Monitor 6 of 2022 – Ministerial Responses

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Attorney-General

Reference: MC22-022767

Senator Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

By email: sdlc.sen@aph.gov.au

Dear Senator

I refer to the Senate Standing Committee for the Scrutiny of Delegated Legislation and its concerns with the Bankruptcy Amendment (Service of Documents) Regulations 2022, as detailed in Delegated Legislation Monitor 5 of 2022. I appreciate the time the Committee has taken to bring these matters to my attention

My advice in response to these concerns is enclosed with this letter. I trust this information is of assistance to the Committee.

Yours sincerely

THE HON MARK DREYFUS KC MP
22 / 9 /2022

Encl. *Response to Senate Standing Committee for the Scrutiny of Delegated Legislation*

Response to Senate Standing Committee for the Scrutiny of Delegated Legislation

Question 1: *Why it is necessary and appropriate to use delegated legislation, rather than primary legislation, to introduce this exemption from requirements under the Electronic Transactions Act 1999?*

Section 315 of the *Bankruptcy Act 1966* (Bankruptcy Act) provides that regulations may be made prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. Notably, paragraph 315(2)(g) of the Bankruptcy Act prescribes that the regulations may 'provide for the means of service of documents.'

Sections 7A and 9 of the *Electronic Transactions Act 1999* (ETA) contemplate the possibility that regulations may provide that all or specified provisions of this Act do not apply.

The Parliament has therefore previously determined in the enactment of the Bankruptcy Act that it may be necessary and appropriate to use delegated legislation to provide the means of service of documents.

The remade Bankruptcy Regulations 2021 (Bankruptcy Regulations) currently provides for the service of documents under the Bankruptcy Act and Bankruptcy Regulations.

The Regulations would rectify an error by the previous government where the remade Bankruptcy Regulations 2021 (Bankruptcy Regulations) inadvertently changed the status quo and lead to the inclusion of a consent requirement for electronic service.

On 1 April 2021, the Bankruptcy Regulations commenced to address the sunsetting of the Bankruptcy Regulations 1996. The Bankruptcy Regulations were remade in substantially the same form with minor and technical amendments aimed at modernising references and ensuring alignment with the Act.

Section 102 of the Bankruptcy Regulations replaced regulation 16.01 in the 1996 Regulations regarding the service of documents and referred to section 28A of the Acts Interpretation Act 1901 (AIA) to specify additional methods of service. Section 28A of the AIA contains a note stating that the ETA deals with giving information in writing by means of an electronic communication.

The ETA provides a regulatory framework which facilitates the use of electronic transactions. Section 9 of the ETA regulates the provision of electronic communication in writing, when it is required or permitted under a law of the Commonwealth. Under paragraphs 9(1)(d) and (2)(d) of the ETA, a party is required to seek the consent of the recipient to provide written information in an electronic form.

The remade Bankruptcy Regulations reflected modern drafting practice to refer to the ETA with respect to electronic service and aligned with the ETA to have a consistent approach to electronic communications across Commonwealth law. However, it was not intended to diverge from the original policy intent of former regulation 16.01 of the 1996 Regulations, which did not contain a consent requirement for the electronic transmission of documents.

Following the remaking of the Bankruptcy Regulations, a number of personal insolvency stakeholders raised concerns that the requirement under s 102 to seek consent before serving documents electronically could be used to frustrate the administration of the Bankruptcy Act. For example, a receiving party may refuse or fail to provide consent, causing unnecessary delays and preventing the efficient administration of the bankrupt estate.

Noting the urgent need to ensure efficient administration of the bankruptcy system and address stakeholder concerns, ss 102(3) was inserted into the Regulations to exempt paragraphs 9(1)(d) and (2)(d) of the ETA from applying to bankruptcy documents required to be served electronically. While there are other service options available under the Regulations, the preference to deliver bankruptcy documents by electronic service is in line with the broader shift towards digital technologies as the preferred method of communication in Australia.

If this exemption is removed, there will likely be inefficiencies in bankruptcy administration, as creditors may need to persist in seeking consent before serving bankruptcy documents electronically, or may be forced to rely on other methods of service that do not require consent.

Question 2: *Whether the instrument can be amended to provide that the measures cease within three years after commencement?*

I do not intend to progress an amendment to provide that the exemption under s 102 of the Regulations will cease three years after commencement. Parliament has already contemplated and agreed through paragraph 315(2)(g) of the Bankruptcy Act that the regulations may 'provide for the means of service of documents.' The ETA itself also contemplates that exemptions from the general operation of the ETA may be implemented by regulation.

