's Rules), rather than by amending the *Farm Household Support Act 2014* (FHS Act) or the *Social Security Act 1991* (SSA). Further, as a FHA recipient's income is assessed by financial year, it was preferable that the Livestock Minister's Rules commenced on 1 July.

The FHS Act has clear and deliberate links to social security law. FHA is aligned where possible with social security payments; and particularly with Newstart Allowance and Youth Allowance. A reference to either of those payments in social security is a reference to FHA, unless the FHS Act either switches off or modifies the reference. This means there will be a continuous need to assess the alignment with social security and make changes as necessary.

As outlined in the Explanatory Memorandum to the Farm Household Support Bill 2014, now the FHS Act, the Minister's Rules can be used to correct any unintended consequences of the substantial interaction between the FHS Act with the SSA. This ensures that any modifications required for the efficient and effective operation of FHA are provided for without the need for further legislative change.

Should the Senate Standing Committee on Regulations and Ordinances have any further concerns relating to this matter, please contact Kerren Crosthwaite, Assistant Secretary, on (02) 6272 3717.

Thank you again for your correspondence.

Yours sincerely

Bridget McKenzie

SENATOR THE HON. JONATHON DUNIAM
Assistant Minister for Forestry and Fisheries
Assistant Minister for Regional Tourism
Deputy Manager of Government Business in the Senate
Liberal Senator for Tasmania

Ref: MC19-006171

Senator the Hon. Concetta Fierravanti-Wells
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

14 AUG 2019

Dear Senator

Thank you for your letter on behalf of the Senate Standing Committee on Regulations and Ordinances, dated 1 August 2019, about the *Fisheries Management Regulations 2019* (the instrument).

I provide the following to assist with the committee's questions.

The committee requests your detailed advice as to the justification for reversing the evidential burden of proof in subsection 80(7) of the instrument. The committee's assessment would be assisted if your response expressly addressed the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Subsections 80(4) and (6) of the instrument provide for offences of strict liability for a person operating a boat for not displaying or removing the prescribed identification code as required. Subsection 80(7) provides an exception for the offences in subsections 80(4) and (6), but places the evidential burden of proof on the defendant. The Committee identifies that the difficulty for the prosecution to prove a particular matter has not traditionally been considered in itself to be a sound justification for placing the burden of proof on the defendant. However, in the case of subsection 80(7) of the instrument a range of factors, as outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide), makes the reversal of evidential burden more readily justified.

The purpose of the exception in the instrument is to reduce the burden on masters and owners of fishing vessels by preventing the need for duplicate licencing and identification systems under Commonwealth and State/Territory regulation. This is considered to be a practical and effective mechanism to properly allow for the various vessel identification regimes to operate together by excluding those from the offences under subsections 80(4) and (6), where they are compliant with State or Territory identification regimes. The obligation to comply with the requirements is with the owner of the vessel and it is reasonable to infer that the owner has information which is particular to them as to their licensing status and whether they in fact comply with the state or territory regulations.

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As described in the Explanatory Statement for the instrument and the additional material provided by the Department of Agriculture on 24 July 2019, to the committee it would be significantly more difficult and costly for Australian Fisheries Management Authority (AFMA) officers to disprove than for the defendant to establish the matter. If the individual does not have a licence, the burden to disprove this could create an excessive and time consuming task for AFMA and require extensive consultation with potentially all states and territory fishing authorities to satisfy the evidential proof that a licence does not exist. AFMA officers undertaking field inspections at the Commonwealth level do not have knowledge of a vessel's licensing status under State or Territory laws nor whether the markings on the vessel would necessarily comply with those laws. No central state and territory fishing vessel registration database exists that would assist in real-time investigations.

In addition, if AFMA were required to undertake extensive consultation with state and territory authorities to determine the registration status of a fishing vessel it would potentially create a time and cost impost on the fisher. State or Territory authorities may not necessarily know whether the identification code on the boat complied with relevant requirements at the time the offence was alleged to have occurred. For example, if an inspection regime was not undertaken or the boat had been repainted since its last inspection. Knowledge on whether the identification code on the boat complied with the relevant state or territory regulations would be particular to the boat owner. Further, where matters are defended there is potentially a need to require evidence to be obtained, including witness statements and the appearance of witnesses in court. This is likely to be particularly more costly and time consuming for the Commonwealth than the burden placed on the individual when considered against the relative low penalty the offence carries.

The offence to which the reverse evidential burden of proof applies, is a *strict liability* offence, not an *absolute liability* offence. It is open to the defendant to raise a defence of *mistake of fact*. Therefore the burden on the owner is not considered to be an oppressive infringement of an individual's rights. Because the burden is neither increased nor decreased by the imposition of this offence. It is a regulatory requirement for the owner to comply with all licence conditions (including, in this case, identification requirements), because the individual requires a licence. Strict liability requiring a master or owner to ensure that a vessel has on board documentary evidence of registration, financial security to meet abandonment liability and other mandatory requirements is common practice for the maritime industry. The production of a licence, if it exists, is a simple and easily discharged matter. It is reasonable to expect that the master or owner would have knowledge on whether the boat was licensed and that the markings were compliant with those laws. For example, the process can be stopped and withdrawn on the production of a State or Territory licence.

Noting that the information sought to establish the elements of the offence is peculiar within the knowledge of the master or owner of the vessel, the significantly more difficult and costly process for AFMA officers to disprove than for the defendant to establish the matter, the simple and routine nature for the defendant to provide the appropriate documentation and the relatively low penalty the offence carries, I do not consider that the reversal of evidential burden unduly trespasses on personal rights and liberties.

I trust this information is of assistance to the committee.

Yours sincerely

Jonathon Duniam

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee of Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

19 AUG 2019

Via email: regords.sen@aph.gov.au

Dear ~~Senator~~ Connie.

I refer to your letter of 25 July 2019 in relation to the *Foreign Influence Transparency Scheme Amendment (2019 Measures No. 1) Rules 2019*.

As you have noted, s30 of the *Foreign Influence Transparency Scheme Act 2018* (FITS Act) permits rules to prescribe additional circumstances in which a person is exempt from registration requirements in that Act. In reliance on this power, subsection 5(2) was recently added to the *Foreign Influence Transparency Scheme Rules 2018* (FITS Rules). Subsection 5(2) creates an exemption to the requirement for a person to register where the person undertakes an activity on behalf of a foreign principal and:

- the activity is 'general political lobbying' for the purposes of political or governmental influence as defined by the FITS Act
- the foreign principal or the person is taking part in a process related to a federal government decision in order to comply with a Commonwealth law
- the process involves the person or the foreign principal provide providing information in accordance with the law to the decision maker or someone assisting them for the purpose of making the decision, and
- at the time the activity is undertaken, the identity of the foreign principal is clear or made apparent.

The intention of the FITS Act is to ensure that there is transparency for the public and government decision makers in political and governmental processes where the interests of a foreign principal are being advanced by an intermediary. Registration obligations generally arise where a person undertakes certain activities on behalf of a foreign principal for the purposes of political or governmental influence, unless an exemption applies. The exemptions in the Act are crafted in recognition of the fact that, in many cases, the scheme's transparency objective can be met without the need for registration. In general, that is done by specifying that the exemption will only apply where the identity of the foreign principal and the relationship between the foreign principal and the person undertaking the activity are made apparent to decision makers.

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Similarly, the exemption in subsection 5(2) of the FITS Rules will only apply in specific circumstances – importantly, where the person or the foreign principal is required by law to participate in a process and when the identity of the foreign principal is clear and apparent to those with whom the person is dealing.

The exemption in subsection 5(2) would apply, for example, in a situation where an Australian company, in a joint venture with a foreign principal, is required by law to apply to a Commonwealth department for a permit necessary to undertake the joint venture's business activities. If the Australian company makes it clear when applying for the permit that they act on behalf of the joint venture, and that the foreign principal is also a party to the joint venture, then there is transparency for the decision maker.

Conversely, the exemption would not apply if the Australian company concealed that they were seeking the permit on behalf of the foreign principal joint venture partner. Further, the exemption would not apply if the company engaged in lobbying activities which went beyond merely providing the information required to participate in the permit application process to the Commonwealth department. Additionally, the exemption would not apply to other activities undertaken by the person in relation to the application process, including lobbying members of parliament or their staff or engaging in communications activities designed to influence the views of the public or a section of the public in relation to the process.

In the absence of this Rule, people who are acting in compliance with other Commonwealth laws, and who may undertake such activities in very high volumes on a regular basis, would need to register and also comply with the reporting and record keeping obligations required by the FITS Act. For example, in the absence of this exemption, entities which are engaged by a foreign principal to prepare and submit applications for the import or export of goods to Australia (and who are not exempt as customs brokers under section 29F of the FITS Act) would need to register large numbers of general political lobbying activities on behalf of those foreign principals. This would have a particularly disproportionate impact on business and industry and would not materially contribute to transparency for the officials making those decisions. In my view, in circumstances where the transparency objectives of the scheme are otherwise met in the way I have described, this additional regulatory burden is unnecessary and inappropriate.

As anticipated in the Revised Explanatory Memorandum to the FITS Bill (at paragraph 550), reliance on this rule making power enabled me to respond to an emerging issue. It was the intent of Parliament that the scheme operate in an adaptable and responsive manner.

The FITS Act provides that the scheme be reviewed by the Parliamentary Joint Committee on Intelligence and Security within three years of the legislation commencing. Matters such as this exemption will be considered in that review.

I hope this information is of assistance.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC19-012298

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

19 AUG 2019

Dear Senator Connie

I refer to your letter of 1 August 2019 on behalf of the Senate Standing Committee on Regulations and Ordinances (the Committee) regarding the Health Insurance (Diagnostic Imaging Services Table) Regulations 2019 (the DIST Regulations) [F2019L00563].

I acknowledge the Committee's concerns that independent merits review is not available in relation to decisions by the Secretary of the Department of Health to refuse to grant exemptions from capital sensitivity in respect of diagnostic imaging equipment used in inner regional areas under subclause 1.2.3(4) of the DIST Regulations. I also acknowledge the Committee's view that internal reviews of decisions made under clause 1.2.4 of the DIST Regulations carried out by senior officers of the Department of Health do not constitute sufficient independent merits review.

In response to the Committee's concerns, I have instructed my Department to arrange for amendment of the capital sensitivity exemption provisions under Division 1.2 of the DIST Regulations to allow applicants who have not been granted exemptions to seek independent merits review by the Administrative Appeals Tribunal. The independent merits review can be sought after an adverse decision is made by the Secretary.

I have instructed my Department to include this amendment in the next package of amendments to the DIST Regulations that are proposed to commence before the end of the year.

Thank you for bringing these matters to my attention.

Yours sincerely

Greg Hunt

THE HON DAVID COLEMAN MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: SB19-001021

Chair
Senate Standing Committee on Regulations and Ordinances
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 25 July 2019, in which the Committee requested my advice regarding the *Migration (Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visa Holders) Instrument 2019*.

The Committee has expressed concerns about the appropriateness of enacting changes to the definition of *fast track applicant* by delegated legislation, rather than primary legislation, and has requested advice as to why it is considered necessary and appropriate to enact these changes by delegated legislation.

Parliamentary intention to ensure Minister has ability to specify class of persons

Paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act) allows the Minister to expand the definition of *fast track applicant* in section 5(1) of the Act to include other cohorts specified by legislative instrument.

The Minister's power to create a new class of persons who are *fast track applicants* was subject to the appropriate levels of parliamentary oversight, including by the Scrutiny of Bills Committee as detailed in your letter, when Parliament passed the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the Legacy Act).

The Department of Home Affairs' (then the Department of Immigration and Border Protection) response to the Scrutiny of Bills Committee, stated that "Vulnerable asylum seekers may, for reasons outside their control, fall within the excluded fast track review applicant criteria because of, for example, not having the mental faculties to understand they have made a claim with no substance. To address this possibility, the Minister may make a legislative instrument to specify that certain fast track applicants should have access to review by the IAA."

The Explanatory Memorandum for the Legacy Act explains that the reason for this power was for the Minister to include other cohorts by disallowable legislative instrument to provide the Minister with the flexibility to respond to changing Government priorities.

The fast track process was established to improve the efficiency and cost effectiveness of merits review for protection visa applicants and continues to be the most effective and appropriate mechanism for assessing the protection claims of fast track applicants. The ability of the Minister to expand this definition is crucial to the success and adaptability of the fast track review mechanism. This ensures that the Minister can bring new cohorts into the fast track process in a timely and efficient manner, leading to shortened timeframes and faster outcomes for all applicants.

Changing the law in a significant way

The Committee has noted its longstanding view that significant changes to the law should be made via primary legislation, to ensure that any such changes are subject to parliamentary oversight.

The instrument expands the definition of fast track applicant to include a person who currently holds, or most recently held, a Subclass 785 (Temporary Protection) visa (TPV) or a Subclass 790 (Safe Haven Enterprise) visa (SHEV), and who makes a subsequent application for a protection visa on or after 2 April 2019.

In expanding the definition of fast track applicant, the instrument does not change the law in a significant way. Currently, the majority of persons who are eligible to apply for a subsequent TPV or SHEV already fall under the definition of a fast track applicant in subsection 5(1) of the Act. The instrument aims to provide consistency in outcomes across all TPV and SHEV holders by bringing TPV and SHEV holders who make an application for a further TPV or SHEV on or after 2 April 2019 into the fast track cohort.

As noted in the explanatory statement to the instrument, expanding the definition of fast track applicants will not impact the cohort's ability to seek asylum in Australia, or their ability to access judicial review of a refusal decision, nor will it prevent grant of a protection visa for applicants who satisfy the criteria for their visa.

The instrument does not purport to change the law in a significant way as it continues to afford applicants merits and judicial review, and provide applicants an opportunity to be granted a protection visa.

Review rights for fast track applicants

I also wish to respond to the Committee's concerns regarding fast track applicants individual review rights. All fast track applicants (with the exception of those who are *excluded fast track review applicants*) have access to a mechanism of merits review in the Immigration Assessment authority (the IAA) that is efficient, quick and free from bias. The IAA has been described by the Statutory Review of the Tribunals Amalgamation Act 2015 (the Callinan Review), tabled 23 July 2019, as 'an effective and fair decision-maker in the cases with which it deals'. Fast track applicants continue to have access to judicial review.

Fast track applicants who are not excluded fast track review applicants have been found by the High Court in *Plaintiff M174 v Minister for Immigration and Border Protection* [2018] HCA 174 to have automatic access to *de novo* merits review by the IAA. The IAA must conduct a review 'on the papers' based on the information provided by the applicant to the Department as part of their protection visa application but may exercise a discretion to receive new information in exceptional circumstances.

The Committee highlights the Scrutiny of Bills committee concerns that the IAA has a 'lack of power to vary or set aside a refusal decision...or to otherwise compel the minister to comply with any direction or recommendation made by the IAA'. Whilst the IAA does not have the power to compel the Minister to grant a protection visa, the IAA is able to remit a fast track applicant's case to the original decision-maker if they find that the applicant satisfies the criteria for a protection visa.

The Government is committed to ensuring Australia is in compliance with its obligations arising under international law and, in particular, its *non-refoulement* obligations. Applicants who satisfy the criteria for a protection visa will not be removed from Australia.

I trust that the information provided above will be of assistance to the Committee.

Yours sincerely

The Hon David Coleman MP
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

14 / 8 / 2019

THE HON DAVID COLEMAN MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: SB19-001019

Senator the Hon Concetta Fierravanti-Wells (Chair)
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CANBERRA ACT 2600

Dear Chair

Migration Amendment (New Skilled Regional Visas) Regulations [F2019L00578]

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 25 July 2019, in which the Committee requested information about the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (the Instrument), which amends the *Migration Regulations 1994* (the Migration Regulations).

