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

Ref: MC19-008202

Senator the Hon. Kim Carr
Senate Standing Committee on Regulations and Ordinances

09 OCT 2019

RegOrds.Sen@aph.gov.au

Dear Senator

Thank you for your letter of 19 September 2019, in your capacity as Acting Chair of the Senate Standing Committee on Regulations and Ordinances, about the Agriculture and Veterinary Chemicals Legislation Amendment (Timeshift Applications and Other Measures) Regulations 2019.

Thank you for reiterating the committee's view about the appropriateness of the use of delegated legislation in relation to Part 6 of the amendment regulations ('Section 88 exemption'). I do not propose to amend the primary legislation at this stage as a comprehensive independent review of the entire agricultural and veterinary chemicals regulatory framework is underway (due in February 2021) and significant changes to both primary legislation and instruments are likely to follow. Matters of this nature could be the subject of amendments to the primary legislation at that stage.

In relation to the basis for calculating charges, although the authorising Act provides for fees that are taxes, all of the fees in this particular instrument are calculated on the basis of cost recovery. The levy referred to in Part 9 of the instrument is a tax. The basis for calculation of these charges has been included in a revised explanatory statement (draft enclosed).

Your further advice about the incorporation of documents and whether these may be made available free of charge is greatly appreciated. Further investigation has confirmed that the pharmacopoeial documents referred to in the instrument are only available for a fee. However, the manner in which these documents and the Food Standards Code are incorporated, and the power relied on for this incorporation, have been identified in the revised explanatory statement.

Parliament House, Canberra ACT 2600 Telephone (02) 6277 7190 Email Minister.McKenzie@agriculture.gov.au

Thank you once again for your further consideration of this matter and trust this information, with the draft revised explanatory statement, address your concerns.

Yours sincerely

Bridget McKenzie

Encl

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

Ref No: MS19-002862

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 12 September 2019, in which the committee requested further advice on the *Customs (Prohibited Imports) Amendment (Collecting Tobacco Duties) Regulations 2019* (the Regulations).

The committee sought my advice in relation to the following issues:

- *the average number of permit applications that are processed each month, and the nature of those applications; and*
- *why it is considered appropriate for officers occupying Executive Level 2 positions to decide any permit application, regardless of its economic significance.*

The committee also considers that it may be appropriate to amend the instrument to expressly require that the minister be satisfied, before delegating powers to approve permit applications, that the persons to whom powers are to be delegated possess appropriate qualifications, attributes and expertise.

Permit applications

In preparation for the 1 July 2019 commencement of the new tobacco control, importers could lodge applications for permission to import tobacco from April 2019. Permission can be granted for both personal and commercial importations.

The Australian Border Force (ABF) has received 273 permit applications from companies and individuals from April to August 2019. While the monthly average application rate for this period is 55, the ABF received significantly more applications in July and August (more than doubling earlier months' applications). This is likely due to importers' increasing awareness of the measure, including through having tobacco seized by the ABF as a prohibited import. The ABF advises importers as part of the seizure process that permission to import tobacco is required before the goods arrive in Australia. I expect that the rate of applications to import tobacco products will remain at the current level or higher.

On this basis, I consider that the volume of applications makes it necessary from a resourcing perspective for Executive Level 2 (EL2) officers to hold this delegation.

Appropriateness of delegation to Executive Level 2 officers

EL2 officers are the most senior rank in the Australian Public Service (APS) outside the Senior Executive Service (SES). The EL2 cohort forms approximately 7.8 per cent of the composition of the APS, and this cohort combined with the SES comprise the top ten percent of the APS. To reach the level of EL2, officers must be highly experienced and possess relevant skills at a higher level than the vast majority of APS employees. This delegation of permit approval powers to the relatively small and senior cohort of EL2 officers is in line with broader Government practice.