Question 3: *Whether there is any intention to conduct a review of the relevant provisions to determine whether they remain necessary and appropriate, including whether it is necessary to include the provisions in delegated legislation.*

The Albanese Government is committed to ensuring that Australia's personal insolvency laws are fit-for-purpose and it will continually assess whether these laws remain necessary and appropriate.

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MS22-000618

Senator Linda White
Chair
Senate Standing Committee for the
Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~ Linda

I refer to the letter of 10 March 2022 from former Senator the Hon Concetta Fierravanti-Wells, the then Chair of the Committee to my predecesor Senator the Hon Simon Birmingham, the then Minister for Finance.The letter seeks information about the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021* [F2021L01823], which inserted item 531 in Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*.

Due to the Government entering into a caretaker period following the announcement of the 2022 federal election in April 2022, the response to the Committee's request was suspended until Parliament resumed.

The Minister for Health and Aged Care, the Hon Mark Butler MP, who has policy responsibility for item 531 - mRNA vaccines and treatments program, has provided the attached response to the Committee's request for information.

I have copied this letter to the Minister for Health and Aged Care.

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

Yours sincerely

Katy Gallagher

26 /08/2022

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021 [F2021L01823]

Response provided by the Minister for Health and Aged Care

The former Government agreed that legislative authority for the program relating to the development and maintenance of Australia's onshore capability to manufacture mRNA products, would be provided under the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations).

On 14 December 2021, the Australian Government, in partnership with the Victorian Government, announced an in-principle agreement with the global vaccine manufacturer, Moderna, to establish an mRNA vaccine manufacturing facility in Australia. Moderna is a global leader in mRNA technology, with responsibility for one of only two approved mRNA vaccines in the world, and a strong pipeline of innovative products. The mRNA vaccines have proven to be safe and effective; and are being used around the world to protect hundreds of millions of people against COVID-19.

The Moderna mRNA Partnership will provide the Australian public with priority access to future vaccines, whether those vaccines are required for COVID-19 and new variants, other diseases such as influenza and other viruses, and potential future pandemics.

At the time of drafting, the details of the Moderna mRNA Partnership were subject to ongoing negotiations. This is outlined in the explanatory statement for the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021* (the Health Regulations). The release of any financial information at that time would have prejudiced ongoing negotiations with Moderna and may have led to a compromising position for the Commonwealth, and ultimately a less favourable outcome for Australia.

The Committee has specifically enquired as to:

- *whether it is intended at any point in the future to inform the Parliament as to the amount of funding that is expected to be expended on the program to develop and maintain Australia's onshore capability to manufacture mRNA products; and*
- *why it is considered necessary and appropriate to provide authority for spending on the program by delegated legislation, instead of primary legislation, noting the significance and broadly drafted scope of this program.*

The cost of the Moderna mRNA Partnership is dependent on several variables including Australia's ongoing COVID-19 vaccine needs. Australia's need for COVID-19 vaccines over the life of the ten-year agreement is unknown and is difficult to predict, and to manage this overall costs are aligned to actual need. Information in the agreements, including financial information, is regarded as commercially sensitive by Moderna and is subject to strict disclosure clauses. It is the intention of the Australian Government to provide greater clarity around the amount of funding allocated for the Moderna mRNA Partnership over the ten years of the agreements. My Department is working with Moderna to provide the required transparency expected by Parliament while ensuring confidential commercial information in the agreements is maintained.

In response to the Committee's enquiry regarding the legislative authority for the Commonwealth spending, the former Australian Government determined that an item under the Principal Regulations was appropriate. At the time this determination was made, it was anticipated that the negotiations with Moderna would need to be finalised in December 2021. The need to establish the authority was considered to be urgent; and an enactment through primary legislation bore the risk that the authority may not be established prior to the execution of one or more of the agreements.

Furthermore, the agreements involve the procurement of goods and does not involve the kinds of considerations that usually dictate the use of primary legislation as outlined in paragraph 1.10 of the Department of Prime Minister and Cabinet Legislation Handbook. Similarly, the agreements do not involve the features outlined at principle (j) of the Guidelines issued by the Committee in February 2022, being:

- the establishment of significant elements of a regulatory scheme;
- the imposition of significant penalties;
- the imposition of taxes or levies; or
- a significant impact on personal rights and liberties.

The Government is comfortable that the current item in the Health Regulations provide the appropriate statutory basis for this program.

