# Monitor 14 of 2021 – Ministerial responses

## Contents

**THE HON MICHAEL SUKKAR MP**
**Assistant Treasurer**
**Minister for Housing**
**Minister for Homelessness, Social and Community Housing**

Ref: MC21-026548

Senator the Hon Concetta Fierravanti-Wells
Senator for New South Wales
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for your correspondence of 12 August 2021 concerning the *Australian Charities and Not-for-profits Commission Amendment (2021 Measures No. 2) Regulations 2021* (the **Regulations**).

The Committee requested my advice regarding:

- the objective test that will be applied to determine whether a registered entity has complied with the requirements of subsection 45.15(3);
- the factors the ACNC Commissioner must consider when making this determination; and
- how the instrument as a whole, including subsection 45.15(3), does not impermissibly restrict the implied freedom of political communication.

Given the numbers of matters to be covered, I have set out my response in the Annexure to this letter.

I trust this information will be of assistance to you.

Yours sincerely

The Hon Michael Sukkar MP

**Annexure**

**Conferral of discretionary powers**

Under the *Australian Charities and Not-for-profits Commission Act 2012* (the **Act**), the ACNC Commissioner can only take compliance action against a registered entity in relation to the governance standards (including new subsection 45.15(3)) if the ACNC Commissioner reasonably believes that either: the entity has not complied with a governance standard; or it is more likely than not the entity will not comply with a governance standard.

This means that before taking any action, the ACNC Commissioner must be satisfied that, based on the facts and evidence, a reasonable person would believe that non-compliance with the governance standard has occurred or will occur. That is, the Act requires the ACNC Commissioner to be satisfied by reference to an objective standard before the power to take compliance action is enlivened. Further details on the ACNC Commissioner's powers, including when the ACNC Commissioner may or may not take regulatory action, is set out in the revised explanatory memorandum to the Australian Charities and Not-for-profits Commission Bill 2012 (see paragraph 3.92).

The Committee sought advice on what factors the ACNC Commissioner must consider before being satisfied that a governance standard has not been complied with or will not be complied with, particularly in relation to subsection 45.15(3). The ACNC Commissioner's satisfaction is not a question of law, subject to legislatively prescribed factors or discretions, but is a question of fact to be determined on the evidence available to the ACNC Commissioner. What evidence is required for a reasonable person to be satisfied of the existence of a set of circumstances existing at a point in time will of course vary from case to case, as it does in all areas of law. The ACNC Commissioner must of course comply with all general administrative law requirements in administering the Act, and while the rules of evidence do not apply to the ACNC Commissioner's administrative actions, the Administrative Appeals Tribunal is likely to have regard to those rules in any review of the ACNC Commissioner's decision to take regulatory action.

Once the ACNC Commissioner is satisfied there has been or will be non-compliance with the governance standards, the decision whether or not to take regulatory action, and what regulatory action to take, is subject to the ACNC Commissioner having regard to the matters set out in section 15-10 of the Act. Those matters include: the need to maintain, protect and enhance public trust and confidence in the not-for-profit sector; the need to maintain and promote an effective and sustainable not-for-profit sector; the principles of regulatory necessity, risk and proportionality; the need for the ACNC Commissioner to cooperate with other government agencies; and the benefits gained from guidance and education in ensuring compliance.

Where compliance action is required in relation to the governance standards, the ACNC Commissioner has a range of powers to allow for a proportionate and effective regulatory response. These include providing regulatory advice, education, guidance or a warning notice, accepting enforceable undertaking, and issuing directions to take certain specified actions. As set out in the ACNC's Regulatory Approach Statement, education and support to registered entities underpins the ACNC's approach.

I would like to reiterate to the Committee, as stated in more detail in my previous letter of 28 July 2021, that the ACNC Commissioner is required to have regard to a prescribed set of matters listed in subsection 35-10(2) of the Act before deciding to revoke a registered charity's registration, or issue a warning or direction. These matters include: the nature, significance and persistence of any contraventions; what actions (if any) the charity could have taken to address to prevent the non-compliance; whether the charity is conducting its affairs in a way that may cause harm to the community or jeopardise public trust and confidence in the not-for-profits sector; and the impact on the community from compliance actions against the charity. These matters are in addition to those factors set out in section 15-10 of the Act summarised above.

Obligations to have in place reasonable internal controls and procedures are a feature of many of the governance and external conduct standards set out in the regulations. For example, registered entities are already required to maintain reasonable internal control procedures to ensure their resources are used outside Australia in a way that is consistent with the entity's purpose and character as a not-for-profit entity. Subsection 45.15(3) was modelled on existing provisions that have been in place for some time and have been operating effectively. While the context of the two requirements maybe different, the general obligation to maintain reasonable internal control procedures is not new for registered entities. Having proper internal controls is a fundamental requirement for the good governance of any organisation, and underpins much of Australia's corporate, government and other regulatory frameworks.

Consistent with good governance practices, it is the role of government to mandate that organisations maintain controls and procedures for certain stated purposes. It is for the board of the organisation to determine the details of the controls and procedures having regard to the individual circumstances of that organisation. These individual circumstances could include its size and the nature of its activities. For example, a large charity that regularly engages in activities jointly with other entities may be expected to have more rigorous procedures compared to the trustee of a small school library fund whose trust deed only permits use of its resources for a narrow purpose.

The legislative note following subsection 45.15(3), and the supporting explanatory statement, list examples of the matters that may be dealt with in the internal control procedures. These include introducing procedures around: who can access, authorise or use a registered entity's funds, premises or social media accounts; when using the registered entity's resources is considered improper or unauthorised; and when relevant training must be provided to responsible entities and employees before they are allowed to exercise certain powers or duties.

In line with the other governance standards, the amended governance standard three supports registered entities by providing a minimum level of assurance that they meet community expectations in relation to how a registered entity should be managed.

Additionally, as mentioned in my letter of 28 July 2021, the ACNC is developing guidance and education for registered charities, which will be released once the amended standard comes into effect, to help them understand and comply with the governance standard.

**Implied freedom of political communication**

The Regulations provide that for an entity to be or remain entitled to registration under the Act, the entity:

- must not engage in certain kinds of summary offences; and
- must maintain reasonable internal control procedures that ensure its resources are not used to actively promote unlawful activity by others.

Any laws (including summary offences) that are invalid because they impermissibly restrict the implied freedom of political communication are not within the scope of the Regulations, as an invalid law is not a law of Australia. On that basis, I do not consider that the Regulations burden the implied freedom of political communication as they do not prevent the registered entity engaging in conduct that is not otherwise already unlawful.

I also note the Committee's concern that subsection 45.15(3) centres on the fact that those requirements relate to the active promotion of unlawful activities by other entities. However, the requirement in subsection 45.15(3) centres on the registered entity's governance arrangements around the use of its own resources. In particular, the requirement is on the registered entity to maintain reasonable internal control procedures around the use of its resources, with the aim of ensuring its resources are not used (nor continued to be used), whether by the registered entity itself or by other entities, to actively promote unlawful activities. A registered entity will not contravene this new requirement simply because another entity has ultimately used the registered entity's resources to actively promote unlawful activities.

Rather, what is required of the registered entity is to maintain reasonable internal control procedures around the use of its resources.

