Monitor 17 of 2021 – Ministerial Responses

Contents

Appendix C - Concluded matters

Senator the Hon Michaelia Cash
Attorney-General
Minister for Industrial Relations
Deputy Leader of the Government in the Senate

Reference: MC21-046005

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 Chair

Thank you for your letter of 21 October 2021 regarding the *Legislation (Exemption and Other Matters) Amendment (2021 Measures No. 1) Regulations 2021*.

The Committee has requested further advice as to:

- why it is considered necessary and appropriate for instructions given under subsections 7(3) and 7(4) of the Air Services Regulations to be exempt from disallowance and, in particular, how providing that these instructions are subject to the usual disallowance process would adversely impact on the orderly management of the aviation industry;
- if the exemption from disallowance is to be retained, whether the exemption can at least be provided for in primary legislation, rather than in the Legislation (Exemptions and Other Matters) Regulations 2015, to allow for full parliamentary scrutiny and consideration of the exemption;
- why it is considered necessary and appropriate for standards made under section 12 of the *Road Vehicle Standards Act 2018* to be exempt from the sunsetting regime in Part 4 of Chapter 3 of the *Legislation Act 2003* and, in particular, why it would not be possible or appropriate to remake any standards that are required to continue after the ordinary 10 year sunsetting period;
- whether the exemption from sunsetting of standards made under section 12 of the *Road Vehicle Standards Act 2018* can be provided for in primary legislation, rather than in the Legislation (Exemptions and Other Matters) Regulations 2015.

I have enclosed additional information in response to the matters raised by the Committee, which I trust will be of assistance.

I have copied this letter to Deputy Prime Minister and Minister for Infrastructure, Transport and Regional Development, the Hon Barnaby Joyce MP, who has responsibility for the *Air Services Regulations 2019* and the *Road Vehicle Standards Act 2018*.

Yours sincerely

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/ / 2021
Encl

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Air Services Regulations 2019

Why it is considered necessary and appropriate for instructions given under subsection 7(3) and 7(4) of the Air Services Regulations to be exempt from disallowance and, in particular, how providing that these instructions are subject to the usual disallowance process would adversely impact on the orderly management of the aviation industry.

The instructions given under subsection 7(3) and 7(4) form part of the key functions of Airservices Australia (Airservices) as an air navigation service provider, and are consistent with the practices of air navigation service providers globally. Consistency in international standards is key in the global aviation context. Issuing these instructions forms part of the daily business of Airservices and is vital to maintaining aviation safety. The uncertainty caused by disallowance could result in adverse safety outcomes for the aviation industry as it removes the ability for Airservices to deliver its core business of issuing instructions to pilots. As the nature and scope of instructions can change quickly in response to major natural adverse weather events or national security threats, it remains critical that Airservices can exercise these functions unencumbered from disallowance.

To further assist the Committee to understand the adverse impact disallowance would have on these instructions issued under 7(3) and 7(4) of the Air Services Regulations, Airservices has provided two detailed examples of how these subsections are used in practice. Both examples relate to Airservices' provision of services in accordance with Annex 11 of the Convention on International Civil Aviation (the Chicago Convention) (Air Traffic Services) and the supporting Procedures for Air Navigation Services – Air Traffic Management. The second example also relates to Airservices' obligations under the *Civil Aviation Safety Regulations 1998* (CASR) – Part 172.

Background

Under Division 2, Section 8 of the *Air Services Act 1995* (the Act), Airservices has, amongst others, the functions of providing services and facilities for the purpose of Australia or another country giving effect to the Chicago Convention or otherwise for purposes relating to the safety, regularity or efficiency of air navigation and for carrying out activities to protect the environment from the effects of, and the effects associated with, the operation of aircraft.

Subsections 7(3) and 7(4) of the Air Services Regulations are critical enablers that permit Airservices to meet the functions set out in the Act. Instructions made under subsections 7(3) and 7(4) of the Air Services Regulations directly relate to the safety of air navigation and are technical in nature. They give specific form and substance to Airservices' functions and powers as set out in subsection 8(1) of the Act.

