Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

Ref: MC17-008279

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator John

Thank you for your correspondence concerning the Senate Regulations and Ordinances Committee's Delegated legislation monitor 13 of 2017 request for an explanation or information with respect to the following disallowable legislative instruments:

- ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669 [F2017L01126]
- ASIC Corporations (Amendment) Instrument 2017/6 [F2017L01128]
- ASIC Credit [Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141]
- Auditing Standard ASA 250 Consideration of Laws and Regulations in an Audit of a Financial Report [F2017L01172]

In relation to:

ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669 [F2017L01126]

ASIC Corporations (Amendment) Instrument 2017/6 [F2017L01128]

On 24 August 2017, ASIC made two legislative instruments that together amend 14 of ASIC's legislative instruments to ensure they have a single, consistent definition of an 'approved foreign market'. The instruments also add two new markets (Euronext Brussels and Euronext Lisbon) to the definition of an approved foreign market and update the names of a number of the markets in the definition that have merged or changed name.

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The substantive effect of the instruments is to add two markets to ASIC's list of an approved foreign market. The addition of these two markets is consistent with ASIC's policy in *Regulatory Guide 72: Foreign securities disclosure relief*, which explains at paragraphs 56 to 58 that ASIC may approve additional foreign markets and sets out the criteria ASIC will take into account for that purpose. The other changes made by the instruments are technical in nature. Consequently, ASIC determined that these changes would not benefit from public consultation.

ASIC intends to lodge a replacement explanatory statement outlining its approach to consultation for the legislative instruments.

The Committee also noted that the explanatory statement to the instruments does not cite section 951B of the *Corporations Act 2001* (the Act) as the source of authority for ASIC to modify the application of Part 7.7 of the Act. The reference to Part 7.7 in paragraph 5 of the ASIC Corporations (Definition of Approved Foreign Market) Instrument 2017/669 is an error, as none of the instruments amended by instrument 2017/669 uses section 951B of the Act as a source of power. ASIC will correct this drafting error in a subsequent amending instrument.

ASIC Credit [Flexible Credit Cost Arrangements) Instrument 2017/780 [F2017L01141]

On 7 September 2017 ASIC made a legislative instrument that will, from 1 November 2018, prohibit flex-commissions – a type of commission payable by lenders to car dealers. Lenders will still be able to pay other types of commissions to car dealers.

Under a flex commission arrangement, the commission received by the car dealer increases when they charge a consumer a higher interest rate. The car dealer's discretion to set the rate is opportunistic and not based on the consumer's credit rating or the risk of default. This practice results in consumers paying more.

Prior to making the decision to make this legislative instrument, ASIC consulted broadly with industry bodies on the problems raised by flex commissions; possible regulatory options, including the appropriate penalties; and on the form of the instrument itself.

This included extensive consultation with key industry bodies, such as the car finance sector and loan distribution sector, lenders, car dealers and consumer groups (both in writing and in numerous meetings).

There were two rounds of written submissions across 2016 on the question of whether or not flex commissions should be prohibited. A detailed Regulation Impact Statement was prepared on the basis of these responses.

There was a further round of written submissions in the first half of 2017 in respect of the form of the legislative instrument, and ongoing engagement with a number of affected entities (in particular motor vehicle finance lenders who would be subject to the prohibition and the industry body representing car dealers) during the finalisation of the terms of the instrument.

In these consultations, there was broad (but not unanimous) agreement that: flex commissions caused harm; it was desirable to have a collective and competitively

neutral response to address the 'first mover problem'; and if ASIC did prohibit flex commissions, there was a substitution risk, in that car dealers may seek to recoup lost revenue by charging higher dealer fees.

The penalties included in the instrument reflect this broad agreement by stakeholders. Given that they were explicitly consulted on and agreed to by stakeholders, their inclusion in the instrument was considered appropriate rather than inclusion in the primary legislation.

Additionally, ASIC's use of its modification powers was seen to be the most appropriate mechanism for implementing these changes given their effectiveness in providing a timely response to concerns surrounding flex commissions.