The development and maintenance of an onshore mRNA manufacturing capability in Australia will provide the Australian public with insurance against future pandemics. It will help ensure that the Australian public is vaccinated more quickly in the event of future pandemics rather than relying on the importation of vaccines from overseas. This capacity will reduce the likelihood of extended lockdown periods and associated social and economic costs. Sovereign capability will also provide priority access to innovative vaccines and will help build an Australian mRNA product ecosystem.

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MS22-000618

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Dear ~~Senator~~ Linda

I refer to the letter of 10 March 2022 from former Senator the Hon Concetta Fierravanti-Wells, the then Chair of the Committee to my predecesor Senator the Hon Simon Birmingham, the then Minister for Finance. The letter seeks information about the *Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021* [F2021L01825], which inserted item 529 in Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997.*

Due to the Government entering into a caretaker period following the announcement of the 2022 federal election in April 2022, the response to the Committee's request was suspended until Parliament resumed.

The Minister for Indigenous Australians, the Hon Linda Burney MP, who has policy responsibility for item 529 - Territories Stolen Generations Redress Scheme, has provided the attached response to the Committee's request for information.

I have copied this letter to the Minister for Indigenous Australians.

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

Yours sincerely

Katy Gallagher

26 / 08/2022

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021 [F2021L01825]

Response provided by the Minister for Indigenous Australians

Matters more appropriate for parliamentary enactment:
The committee requests advice as to why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for the Territories Stolen Generations Redress Scheme (the Scheme).

The Scheme opened for applications on 1 March 2022. The Scheme is largely administratively based, with the minimum of complexity regarding regulation. Only those elements required to be in legislation to facilitate the establishment and administration of the Scheme have been included in the legislation.

The key benefit of an administrative scheme is that it can be established and adapted in a timelier and more flexible manner than a legislative scheme. This means that, if any issues or unintended consequences for applicants are identified during the administration of the Scheme, they can be addressed more promptly, as most changes would not require legislation to pass Parliament. This enables the Scheme to be survivor-focused and trauma informed.

Parliamentary oversight:
The committee requests advice as to why crucial aspects of the Scheme, including the eligibility criteria, evidentiary requirements and the maximum payment that may be provided to survivors, have not at least been provided for in delegated legislation subject to disallowance by the Parliament.

The explanatory statement is taken to be read in conjunction with the *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Regulations). The explanatory statement includes key details about the Scheme, including the maximum value of redress payments. As the Scheme is administratively based, elements such as the detailed eligibility criteria and evidentiary requirements are set out in Scheme policies, procedures and guidelines. This enables the Scheme to be survivor-focused and trauma informed, and more accessible and understandable.

These elements have been clearly communicated in a number of ministerial media releases since the announcement of the Scheme as well as through the Senate Inquiry into the *Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021 and the Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021* (together, the Bills). As part of the Senate Inquiry, the National Indigenous Australians Agency (NIAA) provided a written submission detailing the Scheme and senior executives appeared as witnesses to further discuss the Scheme in detail. The Explanatory Memorandum for both Bills (now Acts) also provides some detail on the elements of the Scheme.

Delegation of administrative powers and functions:
The committee seeks advice from the minister as to who will exercise the power to make decisions under the Scheme and whether any safeguards or limitations apply to the exercise of these powers.

Under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the *Financial Framework (Supplementary Powers) Act* 1997 (FF(SP) Act), the Chief Executive Officer (CEO) is the Accountable Authority for the NIAA. A delegation of power

is made from the CEO by the NIAA Instrument of Delegation. Under this delegation the final decisions in relation to who will receive payments under the Scheme will be made at the SES Band 1 level or above. In addition to an appropriate level of seniority, decision-making authority is limited to officers with the appropriate level of subject matter expertise. The positions designated as decision makers for the Scheme are: Branch Manager, Territories Stolen Generations Redress Branch (SES Band 1), Group Manager, Social Policy and Programs (SES Band 2), Deputy CEO (DCEO), Policy and Programs (SES Band 3), and the CEO.

In the first instance, all applications and supporting information will be referred to an Independent Assessor for the purpose of providing an independent recommendation about the eligibility of the applicant to the delegate. Independent Assessors have significant experience at senior levels working across community and/or government sector/s in areas like case management, health and wellbeing including intergenerational trauma, family services, disability, social welfare, criminal justice and aged care.

