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

Ref No: MB21-001657

21 JUN 2021

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Chair Concetta,

Thank you for your correspondence of 13 May 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) concerning the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021*.

In your letter you sought my advice in relation to the Committee's concerns that the instrument deals with significant matters arising from the scope of a 'reportable incident' under the Serious Incident Response Scheme. I have enclosed advice in response to the Committee's request.

Thank you for raising this matter.

Yours sincerely

Richard Colbeck

Encl (1)

ADVICE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF DELEGATED LEGISLATION – AGED CARE LEGISLATION AMENDMENT (SERIOUS INCIDENT RESPONSE SCHEME) INSTRUMENT 2021 [F2021L00222]

On 13 May 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) requested advice in relation to the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021* (Instrument).

On 1 March 2021, the *Aged Care Legislation Amendment (Serious Incident Response Scheme and Other Measures) Act 2021* (SIRS Amendment Act) received Royal Assent. The SIRS Amendment Act amended the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care Quality and Safety Commission Act 2018* (Commission Act) to introduce the Serious Incident Response Scheme (SIRS) for residential aged care (including flexible care delivered in a residential aged care setting) from 1 April 2021. The SIRS Amendment Act allowed for matters related to the SIRS to be specified in delegated legislation, and on 15 March 2021, the Instrument was registered on the Federal Register of Legislation.

From 1 April 2021, the Instrument amended the *Quality of Care Principles 2017* (Quality of Care Principles), to specify arrangements relating to an approved provider's responsibility to manage incidents and to take reasonable steps to prevent incidents, including through implementing and maintaining an incident management system, under paragraph 54-1(1)(e) of the Aged Care Act. The Instrument also amended the *Aged Care Quality and Safety Commission Rules 2018* to allow the Aged Care Quality and Safety Commissioner (Commissioner) to respond to reportable incidents and made consequential amendments to the *Accountability Principles 2014* and the *Records Principles 2014.*

Item 2 of Schedule 1 to the SIRS Amendment Act inserted section 54-3 to the Aged Care Act. Section 54-3 sets out what reportable incidents are for the purposes of the SIRS and how reportable incidents must be dealt with as part of an approved provider's responsibility to implement and maintain an incident management system under subparagraph 54-1(1)(d)(i). Subsection 54-3(2) defines a 'reportable incident' as any of the following incidents that have occurred, are alleged to have occurred, or are suspected of having occurred, in connection with the provision of residential care, or flexible care provided in a residential setting, to a residential care recipient of an approved provider:

- unreasonable use of force against the residential care recipient;
- unlawful sexual contact, or inappropriate sexual conduct, inflicted on the residential care recipient;
- psychological or emotional abuse of the residential care recipient;
- unexpected death of the residential care recipient;
- stealing from, or financial coercion of, the residential care recipient by a staff member of the provider;
- neglect of the residential care recipient;
- use of physical restraint or chemical restraint in relation to the residential care recipient (other than in circumstances set out in the Quality of Care Principles); or
- unexplained absence of the residential care recipient from the residential care services of the provider.

The Committee raised concerns that the Instrument deals with significant matters arising from defining the scope of a 'reportable incident'.

Significant matters in delegated legislation
Parliamentary oversight

The Committee requests the Minister's advice as to:

- **why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to define the concept of a 'reportable incident' for the purposes of the SIRS**
- **whether the modification to the definition of 'reportable incident' in section 15NB of the Instrument instead be set out on the face of the Aged Care Act**

The Committee raised concerns about the use of delegated legislation to define the concept of a 'reportable incident' for the purposes of the SIRS. Subsection 54-3(4) of the Aged Care Act provides that the Quality of Care Principles may define or clarify the expression 'reportable incident'. As such, item 1 of Schedule 1 to the Instrument inserted new section 15NA to the Quality of Care Principles. New section 15NA of the Quality of Care Principles further defines and provides clarity of the meaning of expressions used in paragraphs 54-3(2)(a), (b). (c), (d), (e), (f) or (h) of the Aged Care Act.

The overarching definition of reportable incident is contained in primary legislation under subsection 54-3(2) of the Aged Care Act. In most instances the definitions and clarifications of terms under section 15NA of the Quality of Care Principles are inclusive, meaning that they are not exhaustive and do not override or modify the overarching definition under subsection 54-3(2) of the Aged Care Act. The only expression that is not inclusive is 'unexplained absence of a residential care recipient from the residential care services of the provider' under new subsection 15NA(11), due to the specific nature of the type of incident, and the certainty required for implementation.

It is considered necessary and appropriate to further define and clarify the expressions used in subsection 54-3(2) of the Aged Care Act (as has been done under new section 15NA of the Quality of Care Principles) to assist the interpretation by individuals involved in meeting the requirements under the SIRS. Clarity is achieved by using concepts to assist the reader to understand what may constitute a reportable incident under the Aged Care Act. If these matters were dealt with in primary legislation it is likely that, in an attempt to capture all scenarios (acknowledging the lack of flexibility), the definitions would become highly complex and therefore difficult to interpret and implement. Given that the SIRS requires assessment of incidents by individuals with a range of backgrounds and education (such as staff members of approved providers) clarity and readability of the legislative arrangements is an important consideration for successful implementation.

Similarly, to further ensure ease of interpretation and implementation, having detailed arrangements in one place also adds to the rationale as to why it is necessary and appropriate to include clarified terms in delegated legislation. As noted in the Instrument's explanatory statement, the legislative design of the SIRS is similar to the incident management and disclosure protection scheme under the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* (NDIS Incident Rules). Feedback from stakeholders affected the NDIS Incident Rules, indicated that keeping all operational arrangements in one place was beneficial and assisted with layman interpretation. This feedback informed the design of the legislative structure for the SIRS, by including all operational detail (including process, procedures and clarity of terms) in new Part 4B of the Quality of Care Principles.