As I am sure the Committee understands, it is a feature of Australian criminal law that someone who aids, abets, counsels, procures, is knowingly concerned in, is a party to the commission of an offence by another, or commissions the carrying out of an offence by proxy, is also taken to have committed that offence and is punishable accordingly. This feature of law equally applies to charities as it does to individuals. Similarly, many Australian jurisdictions also have separate offences relating to urging or inciting another to commit an offence in that jurisdiction (or a subset of offences in that jurisdiction). Requiring registered charities to maintain reasonable internal controls to ensure assets – which are contributed to charities by generous Australians and subsidised by taxpayers – are used in a manner consistent with Australian law does not limit, or impermissibly restrict, the implied freedom of political communication.

# THE HON ANGUS TAYLOR MP
## MINISTER FOR ENERGY AND EMISSIONS REDUCTION

MC21-005971

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

08 SEP 2021

Dear Chair Connie

Thank you for your letter of 12 August 2021 regarding concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) in relation to the *Australian Renewable Energy Agency Amendment (2020-21 Budget Programs) Regulations 2021* (the first 2021 Regulation) and the *Australian Renewable Energy Agency (Implementing the Technology Investment Roadmap) Regulations 2021* (the second 2021 Regulation).

**Scope of what was envisaged by Parliament under the ARENA Act**

My letter of 3 August 2021 outlines the legal basis for the making of both regulations consistent with the *Australian Renewable Energy Agency Act 2011* (ARENA Act). The ARENA Act establishes an independent Commonwealth agency which is conferred functions by the Act and can be conferred additional functions by regulations. There is no wording in paragraph 8(f) of the ARENA Act which limits additional functions to renewable energy technologies and there is no need to read such limitations into the plain words of paragraph 8(f).

There is no basis to depart from the text and plain meaning of the regulation making power. The plain meaning of the regulation making power is not ambiguous, obscure or leading to an absurd or unreasonable result. This means that section 15AB of the *Acts Interpretation Act 1901* is not engaged.

A closer look at the passage of the Australian Renewable Energy Agency Bill 2011 also does not support reading additional words or limitations into paragraph 8(f). The Minister introducing the Bill on 12 October 2011 made clear the context of the Commonwealth's actions was to support 'clean energy' generally, of which the Australian Renewable Energy Agency (ARENA) was intended to be an important part. This second reading speech provides an important policy link between ARENA's support for 'financial assistance for the research, development, demonstration and commercialisation of renewable energy *and related technologies'* and broader emissions reduction policies of the Commonwealth for 'promoting innovation and investment in renewable and *low emissions* energy'.

When the ARENA Act was enacted in 2011, it established an agency with statutory funding until 30 June 2020 that would operate as part of an overarching government program for clean energy and emissions reductions. The terms of the Act dictated that ARENA's workload for the purposes of discharging its initial appropriation would primarily be in the area of renewable energy. However, there was always a wider scope underpinning ARENA's establishment, demonstrated by the extended definition given to the term 'renewable energy' (see further below), the broad constitutional basis for the Act itself and the provision of a regulation-making power authorising the enactment of new functions in unrestricted terms. In my view, the Parliament, in setting a time-limited appropriation for ARENA, intentionally left open the possibility that ARENA might continue beyond 2020 with new funding and new functions set under paragraph 8(f); and that these new functions might legitimately cross over into low emissions technologies in general, quite consistently with the initial vision for ARENA's place as part of an overarching government program for clean energy and emissions reductions.

The Committee's interpretation of 'renewable energy' does not appear to have taken into account the intentionally broad definition of 'renewable energy technologies' in the ARENA Act. They are defined as follows:

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

It is worth considering what 'hybrid' technologies would look like in the context of renewable energy, and particularly what types of technologies might be considered to 'enable' or be 'related to' renewable energy. It is well-known that increasing renewable energy capacity on its own may not create a stable ongoing source of power, since high concentrations of renewable energy can create grid reliability issues and the variability of renewable resources can further weaken the grid during periods of low generation or demand. ARENA has for some time now been funding projects beyond 'pure' renewable energy, for example in areas such as energy efficiency, demand management and energy storage, in the understanding that these technologies are necessary to enable a higher uptake of renewable energy in Australia. It could be argued that at least some of the 'non-renewable' technologies in the first and second 2021 Regulations are better understood as hybrid, enabling or related technologies in the wider context of renewable energy supply and security in Australia.

This extended definition was considered at the time the ARENA Act was first enacted. The Minister's second reading speech gives examples of projects at the Kogan Creek coal-fired power station as examples of the kinds of activities that could be covered, along with technologies such as battery storage. It was understood back in 2011 that without allowing for essential related technologies, renewable energy generation would not be able to contribute to emissions reductions without impacting reliable and secure energy supply. The same arguments are just as valid, if not more so, today.

I would also draw the Committee's attention to the manner in which the activities to be funded by the second 2021 Regulation include a very significant focus on activities within the broad concept of renewable energy technologies. For example, 'priority energy storage technologies financial assistance' is entirely a 'renewable energy technology' as defined, while the 'clean hydrogen technology financial assistance' is expected to have a significant focus on the use of renewable energy in hydrogen production. The 'Regional Australia Microgrids Pilots financial assistance' as defined must also 'relat[e] to the use of renewable energy'. It is therefore the case that a large part of the technologies mentioned in the second 2021 Regulation would already fall within the extended definition of renewable energy as described above.

The link to the broader clean energy innovation agenda has always been an important role for ARENA before the *Australian Renewable Energy Agency Regulation 2016* gave ARENA a specific function beyond renewable energy in the Clean Energy Innovation Fund. In particular, funding from the Clean Energy Finance Corporation can be transferred to ARENA through section 50 of the *Clean Energy Finance Corporation Act 2012*. ARENA also had additional transitional functions under the *Australian Renewable Energy Agency (Consequential Amendments and Transitional Provisions) Act 2011*. As stated in my previous letter, supporting renewable energy or other low emissions solutions reduces the same sources of greenhouse gas emissions which enable the legislation to fulfil is constitutional purpose of meeting our obligations under the Paris Agreement and United Nations Framework Convention on Climate Change. Limiting ARENA to a narrow view of renewable energy technologies would detract from meeting these obligations 'at least economic cost, whilst maintaining adequate, reliable and affordable energy supplies' as set out in the Minister's second reading speech on 12 October 2011.

Finally, I draw the Committee's attention to the fact that all current motions to disallow the second 2021 Regulation have focused only on section 7 and not the programs in section 6. While each of the programs in section 6 involve renewable energy technologies as defined, they include related activities such as energy efficiency. The seeming acceptance of energy efficiency and low emissions technologies within section 6 would appear to indicate that the objection to section 7 is based on ideological or policy differences of opinion, rather than strictly concerns regarding the lawfulness of the regulations. I would welcome the Committee's analysis of whether certain parts of the second 2021 Regulation are already consistent with their view of the Act or would be interpreted that way consistent with paragraph 13(1)(c) of the *Legislation Act 2003*. It is important any such analysis is undertaken with a technical understanding of the interrelationships between different technology solutions.

**The appropriate use of regulations, rather than Parliamentary enactment**

My letter of 3 August 2021 also explained why the regulations were used and the matters did not need Parliamentary enactment. The regulations empower Commonwealth spending by subordinate legislation in a very similar way to regulations under the *Financial Framework (Supplementary Powers) Act 1997* and instruments under section 33 of the *Industry Research and Development Act 1986*. While the Government could have chosen to deliver these functions using another agency, ARENA's expertise made it the most appropriate vehicle. As stated in my earlier letter, these new functions do not draw from the statutory funding in the ARENA Act. New funding has been appropriated and allocated in addition to ARENA's baseline funding to support the delivery of these functions.