The Branch Manager, Territories Stolen Generations Redress Branch is the primary delegate for decisions in relation to eligibility to receive redress. There are three circumstances where the delegation may be exercised by an alternate delegated – the Group Manager, DCEO or CEO:

1. If the Branch Manager, Territories Stolen Generations Redress Branch has a real or perceived conflict of interest.
    - In this instance, the decision will be made by the Group Manager, Social Policy and Programs. If the Group Manager has a conflict of interest, the decision will be made by the DCEO, Policy and Programs or the CEO should the DCEO also have a conflict of interest.
2. If there is a workload issue.
    - In order to ensure a timely decision on applications, if there are a large number of applications requiring decision at a given time, the Branch Manager may request assistance from the Group Manager, DCEO or CEO.
3. Where an applicant requests a review.
    - Where a review of decision is requested, the decision on the reviewed application must go to a different delegate.

Limiting the delegations to the above identified positions ensures the Scheme decision-makers are qualified and informed to make an appropriate and considered decision. Moreover, fewer decision-makers ensures greater consistency in the decision-making process.

The decision-making authority in relation to selecting and funding services for the Scheme is governed by the same policy as applies to payment decisions under the Scheme. The same positions listed above will hold decision-making authority, and decisions are escalated up the levels depending on the level of funding and risk considered in the decision. The financial delegation thresholds are specified in the NIAA Instrument of Delegation.

The normal safeguards apply to the exercise of the decision-making power by the delegate, as contained in the PGPA Act, the *Public Governance, Performance and Accountability Rule 2014*, the FF(SP) Act, the *Privacy Act 1988* and the *Commonwealth Procurement Rules*. In addition, NIAA delegates must comply with the NIAA Conflict of Interest Policy, NIAA Privacy Policy and NIAA Values and Behaviours.

Privacy
The committee seeks advice from the minister as to the nature, scope and extent of personal information that may be collected under the Scheme and whether any safeguards apply to protect this information.

At the first instance, the following information will be collected for Scheme purposes:

- Information to identify the applicant (including identity documents);
- Applicant's contact information;
- Information to determine eligibility (collected on the application form as a mandatory question, and may also be received through the research process);
- Assistance Nominee or Legal Nominee identity and contact information (and in the case of a Legal Nominee - legal documents certifying their relationship - e.g. Power of Attorney);
- Information about someone who is applying on behalf of a person who passed away; and
- Information about the executor or administrator of the Estate of a person who passed away, and related legal documents such as a death certificate, will, grant of probate or letters of administration.

Secondly, if an applicant is eligible for redress, bank details will be obtained to administer payments, and further information may be collected to facilitate a Personal Acknowledgement (also known as a Direct Personal Response) where an eligible applicant requests one, including details about any support person(s) the applicant may choose to support them during the Personal Acknowledgement process.

Of the initial information collected, identity documents and any other identity information supplied by an applicant are disclosed to a third party document verification service to verify identity. If the third party service is unable to check the identity of a particular applicant (for example, due to the nature of identity information provided), the NIAA will conduct an alternate identity verification process for that particular applicant. Consent to collect identity information and use/disclose that information to third parties for the purpose of confirming an applicant's identity is specifically provided to NIAA in the Scheme application form.

Examples of third parties to whom information may be disclosed in the application form, where applicants are also advised their information is protected under the *Privacy Act 1988* and referred to the NIAA Privacy Policy. As part of submitting an application, applicants must sign a consent form detailing the handling of their personal information (page 16 of the Application for redress form at www.territoriesredress.gov.au/resources).

Personal and sensitive information may also be collected from third parties to determine eligibility, including government agencies and state record-holding institutions, using the identifying information disclosed by applicants. Information is only be used in connection with the Scheme and as set out in the Privacy Notice contained in the application form to check identity, determine eligibility, communicate with third parties for the purpose of processing an application (including to determine eligibility or to check whether an applicant has received a relevant prior payment), and providing redress. De-identified information may be used to administer, report on, evaluate and analyse the Scheme.

Any information, including sensitive information, collected or disclosed throughout this process (whether in written or face-to-face DPRs) will be handled in accordance with the *Privacy Act 1988*, the Australian Privacy Principles and the *Privacy (Australian Government Agencies – Governance) APP Code 2017*. All parties involved in Personal Acknowledgments (applicants; estate representatives in the case where the survivor has passed away; support persons and senior government representatives) will be required to submit an Agreement to Participate form, which includes privacy requirements. For facilitator and interpreters, this is achieved through the applicable contract for services.

Scheme applicants may elect to have a Redress nominee, who is a person authorised to perform certain functions on the applicant's behalf. If a Redress nominee is appointed, the applicant's personal and sensitive information provided with their application will also be disclosed to that nominee.