For example, the delegation of this authority to EL2 officers compares appropriately to delegations to approve the importation of firearms and weapons into Australia. I note, for instance, the Minister for Home Affairs has delegated authority to grant import permission under Schedule 6[1] and Schedule 13[2] of the *Customs (Prohibited Imports) Regulations 1956* (the PI Regulations) to EL2 and SES officers in the Customs Group. During 2018-19, Home Affairs received 521 applications to import firearms, and 301 applications to import weapons.

As previously advised, the delegation in question is not to any EL2 positions, but only to EL2 officers within the Customs Group of the ABF who have policy and procedural responsibility for these goods. There are 21 EL2 officers in the Customs Group in total. Of these, only five EL2 officers are within the relevant reporting line and would be expected to exercise the delegated power on a regular basis. Therefore, I do not consider that the delegation to such EL2 officers amounts to a broad delegation of powers.

The alternative approach of restricting the delegation to SES officers in the Customs Group would, in my view, pose an impractical burden and hamper the efficient administration of the tobacco import measure. There are six SES officers in the Customs Group in total, including the Group Manager and five Assistant Secretaries.

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[1] Requirements for the importation of firearms, firearm accessories, firearm parts, firearms magazines, ammunition, components of ammunition and imitations.
[2] Requirements for the importation of certain weapons and weapon parts.

Of these, only two SES officers are within the relevant reporting line for administering this measure (the Group Manager and the Assistant Secretary Customs and Border Revenue). In practical terms, limiting the delegation to SES officers in the Customs Group would require these two officers to decide all tobacco import applications. This would lead to delays in the permit decision making process, which would adversely affect legitimate importers and frontline ABF officers at the border.

Given the skill levels of EL2 officers, and the relatively small cohort of EL2 officers that have been given the delegation, I do not consider it to be a contradiction that EL2 officers may make decisions of economic significance in applying this measure.

I reiterate my previous advice of 9 August 2019, that I am satisfied that the officers occupying the EL2 positions subject to this delegation are appropriately skilled to perform the function of granting import permits for tobacco products. As noted, the delegation of the power to grant tobacco permits is consistent with the delegation of similar powers for more sensitive goods such as weapons and firearms.

Minister's satisfaction as to delegates' qualifications, attributes and expertise

I note the committee's proposal that it may be appropriate to amend the Regulations to expressly require that the Minister be satisfied, before delegating powers to approve permit applications, that the persons to whom powers are to be delegated possess appropriate qualifications, attributes and expertise.

The general form of delegation used for powers and functions administered by the Department is to delegate to officers of a specific classification, rather than a position number or specific person. This supports efficiency in decision-making processes.

I submit that the committee's proposal would place an unnecessary administrative burden on both the ABF and Government. It would effectively require the ABF to brief the Minister for Home Affairs on all individuals who may be required to consider permit applications, to allow the Minister to determine whether that individual holds appropriate qualifications, attributes and expertise.

Based on the seniority of EL2 officers within the APS management structure, and the experience and skill set that EL2s officers in the Customs Group inherently possess, I am satisfied that the relevant EL2 officers possess the appropriate qualifications, attributes and expertise to decide tobacco permit applications. I do not consider that making this a further statutory requirement would provide any additional utility to the delegations framework.

As the committee would be aware, the Minister and the Comptroller-General of Customs can delegate many powers across a wide range of subject matters under the customs framework. Only a very small number of specialist powers have a statutory limitation relating to a delegation holder's qualifications or training.

For example, before the Comptroller-General of Customs can authorise an officer of Customs to operate internal body scan equipment, the officer must have completed specific training. Another example relates to the exercise of monitoring powers for auditing purposes. It would be inconsistent with the Government's practice to impose such statutory requirements that are normally reserved for technical, invasive, or other specialist powers to a delegation of a power that is similar to those exercised across many areas of Government.

I submit that for the efficient administration of the Government's regulations and programs, and for consistency across customs laws and policy frameworks, it would not be appropriate to amend the instrument as described by the committee in this case. The established legal framework is appropriate for the subject matter and allows for the efficient and effective administration of those laws.

I would welcome the opportunity to discuss these matters further with you, should this be helpful.