I would also note the importance of not delaying the delivery of these new functions and the projects they will support to address greenhouse gas emissions and contribute to our international obligations under the Paris Agreement. My Department estimates that the 2020-21 Budget programs to be delivered by ARENA under these regulations will reduce emissions by 16.5 million tonnes.

**Regulations not the same in substance**

The explanatory statement for the second 2021 Regulations sets out key reasons why the two regulations are different as follows:

> These Regulations are different in substance to the disallowed Regulations. Specifically, they have made material changes to the nature and scope of the new functions and programs intended to be supported by ARENA, as well as changing aspects of the context in which they will be deployed and reported on. ARENA's general ability to fund priority low emissions technologies is now entirely centred on the five priority technologies articulated in the first LETS, and is subject to new accountability, reporting and financial controls. Furthermore, ARENA's powers in relation to the 5 targeted budget programs are now capped financially, time limited and have more defined scopes for funding than was the case for the disallowed Regulations.

I would also point out that in advising that the content of my response to your initial letter was relevant to both the first and second 2021 Regulations, I was drawing attention to the fact that both regulations were enacted under the same legislative head of power. I was not drawing any comparisons, and certainly not implicitly, between the actual content of these two regulations.

As an additional comment, I would also note that the Delegated Legislation Monitor incorrectly states that the second 2021 Regulation amends the *Australian Renewable Energy Agency Regulation 2016* when it is a stand-alone regulation.

Finally, if it would assist the Committee, officers from my Department are available to appear before the Committee to assist in resolving or clarifying any technical matters regarding the operation of the Regulation under consideration.

Thank you for bringing the concerns of the Committee to my attention.

Yours sincerely

ANGUS TAYLOR

# The Hon Greg Hunt MP
## Minister for Health and Aged Care

Ref No: MC21-028598

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600
sdlc.sen@aph.gov.au

3 SEP 2021

Dear Chair Council

I refer to your correspondence of 26 August 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation concerning the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021.

In your letter you sought advice in relation to a number of scrutiny matters in relation to the instrument. I have enclosed advice in response to the Committee's request.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl (1)

cc: Senator the Hon Richard Colbeck, Minister for Senior Australians and Aged Care Services

**ADVICE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF DELEGATED LEGISLATION – AGED CARE LEGISLATION AMENDMENT (ROYAL COMMISSION RESPONSE NO. 1) PRINCIPLES 2021 [F2021L00222]**

On 26 August 2021, the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) requested advice in relation to the *Aged Care Legislation Amendment (Royal Commission Response No.1) Principles 2021* (Principles). The Committee has sought the Minister's advice on a number of matters identified through their scrutiny.

On 28 June 2021, the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021* (Amendment Act) received Royal Assent. From 1 July 2021, the Amendment Act inserted new paragraph 54-1(1)(f) of the *Aged Care Act 1997* (Aged Care Act), which introduced a new responsibility for approved providers to ensure a restrictive practice, in relation to a care recipient, is only used in circumstances set out in the Quality of Care Principles. The Amendment Act also inserted new sections 54-9 and 54-10 of the Aged Care Act. New section 54-9 of the Aged Care Act provides that a restrictive practice is any practice or intervention that has the effect of restricting the rights or freedom of movement of the care recipient, and that the Quality of Care Principles may provide that a practice or intervention is a restrictive practice. New section 54-10 of the Aged Care Act provides that, for the purposes of new paragraph 54-4(1)(f) of the Aged Care Act, the Quality of Care Principles must require or make provision for a number of matters related to the use of restrictive practices.

From 1 July 2021, the Principles amended the *Quality of Care Principles 2014* (Quality of Care Principles), to specify strengthened restrictive practices arrangements for residential aged care and flexible care in the form of short-term restorative care in a residential setting. From 1 September 2021, the Principles also amended the Quality of Care Principles to introduce Behaviour Support Plan requirements.

**Significant impact on personal rights and liberties**
**Matters more appropriate for parliamentary enactment**

**The Committee requests the Minister's advice as to:**

- **Why it is considered necessary and appropriate to regulate the use of restrictive practices in residential aged care in delegated legislation; and**
- **Why it was not considered appropriate to include the matters prescribed in this instrument in the *Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Act 2021*.**

From 1 July 2021, Item 9 of Schedule 1 to the Principles inserts new Part 4A into the Quality of Care Principles. New Part 4A of the Quality of Care Principles strengthens and clarifies the definition of restrictive practices to ensure better understanding by providers on what constitutes a restrictive practice and under what circumstances the use of restrictive practices can be considered. New section 15E of the Quality of Care Principles defines practices or interventions that are restrictive practices for the purposes of the new arrangements, these align with the definitions used in the disability sector and include chemical restraint, environmental restraint, mechanical restraint, physical restraint and seclusion.

New Part 4A of the Quality of Care Principles also clarifies responsibilities of providers for minimising, monitoring and reviewing the use of restrictive practices, including the outcome of the use of restrictive practices and whether the intended outcome was achieved, whether an alternative strategy or less restrictive practice could be used, and whether there is ongoing need for its use.

The new arrangements also clarify consent requirements to ensure that providers understand their obligations on obtaining consent, including that aged care recipients must provide consent wherever possible. If a care recipient does not have capacity to consent, consent must be obtained from someone with authority to provide it. New Part 4A of the Quality of Care Principles also strengthens obligations to ensure that restrictive practices are only used as a last resort to prevent harm after alternative best practice behaviour management strategies and interventions have been considered, applied and documented.

From 1 September 2021, further amendments were made to new Part 4A of the Quality of Care Principles to introduce requirements for a Behaviour Support Plan to form part of the existing Care and Services Plan and to be in place for all care recipients that have demonstrated behaviours of concern, are being assessed to determine whether a restrictive practice is required, or if a restrictive practice is being used.

The Committee considers that these matters are significant and more appropriately enacted via primary legislation, and therefore seeks clarification as to why it is considered necessary and appropriate to prescribe circumstances in which restrictive practices may be used in delegated legislation.

The amendments made by the Principles respond to the recommendations made by the Royal Commission into Aged Care Quality and Safety, in the *Final Report: Care, Dignity and Respect* (Royal Commission's Final Report), and the *Independent review of the legislative provisions governing the use of restraint in residential aged care* (Restraint Review).

The Quality of Care Principles previously included arrangements for the use of chemical and physical restraint. These arrangements included a sunsetting clause and ceased to have effect from 1 July 2021. With the existing arrangements due to sunset, the Restraint Review provided to Government in December 2020, and the Royal Commission's Final Report presented to the Governor-General on 26 February 2020, including some finer procedural details in delegated legislation allowed additional time for Government to carefully consider and address the recommendations, as well as to consult (as outlined in the Principles' Explanatory Statement).

It is considered reasonable that these matters be dealt with in delegated legislation as they relate to operational matters such as process and procedures, in that it outlines the steps that an approved provider must take to ensure that restrictive practices are only used in very limited situations. Including these arrangements in delegated legislation will also allow flexibility to respond to unforeseen issues and respond to community and sector concerns in a timely manner. As these matters relate to actions taken in response to restrictive practices it is appropriate (including from a community expectations perspective) that there is flexibility for appropriate and prompt action in response to any unforeseen matters. It is intended that the Australian Government's ability to undertake such actions will prevent impacts on the rights of older Australians.