Applicants can elect either an Assistance Nominee or a Legal Nominee. An Assistance Nominee is appointed by the applicant to assist with the application process and interact with Scheme representatives on behalf of the applicant. A Legal Nominee can only be appointed where there is a current legal arrangement in place with the applicant to make certain legal, financial and/or personal decisions on behalf of the applicant. This could be a Power of Attorney, guardianship arrangement or Financial Management Order.

Both nominee arrangements require disclosure of personal information about the applicant to the nominee, for the purpose of the nominee fulfilling the terms of their appointment. This is specified in the Nominee consent form.

Personal information collected under the Scheme is handled in accordance with the *Privacy Act 1988*, the Australian Privacy Principles and the *Privacy (Australian Government Agencies – Governance) APP Code 2017*. This includes ensuring that NIAA has appropriate security controls on how personal and sensitive information collected under the Scheme is stored and accessed in NIAA's IT system, including limiting floor access and implementing IT security access controls.

The NIAA Privacy Policy also applies and is available at niaa.gov.au/privacy. The Scheme has been developed with the over-arching principle of *do no further harm,* guiding all policy directions and decisions made as part of the Scheme's administration. As such, all Scheme representatives are expected to perform their functions in a culturally sensitive and survivor focused manner.

Availability of independent merits review:
The committee seeks advice from the minister as to whether independent merits review can be provided for decisions made under the Scheme.

The committee's comments on the independent merits review in the explanatory statement are noted. The Scheme is designed to be survivor-focused and trauma informed. As such, all Scheme applicants are able to request a review of their redress decision should they not be satisfied with the decision. Likely reasons for a request for review are that an applicant is found to be ineligible or an applicant is questioning the amount of redress paid (due to the impact of a relevant prior payment).

At the time of drafting the explanatory statement for the FF(SP) Regulations, the review process for redress decisions was in development. It has now been finalised, and is designed to be as straight forward as possible.

The review process is as follows:

- If an Independent Assessor recommends an application as ineligible for redress, the application will be assessed by a second Independent Assessor prior to being referred to the delegate for final decision.
- If NIAA discovers that a Scheme representative has provided incorrect, ambiguous or improper advice to an applicant that may have resulted in the applicant being found ineligible, NIAA will contact the applicant as soon as possible to offer an internal review.
- Whenever a delegate decides that an applicant is not eligible or that a relevant prior payment exists, the applicant may request an internal review of the decision.
    - Before a delegate can decide that an applicant is ineligible or that payment will be reduced because of a prior payment relating to removal, a Scheme representative will contact the applicant to advise that NIAA is inclined to

find the applicant ineligible or the payment should be reduced, provide the applicant with the reasons for the proposed decision, and give the applicant an opportunity to respond, before the final decision is made.

- Once a request for review is received, NIAA will refer the application to an Independent Assessor who has not previously been involved with the application.
- NIAA will ensure the new Independent Assessor undertaking the review has all relevant information, including any information provided by the applicant with their request for review. The new Independent Assessor will ensure the internal review places particular focus on matters that are relevant to the basis of the applicant's request for review.
- The assessment made by the new Independent Assessor will be submitted for decision to a delegate that has not previously been involved in considering the application.

The review process as described above will provide for a person other than the primary decision-maker, but also with appropriate seniority and subject matter expertise, to reconsider the facts, law and policy aspects of the original decision and determine the correct and preferable decision. The review process will provide for the application to be reconsidered by a new Independent Assessor and new recommendation made to a new delegate, the delegate will 'step in the shoes' of the primary decision-maker. The seniority and subject matter expertise of the new decision maker is consistent with the intention that the Scheme be survivor-focused and trauma informed, and more accessible and understandable.

The decision to make a redress payment involves the exercise of powers and making of decisions under both the PGPA Act and the FF(SP) Act. These decisions have not been designated as decisions subject to review by the Administrative Appeals Tribunal (AAT). It would be open to an applicant to request a review by the AAT, and ultimately up to the AAT to decide if it has jurisdiction.

THE HON CHRIS BOWEN MP
MINISTER FOR CLIMATE CHANGE AND ENERGY

MC22-001473

Senator the Hon Linda White
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator White

Thank you for your letter of 8 September 2022, regarding matters raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) in relation to the *Australian Renewable Energy Agency Amendment (Powering Australia) Regulations 2022* (the Regulations). I note that your letter sought a briefing with me and my department to discuss the Committee's concerns. However, as Parliament's sitting dates have been delayed following the passing of Her Majesty Queen Elizabeth II, I am writing to you in the first instance, and am happy to follow up with a briefing should further detail be beneficial.