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

Yours sincerely

JASON WOOD

18 SEP 2019

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

Ref No: MS19-002694

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

Dear Chair

I thank you for your letter of 1 August 2019, indicating the Committee has resolved to give a notice of motion to disallow the *Immigration (Guardianship of Children) Regulations 2018* (the Regulations) in order to emphasise the Committee's scrutiny concerns and to give the Senate additional time to consider the matters raised by the Committee.

If it would assist the Committee, I would be happy to make senior officers of the Department available to provide an in-person briefing about the Regulations at an upcoming meeting.

I look forward to hearing from you in relation to these matters.

Yours sincerely

David Coleman

24 / 9 / 2019

Parliament House Canberra ACT 2600 Telephone: (02) 6277 4188 Facsimile: (02) 6277 2353

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

Ref No: MS19-002935

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 (New Skilled Regional Visas) Regulations [F2019L00578]

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 12 September 2019, in which the Committee requests more information about the *Migration Amendment (New Skilled Regional Visas) Regulations 2019* (the Instrument).

Previous correspondence

I note that the Committee has concluded its examination of the matters raised by the Instrument in relation to the imposition of fees (taxation) and significant matters in delegated legislation. I thank the Committee for its consideration of those matters.

I note the Committee has indicated that, in its view, the additional information relevant to these matters contained in my letter of 14 August 2019 (my previous letter) should be included in the explanatory statement to the Instrument. A revised explanatory statement that clarifies these issues is attached. I will arrange for this to be tabled as soon as practicable.

The Committee has now sought further information relating to the issue of merits review, noting the advice provided in my letter of 14 August 2019 that merits review will not be available for decisions to refuse refunds under new subregulation 2.12F(3C), new regulation 2.73C, and new clause 8101 in Schedule 13 to the *Migration Regulations 1994* (the Regulations). These provisions are inserted in the Regulations by Schedule 2 to the Instrument.

The Committee has noted its general expectation that any decision to exclude merits review would be justified by reference to established grounds set out in the Administrative Review Council guidance document, *What decisions should be subject to merit review?* (the ARC guidance).

In my previous letter I advised the Committee that providing independent merits review of the discretion to refuse a refund could undermine the good administration of Australia's immigration program. This rationale for absence of merits review was also referred to in the replacement Explanatory Statement that was tabled in the Senate on 9 September 2019. The Committee acknowledges this concern but also notes that it does not appear to reflect an established ground set out in the ARC guidance.

The Committee requests my more detailed advice as to the characteristics of decisions under subregulation 2.12F(3C), regulation 2.73C and clause 8101 that would justify excluding independent merits review. The Committee states that it would be assisted if my response identified established grounds for excluding merits review as set out in the ARC guidance.

Characteristics of decisions under subregulation 2.12F(3C), regulation 2.73C and clause 8101

My Department has advised that, if the prescribed circumstances enlivening the discretion to provide a refund exist, the refund request would generally only be refused if the Department was unable to contact the person to obtain their bank details for the purposes of providing the refund.

The circumstances which give rise to the discretion to refund the fee or charge are generally objective in nature.

For example, subregulation 2.12F(3C) provides that:

> *(3C) The Minister may refund the amount paid by way of the first instalment of the visa application charge in relation to a visa application if:*
>
> *(a) the visa application is for a Subclass 494 (Skilled Employer Sponsored Regional (Provisional)) visa; and*
>
> *(b) the visa application relates to a nomination of an occupation under subsection 140GB(1) of the Act; and*
>
> *(c) the applicant for the visa withdraws the visa application in writing for any of the following reasons:*
>
> *(i) the nomination, by mistake, identified the wrong occupation;*
>
> *(ii) the nomination is withdrawn before a decision is made on the nomination under section 140GB of the Act because the nomination, by mistake, identified the wrong stream;*
>
> *(iii) after the visa application was made, action was taken against the nominator under section 140K of the Act for a failure to satisfy an applicable sponsorship obligation;*
>
> *(iv) after the visa application was made, the position associated with the nominated occupation ceased to be available to the applicant because the business within which the applicant was, or was to be, employed to work in the position ceased to operate lawfully in Australia;*
>
> *(v) the nomination is withdrawn in the circumstances specified in subregulation 2.73C(3), (4), (5) or (6); and*
>
> *(d) after the withdrawal, the Minister receives a written request for a refund from:*
>
> *(i) the person who paid the amount (the payer); or*
>
> *(ii) if the payer has died, or the payer has a serious physical or mental incapacity—the payer's legal personal representative; or*
>
> *(iii) if the payer is a bankrupt within the meaning of the Bankruptcy Act 1966—the trustee of the estate of the payer.*