The Committee has sought my advice in relation to matters in the Instrument relating to merits review, imposition of fees (taxation), and significant matters in delegated legislation.

Merits review

The Committee notes that there is no provision for independent merits review of decisions relating to refunds under new subregulation 2.12F(3C), new regulation 2.73C, and new item 8101 in Schedule 13 to the Migration Regulations, which will be inserted by items 9, 30 and 76 of Schedule 2 to the Instrument, respectively. These provisions provide that the Minister may refund amounts of visa application charge, nomination fees and nomination training contribution charge, in certain specified circumstances.

The Committee requests my advice as to the characteristics of decisions made under new regulations 2.12F, 2.73C and item 8101 of the Migration Regulations, in relation to the refund of fees and charges that would justify excluding independent merits review.

The Committee further states that it would also expect such information to be included in the explanatory statement to the Instrument, and it would therefore appreciate my advice as to whether, and if so, when, the explanatory statement will be amended to include this information.

I advise the Committee that the refund provisions under new subregulation 2.12F(3C), new regulation 2.73C, and new item 8101 in Schedule 13 to the Migration Regulations are modelled on existing refund provisions available to permanent employer sponsored visa applicants and businesses seeking to nominate an occupation linked to a vacant position for a foreign worker to fill. None of the existing refund provisions is merits reviewable, and this has been the case since they were inserted into the Migration Regulations on 1 May 1997.

The new refund provisions provide a discretion to refund fees and charges where the application has been withdrawn or cannot progress due to the circumstances set out in the relevant provision. The payment can be refunded where the circumstances prescribed genuinely apply to an applicant - for instance, when the application cannot proceed or becomes purposeless through no fault of the applicant.

However, there is a discretion for a refund to be refused, for instance, where an application is under assessment, but the applicant has withdrawn the application in order to forestall a refusal decision. This might arise, for example, where a letter has been sent to the applicant seeking further information that may be viewed as adverse and possibly lead to a refusal decision. Providing refunds in those circumstances could undermine the good administration of Australia's immigration program. Providing for merits review in those circumstances would compound this situation, and, consistently with previous practice, I consider it preferable not to do so.

I note that such decisions are judicially reviewable and it is open to applicants who consider that they have been unlawfully refused a refund to apply to the Courts.

A revised explanatory statement that clarifies these issues is attached. I will arrange for this to be tabled as soon as practicable.

Imposition of fees (taxation)

The Committee notes that item 19 of Schedule 1 to the Instrument, item 61 of Schedule 2 to the Instrument and item 4 of Schedule 3 to the Instrument, respectively, insert new items 1241, 1242 and 1139 in Schedule 1 to the Migration Regulations. The purpose of these new items is to prescribe the requirements for making valid applications for the new skilled regional provisional visas and the new skilled regional permanent visa, including the visa application charge (VAC) payable in respect of an application.

The VAC payable under section 45A of the *Migration Act 1958* (the Migration Act) is imposed on all visa applications by section 4 of the *Migration (Visa Application) Charge Act 1997* (the VAC Act).

Section 45A of the Migration Act provides that *"A non-citizen who makes an application for a visa is liable to pay visa application charge if, assuming the charge were paid, the application would be a valid visa application"*. Subsection 45B(1) further provides that *"The amount of visa application charge is the amount, not exceeding the visa application charge limit, prescribed in relation to the application"*.

The amount of VAC payable in respect of a particular application for a visa is prescribed in Schedule 1 to the Migration Regulations (see regulation 2.12C – Amount of visa application charge).

The Committee requests my advice on two issues.

Why the application charges set out in the Instrument are specified in the Migration Regulations 1994, rather than in a separate instrument dealing only with the imposition of charges.

The inclusion of the amount of the VACs in the Migration Regulations is not inconsistent with the Office of Parliamentary Counsel's Drafting Direction No. 3.2 in relation to Taxation. Among other things, that Direction notes as follows:

> *It has been suggested that setting rates is an integral part of imposing a tax, and so provisions that set rates should be treated, for the purposes of section 55 of the Constitution, as provisions that impose taxation. This approach is not the approach preferred by the Government.*

While the Direction provides that it would be preferable for a single set of principal regulations not to deal with both rates of tax and other matters, the Direction does not insist on this for amendments to existing principal regulations which, like the Migration Regulations, deal with both rates and other matters.

Since the introduction of the VAC on 1 May 1997, successive Governments have included regulations prescribing the amount of the VAC in the Migration Regulations.

I consider it appropriate for the Migration Regulations to prescribe the amounts of VAC payable for the following reasons.

Payment of the VAC is a requirement for making a valid application for a visa. Please see paragraph 46(1)(ba) of the Migration Act. It is convenient for applicants to have all prescribed requirements for a valid application set out in one place. These requirements are prescribed in Schedule 1 to the Migration Regulations (see subregulation 2.07(1)). It has proven to be effective and convenient to include the VAC payable in respect of an application in the same place as all other requirements for making a valid application, and I consider it appropriate to continue to do so.

As noted above, the VAC is imposed by the VAC Act, which deals only with the imposition of the VAC, and is therefore compliant with section 55 of the Constitution.

Why is it considered necessary and appropriate to impose visa application charges by delegated legislation, noting that these charges are imposed as taxes?

As I outlined above, the VAC is imposed by the VAC Act not by the Migration Regulations. The VAC Act deals only with the imposition of the VAC, and is therefore compliant with section 55 of the Constitution. The Migration Regulations prescribe the amounts of VAC payable, under the power in the Migration Act. This legislative scheme has been in place since 1 May 1997 and has been followed by successive Governments since then.

As has been the case since the Migration Regulations were made in 1994, when a new visa is created, the requirements relating to that visa are prescribed in Schedules 1 and 2 to those Regulations. This includes the requirements for making a valid application for the visa, and the criteria and other requirements to be satisfied for grant of the visa.

In light of the above, I consider that it is appropriate for the amount of VAC payable in respect of an application for a visa to be prescribed at the same time, and in the same instrument, as the other matters required to be prescribed.

Further, it is often necessary to make adjustments to the VAC after a visa has been introduced. For instance, where a visa is amended to cover a new group of applicants or to remove or change a group previously included, corresponding adjustments to the VAC may be required. In addition, the amounts of VAC are monitored and adjusted where necessary, including annual indexation. I consider that it is necessary and appropriate for this to be done in delegated legislation so that the changes can be made in a timely and transparent manner.

The use of delegated legislation to set the amount of the VACs is controlled by the VAC Act, as the amount of a VAC cannot exceed the limit set by the Parliament in that Act. The VAC amounts prescribed in Schedule 1 to the Migration Regulations remain within that limit.

Introduction of a new VAC, for instance when a new visa is introduced, and adjustments to existing VACs, must be done by regulations which are registered on the Federal Register of Legislation and tabled in both Houses of Parliament. The regulations may be disallowed by either House.

Significant matters in delegated legislation

The Committee notes that the Instrument appears to make a number of relatively significant changes to Australia's migration law, for example by introducing three new visas, closing two others, and making associated changes to Australia's visa regime. The Committee has indicated its concern about the use of delegated legislation to make significant changes to law, and the exemption of legislative instruments from parliamentary oversight mechanisms such as sunsetting and disallowance. The Committee states that it will continue to monitor these issues.

I note that it has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to respond quickly to emerging situations including changes in the labour market and the economy.

The Committee has expressed concerns that the amendments are not subject to parliamentary oversight. However, the Instrument itself is subject to the scrutiny framework set out by the *Legislation Act 2003* (the Legislation Act), including the provisions related to disallowance. In the event that either House of Parliament considered that the Instrument was not appropriate, it would be possible for the Instrument to be disallowed, in whole or in part.

In the particular case of this Instrument, the Committee has noted it is made pursuant to the regulation-making power in subsection 504(1) of the Migration Act. While this is correct, I note that many of the amendments made by the Instrument are expressly authorised by a number of provisions in the Migration Act, which are listed in Attachment A to the explanatory statement.

In particular, I note that subsection 31(1) of the Migration Act provides for prescribed classes of visas, and subsection 31(3) provides that the regulations may provide for criteria for visas. In addition, paragraph 46(1)(a) of the Migration Act provides for prescribed criteria and the requirements for making a valid application for a visa.

The Instrument is of benefit to the Australian community because it creates three new Skilled Regional visas. The new visas are designed to support the development of regional Australia, in particular to support businesses and employers in regional areas. They will also support regional communities by requiring that the primary skilled visa holder, and his or her family members, must live, work and study only in regional Australia for the duration of their visa. The visa settings have been developed to support this important objective in the most effective way.

As a general principle, given the frequency and volume of the legislative amendments that are required to maintain a dynamic and responsive immigration system, and given that oversight of the amendments is available to the Parliament under the Legislation Act, I remain of the view that the use of delegated legislation is appropriate.

I thank the Committee again for bringing these matters to my attention.

Yours sincerely

David Coleman

14 / 8 / 2019

THE HON DAVID COLEMAN MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: SB19-001019

Senator the Hon Concetta Fierravanti-Wells (Chair)
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Chair

Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019 [F2019L00551]

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 25 July 2019, in which the Committee requested information about the *Migration Amendment (Temporary Sponsored Parent Visa and Other Measures) Regulations 2019* (the Instrument), which amends the *Migration Regulations 1994* (the Migration Regulations).

The Committee has sought my advice in relation to matters in the Instrument relating to merits review, privacy, imposition of fees (taxation), and significant matters in delegated legislation.

Merits review

Decisions made under regulations 2.60U and 2.68K

The Committee has sought my advice about whether the decisions made under regulations 2.60U and 2.68K, in relation to the approval of a person as a parent sponsor and the variation of the terms of such approvals, are subject to independent merits review. The Committee has also asked for confirmation that the review of a decision to refuse to approve a person as a family sponsor is not limited to refusals based on criminal convictions.

I can confirm that, yes, these decisions are subject to independent merits review and the review is not limited in this way.

Under section 348 of the *Migration Act 1958* (the Act), the Administrative Appeals Tribunal (AAT) must review a Part 5-reviewable decision, so long as the application was properly made under section 347 and the Minister has not issued a conclusive certificate under section 339 (the Minister may issue a conclusive certificate if the Minister believes it would be contrary to the national interest to change the decision or for the decision to be reviewed).

A decision that is prescribed in the Migration Regulations is a Part 5-reviewable decision (refer subsection 338(9)). Subregulation 4.02(4) prescribes decisions for this purpose.

The Instrument amends paragraph 4.02(4)(a) to refer to subsection 140E(1A) of the Act to ensure that a decision to refuse an application for approval as a family sponsor is subject to independent merits review. Paragraph 4.02(4)(n) already prescribes a decision under subsection 140GA(2) of the Act not to vary a term specified in an approval and thus ensures that a decision not to vary a term specified in an approval as a family sponsor is subject to independent merits review (refer Item 135 of Schedule 1 to the Instrument and explanatory statement).

Therefore, these decisions are subject to independent merits review by the AAT, so long as an application is properly made and no conclusive certificate has been issued. The review of the decision to refuse an application for approval as a sponsor is not limited to refusals based on criminal convictions.

A revised explanatory statement that clarifies these issues is attached (refer page 12 of the Statement of Compatibility with Human Rights and Item 135 of Attachment C to the explanatory statement). I will arrange for this to be tabled as soon as practicable.

Other discretionary decisions

The Committee has also asked whether the Instrument makes provision for any other discretionary decisions and, if so, whether these are subject to independent merits review. In relation to any discretionary decisions that are not subject to independent merits review, the Committee has asked for an explanation of the characteristics of the decision that would justify excluding independent merits review, having regard to the Administrative Review Council's guidance document: '*What decisions should be subject to merits review?*'.

As the Committee is aware, the Instrument creates a new visa which is subject to the standard provisions for independent merits review set out at section 338 of the Act and regulation 4.02 of the Migration Regulations. In particular, independent merits review is available in relation to the decision to refuse to grant the visa (see section 338). In addition, I can advise that the Instrument does provide for other discretionary decisions, as follows.

Decision whether to cancel a sponsorship or bar a sponsor

The Instrument amends regulations 2.89, 2.90, 2.91 and 2.92 to permit the Minister to cancel a sponsorship, or bar a parent sponsor, in accordance with section 140M of the Act, for failure to satisfy a sponsorship obligation, for providing false or misleading information, where the application or variation criteria are no longer met, or for contravention of an Australian law (refer Items 100-107 of Schedule 1 to the Instrument and the explanatory statement).

The Instrument also amends paragraph 4.02(4)(h) to ensure that these decisions are subject to independent merits review by the AAT (refer Item 136 of Schedule 1 to the Instrument and explanatory statement).

Decision whether to waive a bar that has been imposed

As raised above, under section 140M of the Act and the related regulations, the Minister may bar an approved sponsor, for a specified period, from sponsoring additional people under the terms of an existing sponsorship or from making future applications for approval as a parent sponsor.

As noted, the circumstances in which a parent sponsor may be barred are for failure to satisfy a sponsorship obligation, for providing false or misleading information, where the application or variation criteria are no longer met, or for contravention of an Australian law (refer Division 2.20 of Part 2A of the Migration Regulations). As noted above, such decisions are subject to independent merits review.

Under section 140O of the Act and regulation 2.101, the Minister may waive a bar placed on a person under section 140M if the Minister has received a request from the person to waive the bar.

The Instrument inserts regulation 2.101 which sets out the criteria to be taken into account in determining whether to waive a bar placed on an approved family sponsor. Those criteria are whether the application for the waiver was made correctly, whether significant new evidence or information has come to light which was not available at the time the decision to place the bar was made, and whether there are exceptional circumstances that justify waiving the bar.

Section 140O sets out the overarching framework under which a sponsorship bar can be waived, including the discretionary nature of the decision, but the Act does not provide for independent merits review of this decision.

While the decision not to waive a bar is not subject to independent merits review, independent merits review is available in relation to the decision to impose the bar and may be accessed by the affected person.

Decision whether to require records to be given to the Minister

Under section 140H of the Act, a person who is or was an approved sponsor must satisfy the sponsorship obligations prescribed by the Migration Regulations.

The Instrument inserts regulation 2.87CC which provides an obligation that, in summary, a person who is or was an approved family sponsor must give to the Minister records that the Minister requests in writing. The obligation only applies until two years after the sponsorship ceases. Records are required to be kept for two years after the sponsorship ends as some sponsorship obligations continue after the sponsorship has ceased.

The types of records that the Minister may request is limited to:

- records of a kind specified in a disallowable instrument made under regulation 2.87CB; and
- records that the person is required to keep under a law of the Commonwealth, or of a State or Territory that applies to the person and that relate to the administration of Division 3A of Part 2 of the Act and the regulations made under that Division (which is about sponsorship).

Independent merits review is not available in relation to the decision to request records to be given to the Minister. The consequence of failing to provide the records (which would amount to a failure to satisfy a sponsorship obligation) is that the Minister may cancel the sponsorship or bar the sponsor under section 140M of the Act. When considering whether to cancel the sponsorship or bar the sponsor, a decision-maker would provide the sponsor with the opportunity to explain any failure to comply with the obligation to provide records, and would consider any response when making their decision. As noted above, a decision to cancel the sponsorship or bar the sponsor is subject to independent merits review by the AAT. In this context, the decision to require records to be given to the Minister has the character of a preliminary or procedural decision. It is therefore appropriate that the decision is not, in itself, subject to independent merits review.