The Government will continue to monitor these arrangements and will review whether they should be included on the face of the Act as part of the current project to introduce a new Aged Care Act. On 1 March 2021, in response to the recommendations of the Royal Commission's Final Report, the Government committed to immediately commence work on a new consumer-focused Aged Care Act.

The new Act will replace the existing aged care legislative framework and is intended to commence from 1 July 2023, subject to parliamentary processes. As part of the project, the Government will consider how existing aged care arrangements should be dealt with under the new legislative structure, including whether certain arrangements should be included on the face of the Act, rather than in delegated legislation.

**Conferral of discretionary powers**
**Clarity of drafting**

**The Committee requests the Minister's advice as to:**

- **what circumstances may constitute an 'emergency' in the context of subsection 15FA(2);**
- **the scope of the powers that the Commission may exercise under the instrument to determine whether an emergency occurred, including:**
  - **who will be exercising these powers and whether they are required to possess any particular qualifications, skills or experience; and**
  - **what factors they must consider in making this determination;**
- **the nature and source of any limitation or safeguards on the exercise of the discretionary power to determine whether an emergency occurred, including whether they are set out in law or policy.**

New section 15FA of the Quality of Care Principles, inserted by the Principles from 1 July 2021, sets out the requirements for the use of any restrictive practices in residential settings consistent with new section 54-10 of the Aged Care Act. In general, restrictive practices should only be used as a last resort to prevent harm, after consideration of the likely impact on the care recipient, used only to the extent possible, with alternatives considered or used and documented, and with informed consent from the care recipient or another person with authority to consent. However, new subsection 15FA(2) of the Quality of Care Principles provides that these requirements do not apply to the use of a restrictive practice in relation to a care recipient if the use of the restrictive practice is necessary in an emergency.

The Committee has sought clarification about the use of the word 'emergency', given that the Principles' Explanatory Statement noted that the term had its ordinary meaning. The Committee also sought clarification on a statement in the Principles' Explanatory Statement that implies that the Aged Care Quality and Safety Commissioner (Commissioner) would be able to exercise discretion in determining whether an 'emergency' occurred.

As outlined in the Explanatory Statement, the term 'emergency' is not defined by the Quality of Care Principles, and therefore the word has its ordinary meaning. The Macquarie Dictionary defines an emergency as an unforeseen occurrence, or sudden and urgent occasion for action. In aged care the scope of emergency situations can be quite broad and adopting a prescriptive definition is likely to result in unintended consequences and may exclude situations of genuine emergency. Situations where restrictive practices are required in residential aged care in the event of an emergency should be following unanticipated or unforeseen events which requires immediate action and therefore should be rare. This term has not been defined in the legislation, so not to speculate or limit the term, as not all circumstances are known or predictable.

The arrangements under new subsection 15FA(2) are intended to ensure that an approved provider can appropriately and rapidly respond to an emergency to ensure the protection of a care recipient or other person from immediate harm.

As outlined in new section 15GB of the Quality of Care Principles (also inserted by the Principles), consent should be provided and recorded as soon as practical after the application or use of the restrictive practice. Once the emergency is over, the provider should revert to the usual policies and procedures regarding the application or use of any restrictive practice for the care recipient. This includes reduction or removal of the restrictive practice, assessment, consideration and use of alternative strategies, and subsequent update and review of the care recipient's Behaviour Support Plan and care and services plan.

It is expected that approved providers will be actively engaged in a care recipient's day to day care and support needs, including behaviour support planning, and that this understanding and engagement will reduce the occurrence of emergencies. While the term 'emergency' is not specifically intended as a discretionary term, the Commissioner (or delegate), in monitoring compliance with provider responsibilities relating to the use of restrictive practices, will be reviewing care and services plans where emergency use of restrictive practices has been applied. This review will include considering the care recipient's care needs in the lead up to the emergency, whether the emergency could have been anticipated given past history of behaviour, and what action was taken to deal with the situation prior to it becoming critical. Approved providers should be conscious of alternative strategies to avoid the need for emergency use of restrictive practices. This includes actively responding to the needs of their care recipients in order to avoid the deterioration of health or escalation of changed behaviours, to a point where emergency use of restrictive practices may be required.

If the provider considers that emergencies are occurring for extended periods of time or are occurring regularly for one or more care recipients, this may also indicate that an approved provider is not meeting their responsibilities and the Commissioner would monitor or investigate these circumstances. Where there is evidence that insufficient action has been taken by a provider to avoid emergency use of restrictive practices for a care recipient, the Commissioner, or delegate, may take further regulatory actions where it is deemed appropriate and proportionate in order to address any non-compliance. This information is outlined in policy details available on the Aged Care Quality and Safety Commission's website.

In respect of the Committee's question regarding who may exercise the compliance powers in respect of whether an emergency occurred, and whether they are required to possess any particular qualifications, skills or experience, subsection 76(1B) of the *Aged Care Quality and Safety Commission Act 2018* (Commission Act), provides that the Commissioner must not delegate their functions or powers under subsections 76(1) or 76(1A) of the Commission Act unless they are satisfied that the person has suitable training or experience to properly perform the function or exercise the power. As such, when the Commissioner delegates their powers and functions, they are expressly required to be satisfied that the delegate has suitable training or experience to exercise the relevant powers and functions.

**Clarity of drafting**

**The Committee requests the Minister's advice as to the meaning of 'not inconsistent with' the context of paragraph 15FA(1)(i)**

New paragraph 15FA(1)(i) of the Quality of Care Principles provides that it is a requirement that use of restrictive practices, in relation to a care recipient is not inconsistent with the Charter of Aged Care Rights set out in Schedule 1 to the *User Rights Principles 2014* (User Rights Principles). The Committee has queried the explanation of the clause in the Principles' Explanatory Statement, which states that 'the use of the restrictive practice is consistent with the Charter of Aged Care Rights'.

The language used in the Principles is what is required by paragraph 54-10(1)(g), which provides that the Quality of Care Principles must require that the use of restrictive practices in relation to a care recipient is not inconsistent with any rights and responsibilities of care recipients that are specified in the User Rights Principles. The Committee is of the view that 'not inconsistent' as stated in the instrument, is a lower bar than 'consistent' as stated in the Principles' Explanatory Statement. The Committee's interpretation is acknowledged. The Principles' Explanatory Statement's reference to 'consistent', as opposed to, 'not inconsistent' is an oversight, a disparity that was not intended to change the meaning of the legislative provision.

While this term may be interpreted to have different meaning than the term 'consistent', the intention is that approved providers should not be using restrictive practices that are generally in conflict, at odds, or contrary to the Charter of Aged Care Rights. The Charter of Aged Care Rights was introduced to protect the rights of aged care recipients, including the right to be treated with dignity and respect, and ensure care recipients are properly looked after and provided with quality care and services. In practical terms, the approved provider should be respecting the rights of care recipients.