The criteria for refunds under regulation 2.73C and clause 8101 are of a similar nature to those outlined above.

As a result, if merits review were available, there would be limited scope for the Administrative Appeals Tribunal to reach a different decision to the Department (because in most refusal cases the discretion to refund the fee or charge would not be enlivened). In these circumstances, the provision of merits review would have limited value to the person seeking the refund.

As an example, a request for a refund might be made because either the nomination or the visa application has been refused, but there is no scope under the legislation to provide a refund in these circumstances. The provision of merits review would therefore not assist the person seeking the refund.

I note, however, that while merits review is not available in relation to the decision to refuse the refund, it *is* available in relation to decision to refuse the nomination or the visa application.

Relevant ground for excluding merits review

Paragraphs 4.56 and 4.57 of Chapter 4 ('Factors that may justify excluding merits review') of the ARC guidance refer to decisions which have such limited impact that the costs of review cannot be justified – see, in particular, the statement at paragraph 4.56:

> Merits review costs money. Given that the Government must allocate resources in an effective way, it would obviously be inappropriate to provide a system of merits review where the cost of that system would be vastly disproportionate to the significance of the decision under review.

I also note that paragraph 4.57 concludes that:

> ... the cost of review must be accounted for not only by comparison with the extent of the interests of any individual that may be affected, but also by comparison with the broader and beneficial effects that merits review is intended to have on the overall quality of government decision-making.

In light of the explanation above about the circumstances in which a request for refund would be refused, I consider that the cost of providing merits review would far outweigh the significance of the decision. In particular, as I have mentioned, where the discretion to provide a refund is enlivened, the refund would generally be given provided it was practicable to do so. As noted above, in circumstances where the Department cannot obtain the person's bank details, a refund might have to be refused.

I note that, if the only reason for the refusal is that the Department is not able to refund the money, it would be open to that person to make a subsequent request for the refund and to provide their bank details. In those circumstances, the fee or the charge would be refunded.

I consider that merits review in these circumstances would have limited utility, and therefore would not have a beneficial effect on the overall quality of government decision-making.

In these circumstances, I am satisfied that the characteristics of the decisions made under subregulation 2.12F(3C), regulation 2.73C and clause 8101 justify the exclusion of merits review. The replacement explanatory statement referred to above has also been amended to clarify these issues.

I thank the Committee again for bringing this matter to attention.

Yours sincerely

David Coleman

14 / 9 / 2019

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

REF: MC19-002919

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 12 September 2019 advising the *Public Works Committee Legislation Amendment (2019 Measures No. 1) Regulations 2019* (the instrument) is no longer subject to disallowance.

Your letter also advised that the Senate Standing Committee on Regulations and Ordinances (the Committee) considered it would be appropriate to provide additional information in the explanatory statement to the instrument to facilitate 'access to understanding of the law and, if needed, as extrinsic material to assist with interpretation'.

I write to advise that I have approved the release of the attached replacement explanatory statement. It now includes additional information to provide greater clarity about parliamentary oversight of public works for defence purposes falling below the new referral threshold of $75 million. For the Committee's reference, the amendments are in track changes and are highlighted. My Department will arrange for the registering and tabling of the clean version of the explanatory statement.