The Committee may notice that the NDIS Incident Rules do not further define or clarify the expressions used to define a 'reportable incident' under subsection 73Z(4) of the *National Disability Insurance Scheme Act 2013,* and that this is instead done through guidance material. The approach taken under the new section 15NA of the Quality of Care Principles, was based on support and feedback from key stakeholders that having clarification in delegated legislation, as opposed to policy, would be beneficial to the implementation of the SIRS by ensuring more definitive clarity of the expressions.

Lastly, as noted in the Instrument's explanatory statement, it is considered necessary and appropriate to include matters under new section 15NA of the Quality of Care Principles in delegated legislation to allow for flexibility. The SIRS is new, and by including these matters in delegated legislation the Government is able to be responsive to unforeseen risks and to provide clarity should confusion arise. Allowing prompt responses to unforeseen circumstances, is particularly of importance in this context, where clarification may address abuse and neglect of older Australians receiving residential aged care.

The Committee's concerns regarding the use of delegated legislation to define the concept of a 'reportable incident' for the purposes of the SIRS also extends to new section 15NB of the Quality of Care Principles. Despite the definition of reportable incident under subsection 54-3(2) of the Aged Care Act, paragraph 54-3(5)(b) of the Aged Care Act provides that the Quality of Care Principles may specify when an incident is not a reportable incident. As such, item 1 of Schedule 1 to the Instrument inserted new section 15NB of the Quality of Care Principles. New section 15NB specifies limited circumstances where an incident covered by subsection 54-3(2) of the Aged Care Act is not a reportable incident; including:

- use of physical restraint or chemical restraint in a transition care program in a residential care setting, if that use is in circumstances consistent with sections 15F and 15G of the Quality of Care Principles (assuming that those circumstances applied to that care); or
- if the incident results from the residential care recipient deciding to refuse to receive care or services offered by the approved provider.

The Committee also queries whether the modifications to the definition of 'reportable incident' in section 15NB of the Quality of Care Principles should instead be set out on the face of the Aged Care Act. The Committee also noted that it is not clear why flexibility is required in relation to these modifications given that it appears that these exceptions to the definition of 'reportable incident' may not change over time.

The Government does not consider that it is necessary to set the modifications to the definition of 'reportable incident' in primary legislation. Similar to new section 15NA of the Quality of Care Principles, the inclusion of these arrangements in delegated legislation is considered necessary and appropriate to ensure ease of interpretation and implementation by having detailed arrangements in one place. Further, as noted above, the legislative design of the SIRS is modelled on the NDIS Incident Rules, and similar modifications to the term 'reportable incident' are present in subsections 16(2) to (4) of the NDIS Incident Rules. It is therefore considered reasonable to include these matters in delegated legislation to be consistent with comparable arrangements under the National Disability Insurance Scheme.

Modifications made by the instrument support the operation of the primary legislation by allowing for unintended consequences of a broad definition to be addressed. Key stakeholders were consulted on the exceptions in new section 15NB of the Quality of Care Principles, and were very supportive of the inclusion of these modifications. Particularly the inclusion of subsection 15NB(3), which was included to ensure that the rights of residential care recipients are maintained, specifically their autonomy and choice.

The inclusion of the power to modify the definition of reportable incident under subsection 54-3(5) of the Aged Care Act (relied upon to include section 15NB in the Quality of Care Principles) is intended to support the effective operation of the SIRS, by allowing the definition of reportable incident to be tailored to the operation of the scheme by providing flexibility to address unintended consequences that may arise with respect to a particular incident. These powers are necessary to allow for responsiveness to unforeseen risks, concerns and omissions in order for the SIRS to achieve its aim of protecting the health, safety, well-being and dignity of older Australians receiving residential aged care. Contrary to the Committee's assumptions it is possible that the powers under subsection 54-3(5) will be used to make further modifications to the definition of reportable incident in delegated legislation. Relevantly, subsection 15NB(2) will be revised in response to sections 15F and 15G of the Quality of Care Principles sunsetting from 1 July 2021. This subsection will be adapted or repealed to align with new arrangements for restrictive practices commencing 1 July 2021. While any further modifications will be considered very carefully based on individual circumstances, it is possible that further exclusions will be included in new section 15NB of the Quality of Care Principles, or existing arrangements will changed over time.

It is appropriate that these aspects be held in delegated legislation to allow for modifications and clarification of the definition of 'reportable incident'. The Department of Health and the Aged Care Quality and Safety Commission will monitor the operation of the Instrument, including whether the provisions remain necessary and appropriate and respond as needed.

Senator the Hon Simon Birmingham

Minister for Finance
Leader of the Government in the Senate
Senator for South Australia

REF: MS21-000645

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the
Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator Fierravanti-Wells Connie,

I refer to your letter dated 24 June 2021 seeking information about the amount of government funding for the Tourism Aviation Network Support (TANS) program (table item 475 in Part 4 of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*).

The Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Barnaby Joyce MP, who has policy responsibility for the TANS program, has provided the following advice in relation to the Committee's request for information.

The TANS program was announced on 11 March 2021. The Government did not disclose the funding commitment to TANS at the time, or subsequently in the Budget papers, pending the outcome of the grant process and subsequent commercial negotiation of program costs with airlines.

The grant agreements executed under the TANS program provide for an Australian Government financial commitment of $210,740,137.70 (GST inclusive) over 2020-21 and 2021-22. The commitment under the program has been communicated to the Senate Rural and Regional Affairs and Transport Legislation Committee at the appearance of the Department of Infrastructure, Transport, Regional Development and Communications on 24 May 2021.

Information about these agreements, including the maximum value of each grant, is published on GrantConnect, as required by Government policy.

I have copied this letter to the Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development.

Thank you for bringing the Committee's comments to the Government's attention.

Yours sincerely

Simon Birmingham

July 2021

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Urban Infrastructure,
Cities & the Arts

MS21-000458

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

Dear ~~Senator~~ Concetta

Thank you for your letter dated 17 June 2021, regarding the Senate Standing Committee for the Scrutiny of Delegated Legislation's (the Committee) concerns in relation to the *Radiocommunications (Spectrum Access Charges - 20 GHz and 30 GHz bands) Determination 2021* (the instrument). The instrument was made by the Australian Communications and Media Authority (ACMA) on 11 March 2021.