It should also be acknowledged that under paragraph 56-1(m) and 56-3(l) of the Aged Care Act, approved providers of residential care, and flexible care in the form of short-term restorative care provided in a residential setting, have a responsibility to not act in a way which is inconsistent with any rights and responsibilities of care recipients that are specified in the User Rights Principles. Sections 9 and 23AD of the User Rights Principles provide that, for the purposes of paragraph 56-1(m) and 56-3(l) of the Aged Care Act, the rights of a care recipient of residential care, or flexible care in the form of short-term restorative care provided in a residential setting, include the rights mentioned in the Charter of Aged Care Rights set out in Schedule 1 of the User Rights Principles. As such, approved providers already have a separate responsibility not to act in a way which is inconsistent with the Charter of Aged Care Rights.

**The Hon Christian Porter MP**

**Minister for Industry, Science and Technology**

MC21-005683

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

26 AUG 2021

Dear Senator Wells

Thank you for your letter of 5 August 2021 concerning five legislative instruments made under section 33 of the *Industry Research and Development Act 1986* (the IR&D Act). The instruments are:

- *Industry Research and Development (Boosting Australia's Diesel Fuel Storage Program) Instrument 2021;*
- *Industry Research and Development (Growing Australia's Cyber Skills Program) Instrument 2021;*
- *Industry Research and Development (Modern Manufacturing Initiative Program) Instrument 2021;*
- *Industry Research and Development (Carbon Capture, Use and Storage Program) Instrument 2021;*
- *Industry Research and Development (Beetaloo Cooperative Drilling Program) Instrument 2021.*

Your letter asked for my response on two specific issues, being:

- whether there is any other primary or delegated legislation supporting or regulating the Modern Manufacturing Initiative Program; and
- the inclusion of eligibility criteria in explanatory statements for programs specified in these instruments.

**Legislative support for the Modern Manufacturing Program**

The IR&D Act instrument is the applicable legislation that confers legislative authority on the program. In my view, this reliance on subordinate legislation is entirely appropriate for a program of this kind.

The Modern Manufacturing Initiative Program does not involve the kinds of considerations outlined in paragraph 1.10 of the *Legislation Handbook* that usually dictate the use of primary legislation, such as appropriations of money; laws that impact on human rights or liberties; or the imposition of taxes, offences and other obligations. Further, the program does not involve the features outlined at Principle (g) of the *Technical Scrutiny Guidelines* issued by your committee in February 2020, which also go to this issue.

While I accept that the program funding is sizeable, the grant delivery mechanism is straightforward and the creation of the program under the IR&D Act framework is entirely consistent with what was envisaged by the Parliament when it enacted the section 33 legislative

authority mechanism. In this connection, the Explanatory Memorandum to the Bill which introduced the mechanism stated:

> *A key pillar of the National Innovation and Science Agenda is that the Government will lead by example, embracing innovation and agility in everything it does. The amendments in this Bill embrace this principle by allowing Government to be agile and respond quickly and appropriately to the need to implement innovative ideas and pilot programs on an ongoing basis and as opportunities arise. This level of flexibility is enabled by creating a statutory framework to provide legislative authority for Commonwealth spending activities in relation to industry, innovation, science and research programs. This will provide transparency and parliamentary oversight of Government programs and spending activities, while also reducing administrative burden on the Commonwealth.*

I note that the Modern Manufacturing Initiative Program is not the first Australian Government program related to the manufacturing sector established by subordinate legislation. Other examples are the Advanced Manufacturing Growth Fund Program, Electric Vehicle Manufacturing Program, Growth Fund—Next Generation Manufacturing Investment Programme, Manufacturing Industry Support Program and Technology Co-Investment Fund.

Finally, there is other legislation relevant to the program. The role of Industry Innovation and Science Australia in relation to the program is also governed by the *Industry Research and Development (Industry Innovation and Science Australia – Modern Manufacturing Initiative) Direction 2021.* Implementation of the program is governed by other general Commonwealth legislation and rules, such as the *Public Governance, Performance and Accountability Act 2013*.

**Inclusion of eligibility criteria in explanatory statements**

I recognise the important role played by committees in ensuring that legislative instruments and extrinsic materials comply with statutory requirements and the principles of parliamentary oversight. In my view, the instruments for these programs and the associated explanatory statements meet those requirements and principles.

As you know, the essential purpose of instruments made under section 33 the IR&D Act is to establish legislative authority for industry, innovation, science or research programs. Importantly, the legal description of each program in these instruments provides boundaries on the activities that can be supported and sets out purposes for which funding can be applied. These are important constraints on the expenditure of Commonwealth money and the types of activities that are eligible. These constraints assist the Parliament to understand the scope of funding powers being conferred by the instrument. Further, to provide constitutional context for programs, subsection 33(3) of the Act requires that the instrument must specify the legislative power or powers of the Parliament in respect of which the instrument is made. The instruments identified in your letter, and their explanatory statements, address these fundamental matters.

Nothing in section 33 of the Act requires an instrument to specify exhaustively the eligibility criteria for a program. However, where eligibility criteria are relevant to legislative authority (e.g. where limits on the kinds of entities that are eligible are needed to ensure constitutional power), they are specified in the section 33 instrument and addressed in the explanatory statement.

In addition to comprehensively explaining the purpose and operation of the instruments, the explanatory statements address the other matters required under section 15J the *Legislation Act 2003*, such as what consultation has been undertaken and whether the instrument is disallowable. Accordingly, explanatory statements covered by your letter comply with the legislative requirements relevant to their content.

In order to assist parliamentary and public scrutiny of the program, the explanatory statements go significantly beyond these legislated requirements and provide further information about important aspects of the programs. They set out the total program funding and explain its source, as well as individual grant limits. They provide information about the application and assessment process, who will decide grants, applicable review processes, and how grants will be delivered. They also provide information about where grant opportunity guidelines can be accessed. The statements are checked against your Committee's *Technical Scrutiny Guidelines*.

Beyond this, grant opportunity guidelines for each program provide substantially more detail on the programs, including comprehensively setting out the eligibility and assessment criteria. This includes criteria that are not relevant to legislative authority but are included to ensure that policy objectives are met. Although the guidelines are not part of the instrument or explanatory statement, they are available for public scrutiny on www.business.gov.au.

Grant guidelines provide a single, comprehensive and consistent source of detailed publicly available information about each program. This is important for prospective applicants for these programs and the general public. Grant guidelines are relied upon for decision-making throughout the grant life-cycle, and are updated for any further rounds. Importantly, eligibility criteria can change over time as a result of feedback and implementation experience. There is significant potential for inconsistency and confusion if explanatory statements were to summarise and unnecessarily duplicate important details contained in grant guidelines.

Finally, I note that these programs, including the details in grant guidelines, remain open to scrutiny through other parliamentary avenues, such as Senate Estimates hearings and parliamentary questions. Program expenditure is also dealt with in relevant budget processes.

Based on the above, I consider that the information available in relation to the instruments covered by your letter is sufficient to allow effective scrutiny without including eligibility criteria in the explanatory statements to the legislative instruments. For these reasons, I do not propose to amend the explanatory statements. However, I will continue to ensure that explanatory statements for future section 33 instruments contain adequate explanations of the scope of the programs so prescribed.

Thank you for writing on this matter.

Yours sincerely

**The Hon Christian Porter MP**
Minister for Industry, Science and Technology

CC: The Hon Angus Taylor MP, Minister for Energy and Emissions Reduction
The Hon Keith Pitt MP, Minister for Resources and Water

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

# PAUL FLETCHER MP

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

*MC21-005560*

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

Dear Senator Concetta Fierravanti-Wells

Thank you for your letter of 5 August 2021 concerning the *Telecommunications (Statutory Infrastructure Providers—Circumstances for Exceptions to Connection and Supply Obligations) Determination 2021* (the Determination) made under Part 19 of the *Telecommunications Act 1997* (the Act).