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

Kind regards

Mathias Cormann
Minister for Finance

25 September 2019

Attachment A

REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of the Minister for Finance and the Public Service

Public Works Committee Act 1969

Public Works Committee Legislation Amendment (2019 Measures No.1) Regulations 2019

Legislative Authority

The *Public Works Committee Act 1969* (the Act) provides for the establishment, as soon as practicable after the commencement of the first session of each Parliament, of a joint committee of members of the Parliament to be known as the Parliamentary Standing Committee on Public Works (the Committee).

Section 40 of the Act permits the Governor-General to make regulations, not inconsistent with the Act, prescribing all matters that by the Act are required or permitted to be prescribed for carrying out or giving effect to the Act.

Purpose

The purpose of the *Public Works Committee Legislation Amendment (2019 Measures No.1) Regulations 2019* (the Regulations) is three-fold:

- Firstly, to amend the *Public Works Committee Regulation 2016* (the Principal Regulation) to specify that the threshold amount for the referral of defence related public works to the Committee for inquiry and report under the Act is the amount of $75 million. The threshold amount for the referral of other public works to the Committee for inquiry and report under the Act will remain the amount of $15 million;

- Secondly, to update to the list of entities to which the Act does not apply; and

- Thirdly, as transitional and consequential amendments, to correct references in the *Defence Force Discipline Appeals Regulation 2016* (DFDA Regulation) and in the *Migration Regulations 1994* (Migration Regulations) to the Principal Regulation.

Details of the Regulations are set out in Attachment A.

Background

Under the Act, public works the estimated cost of which exceeds the threshold amount may not be commenced unless (inter alia) the work has been referred to the Committee in accordance with section 18 of the Act.

Section 18(9) of the Act specifies the threshold amount to be $15 million, or such other amount as may be specified in the regulations.

Defence public works referral threshold

Recommendation 3 of the 2015 *First Principles Review of Defence* was that the Department of Defence (Defence) implement an enterprise approach to the delivery of corporate and military enabling services to maximise their effectiveness and efficiency. One of the keys to delivering an enterprise approach is Recommendation 3.3, that Government amend the Act to set a $75 million threshold amount for referring proposed defence public works to the Committee.

On 1 April 2015, the recommendation to increase the defence public works referral threshold received in-principle agreement from the Government.

Parliamentary oversight of public works for defence purposes between $2 million and $75 million (medium works) will continue. The Public Works Committee Procedure 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. The Procedure Manual states that 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. In considering these notifications, the Committee may decide to seek referral of a medium works project for inquiry.

Entities to which the Act does not apply

Section 7 in the Principal Regulation identifies authorities of the Commonwealth to which the Act does not apply.

An amendment will replace 'ASC Engineering Pty Ltd' with 'Australian Naval Infrastructure Pty Ltd', following a change to the name of the company, and will remove 'ASC Shipbuilding Pty Limited' as it is no longer a Commonwealth entity.

Transitional and consequential amendments

The Principal Regulation superseded the *Public Works Committee Regulations 1969* (the 1969 regulations) which were due to sunset under section 50 of the *Legislation Act 2003.*

Although there was no material difference between the 1969 regulations and the Principal Regulation, there are two references to the 1969 regulations contained in other regulations that should be corrected due to the commencement of the Principal Regulation.

Amendment of DFDA Regulation

Section 16 of the DFDA Regulation refers to Schedule 2 to the 1969 regulations in the context of fees payable to witnesses at Defence Force discipline appeals hearings.

The reference to Schedule 2 to the 1969 regulations in the DFDA Regulation will be replaced with a reference to Part 4 of the Principal Regulation, which deals with fees and expenses of witnesses and assessors.

Amendment of the Migration Regulations

Sub-regulation 5.07(1) of the Migration Regulations contains a reference to Schedule 2 to the 1969 regulations in the context of witness fees for persons appearing before a Commissioner, as provided for under section 203 of the *Migration Act 1958.*

The reference to Schedule 2 to the 1969 regulations will be replaced with a reference to Part 4 of the Principal Regulation, which deals with fees and expenses of witnesses and assessors.

Consultation

The Assistant Minister for Defence requested the proposed amendment in relation to the Defence referral threshold. The Parliamentary Standing Committee on Public Works has been consulted in relation to the Defence referral threshold and did not provide its support.