The instrument fixes spectrum access charges under section 294 of the *Radiocommunications Act 1992*, payable by the Department of Defence (Defence) for two spectrum licences it holds in the 20 GHz and 30 GHz bands. The licences are used by Defence for military satellite communications. Defence has advised that the use of these bands by Defence and allied partners is extensive and continuing to grow. These licences will expire on 26 April 2036.

I understand the Committee's concerns relate primarily to the operation of section 4 of the instrument, which provides for the repeal of the instrument at the end of 26 April 2036. In particular, the Committee seeks advice concerning the validity and necessity of section 4, including the circumstances in which the ordinary sunsetting provisions of the *Legislation Act 2003* would not apply to the instrument.

I can confirm that the sunsetting arrangements set out in section 50 of the *Legislation Act 2003* apply to the instrument, so that the instrument will be repealed by the operation of that section on 1 April 2031. Section 4 of the instrument does not, and cannot, seek to alter the effect of section 50 of the *Legislation Act 2003* on the instrument.

I understand that section 4 has been included to provide for the timely repeal of the instrument in the event of a future, unforeseen, change in law that would otherwise lead to the instrument continuing to have effect following the expiry, on 26 April 2036, of the important licences that are subject to the instrument. This means that the only circumstances in which section 4 of the instrument would come into effect is if there is a future change in the law that alters the effect of section 50 of the *Legislation Act 2003* on the instrument. Such a change could only occur through normal legislative and parliamentary processes.

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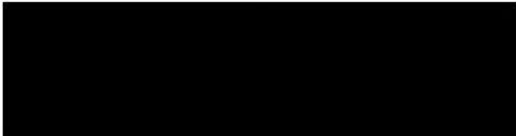
As such, section 4 validly seeks to complement the operation of the sunsetting provisions of the *Legislation Act 2003*, and the provision does not seek to circumvent or contradict the operation of these sunsetting arrangements.

ACMA has advised me that it undertakes to lodge an updated explanatory statement for the instrument, so as to include a clarification of the effect of section 4 of the instrument. In particular, that updated information will make plain that the ordinary timetable for sunsetting under the *Legislation Act 2003* is unaffected by section 4. ACMA will also review the need for, and the appropriate drafting of, such a section in similar instruments in the future, noting the concerns that have been expressed by the Committee.

Thank you for bringing the Committee's concerns to my attention. I hope the information in this letter is of some help.

Yours sincerely



Paul Fletcher

30/6/2021

The Hon Ken Wyatt AM MP
Minister for Indigenous Australians
Member for Hasluck

Reference: MC21-002877

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your correspondence of 17 June 2021 regarding the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021* (Amendment Regulations). You requested my advice on three questions:

1) To who, or which entities, can information collected under this instrument be disclosed?

2) What safeguards apply to the collection and disclosure of personal and sensitive information under this instrument by body corporates that are not Australian Privacy Principles (APP) entities?

3) Given the sensitive nature of the information authorised to be collected and disclosed under this instrument, whether consideration was given to including additional privacy safeguards on the face of the instrument?

Broader context

The function of prescribed bodies corporate (PBCs) within the scheme of the *Native Title Act 1993* is to provide a mechanism for efficient dealings with native title land (see Part B of the Explanatory Memorandum for the Native Title Bill 1993 at page 31). In fulfilling their important role for the native title community and for land management, they have duties to the common law holders of native title rights and interests. In particular, they have a duty to consult the common law holders in relation to native title and compensation application decisions.

The inclusion of a legislative mechanism for the provision of a certificate by a PBC that confirms that the relevant common law holders (or 'native title holders', as they are commonly referred to) have been consulted about and consented to a particular decision concerning native title land is squarely directed at achieving efficient dealings with native title land. In particular, for native title decisions that are concerned with the doing of a future

act, such as agreeing to the grant of a mining lease, the provision of a certificate directly supports the outcome of ensuring that persons with a substantial interest in the decision, for example a mining company, have certainty that the required consent was given and the future act can validly be done (see the preamble to the *Native Title Act 1993*).

Regulation 9 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations) authorises a PBC to collect information about common law holders whose native title rights and interests it manages for the purpose of preparing such a certificate. The certificate must include "details (including names) of the persons who participated in the process of making the decision" (i.e. the common law holders who the PBC consulted and whose consent it sought). This will necessarily create an inference as to the race of the persons. Regulation 10 requires that the PBC must give a copy of a certificate under regulation 9 to any person who is entitled to it.

Having regard to the nature and functions of PBCs, it is difficult to see how these functions could be conferred in a manner that did not involve the collection of the names of common law holders who participated in the decision making process. The very purpose of the certificate is to certify that the correct common law holders have been consulted, and have given consent, in accordance with the requirements of the legislation. This requires details about those persons to be included in the certificate itself. To achieve this outcome, a PBC must be permitted to collect the details of those persons for this purpose.

To who, or which entities, can information collected under this instrument be disclosed?

Regulation 10 provides that the PBC must give a copy of the certificate to any person who is a common law holder represented by the PBC or who has a substantial interest in the decision to which the certificate relates, for example a mining company in relation to an indigenous land use agreement decision. Such persons must make a request in writing for a copy of the certificate. In addition, the Registrar of Aboriginal and Torres Strait Islander Corporations (Registrar) is entitled to a copy of a certificate for the purposes of the Registrar performing the functions mentioned in section 55A of the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (CATSI Regulations) if the Registrar makes a request in writing. Further information about the three categories of persons is set out below.

A person that is a common law holder

'Common law holders' is defined in section 56 as the persons proposed to be included in the determination of native title as the native title holders. Regulations 8, 8A and 8B require that before making a native title decision or a compensation application, a PBC must consult and obtain consent to the decision from the relevant common law holders. As a result, it is the details of the common law holders that participated in the native title decision or compensation application decision that will be included on the certificate. It is then appropriate that the common law holders are able to obtain a copy of the certificate.