The Committee has sought my advice on why it is considered necessary to use delegated legislation, whether the Determination can be amended to sunset within three years after commencement, and if there is any intention to conduct a review of the relevant provisions.

In response to the Committee's first question, Part 19 of the *Telecommunications Act 1997* provides the Statutory Infrastructure Provider (SIP) regime. While NBN Co is the default SIP for all parts of Australia, a number of other SIPs have either been designated or have nominated to become SIPs. The statute provides a default framework that requires SIPs to connect premises and supply broadband services on reasonable request to all Australian premises. As such, SIP obligations apply nationally, but are fulfilled by a number of entities within a marketplace that is inherently complex and subject to change.

A requirement to allow the framework to be tailored was anticipated when the statutory arrangements for the SIP regime were first developed and enacted, recognising a range of practical issues may need to be managed by SIPs in fulfilling the broader statutory objectives of connecting and supplying services to individual premises. It was also anticipated that a high level of detail would be required and this was more appropriate for delegated rather than primary legislation.

Level 2, 280 Pacific Highway, Lindfield NSW 2070 • T 02 9465 3950
P O Box 6022 Parliament House, Canberra ACT 2600 • T 02 6277 7480
paul.fletcher.mp@aph.gov.au • www.paulfletcher.com.au

As the Committee will be able to gauge from the level of detail in the Determination, the exceptions to the SIP obligations reflect quite defined and specific circumstances that are considered to reasonably excuse SIPs from connecting and supplying services to individual premises. Exceptions may need to be added or removed, or exceptions may need to be modified if there is unforeseen and rapid change (for example technological developments or greater community reliance on telecommunications, such as has already arisen due to lockdowns as a result of COVID-19). If such adjustments prove necessary, a subordinate instrument allows any such changes to be made relatively quickly, whereas changes to the statute will generally take more time, and be less certain in terms of timely passage.

A level of detail on exceptions is required to sufficiently guide operational decisions by SIPs and to provide appropriate clarity to consumers. While some exceptions may need to be ongoing features of the SIP regime, the exceptions as a whole or individually may need to be modified over time given the range of factors affecting the provision of telecommunications services across Australia, as noted above. The use of subordinate legislation more readily provides the flexibility needed to provide such detail and make such adjustments, where they are needed, as opposed to statutory change. Where repeated changes could be required, the need for statutory change to make such adjustments could also put considerable demand on the Parliament's valuable time.

For the reasons set out above, the approach taken is consistent with guidance set out in the *Legislation Handbook* issued by the Department of the Prime Minister and Cabinet. It notes (p.33) that 'matters of detail and matters which may change frequently are best dealt with by subordinate legislation'.

In response to the Committee's second question, the 10 year sunsetting period is the default as set out in *Legislation Act 2003*. This was chosen as some of the exceptions are likely to have an enduring role, and the longer life of the Determination provides certainty for SIPs and consumers. While this may suggest some or all of the exceptions could be placed in the statute, this is not the case given the level of detail and the additional need for flexibility as explained above. Even if some of the exceptions were included in the statute, subordinate legislation would still likely be required to fine tune them, depending on changing circumstances.

In response to the Committee's third question, noting the SIP regime is relatively new, its ongoing operation is being monitored closely and with regard to SIPs' performance and any significant developments in the telecommunications market. Should changes to the Determination appear warranted, they would be considered on their merits when they arise. In addition, the *Telecommunications Universal Service Obligation (Standard Telephone Service—Requirements and Circumstances) Determination (No. 1) 2011* is due to sunset on 1 April 2023. This provides some similar exceptions in relation to supply of voice services by Telstra under the Universal Service Obligation (USO). Stakeholder consultation on the USO instrument in the lead up to that sunsetting date would present a timely opportunity to consider more systematically if changes to the Determination are warranted.

I trust the information in this letter is of assistance to the Committee. Should the Committee require further information, the contact officer in the Department of Infrastructure, Transport, Regional Development and Communications is Philip Mason (phone: (02) 6271 1579; email: philip.mason@infrastructure.gov.au).

Yours sincerely

Paul Fletcher

24 / 8 / 2021

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

Ref No: MS21-001087

24 AUG 2021

Senator the Hon Concetta Fierravanti-Wells
Chair of Standing Committee for the Scrutiny of Delegated Legislation
PO Box 6100
Parliament House
CANBERRA ACT 2600
sdlc.sen@aph.gov.au

Dear Senator

I refer to your further correspondence of 12 August 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*.

I appreciate the time the Committee has taken to carefully scrutinise the instrument. In your letter, the Committee sought advice on the expected timeframe and scope of the project to introduce a new Aged Care Act, including whether this additional information could be included in the instrument's explanatory statement.

In response to the first recommendation of the final report of the Royal Commission into Aged Care Quality and Safety, the Australian Government committed to immediately commence work on a new consumer-focused Aged Care Act. The new Act will replace the existing aged care legislative framework and is intended to commence from 1 July 2023, subject to parliamentary processes. As part of the project, the Government will consider how existing aged care arrangements should be dealt with under the new legislative structure, including whether certain arrangements should be included on the face of the Act, rather than in delegated legislation.

In response to the Committee's recommendations, I have approved a supplementary explanatory statement for the amendment instrument. The supplementary explanatory statement includes information about the scope and expected timeframes for the project to introduce a new Aged Care Act, and justifications for the nature and scope of new subsections 15NA(11) and 15NB(3) of the Quality of Care Principles 2014 (provided to the Committee through previous correspondence). I have enclosed the supplementary explanatory statement, which will be registered on the Federal Register of Legislation in the coming days.

Your letter also sought clarification concerning the sunsetting arrangements for the Quality of Care Principles 2014. I can confirm that, if still in force, subsection 50(1) of the *Legislation Act 2003* will repeal the Quality of Care Principles 2014 on 1 October 2024, including the provisions inserted by the instrument, with the first 1 October falling on or after the 10th anniversary of its registration. However, I expect that the Quality of Care Principles 2014 will be repealed earlier, when arrangements are transferred to the new Aged Care Act from 1 July 2023.

Thank you for writing on this matter.

Yours sincerely

Richard Colbeck

Encl (1)

cc: The Hon Greg Hunt MP, Minister for Health and Aged Care.

# SUPPLEMENTARY EXPLANATORY STATEMENT

**Issued by the authority of the Minister for Senior Australians and Aged Care Services**

***Aged Care Act 1997***
***Aged Care Quality and Safety Commission Act 2018***

***Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021***

## Background

The *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021* (Instrument) which came into force on 1 April 2021, amended the *Quality of Care Principles 2014* (Quality of Care Principles) and the *Aged Care Quality and Safety Commission Rules 2018* (Quality and Safety Commission Rules) to prescribe arrangements relating to the Serious Incident Response Scheme (SIRS) in residential aged care, including flexible care delivered in a residential aged care setting. This includes arrangements relating to an approved provider's responsibility to manage incidents and take reasonable steps to prevent incidents. The Instrument also made consequential amendments to the Quality of Care Principles, Quality and Safety Commission Rules, the *Accountability Principles 2014*, and the *Records Principles 2014* to remove references to the previous reportable assault arrangements, and in relation to expanded enforcement powers of the Aged Care Quality and Safety Commissioner.