Subsection 7(3)

Subsection 7(3) of the Air Services Regulations enables Airservices to give directions or instructions to aircraft involved in either Instrument Flight Rules (IFR) or Visual Flight Rules (VFR) flights about the use of a controlled aerodrome or in a specified class of airspace. Airservices may use this power to establish the procedures IFR or VFR aircraft are to follow at controlled aerodromes or in a specified class of airspace.

Subsection 7(3) allows Airservices to run its strategic flow management system (including a ground delay program and the long-range air traffic follow management program), which aims to achieve a balance between forecast air traffic capacity and actual air traffic demand. Instructions given by Airservices pursuant to subsection 7(3) generally relate to information under Part 175 of the CASR, which concerns aeronautical information management. Industry benefits from these instructions by way of fewer airborne delays.

Example

Subsection 7(3) enables the Airservices Australia Network Coordination Centre (Airservices NCC) to issue an aircraft a 'calculated off blocks time' which the aircraft must adhere to within a set compliance window. (A calculated off blocks time is the time at which the aircraft should commence movement associated with departure. Additional detail is contained in **Attachment A**, which is an excerpt from the Australian Aeronautical Information Publication on Air Traffic Flow Management.)

The ability for Airservices to run its ground delay program will become critical as the aviation industry recovers from the COVID-19 pandemic and demand again begins to exceed airport capacity. Airline profitability is based around predictability of service and on time performance. In 2019 the ground delay program resulted in the following benefits:

- Approximately 1 million minutes (or 16,667 hr or 694 days or 1.9 years) reduction in airborne delay
- Equating to 20,500 tons of fuel saved or 65,000 tons of CO^2 gas
    - The fuel saved is the equivalent of 5800 Melbourne to Sydney flights in a B737

The ground delay program is designed to transfer delays to the ground instead of in the air which results in significant fuel, CO^2 emission and airborne delay savings for the airlines. The ground delay program gives the airlines—and therefore customers—a high degree of predictability for schedules and travel through reduction in cancelled flights and flight times that are highly accurate.

An additional benefit of the ground delay program is the pre-tactical management of air traffic control sector capacity. Without the use of the ground delay program, delays are incurred in the air, not on the ground. Aircraft may depart on a schedule that does not consider the capacity of the arriving airport and this results in aircraft being placed in airborne holding patterns. Airborne holding increases air traffic control workload due to the number of aircraft in the volume of airspace, increased communications between air traffic control and aircraft and results in increased fuel emergencies where the planned fuel has not taken into account the amount of holding encountered. The ground delay program has the additional benefit of enhancing the safety of the system whilst providing the economic benefit to industry.

The ground delay program can also be used for disruption management of unpredicted events e.g., un-forecast weather events and emergency runway closures. The activation or revision of the ground delay program brings predictability back into the network and allows airlines to put in place recovery activities. In this context instructions under subsection 7(3) are issued as urgent tailored responses to individual events such severe weather, runway closures or evacuation of the tarmac due to lightning strikes within the vicinity of airports. As such the circumstances triggering the issuing of an instruction may rapidly evolve, and their operation be exhausted, by the time disallowance became possible.

In addition, the unpredictable timing of a disallowance motion passing would create potential safety concerns in that instructions issued to pilots may not be legally valid at the time they are relied upon. Certainty as to the validity of instructions is also critical as they may be relied on in prosecutions for breaches of the *Sydney Airport Curfew Act 1995* or *Adelaide Airport Curfew Act 2000*, where pilots have relied on instructions issued by Airservices in order to determine whether to operate a particular service.

As shown by the above examples, the potential disallowance of instructions issued under subsection 7(3) of the Air Services Regulations would be of limited use given the often transient nature of the instructions' effect, and would adversely impact on the orderly management of the

aviation industry by reducing Airservices' ability to act decisively and provide certainty in emergency situations including unpredicted weather events, resulting in fuel emergencies, increased CO^2 emissions and airborne delays.