A lack of transparency about significant native title decisions and compensation application decisions can be a source of conflict between common law holders. Native title disputes, in particular between PBCs and common law holders, impact on governance and the ability of PBCs and common law holders to fulfil their obligations and to exercise their native title rights and interests. Prior to the Amendment Regulations, PBCs could, but were not required to, document how they consulted and obtained the consent of the common law holders. The Amendment Regulations are aimed squarely at addressing concerns raised by stakeholders in the native title system about transparency and accountability in native title decision making.

A person with a substantial interest

'Substantial interest' is not defined in the *Native Title 1993* nor the PBC Regulations. In a different context, Deputy President Finkelstein interpreted the phrase "a substantial interest in

the application" in *Universal Music Australia v EMI Music Publishing Australia Pty Ltd* [2000] ACopyT 3.[1] Finkelstein DP stated that the adjective 'substantial' meant "that the interest must be something that is real and of substance and not merely minimal or transitory" (at paragraph 11). Finkelstein DP also considered that the person cannot be a 'stranger' or 'busybody' (at paragraph 6).

Ultimately, the determination of what is, or is not, a substantial interest for the purposes of regulation 10 of the PBC Regulations will be determined by the PBC according to the facts and circumstances of the particular request to the PBC. For example, a proponent that had sought an indigenous land use agreement would likely have a sufficient interest to enable them to obtain a copy of the certificate as evidence of whether consent had been given by the common law holders to the agreement.

Registrar of Aboriginal and Torres Strait Islander Corporations

The Registrar is appointed by the relevant Minister under section 653-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) and has the duties, functions and powers provided for under the CATSI Act or another law of the Commonwealth. This means that the Registrar is an agency within the meaning of para (e) of the definition of agency in section 6 of the *Privacy Act 1988*. Accordingly, the Registrar is an APP entity and must comply with the requirements of the APPs as they apply to agencies.

The 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Review) recommended that the Registrar's compliance powers be expressly expanded to include matters of procedural compliance with the PBC Regulations, in particular to ensure that PBCs are fulfilling their obligations to common law holders to the same extent as members.

The functions of the Registrar under new section 55A of the CATSI Regulations are to assess whether or not, in the Registrar's opinion, a certificate prepared by a PBC for the purposes of regulation 9 of the PBC Regulations complies with that regulation. The assessment would be made on request by a common law holder or a person who has a substantial interest in the decision to which the certificate relates. The Registrar also has the function of notifying the person who requested the assessment and the PBC of the date of the certificate, the decision to which the certificate relates and the Registrar's opinion as to whether or not the certificate complies with regulation 9 of the PBC Regulations.

What safeguards apply to the collection and disclosure of personal and sensitive information under this instrument by body corporates that are not APP entities?

Some PBCs will be an APP entity for the purposes of the *Privacy Act 1988* and are therefore required to comply with the APPs. If a PBC is not an APP entity it will not be subject to section 15 of the *Privacy Act 1988*, which requires that an APP entity must not do an act, or engage in a practice, that breaches an APP.

Section 6 of the *Privacy Act 1988* provides that an 'APP entity' means an agency or organisation. As a company incorporated under the CATSI Act, a PBC is not an agency (see paragraph 6(c)(i) in the definition of 'agency'). A PBC will, however, be an organisation within the meaning of the *Privacy Act 1988* unless it is a 'small business operator' as defined

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[1] IMF (Australia) Ltd had sought to be made a party to an application for an order under the *Copyright Act 1968* that would determine the amount of royalty payable by the manufacturers of sound recordings of musical works to the owners of those works.

by section 6D. Subject to certain exceptions, a small business operator is a business with an annual turnover of $3 million or less. Relevant exceptions include where:

1) the business has had an annual turnover of more than $3 million in a financial year since the later of when it started carrying on the business or the commencement of section 6D (paragraph 6D(4)(a)); and

2) where the business is a contracted service provider for a Commonwealth contract (whether or not a party to the contract) (paragraph 6D(4)(e)).

A significant number of PBCs are likely to be small business operators and it would be inappropriate to impose additional regulatory requirements on these PBCs. PBCs are often very small entities without an office or staff that are run by common law holders in remote and regional areas and without ready access to legal and managerial assistance. The imposition of additional regulation, such as requiring them to comply with the APPs, is not appropriate in these circumstances. However, if appropriate, PBCs that are not APP entities could choose to opt into the obligations under the *Privacy Act 1988* under section 6EA.

Collection

The collection of the personal information occurs when a native title decision or compensation application decision is made by a PBC. A native title decision is defined in the PBC Regulations as a decision:

1) to surrender native title rights and interests in relation to land or waters; or

2) to enter an indigenous land use agreement under Subdivision B, C or D of Division 3 of Part 2 of the *Native Title Act 1993* or an agreement under Subdivision P (right to negotiate) of that Division (also known as a section 31 agreement); or

3) to allow a person who is not a common law holder, or a class of persons who are not common law holders, to become members of a PBC; or

4) to include one or more consultation processes in the constitution of a PBC; or

5) to do, or to agree to, any act that would otherwise affect the native title rights or interests of the common law holders (other than a decision to make a compensation application).

These decisions are significant and affect the communally held native title rights and interests of the common law holders represented by the PBC.

A PBC is *only* authorised under regulation 9 to collect personal information for the purposes of performing a function conferred on it in accordance with subsection 58(f) of the *Native Title Act 1993*; that function being the preparation of a certification in relation to consultation and consent of the common law holders for a native title or compensation application decision. As a result, only the minimum information necessary should be included in the certificate. For the majority of small PBCs, the above decisions are unlikely to be frequently made. As a result, the collection of the information about the common law holders that participated in such decisions is likely to be an infrequent occurrence.