The Attorney-General and the then Minister for Immigration and Border Protection have been consulted on the proposed DFDA Regulation amendment and the proposed Migration Regulations amendment, and each has agreed to the relevant proposed amendment.

The Office of Best Practice Regulation (OBPR) has been consulted on the Regulations. The OBPR has advised that no Regulatory Impact Statement was required (OBPR reference 24982 refers).The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

A Statement of Compatibility with Human Rights is set out in Attachment B.

ATTACHMENT A

Details of the *Public Works Committee Legislation Amendment (2019 Measures No. 1) Regulations 2019*

Section 1 – Name

This section provides that the name of the instrument is the *Public Works Committee Legislation Amendment (2019 Measures No. 1) Regulations 2019* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence the day after the Regulations are registered.

Section 3 – Authority

This section provides that the Regulations are made under the *Defence Force Discipline Appeals Act 1955*, the *Migration Act 1958* and the *Public Works Committee Act 1969*.

Section 4 – Schedules

This section provides that each instrument referred to in a schedule to the Regulations is amended or repealed as provided for in that schedule.

Schedule 1 – Amendments

Defence Force Discipline Appeals Regulation 2016

Item 1 – Section 16

This item omits the reference to 'Schedule 2 to the *Public Works Committee Regulations 1969*' and inserts a reference to 'Part 4 of the *Public Works Committee Regulation 2016*'.

Migration Regulations 1994

Item 2 – Subregulation 5.07(1)

This item omits the reference to 'Schedule 2 to the Public Works Committee Regulations as in force from time to time' and inserts a reference to 'Part 4 of the *Public Works Committee Regulation 2016*'.

Public Works Committee Regulation 2016

Item 3 – Section 7 (table item 2)

This item omits the reference to 'ASC Engineering Pty Ltd' and inserts a reference to 'Australian Naval Infrastructure Pty Ltd'.

Item 4 – Section 7 (table item 3)

This item omits the reference to 'ASC Shipbuilding Pty Limited'.

Item 5 – at the end of Part 2

This item adds section 7A that specifies that the threshold amount for defence public works is the amount of $75,000,000.

Item 6 – after Part 4

This item inserts a new 'Part 5 – Transitional provisions' that makes clear that the amendment made by Item 5 of Schedule 1 of these Regulations does not apply in relation to a work referred to the Committee under section 18 of the *Public Works Committee Regulation 2016* before that item commenced.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Public Works Committee Legislation Amendment (2019 Measures No. 1) Regulations 2019

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

Overview of the Legislative Instrument

The *Public Works Committee Legislation Amendment (2019 Measures No.1) Regulations 2019* specifies the referral threshold amount for a public work for defence purposes to be the amount of $75,000,000 and updates references to Schedule 2 of the former *Public Works Committee Regulations 1969*, presently contained in the *Defence Force Regulation 2016* and in the *Migration Regulations 1994*, with a reference to Part 4 of the *Public Works Committee Regulation 2016*.

The amendments to the *Defence Force Regulation 2016* and the *Migration Regulations 1994*, which lie outside the portfolio responsibility of the Minister for Finance and the Public Service, have been agreed by the relevant portfolio Ministers.

Human Rights implication

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

Conclusion

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

Senator the Hon Mathias Cormann
Minister for Finance and the Public Service

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

Ref No: MC19-014750

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

26 September 2019

Dear Senator Concetta,

I refer to your correspondence of 12 September 2019 concerning scrutiny issues in relation to the *Quality of Care Amendment (Minimising the Use of Restraints) Principles 2019* [F2019L00511] (Instrument), which came into force on 1 July 2019.

The Instrument amends the *Quality of Care Principles 2014* (Quality of Care Principles) made under the *Aged Care Act 1997* (Act) to introduce limits on the use of physical and chemical restraint by approved providers of residential care and short-term restorative care in a residential setting.