Subsection 7(4)

Subsection 7(4) of the Air Services Regulations enables Airservices to give specified instructions about the use of airspace above a restricted or danger area which vary from, and prevail over, instructions given to aircraft under subsection 7(3). Subsection 7(4) is relied upon by Airservices in a number of scenarios concerning the safety of aircraft. Airservices has agreements with Defence and other authorities that permit Airservices to stop the activity in the restricted airspace if an aircraft is entering the airspace without approval. The other scenario in which subsection 7(4) is relied upon is in relation to the use of restricted areas when Airservices is unable to provide a service in that area. In these instances, the Civil Aviation Safety Authority (CASA) will declare the area to be 'restricted,' which then permits Airservices to issue instructions to aircraft to manage the issue.

Example

Contingency plans effected by subsection 7(3) and 7(4) instructions may also be enacted for reasons including a fire evacuation or a major equipment outage, runway maintenance requiring specification of taxiways and take-off distances, or the breakdown of an aircraft on an active runway. Airservices also utilises both subsections 7(3) and 7(4) when a 'qualified employee' (in this case a licensed Air Traffic Controller) is not available and contingency plans are enacted as required by CASR Part 172. Circumstances where this may be necessary include where the Air Traffic Control workload is sufficient that a non-qualified employee of the NCC is required to give instructions. Additional general information is contained in **Attachment B**, which is an excerpt from the Australian Aeronautical Information Publication on Contingency Procedures.

If a contingency plan is enacted over Australian territory, a temporary restricted area may be declared after consultation with CASA.

In these circumstances the subsection 7(3) and 7(4) instructions published via a Notice to Airmen, would relate to safety mitigations in a situation where the level of safety has been compromised due the non-availability of the 'qualified employee'. Elements of the instructions are as follows:

(a) The carriage and use of two radios is required for entry to the temporary restricted area.
   - This permits the pilot to conduct broadcasts on the contingency frequency whilst listening on the Air Traffic Control (ATC) frequency. Staff utilised as Contingency Response Managers may provide safety alerts on the ATC frequency if circumstances warrant and the situation permits. Hence, the instruction requiring the carriage of two radios improves the safety outcome of the situation.

(b) Traffic collision and avoidance systems and transponder equipment must be selected on at all times.
   - This instruction ensures that aircraft are visible to each other and avoiding action taken if required. The ability to issue this instruction improves the safety outcome of the situation.

(c) Pilots requesting operations in the controlled airspace subject to the contingency shall contact Airservices NCC for access authority.
   - This enables information on other aircraft also authorised to enter the area to be provided and for Airservices to know exactly who is in the affected airspace when the

contingency is ended, and normal services are resumed. The ability to issue this instruction improves the safety outcome of the situation.

Similarly to the first example, the unpredictable timing of a disallowance motion in relation to a subsection 7(3) or 7(4) instruction described above would create potential safety concerns in that instructions issued to pilots may not be legally valid at the time they are relied upon. Certainty as to the validity of instructions is also critical as they may be relied on in prosecutions for breaches of the *Sydney Airport Curfew Act 1995* or *Adelaide Airport Curfew Act 2000* where pilots have relied on instructions issued in order to determine whether to operate a particular service.

These examples further demonstrate that the potential disallowance of instructions issued under subsections 7(3) and 7(4) of the Airservices Regulations would adversely impact the orderly management of the aviation industry by reducing Airservices' ability to act decisively and provide certainty in various situations where information is required quickly and primarily in order to improve safety outcomes.

Conclusion

As indicated in the explanatory statement to the Amendment Regulations and the previous correspondence provided to the Committee, disallowance of the directions and instructions made under subsections 7(3) and 7(4) of the Air Services Regulations would adversely impact on the orderly management of the aviation industry. It would also increase uncertainty for commercial aircraft operators, providers of air traffic services and aviation regulators. The exemption improves certainty in regulation of the aviation industry, and reduces commercial and safety risks for the industry and the public.