## Purpose

The purpose of this Supplementary Explanatory Statement, which should be read in conjunction with the Instrument's Explanatory Statement, is to provide additional information in response to matters raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation raised in Delegated Legislation Monitors 7 of 2021, 10 of 2021, and 12 of 2021.

## Details of the *Aged Care Legislation Amendment (Serious Incident Response Scheme) Instrument 2021*

After the paragraph commencing "New subsection 15NA(11) provides" insert:

> Unlike other expressions included in new section 15NA, new subsection 15NA(11) is not inclusive, due to the specific nature of the type of incident, and the certainty required for implementation. Subsection 15NA(11) ensures clarity on the circumstances where it would be appropriate to notify the Commissioner about the unexplained absence of a residential care recipient.
>
> New subsection 15NA(11) was included following consultation which indicated that it was not appropriate for every single unexplained absence to be a reportable incident under the scheme. New subsection 15NA(11) limits the definition so that an incident is not reportable to the Commissioner where

a residential care recipient is absent, although it is not out of character for them to be away from the service, and the provider considers that the individual has the ability to look after themselves and make their own choices.

It is necessary and appropriate to include this matter in delegated legislation to ensure the flexibility for prompt modifications, should the arrangements have any unintended consequences, that may result in paternalistic measures or other implications that may affect the health, safety, well-being, quality of life and dignity of residential care recipients. It is also considered necessary and appropriate for these matters to be included in delegated legislation to ensure ease of interpretation and implementation by having all detailed legislative arrangements for approved providers in one place (the Quality of Care Principles). Further, similar arrangements are present in subsections 16(2) and (4) of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018*, upon which the legislative design for the SIRS is based.

The Government will continue to monitor these arrangements and will review whether they should be included on the face of the Act as part of the current project to introduce a new Aged Care Act. On 1 March 2021, in response to the recommendations of the Final Report of the Royal Commission into Aged Care Quality and Safety, the Government committed to immediately commence work on a new consumer-focused Aged Care Act. The new Act will replace the existing aged care legislative framework and is intended to commence from 1 July 2023, subject to parliamentary processes. As part of the project, the Government will consider how existing aged care arrangements should be dealt with under the new legislative structure, including whether certain arrangements should be included on the face of the Act, rather than in delegated legislation.

After the paragraph commencing "It is important for approved providers and their staff members to maintain the rights of residential care recipients" insert:

While it is not expected that situations accounted for under new subsection 15NB(3) will occur frequently, these arrangements were included following consultation which indicated that residential care recipients' choice and autonomy need to be maintained.

It necessary and appropriate to include these matters in delegated legislation to ensure the flexibility for prompt modifications, should the arrangements have any unintended consequences, that may affect the health, safety, well-being, quality of life and dignity of residential care recipients. It is also considered necessary and appropriate for these matters to be included in delegated legislation to ensure ease of interpretation and implementation by having detailed legislative arrangements for approved providers in one place (the Quality of Care Principles). Further, similar arrangements are present in subsections 16(2) and (4) of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018*, upon which the legislative design for the SIRS is based.

The Government will continue to monitor these arrangements and will review whether these arrangements should be included on the face of the Act as part of the project to introduce a new Aged Care Act. In response to the recommendations of the Final Report of the Royal Commission into Aged Care Quality and Safety, the Government has committed to immediately commence work on a new consumer-focused Aged Care Act. The new Act will replace the existing aged care legislative framework and is intended to commence from 1 July 2023, subject to parliamentary processes. As part of the project, the Government will consider how existing aged care arrangements should be dealt with under the new legislative structure, including whether certain arrangements should be included on the face of the Act, rather than in delegated legislation.

**Senator the Hon Marise Payne**
Minister for Foreign Affairs
Minister for Women

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

Dear Chair

Thank you for your letter of 26 August 2021, regarding the various instruments (together, the Instruments) made under Part 4 of the *Charter of the United Nations Act 1945* (the Act), and their interaction with the Charter of the United Nations Amendment Bill 2021 (the Bill).

Australia is obliged to implement United Nations Security Council Resolution 1373 (2001) as a matter of international law. The Resolution obliges Australia to prevent both assets being made available to terrorists, and the use of or dealing with assets owned or controlled by terrorists. This obligation is implemented in Australian law by listing persons and entities under section 15 of the Act as subject to counter-terrorism financial sanctions (counterterrorism listings).

You have asked about the circumstances giving rise to the registration of the Instruments on the Federal Register of Legislation (FRL). The *Legislation Act 2003* requires that legislative decisions be registered on the FRL to ensure their enforceability. The Department of Foreign Affairs and Trade (DFAT) has historically treated counter-terrorism listings as administrative decisions not subject to this requirement. While DFAT was aware counter-terrorism listings had some legislative characteristics, it considered such listings were predominantly administrative in character, as, amongst other things, they concerned specific persons or entities listed pursuant to Australia's international law obligations. Accordingly, DFAT has historically published counter-terrorism listings as Gazette Notices, rather than registering them on the FRL. Counter-terrorism listings are also published in the Consolidated List which is maintained by DFAT and available on its website.

DFAT keeps Australia's sanctions regimes under constant review to ensure they are fit for purpose and in line with Australia's international law obligations. Pursuant to this review process, on 26 May 2021, DFAT registered Australia's current counter-terrorism listings as legislative instruments on the FRL to put beyond doubt the enforceability of these listings, noting both their

administrative and legislative characteristics. Following registration, the Government introduced the Bill to provide that future counter-terrorism listings be made as legislative instruments, including to protect these listings in the event a court were to determine they were legislative rather than administrative decisions.

In practice, this means that a person will not be able to successfully challenge a conviction, or defend a future prosecution, *solely* on the grounds that the counter-terrorism listing relevant to the conviction or prosecution was, at the relevant time, published as a Gazette Notice rather than being registered on the FRL. In this way, the Bill will ensure that a person who committed a sanctions offence, or is accused of committing such an offence, remains accountable for their actions. The Government is resolutely committed to ensuring accountability for breaches of counter-terrorism financial sanctions.

You have asked how the Bill will impact the operation of the Instruments registered on 26 May 2021. The Bill does not expressly override section 12(2) of the *Legislation Act 2003*, which provides that legislative instruments which commence before the instrument is registered are taken not to retrospectively apply to a person if the person's rights would be affected so as to disadvantage the person or impose liabilities. However, by deeming listings to have been registered in instances where lack of registration would otherwise impact their applicability or enforceability, the Bill ensures that listings are able to be enforced from their date of commencement.

The Bill will not impact the operation of the Instruments, substantively change the operation of Australia's UN counter-terrorism sanctions framework, nor create any new rights or obligations. The Bill was not the result of any question as to the legality or validity of Australia's counter-terrorism listings, now or previously. Rather, the Bill merely seeks to change the way counter-terrorism listings are formally communicated to the public. In the future, listings, once made, will be registered on the FRL as legislative instruments, as above.

DFAT will prepare replacement explanatory statements for the Instruments to address the matters that have been raised by the Committee, including a full Statement of Compatibility with Human Rights and an explanation of the operation of the Bill, and lodge them on the FRL. DFAT will advise the Committee when the replacement explanatory statements are available on the FRL.