Disclosure

The Review highlighted that "[c]onsultation participants overwhelmingly supported recommendations that RNTBCs [which are also PBCs] be required to keep and maintain registers of decisions and determinations of matters affecting native title rights and interests to improve accountability and transparency to common law holders.... Concerns were raised

as to whether such records should be subject to commercial in confidence requirements or should be made available to the members and to the general public" (at paragraphs 6.61-2). It was ultimately recommended that a Register of Native Title Decisions be set up by PBCs and that it include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations. It was also recommended that the Register be available for inspection by members of the PBC and non-member common law holders, an extract of the Register could be provided to any person having a 'substantial interest' in the relevant decision.

The recommendations were implemented in part by the Amendment Regulations with the aim of addressing the concerns of consultation participants about transparency and accountability of PBCs to the common law holders. The scope of disclosure is to a very small group of interested parties, being those outlined above.

A person with a substantial interest in the relevant native title decision or compensation application decision may be an APP entity it they meet the definition outlined above. Lastly, the Registrar is an agency within the meaning of paragraph (e) of the definition of agency in section 6 of the *Privacy Act 1988*. Accordingly, the Registrar is an APP entity and must comply with the requirements of the APPs as they apply to agencies.

Given the sensitive nature of the information authorised to be collected and disclosed under this instrument, whether consideration was given to including additional privacy safeguards on the face of the instrument?

Careful consideration was given to the protection of personal information in designing the relevant provisions so as to strike an appropriate balance between the objective of increasing the transparency of decision making by PBCs and the protection of personal information. In this context:

1) the information prescribed for inclusion in the certificate has been prescribed as the minimum necessary for effective transparency and accountability;

2) access to the certificates is restricted to those with a substantial interest in the decision to which the certificate relates;

3) access to the certificates requires a written application to the PBC; and

4) eligibility for access to the certificates is determined by the PBC.

APP 3.3 allows an APP entity to collect sensitive information only where consent is given in accordance with APP 3.3(a) or where APP 3.4 applies in relation to the information. APP 3.4(a) applies where the 'collection of the information is required or authorised by or under an Australian law or court/tribunal order.' An 'Australian law' includes an Act of the Commonwealth, State or Territory or regulations or another instrument made under an Act (see section 6). The intent of the provisions would be undermined if participants in native title decision making could effectively frustrate a PBC's ability to prepare a certificate by withholding consent to the inclusion of their name in the certificate. This would undermine the key transparency and accountability rationale for the amendments.

I note for completeness that PBCs could collect and disclose this information with the consent of the common law holders concerned. It is the policy of the NIAA that the consent of the common law holders should be obtained where feasible.

Please find enclosed a Supplementary Explanatory Statement, which will be registered on the Federal Register of Legislation that more clearly explains the following matters:

1) the nature and the scope of amended regulations 9 and 10 of the PBC Regulations;

2) the nature and extent of the information that may be disclosed;

3) the persons or entities to whom disclosure is permitted;

4) a justification for why the amendments are necessary and appropriate;

5) what safeguards are in place to protect this personal information; and

6) whether these safeguards are in law or policy.

Thank you for raising this matter.

Yours sincerely

The Hon KEN WYATT AM MP
Minister for Indigenous Australians

30 / 6 / 2021

Encl. (1)

SUPPLEMENTARY EXPLANATORY STATEMENT

Issued by the authority of the Minister for Indigenous Australians

Corporations (Aboriginal and Torres Strait Islander) Act 2006

Native Title Act 1993

Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021

Purpose of the Supplementary Explanatory Statement

The purpose of this Supplementary Explanatory Statement is to clarify the nature and scope of the amendments to regulations 9 and 10 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations) by the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2021* (Amendment Regulations).

Nature and scope of the amendments

The 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Review) highlighted that consultation participants overwhelmingly supported recommendations that prescribed bodies corporate (PBCs) be required to keep and maintain registers of decisions and determinations of matters affecting native title rights and interests to improve accountability and transparency to common law holders. It was recommended that a Register of Native Title Decisions be set up by PBCs and that information be available to members, common law holders, any person having a 'substantial interest' in the relevant decision. The recommendations were implemented in part by the Amendment Regulations with the aim of addressing the concerns about transparency and accountability of PBCs by clarifying and strengthening the requirements for PBCs to consult and obtain consent in relation to certain decisions and the making of compensation applications.

Regulation 9 of the PBC Regulations authorises a PBC to collect information about common law holders it represents for the purpose of preparing a certificate that confirms that the correct people have been consulted about and consented to a particular decision concerning native title land. The certificate must include "details (including names) of the persons who participated in the process of making the decision". Regulation 10 requires that a PBC must give a copy of a certificate under regulation 9 to any person who is entitled to it.

Nature and scope of the information contained in the certificates

The scope of the information that must be included in a certificate is, at minimum, the names of the common law holders that were consulted and gave their consent to the relevant decision. This will necessarily create an inference as to the race of the common law holders.

'Common law holders' is defined in section 56 of the *Native Title Act 1993* as the persons proposed to be included in the determination of native title as the native title holders. Regulations 8, 8A and 8B require that before make a native title decision or compensation application, a PBC must consult and obtain consent to the decision from the relevant common law holders.

The information included in the certificates should only be as much as is sufficient to establish the identity of a particular common law holder that participated in the decision. For example, if common law holders have similar names, the inclusion of a relevant apical ancestor may assist with clarifying which common law holders participated in making the decision.

Persons or entities that may be provided a copy of a certificate

A copy of a certificate may be provided to a person if they make a request in writing and are one of the following: a common law holder, a person with a substantial interest in the decision, or the Registrar for Aboriginal and Torres Strait Islander Corporations (CATSI Registrar).

A person that is a common law holders

Native title decision-making is often a process involving a collective. Under section 223 of the *Native Title Act 1993*, the expressions 'native title' and 'native title rights and interests' means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

1) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
2) the Aboriginal people or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
3) the rights and interests are recognised by the common law of Australia.