Given the high volume of work currently being undertaken as a result of the Government's extensive legislative agenda in relation to the financial services sector, the use of an ASIC legislative instrument is the most effective way in addressing this issue in the short-term.

ASIC will be monitoring credit licensees regarding the annual percentage rate and the credit fees and charges under their contracts. Should any operational issues arise, ASIC will be in a position to implement any necessary changes to the instrument in the short-term, while any possible legislative change can be considered by the Government.

Auditing Standard ASA 250 Consideration of Laws and Regulations in an Audit of a Financial Report [F2017L01172]

Regarding the Committee's query on "the effect, if any, of having two auditing standards in force on the same subject", the Auditing and Assurance Standards Board (AUASB) has in force multiple principal versions of individual standards, as each one applies to different financial reporting periods in comparison with any other principal version of the standard. The financial reporting period to which a principal standard applies is set out in the *Operative Date* paragraph of an individual standard. This has been the consistent approach across AUASB's suite of standards since becoming legislative instruments in 2006. In relation to ASA 250:

- October 2009 principal version (amended to June 2011): The standard's operative date is for financial reporting periods commencing on or after 1 January 2010. The issue of the May 2017 principal version means that the 2009 principal version applies to financial reporting periods commencing on or after 1 January 2010 but before 1 January 2018;
- May 2017 principal version: The standard's operative date is for financial reporting periods commencing on or after 1 January 2018 with early adoption permitted.

Auditing Standard ASA 100 *Preamble to AUASB Standards* includes the following paragraphs in relation to the operative date of an AUASB Standard:

> *Operative Date*
>
> 25. The operative date stipulates the date from which the AUASB Standard is to be applied. The operative date is stated in relation to the commencement date of the

financial reporting period. The requirements of an AUASB Standard remain in force until:

a. the operative date of any amendment to those requirements;

b. in relevant circumstances, the early adoption of such amendment; or

c. the AUASB Standard is withdrawn by the AUASB.

26. When early adoption of an AUASB Standard is allowed, a statement to that effect is included in the operative date paragraph of the AUASB Standard.

Financial reports may be required to be prepared for prior financial reporting periods. In order facilitate the conduct of an audit for these periods, the earlier principal version of a standard does not cease, but remains applicable to audits to the covered financial reporting periods.

Regarding the Committee's query on "the intention of the government, if any, with regard to repealing the previous version of ASA 250", earlier principal versions of standards are of enduring importance. While not common, in the event that a need arises for an audit in relation to a prior financial reporting period, the audit must be conducted in accordance with the standards that applied at that time. Accordingly, the AUASB did not intend to repeal the previous version of ASA 250, as no repeal is required. The use of the wording "replace" in the Explanatory Statement and in the instrument itself is not intended to be read as a "repeal" of the previous principal version of the standard.

I hope this information will be of assistance to you.

Yours sincerely

Kelly O'Dwyer

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the letter from the Senate Standing Committee on Regulations and Ordinances (the Committee) dated 19 October 2017 seeking my advice in relation to the *Charter of the United Nations (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No. 2)* and the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017.*

As the Committee notes, a statement of compatibility with human rights (SCHR) for each of these two instruments has been published on the Federal Register of Legislation. However, due to the method of lodgement of the two instruments and their associated documents with the Office of Parliamentary Counsel, each SCHR was treated as a separate document from the relevant instrument's explanatory statement. Accordingly, the explanatory statements that were tabled in Parliament did not include the corresponding SCHRs.

I have instructed the Department of Foreign Affairs and Trade to lodge an explanatory statement containing the SCHR for each of these two instruments with the Office of Parliamentary Counsel. Copies of these two replacement explanatory statements containing SCHRs are enclosed with this letter for the Committee's perusal as requested.

Yours sincerely

Julie Bishop

13 NOV 2017

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Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2)

The *Autonomous Sanctions Regulations 2011* (the Regulations) commenced on 15 December 2011. The purpose of the Regulations is to facilitate the conduct of Australia's relations with certain countries, and with specific entities or persons outside Australia, through the imposition of autonomous sanctions in relation to those countries, or targeting those entities or persons.