Decision to give permission to apply for the Temporary Sponsored Parent visa in Australia

The underlying policy intention is for the Temporary Sponsored Parent visa to be applied for outside Australia. Although the visa allows an extended stay in Australia of up to five years, it is still only a temporary visa and does not create any right to, or pathway to, permanent residence. While it is intended that applicants will generally be required to apply for the visa outside Australia, it will be possible for a sponsor to seek permission for a parent to apply for the visa in Australia. It is intended that permission would be granted in circumstances where the parent is unable to depart. It is not considered appropriate to provide for independent merits review of this decision, as it is procedural in nature and preliminary to the decision about whether or not to grant the visa. Where permission to apply onshore is not granted, the parent can still apply for the visa but must be offshore in order to make a valid application.

The usual requirement is that Temporary Sponsored Parent visa holders wishing to apply for a further visa are required to be outside Australia for at least three months before being granted a further visa, which highlights the temporary nature of the visa and the fact that it does not create a right to ongoing residence.

Permitting independent merits review of a decision not to give permission to apply for the visa onshore risks undermining the intended nature of the visa.

Privacy

The Committee has requested my detailed advice as to why it is considered necessary and appropriate to permit the disclosure of prescribed personal information to the range of Commonwealth, State and Territory agencies prescribed by regulation 2.103A. The Committee has also has requested my detailed advice as to the existence of any relevant safeguards to protect the individual's privacy – in particular, any relevant statutory provisions.

The Instrument permits prescribed, limited personal information to be disclosed only to agencies responsible for four matters: health, law enforcement, public safety and taxation (refer regulation 2.103A).

The only circumstances in which the Minister may disclose personal information to these agencies is where:

- the disclosure may assist the agency to perform its functions; and

- where the disclosure may assist in determining whether a sponsorship obligation has been breached or whether there are grounds for cancelling a sponsorship or barring a sponsor for a specified period (refer subregulation 2.104(4)).

The only kind of information that can be disclosed about a visa holder, or a former visa holder (the visa holder), in summary is: information about compliance with visa conditions; immigration status; costs incurred by the Commonwealth; information about allegations made by the visa holder about the sponsor in relation to cancellation or barring grounds; and information about a debt owed by the sponsor relating to the visa holder (refer subregulation 2.103A(1)).

The only kind of information that can be disclosed about an approved family sponsor, or a former approved family sponsor, in summary, is: information about a failure, or possible failure, to satisfy an obligation; information that one of the grounds for barring a sponsor or cancelling a sponsorship may exist (refer Division 2.20 of Part 2A of the Migration Regulations) or that barring or cancellation has occurred; information about warnings, penalties and infringement notices in relation to the sponsor; information provided to the Minister under certain obligations; and information relevant to the performance of a function by a Commonwealth, State or Territory agency responsible for the regulation of health, law enforcement, public safety and taxation (refer subregulation 2.103A(2)).

Disclosure to agencies responsible for health matters

The *Migration Amendment (Family Violence and Other Measures) Act 2018* (Family Violence Act) was passed by the Parliament late last year with provision that the Minister must take all reasonable steps to ensure that the regulations include an obligation in relation to an approved family sponsor to pay prescribed medical, hospital, aged care or other health-related expenses incurred by a visa holder or former visa holder (refer subsection 140HA(2A) and regulations 1.15K, 2.87CA, 2.87CE). That Act also ensured that the Commonwealth, a State or Territory, or another person, who was owed such a debt may recover the debt due to them in an eligible court (refer section 140S).

The Temporary Sponsored Parent visa scheme strikes a balance between facilitating the parents of migrants visiting their families while reducing the burden on Australia's aged care and health systems by ensuring that sponsors are liable to pay the prescribed debts and ensuring that those debts can be recovered.

Disclosure of personal information to agencies responsible for health matters may be necessary to identify a visa holder, or former visa holder, who has incurred an outstanding debt referred to above, and their sponsor or former sponsor, so that this debt can be recovered as provided for by the Family Violence Act. This measure protects Australia's health and aged care systems.

Disclosure to agencies responsible for law enforcement

Information relating to contravention of a law, activities that endanger or threaten an individual, activities that are disruptive to the Australian community, violence threatening harm to the Australian community or other adverse information may be disclosed to law enforcement agencies. It is in the public interest that law enforcement agencies are able to pursue such matters.

Disclosure to agencies responsible for public safety

Disclosure of personal information to agencies responsible for public safety may be necessary to assist in protecting potentially vulnerable visa holders in limited circumstances, such as natural disasters, emergency situations or other hazardous events. Information may also be shared to assist with investigations undertaken by a State or Territory Government workplace health and safety regulator, for example if a visa holder is located working unlawfully and there are issues relating to workplace health and safety.

Disclosure to agencies responsible for taxation

The Temporary Sponsored Parent visa sponsorship framework obliges the sponsor to support the sponsored parents financially, and in respect of accommodation, to the extent necessary and to pay any outstanding public health debts and therefore requires the sponsor to have a minimum income (refer regulations 2.60W, 2.87CE and 2.87CF). The prescribed circumstance in which the Department of Home Affairs (the Department) would be disclosing personal information to the relevant agency would therefore be to assist the Minister in determining whether there are grounds for cancelling a sponsorship (for example, because there has been a material change in the circumstances (income) on the basis of which the person was approved as a sponsor).

Any collection of information by the Department as a result of disclosing information to an agency responsible for taxation is authorised by, and would be done in compliance with, *Australian Privacy Principle 3.*

Information about the Department's Protective Security Policy Framework

In addition to legal obligations under the *Privacy Act 1988*, the Department has a Protective Security Policy Framework which includes information security management policies. The framework ensures the confidentiality and integrity of all official information by applying safeguards so that only authorised people using approved processes can access information. It further provides that information must only be used for its official purpose, that information is available to satisfy operational requirements and that information is classified and labelled as required.

Personal information is only used or disclosed for the purpose for which it was collected unless the law requires or permits use or disclosure for another purpose, or permission is given by the individual to use or disclose the information for another purpose. Access to information collected from clients is restricted to authorised persons on a need to know basis and internal networks and databases are protected using firewall, intrusion detection and other technologies. All access is audited and monitored and employees are trained on security rules and privacy issues.

Preliminary or procedural decision

A decision to disclose information under subsection 140ZH(1A) of the Act is not subject to independent merits review. As noted above, the information can only be disclosed in these limited circumstances: to assist in determining whether a sponsorship obligation has been breached; to assist in determining whether there are grounds for cancelling a sponsorship or barring a sponsor; or to assist a relevant agency to perform its functions (refer subregulation 2.104(4)). Decisions made in these circumstances have the character of a preliminary or

procedural decision. It is therefore appropriate that the decision is not, in itself, subject to independent merits review. I would add that it would not be in the public interest, and could thwart law enforcement, jeopardise public safety and undermine the integrity of the program, if such preliminary decisions were delayed by independent merits review.

Imposition of fees (taxation)

The Committee has requested advice as to the basis on which the visa application charges at Item 8 of Schedule 2 to the Instrument were calculated. The Committee has also requested advice as to whether, and when, the explanatory statement will be amended to include this information.

I can advise that all visa application charges prescribed by the Migration Regulations are considered taxes imposed on visa applications. The legislative authority for imposing this tax is provided by the *Migration (Visa Application Charge) Act 1997* (the VAC Act). For most visas, including the Temporary Sponsored Parent visa, the prescribed amount of a visa application charge may be any amount not exceeding the visa application charge limit set by section 5 of the VAC Act. The original visa application charge limit in the 1996-1997 financial year was $12,500. This amount has been indexed annually in relation to the Consumer Price Index.

The revised explanatory statement attached to this letter has been updated at Item 8 to reflect the above.

I note the Committee has separately queried, in the context of its comments on the *Migration* Amendment *(New Skilled Regional Visas) Regulations* 2019, whether it is appropriate to prescribe the amounts of the visa application charges in the Migration Regulations. I have answered the Committee's questions in relation to this issue in my response to that letter.

Significant matters in delegated legislation

The Committee has indicated its concern that the Instrument contains matters that may be more appropriate for primary, rather than delegated, legislation. The Committee has indicated its concern about the use of delegated legislation to make significant changes to law, and the exemption of legislative instruments from parliamentary oversight mechanisms such as sunsetting and disallowance. The Committee states that it will continue to monitor these issues.

I note that it has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than the Act. This legislative structure has been in place since 1994.

The Committee has expressed concerns that the amendments are not subject to parliamentary oversight. However, the Instrument is subject to the scrutiny framework set out by the *Legislation Act 2003* (the Legislation Act), including the provisions related to disallowance. In the event that either House of Parliament considered that the Instrument was not appropriate, it would be possible for the Instrument to be disallowed in whole or in part.

In the particular case of the Instrument, the Committee has noted it is made pursuant to the regulation-making power in subsection 504(1) of the Act. While this is correct, I note that many of the amendments made by the Instrument are expressly authorised by a number of

provisions in the Act, which are listed in Attachment A to the explanatory statement. These include provisions of the Act which were either inserted or amended by the Family Violence Act, which was passed by the Parliament in December 2018.

The Family Violence Act created a framework to support the introduction of family sponsorships under the Migration Regulations, but this framework could not operate without supporting amendments to the Migration Regulations, including to prescribe classes of family sponsors and to prescribe the visas which are to be subject to family sponsorship arrangements. By passing the Family Violence Act, the previous Parliament therefore signalled its intention that the matters set out in the Instrument should be prescribed in the Migration Regulations.

As a general principle, given the frequency and extent of the legislative amendments that are required to maintain a dynamic and responsive immigration system, and given that oversight of the amendments is available to the Parliament under the Legislation Act, I remain of the view that the use of delegated legislation is appropriate. In particular, I consider the amendments made by the Instrument are appropriate and reflect the intentions expressed by the Parliament when it passed the Family Violence Act late last year.

I thank the Committee again for bringing these matters to my attention.

Yours sincerely

David Coleman

14 / 8 / 2019

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MB19-001080

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells

Thank you for your letter of 25 July 2019 in relation to the review by the Senate Standing Committee on Regulations and Ordinances (the Committee) of the National Rental Affordability Scheme Amendment (Investor Protection) Regulations 2019 [F2019l00273] (the Amending Regulations).

I am providing the following information to assist the Committee.

Privacy (Regulation 32)
The National Rental Affordability Scheme (NRAS) involves the payment of an annual incentive to approved participants in relation to rental properties, if certain conditions are met. Those conditions in part relate to the income of the tenants of the rental property.

The Department of Social Services (the department) holds a limited amount of personal information in connection with the administration of NRAS. Most approved participants are companies but the department holds contact information about some individuals within approved participants. The department also holds contact information for the owners of NRAS rental properties (known as investors) and the names and demographic information (including income details) for the tenants of NRAS properties. Information about investors and tenants is provided to the department by approved participants, as required under the National Rental Affordability Scheme Regulations 2008 (NRAS Regulations).

The majority of the financial incentives for NRAS are issued in the form of a refundable tax offset certificate and from time to time, the department may disclose NRAS information (including personal information) to the Australian Taxation Office in connection with the administration of NRAS. State and territory governments also pay an annual incentive to approved participants for NRAS properties and the department regularly provides information to states and territories (which occasionally could include personal information) to enable these state and territory incentives to be paid.

While the department would not otherwise normally disclose any of the limited personal information it holds in relation to NRAS, a limited disclosure of personal information may occur in some contexts as part of the administration of NRAS. For example, as part of a procedural fairness process in the context of the possible transfer of an NRAS allocation from one approved participant to another approved participant, or in the context of the department dealing with complaints from tenants, investors and approved participants. If the department becomes aware of a possible breach of the law, it would normally inform the relevant regulator (for example, the Australian Competition and Consumer Commission) and this may involve the disclosure of personal information.

Tenants of NRAS properties who provide demographic information to approved participants acknowledge that approved participants will provide this information to the department and that the department will use and disclose the information to administer NRAS. Personal information collected by the department in connection with the administration of NRAS is held securely by the department and is not disclosed otherwise than for the administration of NRAS or, as noted above, in connection with possible breaches of the law.

The amendments to Regulation 32 merely clarified the operation of the regulation and provided additional transparency about the department's use and disclosure of NRAS information, including personal information, especially in respect of the disclosure of information about possible breaches of the law to regulators, and disclosures to people involved in NRAS where allocations may be or have been transferred. The department's personal information disclosure practices in relation to NRAS are unchanged and no new types of disclosures of personal information are proposed.

Retrospectivity (Regulation 41)
While the Amending Regulations introduced a new compliance framework in Subdivision C of Division 1A of Part 3, with some limited exceptions (mentioned below), the conduct of an approved participant that could result in a determination of "individual breach", "serious breach" or "disqualifying breach" under the Subdivision is conduct that would have been a ground for transfer under the previous Regulation 21A of the NRAS Regulations. Thus, with limited exceptions, Regulation 41(1) of the Amending Regulations does not adversely affect approved participants by making conduct that was not covered by the NRAS Regulations prior to the commencement of the Amending Regulations a ground for taking compliance action under the new compliance framework.

The new compliance framework includes requirements for procedural fairness (see Regulation 22BF) and review of determinations by the Administrative Appeals Tribunal (AAT). In some respects, the new compliance framework is more favourable for approved participants than the regime under Regulation 21A of the previous NRAS Regulations. Under the new compliance framework, transfers of allocations following a determination will not be made until after any AAT review is concluded. Further, under Regulation 22BE of the Amending Regulations, an investor cannot request the department to transfer an allocation unless the investor has given the approved participant written notice of the alleged breach and allowed the approved participant 90 days to take appropriate remedial action. There was no equivalent limitation on investors making transfer requests under the previous Regulation 21A.

The grounds for making a serious breach determination in Regulation 22BB(1)(c) and Regulation 22BB(1)(d) of the Amending Regulations did not have an equivalent in the previous Regulation 21A of the previous NRAS Regulations. However, the drafting of Regulation 22BB(1)(c) and Regulation 22BB(1)(d) means that the conduct of an approved participant occurring before the commencement of the Amending Regulations cannot satisfy these grounds.

The only grounds for possibly making a determination under the new compliance framework that are not reflected under the previous regime under Regulation 21A, where conduct occurring prior to the commencement of the Amending Regulations could be taken into account, are in Regulation 22BD(2)(d) and Regulation 22BD(2)(e) of the Amending Regulations. As a matter of discretion, the department does not propose to rely upon any conduct of an approved participant that occurred before the commencement of the Amending Regulations when assessing whether an approved participant has complied with Regulation 22BD(2)(d) and Regulation 22BD(2)(e) of the Amending Regulations.

I trust this information addresses the Committee's concerns.

Yours sincerely

Anne Ruston

The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories
Federal Member for Forrest

Ref: MS19-001375
20 AUG 2019

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Connie

Thank you for your letter of 1 August 2019 regarding the *Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019* [F2019L00546] (Ordinance).

The Ordinance makes a number of important reforms to ensure that vulnerable people in Norfolk Island receive comparable protections to those in other Australian jurisdictions against the perpetration of sexual abuse or violence. The reforms are also consistent with recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in its 2017 *Criminal Justice* report and further the efforts of Australian governments to protect children and young people from sexual abuse.

I note the Department of Infrastructure, Transport, Cities and Regional Development has already provided advice to the Committee Secretariat regarding the Ordinance and that my further advice is now sought specifically on the offence-specific defences and associated legal burden of proof in relation to subsections 113A and 119A of the *Criminal Code 2007* (NI) (Criminal Code). I am pleased to provide further advice as follows.