The Albanese Government is confident that ARENA's Regulations are consistent with the objects and broader context of the *Australian Renewable Energy Act 2011* (ARENA Act). This follows careful consideration of the advice and information from my department, clean energy stakeholders, and internationally reputable organisations.

Importantly, an amendment included in consequential amendments to the ARENA Act as part of the *Climate Change (Consequential Amendments) Bill 2022* and its recent passage through the Parliament, now means the scope of the regulation making function in paragraph 8(f) the ARENA Act has received a considered response by Parliament. In particular, at the end of section 8 of the ARENA Act (ARENA's Functions), both houses of Parliament passed the following amendment:

> *Note: Paragraph (f) allows additional functions to be prescribed related to renewable energy technologies as well as electrification technologies or energy efficiency technologies.*

I am of the view this significant update addresses the Committee's concerns. It reflects the Parliament's intention that the existing provision authorises the functions conferred by the Regulations. Further, in the interests of a fuller response, the following additional information and context regarding technical, functional and policy matters for the Regulations is provided to help demonstrate their appropriateness.

The scope and definition of energy efficiency technologies

A broad definition of energy efficiency technologies and electrification technologies, constrained by the Regulations' '*limits of functions*' provision and the broader legislative settings of the ARENA Act, will support ARENA to fulfil its objects.

The ARENA Act's objects include improving the competitiveness of renewable energy technologies and increasing the supply of renewable energy in Australia. On 8 September 2022, both houses of Parliament passed an amendment to add a further object the ARENA Act, to facilitate the achievement of Australia's greenhouse gas emissions reduction targets. This commenced on 14 September 2022.

Renewable energy and energy efficiency technologies are aligned in purpose, with strong overlap in the technologies' roll-out. The International Renewable Energy Agency's report on '*Synergies between renewable energy and energy efficiency*'[1] notes the following:

- A combined approach of renewable energy and energy efficiency offers the most timely and feasible route to decarbonising the global energy system. Both renewable energy and energy efficiency offer roughly the same amount of mitigation potential to 2030, but only when working in synergy. Working in isolation, they do not achieve as beneficial results (p.11).

- The cost-competitiveness of technologies varies by country, but deployment of renewable energy and energy efficiency technologies together results in overall savings to the energy system across all countries (p.12).

- Specific technologies are enablers for both energy efficiency and renewable energy, offering important synergies in both the power and end-use sectors. On the end-use side, the electrification of energy services (such as passenger transport or cooking heat) results in higher efficiency, and at the same time enables deployment of renewable power (p.14).

- Electrification of end-use sectors results in greater power generation demand, which can be sourced from renewables... Energy efficiency technologies in end-use sectors result in less power demand, meaning that the same capacity of renewables can cover a higher share of total demand.

As Australia and the world works rapidly to decarbonise and transform our energy systems, energy efficiency technologies will be part of a continuously evolving set of technologies. As such, it is important to avoid unintentionally limiting the definition of energy efficiency technologies. Instead, the Regulations recognise their intended outcomes of energy conservation and demand management, and by doing so provide flexibility in their application, while maximising how they can increase the competitiveness and supply of renewable energy.

I am confident that ARENA's ability to provide financial assistance to energy efficiency technologies will be limited to technologies that are "sufficiently incidental or conducive to the performance of ARENA's legislated functions". This is provided for by the section 7 '*Limits of functions—energy efficiency technologies and electrification technologies*' provision in ARENA's Regulations, as well as other parts of the ARENA Act, including ARENA's General Funding Strategy, which sets out ARENA's objectives and priorities for provision of financial assistant under the ARENA Act.

[1] https://www.irena.org/publications/2017/Aug/Synergies-between-renewable-energy-and-energy-efficiency

For the current period (2022–23 to 2024–25), ARENA's strategic priorities as outlined and approved by the responsible Minister in their General Funding Strategy, are to:

- Optimise the transition to renewable electricity;
- Commercialise clean hydrogen;
- Support the transition to low emissions metals;
- Decarbonise land transport.

Noting this, I am of the view that the 'limits of functions' provision in the Regulations, together with the objects of the ARENA Act, ARENA's General Funding Strategy, and ARENA's governance arrangements and decision making by the Board, will adequately limit ARENA funding projects that are conducive or incidental to ARENA's legislated functions, as in force from time to time. For this reason it is not considered necessary to explicitly link, or limit the definition of energy efficiency technologies to focus on 'those incidental or conducive to renewable energy'. I would also note that to the extent that the recent amendments to the ARENA Act clarify ambiguity, the limits of functions provision in the Regulation would operate before the commencement of those amendments on 14 September to preserve the validity of the Regulation and avoid the need for the Regulation to be remade.