If the exemption from disallowance is to be retained, whether the exemption can at least be provided for in primary legislation, rather than in the Legislation (Exemptions and Other Matters) Regulation 2015, to allow for full parliamentary scrutiny and consideration of the exemption

As noted above and in the explanatory statement to the Amendment Regulations, an exemption from disallowance already exists under the *Legislation (Exemptions and Other Matters) Regulation 2015* (LEOMR) for certain instruments made under the *Air Services Regulations 1995*. This exemption was replicated from the former *Legislative Instruments Regulations 2004*. The 1995 Regulations have been replaced by the *Air Services Regulations 2019*. The Amendment Regulations replace the references to the 1995 Regulations with the equivalent provisions of the current Air Services Regulations. This maintains the scope of the existing exemption from disallowance. The reason for the original exemption was that disallowance would adversely impact on the orderly management of the aviation industry and air traffic safety management, for the reasons detailed above. This exemption being contained in the LEOMR has therefore previously been considered necessary and appropriate by Parliament on at least two separate occasions.

In addition, there was not a suitable alternative legislative vehicle available to facilitate the move to primary legislation. While there have been minor consequential amendments of the Air Services Act, that legislation has not recently been subject to broader reforms that would have provided such an opportunity.

The *Acts and Instruments (Framework Reform) Act 2015* enacted substantial reforms to the then *Legislative Instruments Act 2003*, including consolidating all exemptions from disallowance and sunsetting into the LEOMR. The LEOMR provides a central location where a number of specific exemptions can be found, alongside the class exemptions. This makes it easier for users to access exemptions.

Any amendment to the LEOMR to include a new exemption from the disallowance regime requires the approval of the Attorney-General. This provides enhanced scrutiny over proposed exemptions for disallowance and ensures a consistent policy approach is applied to any requests for exemptions. All rule-makers are required to make a case to the Attorney-General supporting their request for exemptions from disallowance. Careful consideration of exemption requests, with ministerial approval, helps to ensure only genuine exemptions from disallowance are made.

The Attorney-General does not have the same degree of oversight in relation to disallowance exemptions in primary legislation.

In addition to this, any amendment to the LEOMR to include a new exemption from disallowance is subject to appropriate parliamentary scrutiny as such amendments are subject to disallowance.

For the reasons provided above, it is necessary and appropriate that this exemption is provided for in delegated legislation in accordance with the framework provided by section 44 of the *Legislation Act 2003*.

Road Vehicle Standards Act 2018

Why is it considered necessary and appropriate for standards made under section 12 of the *Road Vehicle Standards Act 2018* to be exempt from the sunsetting regime in Part 4 of Chapter 3 of the *Legislation Act 2003* and, in particular, why would it not be possible or appropriate to remake any standards that are required to continue after the ordinary 10 year sunsetting period.

One of the main purposes of the sunsetting provisions in the *Legislation Act 2003* is to regularly review legislative instruments to ensure they remain necessary and current. The National Road Vehicle Standards made under section 12 of the *Road Vehicle Standards Act 2018* (the RVSA) are subject to the Government's regulatory impact statement (RIS) requirements, which also require articulation of the necessity of proposed new standards. When a National Road Vehicle Standard has been superseded by a new more stringent standard, an RIS has already been prepared to justify the new instrument. As a result, it is not possible to show that the old standard is effective in addressing the problem it was implemented to fix because it has already been shown to be inadequate by virtue of the making of a new, more stringent standard. Subjecting old superseded standards to this process every ten years will not serve a useful purpose and could result in the inappropriate repeal of those standards.

It is still important for the effectiveness of the broader regulatory framework that these superseded standards remain in force under Commonwealth Law. This is because State and Territory laws incorporate the National Road Vehicle Standards by reference and the jurisdictions have advised that repeal of those standards would mean they could no longer enforce ongoing compliance with those standards. If superseded standards are repealed there will be a cohort of vehicles to which no National Road Vehicle Standards would apply. This would allow vehicle users to modify road vehicles in an unchecked way and could result in unsafe vehicles being permitted to operate on public roads. The Department of Infrastructure, Transport, Regional Development and Communications has been working with the States and Territories, the National Transport Commission and the National Heavy Vehicle Regulator to improve this approach, but has not yet been able to reach a position that would support the repeal of superseded Australian Design Rules (ADR). The Department will continue to progress this work, but in the interim, an exemption is necessary to prevent these standards from being repealed.

We also note that the Department of Infrastructure, Transport, Regional Development and Communications and the Deregulation Taskforce in PM&C are looking at opportunities to reform the ADR-making process and will be going out to consult and commission economic analysis of reform options in 2022. This process will include jurisdictional and industry consultation, with a view to ensuring that reform options do not have negative safety or productivity outcomes for the vehicle industry and the community.