As the Committee notes, the Ordinance inserts new sections 113A and 119A (sexual intercourse with, and acts of indecency involving, a person aged at least 16 but under 18 where the defendant is in a position of trust or authority) into the Criminal Code. These new offences include subsections 113A(3), 119A(3), 113A(4) and 119A(4), which provide that it is a defence to a prosecution for the relevant offences if the defendant proves that, at the time of the offence, the defendant and the young person were in a valid and genuine marriage or if the defendant proves that they believed on reasonable grounds that the young person was of or above the age of 18 years.

The defences provided for in subsections 113A(3) and 119A(3) (valid and genuine marriage) and in subsections 113A(4) and 119A(4) (belief of age) are modelled on long-standing defences for child sex offences passed by the Australian Parliament in 2011 and contained in sections 272.17 and 272.16, respectively, of the *Criminal Code Act 1995* (Cth) (Commonwealth Criminal Code). The Notes following the new subsections advise that a defendant bears a legal burden in relation to the matters in the defences and refer to section 59 of the Commonwealth Criminal Code. That section provides that a burden of proof imposed on the defendant is a legal burden where, relevantly, the law expressly requires the defendant to prove the matter. In such cases, the defendant must prove the matter on the balance of probabilities, as per section 60 of the Commonwealth Criminal Code.

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide to Framing Offences) sets out circumstances in which it will be appropriate for legislation to provide an offence-specific defence (which effectively places the burden of proof on the defendant in relation to the defence), such as where the matter is peculiarly within the knowledge of the defendant or would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

The Guide to Framing Offences also indicates that the creation of such defences is more readily justified where the matter in question is not central to the question of culpability. The Australian Law Reform Commission (ALRC) further supports this position in its 2016 report, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, and acknowledges the appropriateness of imposing a legal rather than evidential burden on the defendant in those circumstances where the matter is not an essential element of the offence or is not central to culpability.

Belief of age defence

A defendant's 'reasonable belief' about a person's age is a matter that can only ever be within the knowledge of the defendant. It would be extremely difficult for the complainant or the prosecution to prove what the defendant believed, or did not believe, in this respect. Therefore the defendant's 'reasonable belief' that a young person was aged 18 or above is not only a matter which is peculiarly in the knowledge of the defendant, it would also be extremely difficult for the prosecution to disprove, rather than for the defendant to establish, that their belief was reasonable in the circumstances.

Subsections 113A(4) and 119A(4) must also be seen as potentially beneficial for the defendant in placing a limit on the criminal liability associated with the offence, noting that the offence itself is made out only by proving, in addition to the offending behaviour, that a person is between the ages of 16 to 18 and that the defendant is in a position of trust or authority in relation to the young person. In this way, the statutory defence allowing a defendant to prove that they reasonably believed the young person to be aged 18 or over, provides protection to defendants where they are able to prove, on the balance of probabilities, the relevant reasonable belief.

Marriage defence

The 'marriage defence' in subsections 113A(3) and 119A(3) acknowledges that, if a defence was not provided, a couple married under the laws of a particular country (which may differ to the minimum age requirements under Australian law) and who were acting lawfully under the laws of the country which they were in, may be subject to criminal charges under Australian law.

The existence of this defence can act as a protection for a defendant in relevant circumstances and it is appropriate that the burden sit with the defendant. This is important for certain reasons in the context of the offence. First, a defendant relying on this defence may claim the existence of a marriage that has taken place in a country without readily accessible records or registers or where marriages are recognised as legal based on cultural practices. In such circumstances it would be significantly less difficult and less costly for the defendant – a person of adult age – to prove the existence of a valid and genuine marriage, rather than for the complainant (a child at the time of the alleged offence and a younger child at the time of the purported marriage) or prosecution to prove that the marriage did not exist. Further, the adult defendant would be or should be aware of the relevance of the need to prove the existence of a valid and genuine marriage in a country like Australia, which does not generally permit child marriage, and should be able to readily produce such proof.

In addition, the non-existence of a marriage is not an element required to establish the offence. This provides further justification for placing a legal burden, rather than an evidential burden, on the defendant in relation to the defence in subsections 119A(3) and 113A(3). This is particularly so given that both the Guide to Framing Offences and the ALRC indicate that creating an offence-specific defence in legislation is more readily justified where the matter in question is not central to the question of culpability. In the context of sections 113A and 119A, the existence of marriage is not relevant to establishing the offence.

The Committee has specifically raised whether it would be more appropriate to impose an evidential rather than a legal burden on the defendant in relation to the defence. That would mean that the defendant bears the burden of simply adducing or pointing to evidence that suggests a reasonable possibility that the matter (a valid and genuine marriage) exists. If the defendant discharges that burden, the prosecution must then disprove those matters beyond reasonable doubt. In this circumstance there is the clear potential for a perverse outcome undermining the nature of the defence itself. This may present a situation where a defendant produces quite minimal evidence of a marriage which nevertheless meets the evidentiary burden. Where the prosecution is unable to disprove the matter beyond reasonable doubt, which may be quite likely in the circumstances, a defendant could successfully make out the defence, even if a valid and genuine marriage did not actually exist. Such an outcome would be contrary to both the interests of justice and the intent of the defence.

Nothwithstanding the points I have made above, I appreciate the Committee's view that the Explanatory Statement for the Ordinance could discuss these matters in more detail. As such, I have instructed the Department to update the Explanatory Statement to include further explanation of these matters, as outlined above. The revised Explanatory Statement also includes additional content on the special legislative framework applying to Norfolk Island.

I have enclosed for the Committee an advance copy of the revised Explanatory Statement with this letter.

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

Yours sincerely

Nola Marino

Enc

EXPLANATORY STATEMENT

Issued by the authority of the Assistant Minister for Regional Development and Territories, Parliamentary Secretary to the Deputy Prime Minister and Minister for Infrastructure, Transport, Cities and Regional Development

Norfolk Island Act 1979

Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019

Authority

The *Norfolk Island Act 1979* (the Norfolk Island Act) provides for the government of the Territory of Norfolk Island.

Section 19A of the Norfolk Island Act provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory of Norfolk Island.

The *Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019* (the proposed Ordinance) is made under section 19A of the Norfolk Island Act. The Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Continued Laws Ordinance) to amend certain laws made by the former Norfolk Island Legislative Assembly (continued laws), namely the *Criminal Code 2007* (NI) (the NI Criminal Code) and the *Telecommunications Act 1992* (NI) (the Telecommunications Act). Continued laws are continued in force by sections 16 and 16A of the Norfolk Island Act, and may be amended or repealed by a section 19A Ordinance in accordance with subsection 17(3) of the Norfolk Island Act.

Purpose and operation

The amendments contained in the Ordinance further the work of the Australian Government in ensuring that vulnerable people in Norfolk Island receive comparable protections to those in other Australian jurisdictions, and that Norfolk Island police and courts have the authority and ability to take action against people who perpetrate sexual abuse or violence. The new offences contained in the Ordinance are also consistent with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in its 2017 *Criminal Justice* report.

The Ordinance amends the NI Criminal Code to insert new definitions and new offences, and increases penalties in relation to certain sexual offences.

Specifically, the Ordinance:

- amends the definition of 'sexual intercourse' and inserts a definition for 'act of indecency', to align the NI Criminal Code more closely with other Australian jurisdictions
- increases the penalty for sexual intercourse with a young person under the age of 10 years from 17 to 20 years
- increases the penalty from 5 to 7 years for committing an act of indecency without consent, and from 7 to 9 years for committing an act of indecency without consent and in company with another person, and
- introduces new offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority (with a penalty of 10 years and 7 years respectively).

The Ordinance also amends the Telecommunications Act by allowing for the interception of telecommunications without a warrant in certain circumstances (including, for example, where a person's life or physical safety may be at risk and the matter is so urgent that applying for a warrant is not reasonably practicable). This amendment makes the law in Norfolk Island more consistent with that in other Australian jurisdictions, including the Commonwealth.

In addition, the Ordinance makes minor technical amendments to the *Norfolk Island Applied Laws Ordinance 2016* in relation to the domestic and personal violence provisions that were applied to Norfolk Island in 2018.

The Commonwealth develops offences having regard to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) which sets out limitations on the inclusion of certain penalties in delegated legislation. However, the special legislative framework applying in the case of Norfolk Island permits departure from the limitations regarding penalties in delegated legislation.

Special legislative framework

The Ordinance is made pursuant to a plenary legislative power conferred on the Governor-General under section 19A of the Norfolk Island Act, which provides that the Governor-General may, subject to the Act, make Ordinances 'for the peace, order and good government of the Territory'. This is quite different from the general regulation-making powers commonly found in Commonwealth legislation, which generally only authorise the Governor-General to make regulations prescribing matters that are 'required or permitted' to be prescribed by an Act, or that are 'necessary or convenient' for carrying out or giving effect to an Act.

The Parliament has conferred plenary legislative power on the Governor-General for the external territories and the Jervis Bay Territory. That power is expressed in broad terms, and reflects the wording used in state constitutions to confer plenary legislative power on state parliaments. The conferral of the power is to enable the Governor-General to legislate for state-level matters, and authorises the broadest range of Ordinances as necessary for the good government of Norfolk Island, including to prescribe offences that are punishable by imprisonment.

The *Criminal Code 2007* (NI) was made by the now abolished Legislative Assembly of Norfolk Island and has been continued in force by section 16A of the Norfolk Island Act. The Criminal Code covers matters that would normally be dealt with under state or territory legislation. Subsection 17(3) of the Norfolk Island Act expressly provides that laws continued in force by section 16A of that Act may be amended or repealed by a section 19A Ordinance. Accordingly, the amendment of this continued law by a section 19A Ordinance is expressly authorised by the Norfolk Island Act.

Section 19A authorises the broadest range of Ordinances to be made for the good government of Norfolk Island, which includes the power to prescribe offences that impose penalties exceeding a fine of 50 penalty units and/or punishable by imprisonment. The Criminal Code as amended increased penalties for the existing offences of: sexual intercourse with a young person under the age of 10 years (penalty increased from 17 to 20 years); committing an act of indecency without consent (penalty increased from 5 to 7 years); and committing an act of indecency without consent and in company with another person (penalty increased from 7 to 9 years). It also imposes penalties for the offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or

authority (with a penalty of 10 years and 7 years respectively). These penalties are consistent with penalties in other jurisdictions in Australia for similar offences.

Consultation

The Department of Infrastructure, Regional Development and Cities consulted broadly about measures included in the proposed Ordinance. The consultation included:

- community consultation conducted during 2017-2018 regarding the proposed amendments, which drew involvement from a range of members of the Norfolk Island community, including the legal profession and health care practitioners, and
- consultation with the Department of Prime Minister and Cabinet, the Norfolk Island Supreme Court, the Chief Magistrate, Registrar and Deputy Registrar of the Norfolk Island Court of Petty Sessions, and various Commonwealth and state and territory agencies, including the Australian Federal Police and Norfolk Island Police Force, the Department of Home Affairs, the Attorney-General's Department, the Commonwealth Office of the Director of Public Prosecutions, the Australian Capital Territory Justice and Community Safety Directorate, and the NSW Department of Premier and Cabinet. The community and other parties consulted, generally supported the proposed amendments.

Details of the Ordinance are set out in the Attachment.

The Ordinance is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Ordinance commences the day after registration on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

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

Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019

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

Overview of the Ordinance

The *Norfolk Island Act 1979* (the Norfolk Island Act) provides for the government of the Territory of Norfolk Island.

Section 19A of the Norfolk Island Act provides that the Governor-General may make Ordinances for the peace, order and good government of the Territory of Norfolk Island.

The *Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019* (the proposed Ordinance) is made under section 19A of the Norfolk Island Act. The Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Continued Laws Ordinance) to amend certain laws made by the former Norfolk Island Legislative Assembly (continued laws), namely the *Criminal Code 2007* (NI) (the NI Criminal Code) and the *Telecommunications Act 1992* (NI) (the Telecommunications Act). Continued laws are continued in force by sections 16 and 16A of the Norfolk Island Act, and may be amended or repealed by a section 19A Ordinance in accordance with subsection 17(3) of the Norfolk Island Act.

The amendments contained in the Ordinance further the work of the Australian Government in ensuring that vulnerable people in Norfolk Island receive comparable protections to those in other Australian jurisdictions, and that Norfolk Island police and courts have the authority and ability to take action against people who perpetrate sexual abuse or violence. The new offences contained in the Ordinance are also consistent with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse in its 2017 *Criminal Justice* report.

The proposed Ordinance amends the NI Criminal Code to insert new definitions and new offences, and increase penalties in relation to certain sexual offences.

Specifically, the Ordinance:

- amends the definition of 'sexual intercourse' and inserts a definition for 'act of indecency', to align the NI Criminal Code more closely with other Australian jurisdictions
- increases the penalty for sexual intercourse with a young person under the age of 10 years from 17 to 20 years
- increases the penalty from 5 to 7 years for committing an act of indecency without consent, and from 7 to 9 years for committing an act of indecency without consent and in company with another person, and
- introduces new offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority (with a penalty of 10 years and 7 years respectively).

The Ordinance also amends the Telecommunications Act by allowing for the interception of telecommunications without a warrant in certain circumstances (including, for example, where a person's life or physical safety may be at risk and the matter is so urgent that applying for a warrant is not reasonably practicable). This amendment makes the law in Norfolk Island more consistent with that in other Australian jurisdictions, including the Commonwealth.

In addition, the Ordinance makes minor technical amendments to the *Norfolk Island Applied Laws Ordinance 2016* in relation to the domestic and personal violence provisions that were applied to Norfolk Island in 2018.

The Commonwealth develops offences having regard to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) which sets out limitations on the inclusion of certain penalties in delegated legislation. However, the special legislative framework applying in the case of Norfolk Island permits departure from the limitations regarding penalties in delegated legislation.

Special legislative framework

The Ordinance is made pursuant to a plenary legislative power conferred on the Governor-General under section 19A of the Norfolk Island Act, which provides that the Governor-General may, subject to the Act, make Ordinances 'for the peace, order and good government of the Territory'. This is quite different from the general regulation-making powers commonly found in Commonwealth legislation, which generally only authorise the Governor-General to make regulations prescribing matters that are 'required or permitted' to be prescribed by an Act, or that are 'necessary or convenient' for carrying out or giving effect to an Act.

The Parliament has conferred plenary legislative power on the Governor-General for the external territories and the Jervis Bay Territory. That power is expressed in broad terms, and reflects the wording used in state constitutions to confer plenary legislative power on state parliaments. The conferral of the power is to enable the Governor-General to legislate for state-level matters, and authorises the broadest range of Ordinances as necessary for the good government of Norfolk Island, including to prescribe offences that are punishable by imprisonment.

The *Criminal Code 2007* (NI) was made by the now abolished Legislative Assembly of Norfolk Island and has been continued in force by section 16A of the Norfolk Island Act.. The Criminal Code covers matters that would normally be dealt with under state or territory legislation. Subsection 17(3) of the Norfolk Island Act expressly provides that laws continued in force by section 16A of that Act may be amended or repealed by a section 19A Ordinance. Accordingly, the amendment of this continued law by a section 19A Ordinance is expressly authorised by the Norfolk Island Act.

Section 19A of the Norfolk Island Act authorises the broadest range of Ordinances to be made for the good government of Norfolk Island, which includes the power to prescribe offences that impose penalties exceeding a fine of 50 penalty units and/or punishable by imprisonment. The NI Criminal Code as amended increases penalties for the existing offences of sexual intercourse with a young person under the age of 10 years, committing an act of indecency without consent, and committing an act of indecency without consent and in company with another person. It also imposes penalties for the offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority. These penalties are consistent with penalties in other jurisdictions in Australia for similar offences.