The Senate Standing Committee on Regulations and Ordinances (Committee) requests advice regarding whether consideration has been given to setting out the core principles governing the use of restrictive practices in the aged care setting in primary legislation. The Committee also requests advice as to why this approach has not been taken, noting the additional parliamentary scrutiny that attaches to primary legislation.

Quality and safety in aged care relies on a suite of legislative reforms

As the use of physical and chemical restraint is a quality of care issue, the Australian Government made the decision to set out this matter in the Quality of Care Principles. However, this Instrument is just one component of a suite of reforms aimed at improving the quality and safety of aged care. To implement these improvements in a timely manner in line with community expectations, the vast majority have been included in delegated legislation.

For example, the Department of Health has worked with stakeholders to develop a single set of Aged Care Quality Standards (Standards) and a single Charter of Aged Care Rights (Charter). Previously, there were different sets of the Standards and Charter for different types of aged care. Along with the Instrument, the new single Standards and Charter also came into effect on 1 July 2019. Importantly, I note that like the new restraints measures, these changes were also introduced through amendments to delegated legislation, namely the Quality of Care Principles and the *User Rights Principles 2014* respectively.

The new Standards and the new Charter both have a substantial (positive) impact on personal rights. Under the Charter, care recipients have the right to be treated with dignity and respect, to personal privacy and to live without abuse and neglect. Of direct relevance to this letter, I note the Standards, for the first time, introduce a requirement for service providers to have in place a clinical governance framework that includes minimising the use of restraint.

The new regulatory arrangements relating to the use of physical and chemical restraint were intended to complement the new Standards and Charter. All were introduced through amendments to delegated legislation and all commencing on the same date.

Ability to respond in an agile and flexible manner

The Committee notes that other jurisdictions, such as Victoria, set out the core principles governing the use of restrictive practices in primary rather than delegated legislation. While this approach may provide an additional layer of scrutiny, it can increase the time for new measures to come into force. For example, the development of Victoria's *Disability Act 2006* commenced with the release of a discussion paper in 2003. Following significant public consultation, it received Royal Assent on 16 May 2006.

In contrast, the use of delegated legislation allows the Government to act promptly to protect vulnerable, older Australians. The ability to make disallowable amendments to Principles under the Act also provides an opportunity to monitor the response of the aged care sector, conduct an evaluation of the reform, and make consequent refinements as necessary.

Scrutiny of the Instrument

The Instrument has been subject to parliamentary and public oversight.

Departmental officials appeared at a public hearing led by the Parliamentary Joint Committee on Human Rights, and later provided responses to questions on notice. Copies of the Hansard and the Department's responses are available at: www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights. The Department also engaged with the Senate Standing Committee on Regulations and Ordinances. Again, this correspondence will be available online.

In this instance, the Instrument also had an additional layer of scrutiny through the Royal Commission into Aged Care Quality and Safety. Departmental officials appeared as witnesses and provided statements that clarify various issues related to the development and operation of the Instrument.

In my view, while the Committee advises the Instrument does include significant matters, the need to act in a swift and agile manner to protect vulnerable, older Australians is best achieved by setting out these matters in delegated legislation.

Yours sincerely

Richard Colbeck

The Hon Michael McCormack MP

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

Ref: MC19-004359

30 SEP 2019

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

Connie

Dear Senator Fierravanti-Wells

Thank you for your letter of 12 September 2019 regarding the Road Vehicle Standards Rules 2018 (the Rules) and the concerns of the Senate Standing Committee on Regulations and Ordinances (the Committee) in relation to the incorporation of documents.

I note your advice about the resolution of the Committee to place a protective notice of motion to disallow the Rules, pending the amendment of the Rules and inclusion of certain information in the Explanatory Statement, in accordance with my undertaking to the Committee on 23 August 2019.

I will write to you when my undertaking has been implemented to advise the Committee of the nature of the amendments to the Rules and request that the Committee resolve to withdraw the notice. I note that the Rules are due to be disallowed on 26 November 2019, and that I will provide my advice by no later than 12 November 2019 to support the Committee's consideration.

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

Yours sincerely

Michael McCormack

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