I trust this information will assist you in concluding your consideration of the Instruments.

Yours sincerely

**MARISE PAYNE**

02 SEP 2021

# Senator the Hon Simon Birmingham

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


REF: MS21-000864

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 12 August 2021 requesting that the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 1) Regulations 2021* [F2021L00290] (the Regulations), which establishes legislative authority for government spending on the Commonwealth Disability Support for Older Australians (DSOA) program (table item 470 in Part 4 of Schedule 1AB), be amended to include core details of how the program would operate on the face of the instrument. You further suggested including, for example, that this table item only relates to persons who had been receiving services under the Commonwealth Continuity of Support (CoS) Programme.

While it is not the purpose of the *Financial Framework (Supplementary Powers) Regulations 1997* to include detailed eligibility criteria for specified grants, programs and other arrangements as this is not expressly contemplated by the *Financial Framework (Supplementary Powers) Act 1997*, I agree to request the Governor-General amend table item 470 in Part 4 of Schedule 1AB as requested by the Committee, as a gesture of good faith to help address the Committee's remaining concerns about the Regulations. The proposed amendment will be brought forward for the Governor-General's consideration at one of the forthcoming Federal Executive Council meetings.

The Minister for Senior Australians and Aged Care Services,
Senator the Hon Richard Colbeck, who has policy responsibility for the DSOA program, is supportive of making the proposed amendment to table item 470. Minister Colbeck has further advised that the CoS Programme is a grandfathering program for older people with disability who had been accessing state-administered services only when the National Disability Insurance Scheme (NDIS) was rolled out in their area. The DSOA program, which commenced on 1 July 2021, will provide ongoing services in place of the CoS Programme.


**Adelaide**
107 Sir Donald Bradman Drive, Hilton SA 5033
**Ph** 08 8354 1644

**Canberra**
Parliament House Canberra ACT 2600
**Ph** 02 6277 7400

I trust this advice will assist the Committee with its consideration of the instrument.

I have copied this letter to the Minister for Senior Australians and Aged Care Services, Senator the Hon Richard Colbeck, and the Minister for Health and Aged Care, the Hon Greg Hunt MP.

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

~~Yours sincerely~~

**Simon Birmingham**

24 August 2021

HIGH COURT OF AUSTRALIA

Parkes Place
CANBERRA ACT 2600

Chief Executive &
Principal Registrar

16 September 2021

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

BY EMAIL: sdlc.sen@aph.gov.au

Dear Senator Fierravanti-Wells,

I refer to your letter of 5 August 2021 relating to the *High Court of Australia (Building and Precincts – Regulating the Conduct of Persons) Directions 2021* ("the Directions") seeking advice as to whether the Directions can be amended to:

- set out the factors that would be taken into consideration in determining whether an individual has acted in a "disorderly or offensive manner" or created "any nuisance" within the building or the precincts; and

- clarify that celebrations or protests which do not impede access to or impact on proceedings, or cause damage to the building would not be likely to be considered conduct falling within either paragraph 5(i) or 5(xii).

I am attaching a draft amending instrument which has been drafted by the Office of Parliamentary Counsel to address the points in your letter. It would insert a new section after section 5, which would provide:

5A. To avoid doubt, paragraph 5(i) or (xii) does not apply to action that:

(a) is participation in a public protest or other assembly (including for the purposes of industrial action, dissent, celebration or ceremony); and

(b) is not reasonably likely to:
(i) put the health or safety of any person within the building or the precincts at risk; or
(ii) interfere with, damage or destroy any tree, plant, grass, building or other property within the building or precincts; or

(iii) impede a person's access to the building or precincts; or
(iv) interrupt Court proceedings.

Examples: Action that would fall within one or more of subparagraphs (b)(i) to (iv) includes the following:
(a) yelling at, or harassing, visiting school children;
(b) making physical threats to a Court staff member;
(c) climbing the exterior of the building;
(d) smashing the exterior glass of the building;
(e) intercepting cars entering the staff car park.

Note: Approval of the Chief Executive is required to conduct or participate in any public protest or assembly within the building: see paragraph 5(xviii).

I would be very happy to answer any queries the Committee may have on the draft.

Yours sincerely

Philippa Lynch
Chief Executive & Principal Registrar
High Court of Australia

## 1 Name

This instrument is the *High Court of Australia (Building and Precincts—Regulating the Conduct of Persons) Amendment Directions 2021*.

## 2 Commencement

(1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

**Commencement information**

| Column 1 | Column 2 | Column 3 |
|---|---|---|
| **Provisions** | **Commencement** | **Date/Details** |
| 1. The whole of this instrument | The day after this instrument is registered. | |

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

(2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

## 3 Authority

This instrument is made under subsection 19(2) of the *High Court of Australia Act 1979*.

## 4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

DRAFT

# Schedule 1—Amendments

## *High Court of Australia (Building and Precincts—Regulating the Conduct of Persons) Directions 2021*

### 1 After section 5

Insert:

5A. To avoid doubt, paragraph 5(i) or (xii) does not apply to action that:

(a) is participation in a public protest or other assembly (including for the purposes of industrial action, dissent, celebration or ceremony); and

(b) is not reasonably likely to:

(i) put the health or safety of any person within the building or the precincts at risk; or

(ii) interfere with, damage or destroy any tree, plant, grass, building or other property within the building or precincts; or

(iii) impede a person's access to the building or precincts; or

(iv) interrupt Court proceedings.

Examples: Action that would fall within one or more of subparagraphs (b)(i) to (iv) includes the following:

(a) yelling at, or harassing, visiting school children;

(b) making physical threats to a Court staff member;

(c) climbing the exterior of the building;

(d) smashing the exterior glass of the building;

(e) intercepting cars entering the staff car park.

Note: Approval of the Chief Executive is required to conduct or participate in any public protest or assembly within the building: see paragraph 5(xviii).

DRAFT

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

# PAUL FLETCHER MP

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

*MC21-005090*

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 letter of 5 August 2021 concerning the *Legislation (Telecommunications Customer Service Guarantee Instruments) Sunset-altering Declaration 2021* (the Declaration).

I note that you have asked if the additional detail that I provided in my letter of 16 July 2021 to the Committee could be incorporated in the explanatory statement (ES) for the Declaration. The Committee has highlighted that the ES could include additional detail on the approach to consultation, including prior consultation concerning related policy processes, and the anticipated timing for a thematic review.

As you would be aware, the Declaration itself and accompanying ES, were made by the Assistant Minister to the Attorney-General, the Hon Amanda Stoker. Accordingly, I undertake to work with the Assistant Minister to the Attorney-General to settle and have an amended ES made as soon as practical, incorporating additional information provided in my correspondence to the Committee of 16 July 2021.

A copy of this letter has been provided to the Assistant Minister to the Attorney-General, Senator the Hon Amanda Stoker and to the Chair of the Australian Communications and Media Authority (ACMA), Ms Nerida O'Loughlin PSM.

Thank you for bringing the Committee's concerns to my attention. I hope this information proves useful in responding to the scrutiny matters raised by the Committee.

Yours sincerely

Paul Fletcher

24 / 8 / 2021

Level 2, 280 Pacific Highway, Lindfield NSW 2070 • T 02 9465 3950
P O Box 6022 Parliament House, Canberra ACT 2600 • T 02 6277 7480
paul.fletcher.mp@aph.gov.au • www.paulfletcher.com.au