Human Rights implications

This Ordinance engages the following rights:

- The rights of children, and the right to protection from exploitation, violence and abuse, in Articles 3, 19 and 34 of the Convention on the Rights of the Child (CRC)
- The prohibition on retrospective criminal laws and the presumption of innocence in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR)
- The right to privacy in Article 17 of the ICCPR

The rights of children, and the right to protection from exploitation, violence and abuse

The Ordinance promotes the principles underpinning, and the fundamental rights and freedoms protected by, the CRC including the right of the child to be protected from all forms of physical and mental violence, including sexual abuse (Articles 19 and 34).

The best interests of the child (Article 3 CRC)

Article 3 of the CRC provides that States Parties shall make the best interests of the child a primary consideration in all actions concerning children, including by courts of law, administrative authorities and legislative bodies. States Parties must ensure the child has such protection and care as is necessary for his or her well-being.

Consistent with the CRC, the Ordinance gives primary consideration to the best interests of the child through amendments to the legal framework applicable to child sex offending in Norfolk Island, mirroring the Commonwealth framework. The Ordinance protects all people from non-consensual sexual intercourse and acts of indecency, and by increasing the penalties involved for these offences aims to prevent and deter the perpetration of child and adult sex offences. This is particularly the case in relation to circumstances where a person is in a position of trust or authority in relation to the child (in this instance, a young person aged between 16-18 years), as the Ordinance places a positive obligation on an accused person to consider the age of the young person and their relationship with them.

Right of the child to be protected from sexual abuse (Articles 19 and 34 CRC)

Article 19 of the CRC provides that "States Parties shall take all appropriate legislative … measures to protect the child from all forms of physical or mental violence, injury or abuse, … including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has care of the child."

Article 34 similarly provides that "State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse".

The Ordinance provides measures to protect children from sexual abuse, including:

- Increased penalties for sexual intercourse and acts of indecency where the victim is less than 10 years old, and

- The new offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority in relation to the young person.

In addition, the Ordinance promotes Articles 19 and 34 of the CRC by increasing the general and specific deterrence for committing child sex offences, and ensuring that penalties for these offences more appropriately reflect the gravity of child sexual abuse. This is achieved through various measures, including:

- the creation of new offences that criminalise sexual abuse of young people where the accused person is in a position of trust or authority, and
- the increase in maximum penalties for certain offences.

Criminalisation of child sex abuse

Article 3(1) of the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography (OPSC) expands on the fundamental rights in the CRC by requiring that certain forms of child sex abuse be fully covered under criminal law. The Ordinance advances this Article by introducing new offences which criminalise sexual intercourse and acts of indecency perpetrated on young people (aged between 16 and 18 years), where the accused person is in a position of trust or authority in relation to the young person. These new offences are modelled on existing Commonwealth laws and support recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse. In addition, the Ordinance increases the maximum penalties for certain child and other sex offences, to penalties which more adequately reflect the serious nature of the offending.

The amendments made by the Ordinance in relation to the sexual offences and child sexual offences are compatible with human rights, as they promote and advance human rights and, to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate to protect children and other people at risk of sexual abuse and sexual violence.

The prohibition on retrospective criminal laws and the presumption of innocence

Prohibition on retrospective criminal laws

Article 15(1) of the ICCPR provides that a heavier penalty shall not be imposed than the one that was applicable at the time a criminal offence was committed.

The Ordinance increases the maximum penalties for certain offences, from 17 to 20 years in the case of sexual intercourse with a young person under the age of 10 years, and from 7 to 9 years in the case of committing an act of indecency without consent and in company with another person.

However, it is not the intention that the Ordinance retrospectively impose a harsher penalty, in relation to an offence committed prior to the commencement of the Ordinance, than would have been available at the time the offence was committed. Rather, if a circumstance arose in which the Court was called to pass sentence for an offence committed prior to the commencement of the Ordinance, the Court could exercise its discretion to ensure the sentence did not exceed the sentence applying at the time the offence was committed. This would be consistent with the rule of statutory interpretation outlined by Dawson J in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501: 'a statute ought not be given a retrospective operation where to do so would be to attach new legal consequences to facts or events which occurred before its commencement'.

Presumption of Innocence

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. This right imposes on the prosecution the burden of proving charges against a defendant.

In relation to the new offences of sexual intercourse and acts of indecency with a person aged at least 16 but under 18, where the defendant is in a position of trust or authority, the Ordinance introduces offence-specific defences that shift the burden of proof to the accused. It is a defence to these offences if the defendant proves that, at the time of the alleged offence, there existed between the defendant and the other person a marriage that was valid (or recognised as valid in relevant jurisdictions) and that, when it was solemnised, the

marriage was genuine. It is also a defence to these offences if the defendant proves that, at the time of the alleged offence, the defendant believed on reasonable grounds that the other person was of or above the age of 18 years.

Reverse onus provisions can be considered a limitation on the presumption of innocence. However, under international law, a reverse onus provision may be acceptable provided the law is reasonable in the circumstances and maintains the rights of the accused.

In the defences mentioned above, it is reasonable in the circumstances to require the defendant to prove the existence of a marriage, since that fact is not central to the question of culpability. The non-existence of a marriage between the defendant and the young person is not needed to establish the offences in question. It is also reasonable for the defendant to bear the onus of proving they had reasonable grounds to believe the other person was of or above the age of 18 years. This is because the defendant's belief about the age of the person would be peculiarly within the knowledge of the defendant, and would also be significantly less difficult and less costly for the defendant to establish than for the prosecution to disprove.

The Ordinance does not otherwise affect rights to a fair trial and fair hearing, minimum guarantees in criminal proceedings, or existing legislation relating to procedural fairness.

The right to privacy

The human rights engaged by the Ordinance in relation to the amendments to the Telecommunications Act are those set out in Article 17 of the ICCPR, in relation to privacy.

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, or to unlawful attacks on their honour or reputation, and that everyone has the right to the protection of the law against such interference or attacks.

The Ordinance limits the right to privacy under Article 17. However, the right to privacy under the ICCPR is not an absolute right. The right can be limited if the limitation is not incompatible with the right itself and the limitation is authorised by law, is for a legitimate objective and is reasonable, necessary and proportionate to that objective.

In general, interception of people's private communications without a warrant is unlawful. However, the provisions of the Ordinance mean that such interception will not be unlawful in some circumstances, such as when a person's safety or life is threatened or at risk or there is a risk of serious property damage. In these circumstances, as limited by the provisions of the Ordinance, the police can intercept communications without a warrant, as long as a warrant application is made as soon as reasonably practicable and, if an application is not granted, the interception ceases.

In these circumstances, the interception will not be arbitrary within the meaning of Article 17. Interception of telecommunications may only occur subject to either a warrant issued by a judge, or in emergency circumstances. The instrument will serve the legitimate objective of the investigation and prosecution of serious crime and the preservation of people's lives and safety and is reasonable, necessary and proportionate to achieving this end.

Other jurisdictions have similar measures in place to allow for communications to be intercepted without a warrant in emergency circumstances. The measures in the Ordinance bring Norfolk Island law into better alignment with other Australian jurisdictions.

The amendments made by the Ordinance in relation to telecommunications interception without a warrant are compatible with human rights because they advance the protection of human rights, and to the extent that they limit human rights, those limitations are authorised by law, reasonable, necessary and proportionate.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

Assistant Minister for Regional Development and Territories,
Parliamentary Secretary to the Deputy Prime Minister and Minister for Infrastructure, Transport, Cities and Regional Development

The Hon Nola Marino MP

ATTACHMENT

Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019

Section 1 – Name

This section provides that the title of the proposed Ordinance is the *Norfolk Island Legislation Amendment (Criminal Justice Measures) Ordinance 2019.*

Section 2 – Commencement

This section provides that the proposed Ordinance commences on the day after it is registered on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the proposed Ordinance is made under section 19A of the *Norfolk Island Act 1979* (the Norfolk Island Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

Part 1—Amendment of the Criminal Code 2007 (Norfolk Island)

Part 1 of Schedule 1 to the Ordinance amends the *Norfolk Island Continued Laws Ordinance 2015* (the Continued Laws Ordinance) with the effect of amending the *Criminal Code 2007* (NI) (the NI Criminal Code) in relation to certain sexual offences and their associated penalties.

The Norfolk Island criminal law regime is based to a large degree on the criminal law regime operating in the Australian Capital Territory at various points in time (for example, the *Crimes Act 1900* (ACT) as it existed in 2007). Since that time, the criminal law in the Australian Capital Territory has been amended to reflect changing community attitudes in relation to the protection of vulnerable people, particularly children, and the need for stronger deterrence of sexual violence and child sexual abuse. Criminal law in Norfolk Island has remained unchanged and, as a result, the amendments in the Ordinance are required to modernise Norfolk Island laws, to ensure they continue to be comparable to other Australian jurisdictions.

The amendments and new offences also generally reflect recommendations for law reform made by Australian, New South Wales and Victorian Law Reform Commissions and other legal review processes established to strengthen law enforcement and deliver improved justice outcomes to reduce sexual violence and child sexual abuse.

Norfolk Island Continued Laws Ordinance 2015

Item [1] – After item 53D of Schedule 1

Item 1 inserts new items 53DAAA, 53DAAB and 53DAAC into Schedule 1 to the Continued Laws Ordinance.

Item 53DAAA of Schedule 1 – Section 108

New item 53DAAA of Schedule 1 repeals section 108 of the NI Criminal Code (meaning of sexual intercourse) and substitutes a new definition. The new definition is consistent with the definitions contained in both Commonwealth and Australian Capital Territory laws. The use of 'genitalia' has been preferred over 'vagina' as it is less gendered. The new definition defines sexual intercourse as the penetration, to any extent, of the genitalia or anus of a person by any part of the body of another person; or the penetration, to any extent, of the genitalia or anus of a person, by an object, carried out by another person; or fellatio; or cunnilingus; or the continuation of any of those preceding activities. Sexual intercourse does not include an act of penetration that is carried out for a proper medical or hygienic purpose, or is carried out for a proper law enforcement purpose. The definition also specifies that 'genitalia' includes surgically constructed or altered genitalia and that 'object' includes an animal.

New item 53DAAA also inserts new subsection 108A into the NI Criminal Code, which provides a definition of 'act of indecency'. The definition provides that 'act of indecency' means any act, other than sexual intercourse, that is of a sexual or indecent nature (including an indecent assault); and involves the human body, or bodily actions or functions; whether or not the act involves physical contact between people.

Item 53DAAB of Schedule 1 – Subsection 113(1)

New item 53DAAB of Schedule 1 amends subsection 113(1) of the NI Criminal Code to increase the penalty for sexual intercourse with a young person under the age of 10 years from 17 years imprisonment to 20 years imprisonment. While the current penalty of 17 years is consistent with that imposed in the Australian Capital Territory, the offence carries higher

penalties in most other Australian jurisdictions, including the Commonwealth, New South Wales and Victoria. The increase in penalty is appropriate given the seriousness of the offence.

Item 53DAAC of Schedule 1 – After section 113

New item 53DAAC of Schedule 1 inserts new section 113A, 'Sexual intercourse with person aged at least 16 but under 18—defendant in position of trust or authority', into the NT Criminal Code, with a penalty of 10 years imprisonment. The new offence provides that a person ('the defendant') commits an offence if (a) they engage in sexual intercourse with another person; and (b) that person is at least 16 but less than 18 years old; and (c) the defendant is in a position of trust or authority in relation to the other person for the purposes of section 272.3 of the *Criminal Code* of the Commonwealth.

Subsection (2) of the new offence provides that absolute liability applies with respect to the age of the person and that strict liability applies with respect to the defendant's position of trust or authority. In this instance, the imposition of absolute liability with respect to the age of the young person is appropriate and consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) as the element of the person's age is a precondition of an offence, and the state of mind of the defendant is not relevant. Imposing strict liability with respect to the defendant's position of trust or authority in relation to the young person will except circumstances where a defendant honestly and reasonably does not believe they hold such a position in relation to the young person.

However, offence-specific statutory defences to the strict and absolute liability offences in subsection (1) are available under new subsections (3) and (4). Subsection (3) of the new offence sets out a defence if the defendant proves that, at the time of the alleged offence, there existed between the defendant and the other person a marriage that was valid (or recognised as valid in relevant jurisdictions) and that, when it was solemnised, the marriage was genuine. Subsection (4) of the new offence sets out a further defence if the defendant proved that, at the time of the alleged offence, the defendant believed on reasonable grounds that the other person was of or above the age of 18 years. A defendant bears a legal burden in relation to subsections (3) and (4) of the new offence.

The Guide outlines circumstances in which it will be appropriate for legislation to provide an offence-specific defence, being where:

- it is peculiarly within the knowledge of the defendant,
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The Guide also indicates that creating an offence-specific defence in legislation is more readily justified where the matter in question is not central to the question of culpability. In relation to an offence referred to in subsection 113A(1), the non-existence of a marriage between the defendant and the young person is not something that is needed to establish the offence. This provides justification for the legal burden of proof resting on the defendant, rather than simply an evidential burden of proof, in relation to the statutory defence set out at subsection 113A(3). Further, it is appropriate to require the defendant to prove the defence because the defendant is likely to be claiming the existence of a marriage that has taken place in a country without readily accessible records or registers, or where marriages are recognised as legal based on cultural practices. In the circumstances it would be significantly less difficult and less costly for the defendant – a person of adult age – to prove the existence of a valid and genuine marriage, rather than for the complainant or prosecution to prove that the marriage does not exist. An adult defendant should be aware of the relevance of the need

to prove the existence of a marriage in a country like Australia that does not generally permit child marriage and be able to readily produce proof of such.

In relation to the defence in subsection (4), it is clear that there is a presumption against sexual intercourse with a young person, and that the defendant's belief about the age of that person would be peculiarly within the knowledge of the defendant. If the defendant believed on reasonable grounds that the person was of or above the age of 18 years at the time of the alleged offence, the reasons for that belief would not only be solely within the knowledge of the defendant, their existence and nature would also be significantly less difficult and less costly for the defendant to establish than for the prosecution to disprove.

Item [2] – After item 53DA of Schedule 1

Item 2 inserts new items 53DAA, 53DAB and 53DAC into Schedule 1 to the Continued Laws Ordinance.

Item 53DAA of Schedule 1 – Subsection 118(1)

New item 53DAA of Schedule 1 amends subsection 118(1) of the NI Criminal Code to increase the penalty for an act of indecency without consent from 5 years imprisonment to 7 years imprisonment.

Item 53DAB of Schedule 1 – Subsection 118(2)

New item 53DAB of Schedule 1 amends subsection 118(2) of the NI Criminal Code to increase the penalty for an act of indecency without consent and in company with another person from 7 to 9 years imprisonment.

The increased penalties bring the NI Criminal Code into line with similar penalty increases in the *Crimes Act 1900* (ACT).

Item 53DAC of Schedule 1 – After section 119

New item 53DAC of Schedule 1 inserts a new section 119A, 'Act of indecency with person aged at least 16 but under 18—defendant in position of trust or authority', with a penalty of 7 years imprisonment, into the NI Criminal Code. The new offence provides that a person ('the defendant') commits an offence if (a) they commit an act of indecency on, or in the presence of, another person; and (b) that person is at least 16, but less than 18, years old; and (c) the defendant is in a position of trust or authority in relation to the defendant for the purposes of section 272.3 of the *Criminal Code* of the Commonwealth. Subsection (2) of the new offence provides that absolute liability applies with respect to the age of the person and that strict liability applies with respect to the defendant's position of trust or authority.