The purpose of the certificate is to certify that the correct common law holders have been consulted, and have given consent, in accordance with the requirements of the legislation. It is appropriate that the common law holders are able to obtain a copy of the certificate, which evidences the native title decision. This aims to enhance transparency for common law holders and persons who claim to be entitled to compensation by recording key information about decisions that may affect them, and in particular, their communal interest in land. This will also increase the transparency and accountability of the directors of the PBCs to the common law holders and persons who claim to be entitled for compensation.

A person with a substantial interest in the decision

"A person with a substantial interest in the decision" is not defined in the *Native Title Act 1993* nor the PBC Regulations. In a different context, Deputy President Finkelstein interpreted the term "a substantial interest in the application" in *Universal Music Australia v EMI Music Publishing Australia Pty Ltd* [2000] ACopyT 3. Finkelstein DP stated that the adjective 'substantial' meant "that the interest must be something that is real and of substance and not merely minimal or transitory" (at paragraph 11). Finkelstein DP also considered that the person cannot be a 'stranger' or 'busybody' (at paragraph 6). Ultimately, the determination of what is, or is not, a substantial interest for the purposes of regulation 10 of the PBC Regulations will be determined by the PBC according to the facts and circumstances of the particular request to the PBC. For example, a proponent that had sought an indigenous land use agreement would likely have a sufficient interest to enable them to obtain a copy of the certificate as evidence of whether consent had been given by the common law holders to the agreement.

Registrar of Aboriginal and Torres Strait Islander Corporations

The Review recommended that the Registrar's compliance powers be expressly expanded to include matters of procedural compliance with the PBC Regulations, in particular to ensure that PBCs are fulfilling their obligations to common law holders. The Registrar is appointed by the relevant Minister under section 653-1 of the *Corporations (Aboriginal and Torres Strait*

Islander) Act 2006 (CATSI Act) and has the duties, functions and powers provided for under the CATSI Act or another law of the Commonwealth. The functions of the Registrar under new section 55A of the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* are to assess whether or not, in the Registrar's opinion, a certificate prepared by a PBC for the purposes of regulation 9 of the PBC Regulations complies with that regulation. The Registrar also has the function of notifying the person who requested the assessment the date of the certificate, the decision to which the certificate relates and the Registrar's opinion as to whether or not the certificate complies with regulation 9 of the PBC Regulations.

Providing for the CATSI Registrar to assess the compliance of the certificate with the requirements of regulation 9 of the PBC Regulations will assist with any complaints that may be made to the Office of the Registrar of Indigenous Corporations about a PBC in relation to particular native title or compensation application decision. These amendments will also assist to address concerns raised in the Review consultation process that PBCs lacked accountability and transparency to common law holders.

Safeguards

Careful consideration was given to the protection of personal information in designing the relevant provisions so as to strike an appropriate balance between the objective of increasing the transparency of decision making by PBCs and the protection of personal information. In this context:

1) the information prescribed for inclusion in the certificate has been prescribed as the minimum necessary for effective transparency and accountability;
2) access to the certificates is restricted to those with a substantial interest in the decision to which the certificate relates;
3) access to the certificates requires a written application to the PBC; and
4) eligibility for access to the certificates is determined by the PBC.

The function of preparing a certificate is bestowed on a PBC in accordance with subsection 58(f) of the *Native Title Act 1993*. A PBC is *only* authorised under subregulation 9(5) to collect (within the meaning of the *Privacy Act 1988*) personal information (within the meaning of the *Privacy Act 1988*) about common law holders or persons who claim to be entitled to compensation for the purposes of preparing a certificate. As a result, only the minimum information necessary should be included in the certificate.

Some PBCs will an APP entity for the purposes of the *Privacy Act 1988* and are therefore required to comply with the APPs. Section 6 of the *Privacy Act 1988* provides that 'APP entity' means an agency or organisation. As a company incorporated under the CATSI Act, a PBC is not an agency (see paragraph 6(c)(i) in the definition of 'agency'). A PBC will, however, be an organisation within the meaning of the *Privacy Act 1988* unless it is a 'small business operator' as defined by section 6D. Subject to certain exceptions, a small business operator is a business with an annual turnover of $3 million or less. Relevant exceptions include where:

1) the business has had an annual turnover of more than $3 million in a financial year since the later of when it started carrying on the business or the commencement of section 6D (paragraph 6D(4)(a)); and
2) where the business is a contracted service provider for a Commonwealth contract (whether or not a party to the contract) (paragraph 6D(4)(e)).

If a PBC is not an APP entity it will not be subject to section 15 of the *Privacy Act 1988*, which requires that an APP entity must not do an act, or engage in a practice, that breaches an APP.

PBCs that are not APP entities could choose to opt into the obligations under the *Privacy Act 1988* under section 6EA. In doing this, a PBC would be making a public commitment to good privacy practice that may result in further confidence and trust being derived from operating under the *Privacy Act 1988*.

PBCs could also collect and disclose this information with the prior and informed consent of the common law holders concerned where feasible. However, the intent of the provisions would be undermined if participants in native title decision making could effectively frustrate a PBC's ability to prepare a certificate by withholding consent to the inclusion of their name in the certificate. This would undermine the key transparency and accountability rationale for the amendments.

A person with a substantial interest in the relevant native title or compensation application decision may be an APP entity if they meet the definition outlined above. Lastly, the Registrar is an agency within the meaning of paragraph (e) of the definition of agency in section 6 of the *Privacy Act 1988*. Accordingly, the Registrar is an APP entity and must comply with the requirements of the APPs as they apply to agencies.

Senator the Hon Anne Ruston

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

Ref: MS21-000387

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your letter of 17 June 2021 regarding concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the committee) about aspects of the Student Assistance Regulations 2021 (the Regulations). I am grateful for your communications with my department about this matter, and for the opportunity to personally consider and address the committee's concerns.

I would like to assure the committee that I will ask the Governor-General to amend the Regulations to take account of the committee's comments to the greatest extent possible within the scope of the regulation-making powers of the *Student Assistance Act 1973* (the Act), while maintaining consistency with other student payments administered under social security law.