Additionally, most of the National Road Vehicle Standards include applicability provisions that make the standard mandatory for different categories of vehicle. Remaking a National Road Vehicle Standard will result in the standard having a retrospective effect. For example a standard originally made in 2006 and remade in 2022 will apply to vehicles manufactured from 2006. If the remade standard has a commencement date in 2022, its ability to regulate vehicles manufactured prior to 2022 is subject to challenge.

National Road Vehicle Standards regularly incorporate documents by reference. As time passes these documents are updated to reflect new technology and improve safety outcomes. The old versions of the incorporated documents become difficult to source. Amending the instrument to reference later, current versions of these documents will increase the stringency of the standard and may mean that vehicles manufactured in accordance with the standard at the date of production no longer comply.

These types of issues are regularly raised as concerns by the Senate Standing Committee for the Scrutiny of Delegated Legislation, and not subjecting National Road Vehicle Standards to the sunsetting process is considered to be an appropriate approach to minimising these concerns.

Whether the exemption from sunsetting of standards made under section 12 of the *Road Vehicle Standards Act 2018* can be provided for in primary legislation, rather than the *Legislation (Exemptions and Other Matters) Regulation 2015*.

The *Road Vehicle Standards Act 2018* (RVSA) replaced the *Motor Vehicle Standards Act 1989* (MVSA) on 1 July 2021. National Standards made under section 7 or 9 of the MVSA are exempt from the sunsetting regime pursuant to item 40 of section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (LEOMR). Section 7 of the MVSA was replaced by section 12 of the RVSA, so it was appropriate for a similar exemption from sunsetting to be included for National Standards made under section 12 of the RVSA. The RVSA therefore did not include provisions for exempting instruments made under section 12 from sunsetting arrangements because at the time it was thought the LEOMR was an appropriate legal mechanism to achieve a similar arrangement to what existed for the Australian Design Rules under the MVSA.

In addition, it is government policy that all exemptions from the sunsetting regime must be included in the LEOMR and must not be included in the primary legislation which contains the power to make the instrument. This has the effect that any proposed exemption of an instrument that is legislative in character from the sunsetting regime would require the approval of the Attorney-General. This requires rule-makers to make a case to the Attorney-General for exemptions from sunsetting. Careful consideration of exemption requests, with ministerial approval, helps to ensure only genuine exemptions from sunsetting are made. This is intended to preserve the operation and effectiveness of the sunsetting regime. It is also useful for sunsetting exemptions to be contained in one place, in the LEOMR. Legislative notes are routinely included in enabling provisions for legislative instruments that are exempt from sunsetting, alerting readers to the exemption and directing them to the LEOMR.

The Department of Infrastructure, Transport, Regional Development and Communications is also concerned that disallowance of this instrument could mean that a large proportion of the existing suite of National Road Vehicle Standards would immediately be subject to sunsetting because they were made more than ten years ago. If this were to occur it would have a significant impact on the regulation of safety, theft protection and emissions performance of vehicles being provided to the market in Australia. As a result we believe it is necessary and appropriate for the inclusion of this exemption in the LEOMR to continue.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-002573

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2913

Dear Senator Fierravanti-Wells

Thank you for your correspondence of 21 October 2021, on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Taxation Administration (Data Sharing—Relevant COVID-19 Business Support Program) Declaration 2021* and the *Taxation Administration (Data Sharing—Relevant COVID-19 Business Support Program) Amendment Declaration (No.1) 2021*.

The Committee has sought my advice as to:

- whether the *Taxation Administration (Data Sharing—Relevant COVID-19 Business Support Program) Declaration 2021* (the Declaration) can be amended to provide that it ceases within three years after commencement;
- whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate;
- the nature, scope and extent of information that may be shared or disclosed under the instruments; and
- whether any additional statutory safeguards apply to protect this information, including whether the *Privacy Act 1988* applies.

I set out my advice on those matters below.