Subsection (3) of the new offence sets out a defence if the defendant proves that, at the time of the alleged offence, there existed between the defendant and the other person a marriage that was valid (or recognised as valid in relevant jurisdictions) and that, when it was solemnised, the marriage was genuine. Subsection (4) of the new offence sets out a further defence if the defendant proved that, at the time of the alleged offence, the defendant believed on reasonable grounds that the other person was of or above the age of 18 years. A defendant bears a legal burden in relation to subsections (3) and (4) of the new offence.

The justification for imposing strict and absolute liability to the offence in subsection 119A(1) and the imposition of a legal burden on the defendant for making out the statutory defences are as described for new section 113A, as the same fault elements and defences apply.

Item [3] – After item 53DB of Schedule 1

Item 3 inserts items 53DBA and 53DBB into Schedule 1 to the Continued Laws Ordinance.

Item 53DBA of Schedule 1 – Subsection 125(6) (at the end of the definition of *act of a sexual nature*)

New item 53DBA of Schedule 1 adds "(both within the meaning of Part 3.6)" to the current definition of "act of a sexual nature" ("act of a sexual nature means sexual intercourse or an act of indecency") in subsection 125(6) of the NI Criminal Code. This addition clarifies that "sexual intercourse" and "act of indecency" take the same meaning as contained in the respective definitions inserted in sections 108 and 108A of the NI Criminal Code by new item 53DAAA.

Item 53DBB of Schedule 1 – Subsection 126(1)

New item 53DBB of Schedule 1 amends subsection 126(1) of the NI Criminal Code to omit "122, 123 (3) (b)", and substitute "112, 113(3)(b)". This amendment corrects an error by replacing incorrect references in this subsection to child pornography offences with references instead to sexual intercourse without consent and sexual intercourse with a young person.

Item [4] – After item 53DD of Schedule 1

Item 4 inserts items 53DE, 53DF, 53DG and 53DH into Schedule 1 to the Continued Laws Ordinance.

Item 53DE of Schedule 1 – At the end of section 129

New item 53DE of Schedule 1 adds new subsection 129(6) to the NI Criminal Code. Section 129 relates to alternative verdicts for certain sexual offences. New subsection 129(6) provides that a person may be found guilty of an offence in accordance with section 129 only if the person has been accorded procedural fairness in relation to that finding of guilt. This addition reflects the provisions of the *Criminal Code* of the Commonwealth (section 272.28).

Items 53DF and 53DG of Schedule 1 – Section 130

New items 53DF and 53DG of Schedule 1 amend section 130 of the NI Criminal Code to break it into two subsections, such that the current provision becomes subsection 130(1) and a new subsection 130(2) is added, which provides that in an indictment for sexual intercourse without consent where the defendant is in a position of trust or authority (section 113A), a count may be added for an act of indecency with a person aged at least 16 but under 18 (section 119A) where the defendant is in a position of trust or authority.

Item 53DH of Schedule 1 – Section 131

New item 53DH of Schedule 1 amends section 131 of the NI Criminal Code by omitting "118 or 119" and substituting "118, 119 or 119A". This addition takes account of the new offence of act of indecency with a person aged at least 16 but under 18 where the defendant is in a position of trust or authority.

Part 2—Amendment of the Telecommunications Act 1992 (Norfolk Island)

Part 2 of Schedule 1 to the Ordinance amends the Telecommunications Act 1992 (NI) (the Telecommunications Act) by allowing for the interception of telecommunications without a warrant in certain circumstances (including, for example, where a person's life or physical safety may be at risk and the matter is so urgent that applying for a warrant is not reasonably practicable). These amendments make the law in Norfolk Island more consistent with that in other Australian jurisdictions, including the Commonwealth.

Norfolk Island Continued Laws Ordinance 2015

Item [5] – After item 338 of Schedule 1

Item 5 inserts items 338AA and 338AB in Schedule 1 to the Continued Laws Ordinance to amend section 3 of the Telecommunications Act, to insert 'Judge' and 'officer in charge' and omit 'Principal Police Officer'. This amendment is consequential to the amendment effected by item [7] below to the list of definitions included in Schedule 1 to the Telecommunications Act (see new item 340AA below).

Item [6] – After item 339D of Schedule 1

Item 6 inserts new items 339DA, 339DB, 339DC, 339DD and 339DE into Schedule 1 to the Continued Laws Ordinance.

These items relate to the interception of telecommunications by police officers without a warrant in emergency circumstances, such as when a person's life or personal safety has been threatened or is at risk, or serious damage to property has occurred or is likely to occur, and it is not practical in the circumstances to apply for a warrant before intercepting the communication. The new provisions require a police officer to apply for a warrant as soon as reasonably practicable after intercepting the communication and sets out the requirements for ceasing the interception and the consequences for continuing the interception if a warrant is not issued on application.

Item 339DA of Schedule 1 – At the end of subsection 48(2)

New item 339DA of Schedule 1 amends subsection 48(2) of the Telecommunications Act to add new paragraph 48(2)(d) to include the interception of a communication because of a request made, or purporting to be made, under new subsection 54A(2) or (4). Subsections 54A(2) and (4) relate to requests by members of the police force asking the Norfolk Island Regional Council to trace the location of a caller, in the context of emergency requests for interception (see item 339DE below). Section 48 of the Telecommunications Act makes it an offence to intercept telecommunications and this amendment extends the exemptions to this offence to interceptions of telecommunications made under new section 54A.

Item 339DB of Schedule 1 – At the end of section 48

New item 339DB amends section 48 of the Telecommunications Act to add new subsections (3) to (9). Subsection (3) provides that subsection 48(1), which prohibits the interception of a communication passing over a telecommunications network, does not apply to, or in relation to, an act done by a member of the police force in relation to a communication if: the member, or another member of the police force, is a party to the communication; there are reasonable grounds for suspecting that another party to the communication has: done an act that has resulted, or may result, in the loss of life or the infliction of serious personal injury; or threatened to kill or seriously injure another person or to cause serious damage to property; or threatened to take their own life or create a serious threat to their safety; and, in any case, because of the urgency of the need for the act to be done, it is not reasonably practicable for an application for a warrant to be made.

Subsection (4) provides that subsection (1) (as outlined above) does not apply to, or in relation to, an act done by a member of the police force in relation to a communication if all of the following conditions are satisfied: the person to whom the communication is directed has consented to it; there are reasonable grounds for believing that that person is likely to receive a communication from a person who has done an act that has resulted or may result in loss of life or the infliction of serious personal injury; or threatened to kill or seriously injure another person or to cause serious damage to property; or threatened to take their own life or to do an act that would or may endanger their own life or create a serious threat to their health or safety; and, in any case, because of the urgency of the need for the act to be done, it is not reasonably practicable for an application for a warrant to be made.

Subsection (5) provides that as soon as practicable after the doing of an act in relation to a communication under subsection (3) or (4), a member of the police force concerned with the communication must apply for a warrant in relation to the matter.

Subsection (6) provides that subsection (5) does not apply if action has been taken under subsection (3) or (4) (above) to intercept or cause to intercept a communication and the action has ceased before it is practicable for an application for a warrant to be made.

Subsection (7) provides that if a judge does not issue a warrant in relation to an application made under subsection (3) or (4), the officer in charge must ensure that no further action is taken to intercept the communication or cause it to be intercepted.

Subsection (8) provides that the acts in subsections (3) and (4), in relation to the inflicting/threatening of personal injury or damage to property or threatening/endangering one's own life, are taken to be eligible offences (as defined in Schedule 1 to the Telecommunications Act), even if they would not constitute eligible offences apart from subsection (8).

Subsection (9) provides that subsection (8) has effect only to the extent necessary to enable an application to be made for the purposes of subsection (5), and to enable a decision to be made on such an application, and if a judge so decides, a warrant to be issued, and to enable the Telecommunications Act to operate in relation to a warrant issued on the application.

Item 339DC of Schedule 1 – Paragraph 50(3)(a)

New item 339DC of Schedule 1 omits "Principal Police Officer" from paragraph 50(3)(a) of the Telecommunications Act wherever it occurs and substitutes it with "officer in charge". This amendment is consequential to the amendment effected by item [7] below to the list of definitions included in Schedule 1 to the Telecommunications Act (see new item 340AA below).

Item 339DD of Schedule 1 – Subparagraph 53(3)(b)(ii)

New item 339DD of Schedule 1 omits "Principal Police Officer" from subparagraph 53(3)(b)(ii) of the Telecommunications Act and substitutes it with "officer in charge". This amendment is consequential to the amendment effected by item [7] below to the list of definitions included in Schedule 1 to the Telecommunications Act (see new item 340AA below).

Item 339DE of Schedule 1 – At the end of Part 7

New item 339DE of Schedule 1 adds new section 54A, relating to emergency requests, to the end of Part 7 (Privacy) of the Telecommunications Act.

Section 54A consists of subsections (1) to (6). Subsection (1) provides that a person may take action under subsection (2) or (3) (which relate to intercepting communications to trace the location of a caller) if: the person is a party to a communication passing over a telecommunications system, and as a result of information conveyed by another party to the

communication (the caller) and of any other matters, the person forms the honest belief that either another person is dying, has been or is being seriously injured, or another person is likely to die or be seriously injured, and, in any case, the person does not know the location of the caller.

Subsection (2) provides that the person may request the Norfolk Island Regional Council to intercept a communication for the purposes of tracing the location of the caller if the person is a member of the police force, and is of the opinion that tracing the location of the caller is likely to be of assistance in dealing with the emergency.

Subsection (3) provides that if the person is not a member of the police force, the person may inform, or cause another person to inform, a member of the police force of the matters in subsection (1).

Subsection (4) provides that a member of the police force may request the Norfolk Island Regional Council to intercept a communication for the purposes of tracing the location of the caller if the member is informed by a person under subsection (3) of the matters referred to in subsection (1), and is of the opinion that tracing the location of the caller is likely to be of assistance in dealing with the emergency.

Subsection (5) provides that if the Norfolk Island Regional Council intercepts a communication under subsection (2) or (4), they must provide the location of the caller to the member of the police force who made the request, or another member of the police force.

Subsection (6) provides that a member of the police force who makes a request under subsection (2) or (4) must, as soon as practicable after making the request, give, or cause another member of the police force to give, written confirmation of the request to the Norfolk Island Regional Council.

Item [7] – After item 340A of Schedule 1

Item 7 insert items 340AA and 340AB in Schedule 1 to the Continued Laws Ordinance. These items insert, respectively, definitions of 'judge' and 'officer in charge' and repeal the definition of 'principal police officer', in item 2 of Schedule 1 to the Telecommunications Act. For the purposes of these items, 'judge' means a judge of the Supreme Court of Norfolk Island, and includes an acting judge, and 'officer in charge' means the police officer in charge of the Police Force of Norfolk Island.

Part 3—Other amendments

Part 3 of Schedule 1 to the Ordinance makes minor technical amendments to the *Norfolk Island Applied Laws Ordinance 2016* (the Applied Laws Ordinance) in relation to the domestic and personal violence provisions that were applied to Norfolk Island in 2018. These technical amendments are consequential to recent amendments made to the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) and the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (the NSW AVO laws) as these laws apply in New South Wales. The effect of these amendments is that the relevant functions exercised by a Police Area Commander or Police District Commander in New South Wales with respect to the NSW AVO laws will continue to be exercised by the police officer in charge in Norfolk Island with respect to the NSW AVO laws as applied in the Territory under section 18A of the Norfolk Island Act.

Norfolk Island Applied Laws Ordinance 2016

Item [8] – Items 17 and 19 of Schedule 1AAA

Item 8 substitutes the references to "Local Area Commander of Police" in items 17 and 19 of Schedule 1AAA to the Applied Laws Ordinance with references to "Police Area Commander or Police District Commander". Items 17 and 19 of Schedule 1AAA to the Applied Laws Ordinance presently amend subsections 28A(3) and 33A(4) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) (NI) as it applies in Norfolk Island.

Item [9] – Item 3 of Schedule 3A

Item 9 substitutes a new item 3 into Schedule 3A to the Applied Laws Ordinance which has the effect of amending subsection 3(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI) as it applies in Norfolk Island. New item 3 of Schedule 3A inserts into subsection 3(1) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) (NI) the existing definition of 'Local Court' but provides that 'Police Area Commander' or 'Police District Commander' in this applied law means the police officer in charge in Norfolk Island.

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC19-009435

19 AUG 2019

Senator the Hon Concetta Fierravanti-Wells
Chair
Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear ~~Chair~~ Connie

I am writing in response to the letter from the Senate Standing Committee on Regulations and Ordinances (Committee) dated 25 July 2019. The letter refers to the Committee's scrutiny concerns in relation to the Privacy (Disclosure of Homicide Data) Public Interest Determination 2019 [F2019L00322] (the Determination). This letter provides the requested information about the Determination.

The Australian Information Commissioner, Ms Angelene Falk (the Commissioner), made the Determination under subsection 72(2) of the *Privacy Act 1988* (Cth) (Privacy Act).

As you are aware, the Determination relates to the Australian Institute of Criminology's (AIC) research under the National Homicide Monitoring Program (NHMP). The NHMP is a longstanding initiative that relies on the support of all Australian jurisdictions, including the Australian Government, through the Australian Federal Police (AFP).

I note the reference in your letter that "the explanatory statement appears to recognise the significant privacy implications of the instrument". In the explanatory statement, the Commissioner's view was that "the proposed disclosure of personal information is reasonable, necessary and proportionate", that "the personal information to be disclosed is limited to the minimum amount necessary to achieve the purpose", and that "the potential for the disclosures to adversely affect individuals is limited".

- **Statutory safeguards to protect the privacy of individuals in relation to the use and disclosure of homicide data for the purposes of the National Homicide Monitoring Program (NHMP)**

The AFP and AIC are subject to statutory obligations under the Privacy Act, including the Australian Privacy Principles (APPs). As a result, both agencies are required to handle homicide data in accordance with these statutory obligations.

The Determination will allow the AFP to disclose personal information to the AIC for the purposes of the NHMP without breaching APP 6.1 and section 15 of the Privacy Act.

However, it is imperative to understand that in all other respects, the AFP and AIC remain subject to statutory obligations under the Privacy Act, including the APPs. This means that the AIC will be required to handle the homicide data received from the AFP in accordance with their statutory obligations under the Privacy Act and the APPs.

As mentioned in the Explanatory Statement, as well as the AFP's and AIC's statutory obligations, there are existing and anticipated non-statutory safeguards to mitigate and minimise the privacy impacts on individuals. This includes research guidelines and approvals that underpin all research conducted by the AIC, disclosure to authorised persons and publication being limited to de-identified, aggregate data only.

The Government considers that the statutory protections under the Privacy Act, and robust privacy protection safeguards in relation to the use and disclosure of homicide data for the purposes of the NHMP, are appropriate.

- **Whether amendments to the Privacy Act (or other primary legislation) are being considered to permit the Australian Federal Police (AFP) to disclose homicide data to the Australian Institute of Criminology (AIC)**
- **If not, the justification for continuing the exemptions to the Privacy Act and the APPs, and why it is considered necessary and appropriate to enact these exemptions in delegated legislation**

The purpose of Part VI of the Privacy Act is to provide a mechanism for agencies to seek a determination by the Commissioner with respect to a particular act or practice, and subsection 72(2) of the Privacy Act allows the Commissioner to make a public interest determination (PID).

The effect of determinations under Part VI of the Privacy Act are naturally limited in scope. Such determinations can only authorise acts or practices, by particular APP entities, in circumstances where the Commissioner is satisfied that the public interest in doing that act or practice substantially outweighs the public interest in adhering to the APPs.

In the case of the Determination, it relates only to disclosure by the AFP, to the AIC, for the purposes of the AIC's research under the NHMP, and with further limits on what is to be regarded as the personal information that can be disclosed. The Determination does not otherwise affect the operation of the Privacy Act or the APPs as they apply to either the AFP or the AIC.