Paragraph 6 (1) (a) of the Regulations authorises the Minister for Foreign Affairs (the Minister), by legislative instrument, to designate a person or entity on the basis that it is mentioned in an item of the table in regulation 6, including on the basis that the Minister is satisfied that the person or entity is assisting or has assisted in the violation or evasion by the DPRK of Resolution 825, 1540, 1695, 1718, 1874, 1887, 2087, 2094, 2270 or 2321 of the United Nations Security Council, or of a subsequent resolution relevant to one of the aforementioned resolutions. The purpose of such a designation is to subject the designated person or entity to targeted financial sanctions. The designated person or entity becomes the object of the prohibition in regulation 14 (which prohibits directly or indirectly making an asset available to, or for the benefit of, a designated person or entity, other than as authorised by a permit granted under regulation 18).

An asset owned or controlled by a designated person or entity is a "controlled asset", subject to the prohibition in regulation 15 (which requires a person who holds a controlled asset to freeze that asset, by prohibiting that person from either using or dealing with that asset, or allowing it to be used or dealt with, or facilitating the use of or dealing with it, other than as authorised by a permit granted under regulation 18).

Each person listed in Schedule 1 of the *Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2)* (the Amendment List), and each entity listed in Schedule 2 of the Amendment List, is designated by the Minister for the purposes of paragraph 6 (1) (a) of the Regulations on the basis that the person or entity meets the criterion mentioned in Item 1(b) of the table in regulation 6; that is, they are a person or entity that the Minister is satisfied is assisting or has assisted in the violation or evasion by the DPRK of Resolution 825, 1540, 1695, 1718, 1874, 1887, 2087, 2094, 2270 or 2321 of the United Nations Security Council, or of a subsequent resolution relevant to one of the aforementioned resolutions.

Each person listed in Schedule 1 of the Amendment List is also declared by the Minister for the purposes of paragraph 6 (1) (b) of the Regulations, on the basis that he or she meets the criterion mentioned in Item 1(b) of the table in regulation 6; that is, he or she is a person that the Minister is satisfied is assisting or has assisted in the

violation or evasion by the DPRK of Resolution 825, 1540, 1695, 1718, 1874, 1887, 2087, 2094, 2270 or 2321 of the United Nations Security Council, or of a subsequent resolution relevant to one of the aforementioned resolutions. Declared persons are prevented from travelling to, entering or remaining in Australia.

The imposition of sanctions, including through designations and declarations, is designed to increase pressure on the DPRK to comply with its non-proliferation obligations consistent with United Nations Security Council resolutions, and to engage in serious negotiations on its nuclear and missile programs. The new sanctions comprise financial and travel restrictions on the following three persons and seven entities that the Minister for Foreign Affairs is satisfied are assisting, or have assisted, in the violation or evasion of United Nations Security Council Resolution 825, 1540, 1695, 1718, 1874, 1887, 2087, 2094, 2270 or 2321, or of subsequent resolutions relevant to one of the aforementioned resolutions:

- Rim Yong-hwan
- Kim Yong Su
- Kim Yong-chol

- Global Communications Company
- Sonbak Trading Corporation
- Eko Development and Investment Company
- Mirae Shipping Company (alias for Ocean Maritime Management Company Ltd)
- Saigon United Co Ltd
- Sunrise Trading and Logistics Co Ltd
- Marine Transport Office

The legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations and the Amendment List are part, has been the subject of extensive consultation with governmental and non-governmental stakeholders since May 2010.

The Department of Foreign Affairs and Trade (DFAT) conducts ongoing public consultations, including with the Australian financial servces sector and broader business community, in relation to these types of measures. Relevant Commonwealth Government departments were consulted prior to and during the drafting of this legislative instrument.

In order to meet the policy objective of prohibiting unauthorised financial transactions involving the persons specified in the Amendment List, the Department is satisfied that wider consultations beyond those it has already undertaken would be inappropriate (sub-sections 17 (1) and (2) of the *Legislation Act 2003*).