In particular, I propose to replace incorporated terms with substantive definitions (except where this is not practicable), and to improve the clarity of the drafting of the instrument. I will ensure that the amendments are fully explained in the explanatory statement to the amending regulations.

Background

As the committee is aware, the ABSTUDY and Assistance for Isolated Children (AIC) schemes provide significant assistance to Aboriginal and Torres Strait Islander people and other young persons who are geographically remote and will benefit greatly from improved educational opportunities. Both schemes have been adapted over time but have also retained their character as largely administratively-based schemes that cater flexibly to the needs of the people who access this important student assistance.

The Act provides a legislative framework for aspects of the ABSTUDY and AIC schemes, for example, by providing a standing appropriation for payments, a system for payees to notify changed circumstances that may affect their payments, debt recovery and non-recovery mechanisms and merits review for certain decisions. Eligibility decisions, however, are made in accordance with policy guidelines.

Despite the hybrid framework, the schemes offer student benefits in a manner broadly consistent with other student payments available under the social security law, namely, Youth Allowance and Austudy. I consider that the ABSTUDY and AIC schemes produce optimal outcomes for participants because they are flexible without foregoing government accountability. Nonetheless, I appreciate that the committee has concerns that the Regulations raise transparency issues, which I will take action to address.

My responses to the committee's detailed comments about the Regulations are below.

Issues

Parliamentary oversight – terms incorporated by reference

Your letter identifies concerns with the incorporation of terms by reference in the Regulations. Specifically, you have identified that:

- sections 5, 6, 13, 16, 19 and 20 of the instrument incorporate terms from the ABSTUDY Policy Manual; and
- sections 5, 24, 25, 27 and 28 of the instrument incorporate terms from the AIC Guidelines.

Subsection 48(1) of the Act provides that a person who is receiving, or entitled to receive, an amount under a current special educational assistance scheme – which includes ABSTUDY and AIC – must notify the happening of prescribed event within 14 days of the happening of that event. Subsection 48(2) of the Act states that regulations for the purposes of subsection 48(1) 'may apply, adopt or incorporate any matter contained in any instrument or other writing as in force or existing from time to time'.

Subsection 48(2) of the Act was inserted by the Student Assistance Legislation Amendment Bill 2005. The Explanatory Memorandum to that Bill explained that:

> Item 10 adds proposed subsection 48(2) which provides an express provision permitting the incorporation of an instrument "as in force or existing from time to time" for the purposes of section 14 of the *Legislative Instruments Act 2003*. This will eliminate the need to make new regulations under the Act whenever the guidelines for the non-statutory ABSTUDY and Assistance for Isolated Children schemes are altered.

In this light, I consider that the technique used to cross-reference definitions in the ABSTUDY Policy Manual and AIC Guidelines is authorised by the Act, and within the contemplation of the Parliament having regard to the policy basis for the Scheme.

Nevertheless, I accept the committee's concerns and will amend the Regulations to remove all incorporated definitions and replace them with substantive definitions to the fullest extent permitted by the regulation-making powers in the Act. I will explain any corresponding changes fully in the explanatory statement to the amending regulations. I will also direct my department to amend the manuals in a timely manner so that the regulations and manuals are consistent and reflect the government's policy intention.

I must, however, flag with the committee that some terms may not be able to be replaced with a wholly self-contained definition because, for example, the definition incorporates amounts calculated and indexed under the social security law. The term 'personal assets test limit' provides an example of a term which can be improved but may need to rely on a more direct cross-reference, for example, to the relevant table in *A Guide to Australian Government Payments* as in force from time-to-time or, if necessary, to the social security law.

Clarity of drafting and legal certainty

Your letter identifies concerns about a lack of clarity with respect to phrases used in the Regulations that 'appear to have a subjective character' and the absence of guidance in the explanatory material. You have asked whether the instrument can be amended to prescribe the events in more certain terms, so that a person who is subject to the requirements can clearly understand when they are required to report under the Act.

The committee has identified the following prescribed events as being of concern:

- paragraphs 14(1)(c), 16(1)(d) and 16(1)(e) of the Regulations, which prescribe as an event the situation where a person '*becomes aware*' that something is '*likely to occur*';
- subsection 19(3), 19(4) and 27(3) which prescribe events where a person *becomes aware* something is *reasonably likely* to occur (including to the extent that subsections 19(3) and (4) are affected by subsection 19(5) which applies a standard that the person *ought reasonably know*);
- paragraph 26(a) which prescribes an event when certain payments become *receivable* in respect of the student, which does not address the fact of the student *becoming aware* of the fact.

As a preliminary point, I note that several of my portfolio laws create offences in circumstances where a person fails or refuses to notify in accordance with statutory obligations. There are significant parallels between these laws, which are aimed at ensuring that people who access benefits in the different schemes can rely on consistent reporting requirements. For example, it is not uncommon for students who are parents to access family assistance payments or for young people on Youth Allowance (other) to move onto ABSTUDY. For this reason, the Regulations adopt similar requirements to inform the Secretary when the claimant 'becomes aware' of a matter that is 'likely to occur'.

Consistency is vital as it helps to avoid overpayments of student benefits, which can have deleterious impacts on students and their families. I note that potential inconsistencies identified by the committee reflect policy choices to recreate aspects of the sunsetted Student Assistance Regulations 2003, but can be readily revised in line with the committee's preferences.

I will now address the committee's concerns under the events as grouped in your letter.

'Becoming aware' - paragraphs 14(1)(c), 16(1)(d) and 16(1)(e)

Paragraphs 14(1)(c), 16(1)(d) and 16(1)(e) prescribe events to trigger payee notification in essentially the following circumstances:

- an independent ABSTUDY student *becoming aware* that a dependent child is *likely to* travel outside Australia for any period;
- for ABSTUDY remote area allowance recipients—the payee *becoming aware* that the student is *likely to* be absent from their permanent home for a period of more than 8 weeks; and
- the ABSTUDY payee *becoming aware* that the student *is likely* to be outside Australia for any period.