The Explanatory Statement of the Determination also sets out the background to the making of the Determination, including the consultation process and the public interest considerations undertaken by the Commissioner. Further, in light of the statutory safeguards under the Privacy Act that will consequently continue to apply to the AFP and AIC, in addition to the non-statutory safeguards discussed above, the Government considers that the Determination is a necessary and appropriate use of the power in subsection 72(2) of the Privacy Act.

More generally, the Government considers that the determination-making powers under Part VI of the Privacy Act, as enacted by the Parliament, remain appropriate. As outlined above, the powers relate to particular acts or practices. Determinations under Part VI of the Privacy Act, if made by the Australian Information Commissioner after consideration, also remain subject to Parliamentary scrutiny as disallowable instruments. For these reasons, the current legislative framework provides a reasonable and appropriate process, rather than requiring amendments to primary legislation for any specific acts or practices.

I hope this information has been of assistance in addressing the Committee's concerns.

Thank you again for writing on this matter.

Yours faithfully

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: SB19-001022

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair Connie,

Public Order (Protection of Persons and Property) Regulations 2019 [F2019L00272]

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 25 July 2019, in which the Committee requested advice with respect to the *Public Order (Protection of Persons and Property) Regulations 2019* (the Regulations).

The Regulations were made in March 2019 substantially replicating the previous *Public Order (Protection of Persons and Property) Regulations 1999* (rep.) which were scheduled to sunset on 1 April 2019 (the Repealed Regulations). Relevantly, the Australian Criminal Intelligence Commission (ACIC) and the Australian Commission for Law Enforcement Integrity (ACLEI) were prescribed in the Repealed Regulations as investigatory authorities to which Part IIA of the *Public Order (Protection of Persons and Property) Act 1971* (the Act) applies.

I note in your letter, the Committee requests advice in relation to why it is considered appropriate to specify investigatory authorities whose officers may exercise coercive powers under Part IIA of the Act by delegated legislation, rather than primary legislation.

The ACIC and ACLEI perform particular functions within the Commonwealth government. ACIC and ACLEI undertake hearings with respect to suspected breaches of law by criminal entities and Commonwealth law enforcement officers respectively.

Under Part IIA of the Act, police and, by virtue of section 6 of the Regulations, appropriately authorised ACIC and ACLEI officers are given powers to question and search persons on, and remove persons from, ACIC and ACLEI premises (see sections 13C and 13D respectively). These are important powers under which ACIC and ACLEI authorised officers are able to take protective security functions in relation to hearings by these bodies that are appropriate to maintain.

Without these powers, ACIC and ACLEI would have no legal basis to conduct security screening or searches, or require persons to deposit personal effects, other than their rights as occupants of their premises and the consent of the individuals involved. In some circumstances, hearings and examinations may be held at facilities that the relevant investigative authority does not own (for example, state and territory law courts) and therefore they would not be able to rely on their authority as building owners to conduct such searches lawfully. Disallowance of the Regulations would restrict the ability of these authorities to exercise such functions, which may prejudice the conduct of current or impending hearings.

There are three principal reasons why I consider it appropriate for the particular agencies able to exercise the powers under Part IIA of the Act to be prescribed in the Regulations.

Firstly, it is noted that the types of bodies or authorities that may be prescribed for the purpose of Part IIA of the Act are limited to 'investigatory authorities' as defined by section 13A of the Act. That definition provides that an investigatory authority is 'a tribunal, authority or person having a power under a law of the Commonwealth to require the production of documents or the answering of questions'. This means that the Parliament has evidenced an intention to limit the availability of Part IIA powers to a narrow class of agencies.

The Act further provides that this narrow class of agencies may only exercise the Part IIA powers for a very particular purpose, being upon an authorised officer forming reasonable grounds to believe that it is necessary in the interests of security for the powers to be exercised at the premises (see sections 13B and 13C of the Act). Part IIA powers are also appropriately restricted under the Act and the Regulations, as follows:

- the only persons who can exercise powers are constables or officers of ACIC or ACLEI that are authorised by the Minister or the head of the authority (see section 13A of the Act);
- before exercising a Part IIA power an authorised officer must identify themselves andprovide evidence of their identity (section 8 of the Regulations); and
- prior to conducting any frisk search, if practicable, the authorised officer needs to explain procedure for that search and the fact that it does not require removal of clothing, will be conducted by a member of the same sex as the person etc. (section 9 of the Regulations).

Secondly, the prescription of investigatory authorities in the Regulations, as opposed to expressly stating them in the Act, provides greater flexibility and adaptability in relation to the bodies able to exercise the powers in Part IIA of the Act. As the criminal and security environments continue to evolve, the nature of persons (for example, suspected criminals and their associates) who may attend hearings conducted, and evidence which may be obtained, by an investigatory authority may result in changes to the list of prescribed investigatory authorities being required. This is evidenced through multiple amendments to the equivalent provision of the Repealed Regulations. Multiple amendments to that section were made to insert and remove authorities and tribunals as required from time to time.[1]

The flexibility provided by prescription of investigative authorities in the Regulations provides, for example, for an authority to be prescribed at short notice should a particular security-sensitive event occur at that authority's premises. The protective security powers under Part IIA of the Act could be made available for a prescribed purpose and a limited time at short notice during, for example, a significant break in the Parliamentary sitting calendar.

Thirdly, the explanatory materials relating to the insertion of Part IIA of the Act indicate that, prior to a particular investigatory authority being prescribed, particular consideration would be given to issues particular to a premises, including the history of security breaches at the particular premises, the geographical location and layout of the premises, and the availability of alternative measures to maintain security.[2]

I am of the view that decisions to be made after detailed consideration of particular circumstances is appropriate for delegated legislation.

I also note that, as a legislative instrument for the purposes of the *Legislation Act 2003*, any amendment to the Regulations would be subject to further parliamentary oversight. This would occur, for example, where an additional investigatory authority were to be prescribed for the purpose of section 13B of the Act.

Having turned my mind to the concern raised by the Committee, as well as the advice provided above, I consider that the current legislative scheme is effective and appropriate.

I thank the Committee for bringing the issue to my attention.

Yours sincerely

02/08/19

PETER DUTTON

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[1] See the *Court Security Regulation 2013*, the *Public Order (Protection of Persons and Property) Amendment Regulations 2008*, the *Public Order (Protection of Persons and Property) Amendment Regulations 2006 (No.1)*, and associated Explanatory Statements.
[2] See paragraph 14 of the Explanatory Memoranda to the Public Order (Protection of Persons and Property) Amendment Bill 1995.

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Leader of the Government in the Senate

REF: MC19-002337

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
Canberra ACT 2600

Dear Chair

Thank you for your letter of 25 July 2019 concerning the *Public Works Committee Legislation Amendment (2019 Measures No. 1) Regulations 2019* (the instrument).

I write to provide advice regarding the Senate Standing Committee on Regulations and Ordinances' view that the provision in the instrument increasing the 'threshold amount' for referral to the Public Works Committee (the Committee) of public works for defence purposes from $15 million to $75 million is a significant matter, and would be more appropriately enacted via primary legislation.

As you note, the present instrument is lawfully made. Section 18(9) the *Public Works Committee Act 1969* (the Act) allows for the threshold amount to be set by regulation, and it is therefore appropriate to specify an increase to the threshold amount by delegated legislation. This delegation of legislative powers to subordinate legislation was made by an amendment to the Act in the *Public Works Committee Amendment Act 2006.* The purpose of allowing a regulation to define the threshold amount was to enable the threshold to be altered without having to amend the Act. Increasing the referral threshold by delegated legislation provides an expeditious means to implement an outstanding recommendation from the independent *2015 First Principles Review of Defence* (the Review).

The Government agreed to the Review's recommendation to increase the threshold for defence purposes. One of the key recommendations of the Review was to fully implement an enterprise approach to the delivery of corporate and military enabling services to maximise their effectiveness and efficiency. This approach sought to achieve a more efficient and strategically aligned estate footprint through both estate consolidation and realignment, and obtaining government approval. The Review recommended increasing the referral threshold to $75 million to improve procedural efficiency, and reduce overhead, cost and significant delays to infrastructure projects.

Key findings include:

- Defence infrastructure projects forwarded to the Committee had increased in both number and value since 2006. However the $15 million referral threshold for public works had not been revised since 2006, and did not align with the approval threshold for military equipment being considered by the National Security Committee of Cabinet at the time. Consequently, more extensive consideration may have been required for the approval of facilities works of a lower value than the military equipment they were intended to support.
- The $2 million to $15 million threshold added more than one month to the time required to commence medium works. The $15 million referral threshold added three to six months to the time required to commence major works.

Given the critical Government priorities undertaken in the Defence portfolio, the Review recommended the Government amend the Act to give effect to this increase in the threshold amount. The present instrument gives effect to the purpose of this recommendation, which is to raise the threshold amount. I also note the former Assistant Minister for Defence, Senator the Hon David Fawcett, wrote to me in December 2018 requesting that I consider amending the *Public Works Committee Regulations* to reflect the Review's recommendation to increase the referral threshold. Further, I suggest that this approach is consistent with the Prime Minister's focus on more efficient and effective government regulation and delivery of services.

Parliamentary oversight of public works for defence purposes between $2 million and $75 million will continue. Consistent with longstanding practice supported by successive Committees and Finance Ministers, the Committee and its Secretariat updated the Public Works Committee Procedure Manual in April 2019 to require that the Committee be notified of all public works for defence purposes between $2 million and $75 million, referred to as medium works. The notification requirements for other medium works remains between $2 million and $15 million. This manual sets outs that each medium works notification will be examined by the Committee, which will determine whether it has any questions or concerns about the project. Construction of a medium work project must not proceed until the Committee has had an opportunity to examine and approve the project to proceed as a medium work. Importantly, in considering these notifications, the Committee may decide to seek referral of a medium works project for inquiry.

The Review noted that Defence expects to manage between 150 and 200 major capital facilities and infrastructure projects each year for the next decade. Given the number of projects and the need to ensure that the Committee's workload is manageable and prioritised to focus on the most significant or sensitive projects, it is reasonable that the Committee can call in medium works projects between $2 million and $75 million.

I have copied this letter to the Assistant Minister for Defence, the Hon Alex Hawke MP.

Kind regards

Mathias Cormann
Minister for Finance

August 2019

SENATOR THE HON RICHARD COLBECK
Minister for Aged Care and Senior Australians
Minister for Youth and Sport

Ref No: MC19-011912

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator ~~Fierravanti-Wells~~ Connie,

I refer to your letter of 25 July 2019 requesting advice in relation to the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* (the Instrument).

The Instrument amends the *Quality of Care Principles 2014* (Quality of Care Principles) to introduce limits on the use of chemical and physical restraint by approved providers of residential care and short-term restorative care in a residential setting.

I have responded to the issues raised by the Committee below. While I have sought to address the Committee's concerns in full, where these matters may be further detailed in the Explanatory Statement, this will also be undertaken.

Your correspondence notes that the Committee must ensure that instruments do not unduly trespass on personal rights and liberties. The Instrument introduces two new provider responsibilities to promote – for the first time – a restraint-free environment under Commonwealth aged care law. It is intended to complement those State and Territory laws which protect individuals from interference with their personal rights and liberties. In this context the reform should properly be seen as introducing limitations on use of these restraints, rather than including some new authorisation for physical and chemical restraint. In particular, the Instrument does not – even by exception - authorise the use of restraint where it is otherwise unlawful. In this regard, it does not have a significant, negative impact on the personal rights and liberties of consumer.

The Committee also seeks advice on why it is considered necessary and appropriate to prescribe the circumstances in which restraints may be used in delegated legislation, rather than in primary legislation. The use of delegated legislation provides flexibility for the instrument to be updated if changing circumstances make it necessary to do so.

Further detailed advice on these matters is set out below.

Provider responsibilities

The Instrument provides that physical restraint must not be used unless:

- the consumer has been assessed by an approved health practitioner with

day-to-day knowledge of the consumer as posing a risk of harm to themselves or others; and as requiring restraint;
- alternatives to restraint have been used for the consumer to the extent possible;
- the restraint is the least restrictive form of restraint possible; and
- the provider has the informed consent of the consumer (or their representative) to the use of restraint, unless the restraint is necessary in an emergency.

Additionally, the Instrument states that chemical restraint must not be used unless:
- a medical practitioner or nurse practitioner has assessed the consumer as requiring the restraint and has prescribed the medication for the purposes of restraint;
- the decision to use restraint is documented in the consumer's care and services plan; and
- the consumer's representative is informed of the use of the chemical restraint.

If restraint is used, the Instrument requires providers to regularly monitor the consumer and record information in their care and services plan.

Personal rights and liberties

The purpose of the Instrument is to introduce for the first time minimum conditions into Commonwealth aged care law which must be complied with before a provider may use restraint, in accordance with its other legal obligations. This requirement is provided for by section 15E of the Instrument, which states that Part 4A does not affect the operation of State and Territory laws governing the use of restraint.

The provider responsibilities, as made under paragraph 54-1(1)(h) of the *Aged Care Act 1997* (the Act), are in effect, a condition to receive subsidy from the Australian Government. Providers, medical practitioners, nurses and other health professionals must also comply with the applicable State or Territory laws which regulate restraint. Where a provider meets its responsibilities under the Act, this does not excuse it from complying with State and Territory laws, or provide for a defence should legal action be taken under those laws.

By way of example, under common law a provider must seek consent or other lawful authorisation, before using physical restraint on a consumer. This is because *'the law treats as unlawful, both criminally and civilly, conduct which constitutes an assault on or a trespass to the person'*.[1] Accordingly, civil or criminal action may be taken should a provider fail to seek such consent. What the Instrument does is to introduce a new requirement that a provider must comply with its responsibilities as set out in the Principles. If a provider is not meeting its obligations under Commonwealth aged care legislation, the Department of Health may take regulatory action, including imposing sanctions.

Significant matters in delegated legislation

The new restrictions on the use of restraint by providers in the Instrument complement State and Territory laws which protect individuals from interference with their personal rights and liberties.

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[1] *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218, 8.

This reform does not introduce a permission to use restraint. Instead it imposes restrictions, safeguards and conditions on the use of restraint. The use of delegated legislation allows for detailed regulation of the use of restraint in residential aged care. In addition it provides flexibility for the Instrument to be refined to address to emerging issues, and to reflect best practice.

I trust that the advice provided in my letter will assist the Committee in its scrutiny of the Instrument. Subject to the Committee's consideration of this advice, I will incorporate additional information into the Explanatory Statement for the Instrument.

Thank you for raising this matter.

Yours sincerely

Richard Colbeck

The Hon. David Littleproud MP

Minister for Water Resources, Drought, Rural Finance,
Natural Disaster and Emergency Management
Federal Member for Maranoa

Ref: MS19-001068

20 AUG 2019

Senator the Hon. Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in response to your two letters dated 25 July 2019 in relation to the following three Regional Investment Corporation (RIC) instruments:

a. Regional Investment Corporation Operating Mandate (Amendment) Direction 2018 [F2019L00434];

b. Regional Investment Corporation (Agribusiness Natural Disaster Loans—2019 North Queensland Flood) Rule 2019 [F2019L00532]; and

c. Regional Investment Corporation (Agristarter Loans) Rule 2019 [F2019L00604].

The Committee has requested my advice on the necessity and appropriateness of using delegated legislation to prescribe certain matters relating to the RIC, as well as whether decisions made by the RIC in relation to the granting of farm business loans are subject to merits review by an independent tribunal and, if not, the characteristics of the decisions that would justify excluding merits review.