Consultation with stakeholders

While in opposition, I engaged with a range of stakeholders who had concerns with the three attempts by the previous government to make regulations which would allow ARENA to invest in carbon capture and storage and other technologies, which would not increase the competitiveness and supply of renewable energy. We then moved disallowance motions relating to those regulations.

As a result of discussions with stakeholders, our position on the second ARENA regulations was only to disallow the elements of that regulation which went beyond the renewable energy, energy efficiency and electrification aspects covered by that regulation.

On coming into government, I was aware of the urgency of addressing the third regulation, which had been made just before the election was called.

ARENA was consulted on the drafting of the changes and key organisations were briefed by my office on the proposal, including the Clean Energy Council and Smart Energy Council. While this level of detail was not shown in the Explanatory Statement, I was satisfied that appropriate consultation had been undertaken before progressing with the new regulations.

I trust the information provided above will assist the Committee. Should the Committee seek further clarification, including on the technical and policy details, I would be happy to meet with them, along with representatives of my Department and other stakeholders as necessary and beneficial.

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

Yours sincerely

CHRIS BOWEN

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MS22-000618

Senator Linda White
Chair
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Dear Senator Linda

I refer to the letter of 10 March 2022 from former Senator the Hon Concetta Fierravanti-Wells, the then Chair of the Committee to my predecesor Senator the Hon Simon Birmingham, the then Minister for Finance. The letter seeks information about the *Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2021* [F2021L01824], which inserted item 514 in Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*.

Due to the Government entering into a caretaker period following the announcement of the 2022 federal election in April 2022, the response to the Committee's request was suspended until Parliament resumed.

The Minister for Home Affairs, the Hon Clare O'Neil MP, who has policy responsibility for item 514 - Economic Pathways to Refugee Integration program, has provided the attached response to the Committee's request for information.

I have copied this letter to the Minister for Home Affairs.

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

Yours sincerely

Katy Gallagher

26 /08/2022

Attachment

Financial Framework (Supplementary Powers) Amendment (Home Affairs Measures No. 4) Regulations 2021 [F2021L01824]

Response provided by the Minister for Home Affairs

The Governor-General agreed to make regulations, which inserted item 514 to Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* to establish legislative authority for government spending for the Economic Pathways to Refugee Integration (EPRI) program. The Committee requested for clarity of drafting as to whether the instrument can be amended to clarify the intended meaning of 'large employer'.

In line with advice previously provided by the Department of Home Affairs to the Committee, a 'large employer' as used in item 514 is intended to be used in line with the Australian Bureau of Statistics (ABS) definition of a large business, that is, a 'business employing 200 or more people'.

In relation to the Committee's request to amend the instrument, the Government note that:

- the definition of a large employer used in item 514 is the commonly accepted definition employed by the ABS as a 'business employing 200 or more people', and is consistent with the plain English meaning of a 'large business';
- item 514 provides examples of initiatives to help refugees and humanitarian entrants and is not exhaustive; and
- the EPRI program supports initiatives that lift the rate of refugee and humanitarian entrants' economic participation, including initiatives that support refugees to access a role with an employer of any size. The definition of a large employer in this context does not therefore have a significant impact on the outcomes sought by EPRI.

For these reasons, the Government recommend replacing the explanatory statement to include:

- the ABS definition of a 'large employer'; and
- a clarification that the initiatives to help refugees and humanitarian entrants currently listed in item 514 are examples only and not an exhaustive list.

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MS22-000970

Senator Linda White
Chair
Senate Standing Committee for the
Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Linda Chair

I refer to the request of 8 September 2022 from the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) secretariat on behalf of the Committee.

The request seeks information about the *Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022* [F2022L00240], which inserted item 544 in Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*.

The Assistant Minister to the Prime Minister, the Hon Patrick Gorman MP, has provided the attached response to the Committee's request for information on behalf of the Prime Minister, who has policy responsibility for item 544 – Australian Future Leaders Program.

I have copied this letter to the Assistant Minister to the Prime Minister.

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

Yours sincerely

Katy Gallagher

26 SEP 2022

02 6277 7400 | Parliament House Canberra ACT 2600

Attachment

Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022 [F2022L00240]

Response provided by the Assistant Minister to the Prime Minister, on behalf of the Prime Minister (the Minister)

The Committee is seeking further information about the Australian Future Leaders Program (the program) prescribed in the *Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet's Portfolio Measures No. 2) Regulations 2022* (the Regulations), including the status of the entity or entities to which funding is to be provided, the status of that funding and the availability of relevant eligibility criteria.