Instrument duration

As I have noted in my previous correspondence to the Committee, the Government shares the Committee's objective that the period of operation of legislative instruments should be consistent with maintaining appropriate Parliamentary oversight, while also considering the underlying policy intent of the primary law as well as the purposes of the individual instruments.

As such, I agree that the Declaration may cease its operation earlier than the default 10-year sunsetting timeframe and consider that a duration of five years would be appropriate. This timeframe ensures that taxation officers can share the protected information with the relevant State and Territory agencies administering the relevant programs for the specified purposes over a reasonable period, especially in circumstances where extended compliance activities may occur.

It is also consistent with the principles I have previously provided to the Committee about when a period shorter than the default sunsetting timeframe will generally be appropriate.

If you agree with this approach, I intend to amend the Declaration at the earliest opportunity to insert a cessation provision to provide that the Declaration ceases its operation on 30 June 2026.

Review of exemption provisions

As you are aware, subsection 355-65(8) in Schedule 1 to the *Taxation Administration Act 1953* (the TAA 1953) exempts taxation officers from committing an offence under section 355-25 in Schedule 1 to the TAA 1953 when disclosing protected information for specified purposes with certain agencies, including government agencies administering declared COVID-19 business support programs.

The Declaration itself does not create an exemption. The sole purpose of the Declaration is to declare COVID-19 business support programs to which the exemption applies.

Given that the Declaration is made for a very specific and narrow purpose, provides temporary relief, and will be amended to operate within a limited period of five years, I do not consider it appropriate to conduct a review of the Declaration before it ceases to have operative effect.

Nature, scope and extent of information disclosure

Since the sole purpose of the Declaration is to declare a program as a COVID-19 business support program, the explanatory statements are focused on providing information about these programs and how they meet the legislative criteria to be so declared. I do not consider it necessary for the explanatory statements to explain the nature, scope and extent of the information to be disclosed by taxation officers to the agencies administering these programs as these matters are covered entirely by the provisions contained within the TAA 1953 and are not affected by the operation of the Declaration.

I note further that the information sought by the Committee is included in the explanatory memorandum to the Treasury Laws Amendment (COVID-19 Economic Response No. 2) Bill 2021.

Privacy and information sharing safeguards

I note the Committee's view that provisions which enable the collection, use and disclosure of personal information should generally be included in primary law. This is the reason why the *Treasury Laws Amendment (COVID-19 Economic Response No. 2) Act 2021* amended the TAA 1953 to insert subsection 355-65(8) into Schedule 1 to enable taxation officers to disclose protected information in certain circumstances.

Subsection 355-65(10) in Schedule 1 to the TAA 1953 only empowers me to declare a program as a COVID-19 business support program (subject to the program meeting the conditions as set out in the TAA 1953) for the purposes of item 12 of Table 7 in subsection 355-65(8), not to authorise the disclosure of the protected information itself.

The explanatory memorandum to the Treasury Laws Amendment (COVID-19 Economic Response No. 2) Bill 2021 explains at paragraph 2.10 why it is appropriate for me to exercise the power to declare a relevant COVID-19 business support program in delegated legislation:

> Authorising the Minister to declare the programs that are eligible for information sharing is appropriate as it ensures the Government can respond quickly to changes in circumstances because of the unpredictable nature of COVID-19 outbreaks. It also ensures that information

sharing is not automatically provided in respect of any new program that is developed by the Commonwealth or by a State or Territory. Rather, any new program must be actively considered and declared by the Minister as being eligible for information sharing.

Paragraph 2.14 of the explanatory memorandum also notes that the *Privacy (Tax File Number) Rule 2015* (the Rule) continues to apply to information provided to Australian government agencies under the exemption. The Rule regulates the collection, storage, use, disclosure, security and disposal of an individual's tax file number information that may be provided alongside protected information to an Australian government agency administering a business support program.

Information disclosed under the TAA 1953 remains subject to its confidentiality framework with any on-disclosure being strictly controlled by the terms of the TAA 1953 and the purposes for which the information was disclosed by the Australian Taxation Office. Breaches of the on-disclosure rules are subject to similar criminal sanctions as those that apply to taxation officers. The *Privacy Act 1988* also continues to apply to the information disclosed under the TAA 1953 to State and Territory officials.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

12 November 2021