I thank the Committee for its consideration of these instruments and enclose my responses to the issues raised. I have copied this letter to the Senator the Hon. Mathias Cormann, Minister for Finance, as the other responsible minister for the RIC.

I trust that the information provided confirms the appropriateness of the operation of the Amendment Direction and the two Rules.

Yours sincerely

DAVID LITTLEPROUD MP

cc Minister for Finance, Senator the Hon. Mathias Cormann

Enc.

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

RESPONSE TO THE SENATE STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

REGIONAL INVESTMENT CORPORATION (AGRIBUSINESS NATURAL DISASTER LOANS – 2019 NORTH QUEENSLAND FLOOD) RULE 2019 [F2019L00532]

REGIONAL INVESTMENT CORPORATION (AGRISTARTER LOANS) RULE 2019 [F2019l00604]

Significant matters in delegated legislation

The committee requests the minister's advice as to why it is considered necessary and appropriate to set out broad administrative and financial matters relating to loan management in delegated legislation, rather than primary legislation.

Both the Regional Investment Corporation (Agribusiness Natural Disaster Loans—2019 North Queensland Flood) Rule 2019 (the Flood Rule) and the Regional Investment Corporation (Agristarter Loans) Rule 2019 (the Agristarter Rule) set out arrangements for new programs to be administered by the Corporation.

Both rules specify requirements for the provision of loans, including on eligibility and loan terms, as well as administrative and financial matters that the Corporation must comply with.

The use of rules to add new programs to be administered by the Corporation is in accordance with the *Regional Investment Corporation Act 2018* (the Act), specifically:

- Paragraph 8(1)(g), which provides that a function of the Corporation is to administer programs prescribed by the rules;
- Subsection 8(5), which provides that the rules may prescribe one or more programs to be administered by the Corporation; and
- Section 54, which provides that the responsible Ministers may, by legislative instrument, make rules prescribing matters required by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

This approach was made clear in the explanatory memorandum to the Regional Investment Corporation Bill 2017. It stated that 'on its establishment, the Corporation will initially administer farm business loans and financial assistance provided to states and territories in relation to water infrastructure projects. It may also deliver other programs in the future. Subsection 8(5) provides for this to occur by allowing for rules to prescribe additional programs to be administered by the Corporation'.

The Act was passed by Parliament and enacted in 2018 and, at that time, Parliament considered it appropriate to allow new programs to be administered by the Corporation to be prescribed by rules. The nature of the rules, in that they provide for tabling and disallowance, ensures that Parliament has the appropriate opportunity to consider a new program before it is added to the Corporation's functions.

More broadly, using rules to deliver new programs allows the Australian Government to be more responsive in times of crises or emergencies. Further, such delegated legislation provides scope to differentiate the loan products offered by the Corporation should circumstances lend themselves to do so.

In terms of the Committee's concerns about why broad provisions in each rule are almost identical and similar to other instruments relating to the Corporation, the primary legislation was found to not cover all farm businesses that could need a flood loan or a loan to purchase a farm. The Rules were needed to ensure both loan products were available to the full cohort of farmers that should be eligible and to allow loans to be delivered in a timely fashion.

The decision to replicate relevant information from the Operating Mandate in both rules allows for the 'standard' farm business loan criteria to apply to the flood and Agristarter loans. As the criteria in the Operating Mandate only apply to farm business loans, they could not apply to the flood and Agristarter loans without it expressly being made so.

Specifying all information in the rules allowed for one complete document governing the operations of the new loans and removed the avoidance of doubt on which clauses could apply. In the long term, particularly for ongoing loan products rather than short-term emergency responses, the government may consider amending the Operating Mandate to streamline loan operations.

Merits review

The committee requests the minister's advice as to:

- whether decisions made by the Regional Investment Corporation, in relation to the grant of loans under the instruments, are subject to merits review by an independent tribunal; and

- if not, the characteristics of those decisions that would justify excluding independent merits review. It would assist if the response would expressly identify relevant grounds for excluding merits review set out in the Administrative Review Council's guidance document, 'What decisions should be subject to merits review?'

Decisions made by the Corporation on whether to grant loans under the rules are subject to an internal review process, rather than merits review by an independent tribunal. This approach reflects the governance arrangements of the Corporation, as well as its legal obligation to manage Commonwealth funds prudently.

The Corporation is a corporate Commonwealth entity with an independent expertise-based Board whose role is to ensure the proper, efficient and effective performance of the Corporation's functions. Under section 12(1) of both rules, the Corporation is required to undertake all aspects of its loan management in a prudential manner to minimise the risk of default. Allowing an independent body to have authority over the Corporation's decision to grant a loan may jeopardise the capacity of the Board to ensure the Corporation is adequately managing the financial risk to the Commonwealth associated with the loan.

Under Section 13 of both the Rules, the Corporation's Board is required to establish an internal review procedure that is transparent, robust and fair. Section 13 also sets out requirements for this procedure, including that internal reviews and decisions are undertaken by an individual who was not the primary decision maker in the original decision. This is an appropriate and sufficient mechanism, and ensures applicants can have loan decisions reviewed in a transparent, robust and fair manner.

The Corporation is not prevented from seeking independent counsel, should the need arise, and applicants are able to seek redress through civil processes. More broadly, there are also concerns with the costs of applying for review, for example though the Administrative Appeals Tribunal, delayed decision making and opportunity costs resulting from a review. In an increasingly competitive commercial lending market, farmers would have to consider whether the benefits of seeking an external review outweighed the costs of fees and delays.

While the application of loan criteria and capacity to repay the debt appear to be fact finding matters suitable for review, this information needs to be examined through the lens of the risk appetite and policies set by the Corporation's independent Board. Section 8 of the Act requires the Corporation to determine the terms and conditions on which approved loans are provided in accordance with the strategies and policies decided by the Board. These have been developed by the Board recognising the entity has a legal obligation to undertake all aspects of its loan management in a prudential manner to minimise the risk of default.

Under the Administrative Review Council's guidance document on merits review, there are a number of characteristics that may permit the exclusion of external merits review. Under paragraph 4.35 of its guidance document, the council suggests that decisions which 'would typically involve the evaluation of complex and competing facts and policies (going beyond mere fact finding)' may warrant exclusion from merits review processes. The Corporation's decisions to grant loans under the two rules involves the evaluation of complex and competing facts and policies.

For example, as stipulated in subsections 7(i) of the Flood Rule and subsection 8(d) of the Agristarter Rule, the eligibility criteria for these loans includes that the loan recipient has the capacity to repay the loan. This eligibility criteria requires the Corporation to undertake a commercial assessment of the business applying for a loan, with consideration given to the past and present financial performance of the business, as well as the financial outlook going forward.

The complexity of the Corporation's policies of lending reflect the high public interest element of lending to farmers. Paragraph 4.35 of the Council's guidance document also indicates that decisions with high public interest elements, which 'would typically involve a high level of political accountability', may warrant exclusion. The risk involved in lending Commonwealth funds to farmers inherently involves a high degree of political accountability, and is a key reason why the government established the Corporation as a corporate Commonwealth entity with an independent expertise-based board to administer these loans and manage the associated financial risk.

REGIONAL INVESTMENT CORPORATION OPERATING MANDATE (AMENDMENT) DIRECTION 2019 [F2019L00434]

Significant matters in delegated legislation

The committee requests the minister's advice as to why it is considered necessary and appropriate to leave significant matters relating to the operation of the Regional Investment Corporation to delegated legislation, rather than primary legislation.

Subsection 11(1) of the *Regional Investment Corporation Act 2018* (the Act) requires the responsible Ministers to issue an Operating Mandate to the Corporation about the performance of its functions. As outlined in the explanatory statement to the Regional Investment Corporation Bill 2017, the Operating Mandate is the key vehicle for the government to set out its expectations for the Corporation and the programs it delivers. An Operating Mandate is required to be in force at all times, providing clarity to the Corporation on the government's expectations for the programs it administers.

Subsection 11(2) describes the types of matters that may form part of the Operating Mandate. As stated in the explanatory memorandum to the Regional Investment Corporation Bill 2017, the subsection provides for the Operating Mandate to identify objectives the Corporation should pursue in administering farm business loans, financial assistance for water infrastructure projects and any programs prescribed in the rules. It may provide guidance on expectations on the strategies and policies to be followed for the effective performance of the Corporation's functions. It may also include eligibility criteria for loans and financial assistance, as well as directions on other matters.

Paragraph 11(2)(d) allows the Operating Mandate to also include directions on financial arrangements in relation to the Corporation, including how amounts received should be dealt with and the circumstances in which they are to be remitted to the Commonwealth. The Corporation will be funded through annual Appropriation Acts. Paragraph 11(2)(d) is intended to allow the government to ensure, for example, that the Corporation reports separately on funding it receives for loans and funding for operating expenses. It will also allow for clarity around how payments of principal and interest on loans are to be remitted back to the Commonwealth.

One key area of covered by the financial aspects of the Operating Mandate relates to the requirement for the Corporation to be cost neutral. This requires the Corporation calculate interest rates based on lending the total amount of funding appropriated to it for farm business and water infrastructure loans. This, and the need for critical water infrastructure to be created, has allowed the government to make appropriate changes to encourage borrowings without increasing financial risks.

While Section 11 of the Act does contain some significant operational matters for the RIC, there are also a number of safeguards in place. The Act does not allow for unlimited matters to be covered in the Operating Mandate. The Act was also passed by Parliament and enacted in 2018 and, at that time, Parliament considered it appropriate for detailed matters such as eligibility requirements for the financial assistance to States and Territories in relation to water infrastructure projects to be provided to the entity in the Operating Mandate. The nature of the Operating Mandate, in that it provides for tabling and disallowance, ensures that Parliament has an appropriate visibility and scrutiny over the Operating Mandate provided to the entity.

The Hon Michael McCormack MP

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

Ref: MC19-003471
09 AUG 2019

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells Connie

Thank you for your letter of 25 July 2019 regarding the Road Vehicle Standards Rules 2019 (the Rules) and the concerns of the Senate Standing Committee on Regulations and Ordinances (the Committee) in relation to incorporation of documents.

I can confirm to the Committee that intergovernmental agreements to which sections 50 and 171 of the Rules refer are not incorporated by the instrument. They are not given force of law by the Rules; rather, the agreements operate according to their own terms to produce a result and sections 50 and 171 of the Rules operate by reference to this result.

The intergovernmental agreements do not determine the application of the law as they do not determine when a person may import a road vehicle or the circumstances in which offence and civil penalty provisions will apply. The temporary importation of vehicles to which intergovernmental agreements apply is permitted due to Australia's obligations under the conventions it has acceded to and the agreements it has reached with other nations. These intergovernmental agreements are given the force of law domestically through the operation of the *Customs Act 1901, Customs Tariff Act 1995* and the Customs (International Obligations) Regulation 2015.

The recognition of intergovernmental agreements in subsection 171(2) of the Rules, in relation to vehicle importation, is in effect a relaxation intended to avoid unnecessary administrative burden on those to whom these circumstances would apply, by ensuring they are not required to submit import applications for these vehicles. Section 50 of the Rules, which recognises intergovernmental agreements as a circumstance in which a road vehicle may be provided – and therefore used on roads – is a logical extension and follows as a matter of course.

The Hon Michael McCormack MP
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The Rules have been intentionally drafted to not incorporate intergovernmental agreements so as to ensure maximum flexibility and currency of the instrument. While intergovernmental agreements could be incorporated as in force or existing from time to time, due to the effect of subsection 82(6) of the *Road Vehicle Standards Act 2018*, the inclusion of a definitive list of agreements would necessitate amendments each and every time Australia acceded to a convention or established a new agreement with another nation.

In order to avoid any confusion, and for clarity, I will have the Rules amended prior to the commencement of sections 50 and 171 of the Rules to make it clear that intergovernmental agreements are not incorporated by the instrument. The explanatory statement that accompanies this amendment will list the relevant intergovernmental agreements, as at the time of making, will advise readers where each can be accessed free of charge and will note that Australia may become subject to additional agreements over time.

Thank you again for your correspondence and I trust this is of assistance.

Yours sincerely

Michael McCormack

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC19-009243

Senator the Hon Concetta Fierravanti-Wells
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Dear Senator

Thank you for your letter of 25 July 2019 concerning the Senate Standing Committee on Regulations and Ordinances (the Committee) - Underwater Cultural Heritage Rules 2018 (the Rules) (F2019L00096).

The Committee requested:

> *'.... further advice as to the appropriateness of amending the instrument to remove references to 'relevant government guidelines' and 'relevant international conventions, agreements and treaties' and making future amendments to add the specific guidelines and international agreements to the instruments as they are made'.*

I note the Committee's concerns that the form of the Rules 'may reduce the clarity and intelligibility of the instrument for persons interested in or affected by the law'. With one exception, my preferred position is not to amend the instrument to specify each relevant document as they are made. I have outlined reasons for this below, and have proposed an administrative response to address the Committee's concern.

The most significant agreement likely to be relevant to the Rules is the 2001 *UNESCO Convention on the Protection of the Underwater Cultural Heritage* (the Convention), for which whole of government consultation on ratification is in its final stages. As part of the ratification process, the Convention will be submitted for consideration by the Joint Standing Committee on Treaties, giving the Parliament the opportunity to scrutinise its provision. Should the Australian Government decide to ratify the Convention I will amend the Rules to specifically identify the Convention.

The Government is also discussing potential Memoranda of Understanding for the collaborative protection of underwater cultural heritage with Papua New Guinea, Solomon Islands, Indonesia and the Philippines (states where Australia has sunken Sovereign vessels, or vessels of significance, lost during WWI and WWII, often with significant human remains on-board). Similarly, the Department is in discussions with the United States and Japan on how to effectively manage their Sovereign underwater heritage in Australian waters.

These Memoranda's, if agreed, will be in line with the principles of the Convention, and its associated Annex Rules. My preference is not to amend the Rules to include these agreements or any specific guidance notes for underwater cultural heritage managers which spell out detail of day to day protection or assessment of significance in line with the Convention, and its associated Annex Rules, as they are made.

Amending the Rules for each of these new guidelines or agreements would be administratively burdensome, and would likely delay the implementation of the agreements. This could have implications for the protection of underwater cultural heritage and relations with neighbouring countries. For example, a State may approach Australia with a request to limit access to their Sovereign underwater heritage, or to place stricter conditions on divers applying for permits to the site. A requirement that the Rules must be amended before an agreement about a Sovereign vessel's day-to-day management could be considered by me when granting or varying permits may result in delays to manage the shared heritage sites as agreed.

To address the Committee's concerns about the 'clarity and intelligibility of the instrument' without specific reference to each guidance document in the Rules, the Department will create a dedicated web page on the Department's website (http://www.environment.gov.au/heritage/underwater-heritage/underwater-cultural-heritage-rules) linking to the existing web page on International agreements (http://www.environment.gov.au/heritage/underwater-heritage/international-agreements). This web page will ensure applicants can easily access all relevant guidelines, relevant international conventions, agreements and treaties referred to in the Rules.

Further, the Department will amend the online permit application process to ensure that persons applying for a permit will be directed to the above webpages. This will reduce the risk of applicants being unaware of 'relevant government guideline(s)' and 'relevant international conventions, agreements and treaties' when applying for a permit.

I hope the Committee's concerns are addressed by the proposed administrative changes and my intent to amend the Rules, should the Australian Government ratify the Convention. If you have ongoing questions or concerns, please contact Andrew Viduka, Assistant Director Maritime and Commonwealth Heritage (02) 6274 2116, or by email to andrew.viduka@envrionment.gov.au.

Thank you for bringing your concerns to my attention.

Yours sincerely

SUSSAN LEY