The Minister confirms that no funding authorised by the Regulations has been expended on the program, and no contractual agreement has been entered into with the Australian Future Leaders Foundation Limited. Additionally, the Treasurer, the Hon Dr Jim Chalmers MP has publicly announced that the funding allocated for the program by the previous government will not proceed.

Given that the Government has publicly confirmed the program will not receive funding from the Commonwealth, the Minister does not propose to update the explanatory statement to reflect the information requested by the Committee.

The Hon Michelle Rowland MP

Minister for Communications
Federal Member for Greenway

MS22-001719

Ms Laura Sweeney
Acting Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Ms Sweeney

Thank you for your email of 8 September 2022 regarding the *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2022* (the Instrument) made under Part 20A of the *Telecommunications Act 1997* (the Act).

I note the Committee's concerns in Monitor 5 of 2022 (pp. 37-39) that the Instrument contains matters of an enduring nature that should be placed in statute, and that where such exemptions are included in delegated legislation they should be subject to sunsetting after three years, not the default period of ten years.

The Committee notes in paragraph 1.135 that its longstanding view is that provisions which exempt persons or entities from the operation of primary legislation should be included in primary rather than delegated legislation. It adds that, if the provisions are in delegated legislation, the instrument should operate no longer than strictly necessary. The Committee says it considers that in most cases, this means the instrument should cease to operate no more than three years after it commences to ensure a minimum degree of regular Parliamentary oversight.

While I acknowledge and respect the Committee's view on these matters I would make two general observations. First, Part 20A is broad in nature and depends on exemptions to tailor its practical operation to the real world and the Parliament passed it on this basis. That is, the Parliament has seen fit to deal with these exemptions through delegated legislation, not in the statute itself. The exemptions that have been made in the Instrument can be made under the statute and, I would contend, are envisaged by it. This appears likely because of the level of detail generally required for such exemptions and the need for flexibility so that changes in circumstances can be addressed quickly as needed. The integral and important role of the exemption mechanisms is explained in the Explanatory Memorandum (www.legislation.gov.au/Details/C2011B00039/Download) to the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011, which added Part 20A to the Act (e.g. at pp. 2 and 32-34).

I also note the ten year sunsetting period is consistent with the *Legislation Act 2003*, which sets the default sunsetting period at ten years.

The Hon Michelle Rowland MP
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Turning to the matters more specifically, in 2021 the Committee raised similar concerns about a similar instrument, also made under Part 20A of the Act, the *Telecommunications (Fibre-ready Facilities – Exempt Real Estate Development Projects) Instrument 2021*. The previous Minister made a commitment to the Committee to review that instrument, together with the *Telecommunications (Fibre-Ready Facilities in Real Estate Development Projects and Other Matters) Instrument 2011* (the 2011 Instrument), to explore the need to update the exemptions in place in light of experience and current circumstances, and to consider whether the matters dealt with by the instruments could be incorporated into the Act.

This review was conducted between November 2021 – February 2022. Details can be found on the website of my department at: www.infrastructure.gov.au/have-your-say/review-fibre-ready-facilities-exemptions-under-telecommunications-act-1997.

The discussion paper for the review explicitly referenced the Committee's concerns (p.1) and explicitly sought comment from stakeholders on whether the matters addressed in the instruments should be placed in the Act, or whether there were reasons why they should remain in legislative instruments. The consensus view in the submissions received was that the exemptions are of continuing importance for industry, but, given the ongoing changes in the telecommunications industry, the exemptions should remain in legislative instruments rather than be placed in statute. This would provide greater flexibility to adjust the exemptions in light of changes in circumstances. Furthermore, the level of detail in, and complexity of, the instruments were not appropriate for primary legislation, particularly given the need for flexibility.

The 2011 Instrument was scheduled to sunset in April 2022. At the conclusion of the review, given the ongoing need for the exemptions and flexibility, the Instrument was re-made by the previous Minister with some minor adjustments, subject to the default sunsetting arrangements. As a practical matter, at that stage there would have not been sufficient time available to prepare and pass legislation before sunsetting even if that course was considered preferable.

As part of its ongoing work on the operation of the Part 20A exemptions generally, my department is continuing to look at whether some parts of the exemptions in both instruments could practically be placed in the Act. However, I note the strong views of stakeholders and the potential complexity of drafting such amendments.

Thank you for taking the time to write to me on this matter. I trust this information addresses the Committee's concerns.

Yours sincerely

Michelle Rowland MP

20 / 9 /2022