Each of the above events is relevant to a person's rate of ABSTUDY payment and should remain as a notifiable event even if in a modified form.

I agree that the phrases 'becoming aware' and 'is likely to' apply a subjective standard that depends on the person's knowledge and capacity to understand the information in their possession. These matters will vary from person to person and in different circumstances.

The phrases are deliberately pre-emptive as early reporting of income-related events will minimise the scope for overpayment. The events apply the same standard as for reporting of these matters under the social security law. As a result, I have preferred these events to be prescribed in this form and accepting that a court is likely to resolve uncertainty in the claimant's favour having regard to the circumstances.

In light of the Committee's concerns, I will omit any references to 'is likely to' and replace them with the word 'will'.

I would also be happy to provide further detail in a explanatory statement to the Regulations.

'Becoming aware' and 'reasonably likely' to occur – subsections 19(3)-(5) and 27(3)

These paragraphs prescribe events to trigger payee notification in the following circumstances:

- for a dependent student aged 18 years and over—the ABSTUDY student *becomes aware* that it is *reasonably likely* that parental income for the year has exceeded or will exceed the estimated or stated amount by at least 25 per cent;
- for the parent of a dependent ABSTUDY student aged under 18 years—that parent *becomes aware* that it is *reasonably likely* that their or their partner's income has exceeded or will exceed the estimated or stated amount about by at least 25 per cent;
- for both of the above circumstances, a person is be taken to be aware of something if he or she 'ought reasonably know of it'; and
- for the parent of an AIC student—that parent *becoming aware* that it is *reasonably likely* that their or their partner's income has exceeded or will exceed the estimated or stated amount about by at least 25 per cent.

The above events relate to means testing arrangements, which are common to most student payments including under the social security law. The phrase 'reasonably likely' was used to apply an objective standard to the requirement to report prospective income, while subsection 19(5) was intended to follow paragraph 6(2)(b) of the sunsetted regulations.

The income of the student or the applicant's partner or their parent(s) is relevant to the calculation of ABSTUDY benefits, noting that the members of the student cohort are often in a position of dependency. Again, the events are expressed in pre-emptive terms to avoid overpayment and possible debt recovery action.

In my view, the requirement to report these events should be retained in this form with the exception of section 19(5), which I am prepared to repeal due to its deeming effect.

However, I accept that the word 'reasonably' creates an inconsistency with matters in the social security law and paragraphs 14(1)(c), 16(1)(d) and 16(1)(e) of the Regulations. If retention of this word is not acceptable to the committee, I would be prepared to remove the word 'reasonably' (as it is unnecessary) or, more reluctantly, remove the phrase 'it is reasonably likely that' from each of the events.

I would also be happy to provide further explanation in the explanatory statement to the amending Regulations.

Payments becoming 'receivable' – paragraph 26(a)

This event relates to the reporting of income received from specified Australian Government sources such as scholarships, social security or veterans' income support payments or ABSTUDY or AIC Scheme payments. You have noted that the explanatory statement to the Regulations does not address the implications of the specified payments being receivable by a student who is not aware of the fact (of those payments being made).

For the AIC Scheme, payments can only be claimed by, or at the instance of, parents of dependent students. The large majority of these students are under the age of 18 years. AIC payments are only paid for primary, secondary or ungraded-level students who are under 19 years of age on 1 January of the year of study. However, this may be extended by one year if the student's progress through school has been delayed by special circumstances such as illness or English language difficulties.

I accept that paragraph 26(a) of the Regulations does not incorporate an awareness component as has been included for other prescribed events discussed above. I accept that the events should be consistent in this regard. I am therefore prepared to seek amendment to paragraph 26(a) to include an awareness component, and ensure that the effect of this amendment is explained in the explanatory statement to the amending Regulations.

Summary and contact details

In summary, I reiterate that the Australian Government is highly committed to improving the circumstances of Australia's first peoples and geographically isolated students, including by promoting access to important educational opportunities and providing appropriate financial support.

In this light, I am prepared to take action as soon as practicable, and no later than the end of the 2021 calendar year, to:

- seek amendments to the Regulations to:
  - remove incorporated terms from the Regulations and replace them with substantive definitions to the extent this is possible under the relevant regulation-making powers in the Act;
  - remove references to 'is likely to' from paragraphs 14(1)(c), 16(1)(d) and 16(1)(e) of the Regulations and replace these phrases with 'will';
  - remove references to 'that it is reasonably likely that' from subsection 19(3), 19(4) and 27(3);
  - repeal subsection 19(5) which recreated paragraph 6(2)(a) of the sunsetted regulations dealing with deemed knowledge; and
  - insert an 'awareness' component into paragraph 26(a) of the Regulations; and
- ensure that the explanatory statement to the amending Regulations provides more detailed information:
  - explaining that the Regulations implement, as far as possible, reporting requirements in similar terms to those that apply to other Centrelink administered payments, including Austudy, Youth Allowance and Family Assistance payments; and
  - providing examples of circumstances in which a person may be asked to report various matters in the provisions identified by the committee as requiring additional explanation.

I will also ensure that the explanatory statement is consistent with the committee's *Guidelines* published on its webpages and that the ABSTUDY Policy Manual and AIC Guidelines will be updated in a timely way.

To assist the committee's consideration of the Regulations, I note that I am already making arrangements to repeal Part 3 of the instrument to reflect the passage of new measures dealing with tax file numbers in the *Social Services and Other Legislation Amendment (Student Assistance and Other Measures) Act 2021*, as part of this exercise.

I appreciate that the committee would like to finalise these matters before the disallowance period for the Regulations ends. If there are any further issues arising from my correspondence, I would be happy for the committee to make contact with my office or the Chief Counsel of my department, Ms Bronwyn Worswick, who is available on (02) 6146 1939.

For completeness, I acknowledge that the committee will publish my response to the committee's letter on its website in the interests of transparency.

Yours sincerely

Anne Ruston

6 / 7 / 2021