Statement of Compatability with Human Rights

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

Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2)

The *Autonomous Sanctions (Designated Persons and Entities – Democratic People's Republic of Korea) Amendment List 2017 (No 2)* (the Amendment List) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

A person subject to designation or declaration under regulation 6 of the Regulations may apply to the Minister for the revocation of those decisions (regulation 11 of the Regulations). Decisions under both regulations 6 and 11 of the Regulations are judicially reviewable.

The targeted financial sanctions imposed on the persons and entities designated under paragraph 6 (1) (a) of the Regulations do not affect the title to any asset owned or controlled by the designated person or entity. A designated person or entity may apply for a permit to draw on his or her frozen assets, or receive assets from other sources, to meet basic expenses, including for foodstuffs, rent or mortgage, medicines or medical treatment, taxes, insurance premiums, public utility charges, reasonable professional fees, reimbursement of expenses associated with the provision of legal services, or fees or service charges that are in accordance with a law in force in Australia for the routine holding or maintenance of frozen assets (regulations 18 and 20 of the Regulations).

Similarly, a designated person or entity may apply for a permit to draw on frozen assets they own or control to satisfy any pre-existing judicial, administrative or arbitral lien or judgement awarded to another (non-designated) person or entity, as well as to make payments required under contracts, agreements or obligations made before the date on which those assets became frozen.

Regulation 19 authorises the Minister to waive the operation of a declaration under regulation 6 so as to allow the person to travel to, enter or remain in Australia, either on the grounds that it would be in the national interest or on humanitarian grounds.

The Department of Foreign Affairs and Trade (DFAT) conducts ongoing public consultations, including with the Australian financial services sector and broader business community, in relation to these types of measures. Relevant Commonwealth Government departments were consulted prior to and during the drafting of this legislative instrument.

Explanatory Statement

Issued by the Authority of the Minister for Foreign Affairs

Autonomous Sanctions Regulations 2011

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017

Section 28 of the *Autonomous Sanctions Act 2011* (the Act) provides that the Governor-General may make regulations 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.

The *Autonomous Sanctions Regulations 2011* (the Regulations) facilitate the conduct of Australia's relations with Syria, and with specific persons or entities outside Australia, through the imposition of autonomous sanctions in relation to Syria, and through targeting those persons or entities.

The Regulations permit the Minister for Foreign Affairs (the Minister) to designate a person or entity for targeted financial sanctions and/or declare a person for the purposes of a travel ban, if they satisfy a range of criteria, as set out in regulation 6.

The purpose of a designation is to subject the designated person or entity to targeted financial sanctions. There are two types of targeted financial sanctions under the Regulations:

- the designated person or entity becomes the object of the prohibition in regulation 14 (which prohibits directly or indirectly making an asset available to, or for the benefit of, a designated person or entity, other than as authorised by a permit granted under regulation 18); and/or
- an asset owned or controlled by a designated person or entity is a "controlled asset", subject to the prohibition in regulation 15 (which requires a person who holds a controlled asset to freeze that asset, by prohibiting that person from either using or dealing with that asset, or allowing it to be used or dealt with, or facilitating the use of or dealing with it, other than as authorised by a permit granted under regulation 18).

The purpose of a declaration is to prevent a person from travelling to, entering or remaining in Australia.

Each person listed in Schedule 1 of the *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017* (the 2017 List) is designated by the Minister pursuant to paragraph 6(1)(a) of the Regulations, and declared by the Minister pursuant to paragraph 6(1)(b) of the Regulations, on the basis that the person meets the criteria mentioned in Item 7 of the table in subregulation 6(1); that is, they are a person that the Minister is satisfied is:

- providing support to the Syrian regime; and/or
- responsible for human rights abuses in Syria, including (relevantly) the use of violence against civilians.

Each person listed in Schedule 2 of the 2017 List is designated by the Minister pursuant to paragraph 6(1)(a) of the Regulations, and designated by the Minister pursuant to paragraph 6(2)(a) of the Regulations. Each person listed in Schedule 2 of the 2017 List is also declared by the Minister pursuant to paragraph 6(1)(b) of the Regulations, and declared by the Minister pursuant to 6(2)(b) of the Regulations. This is on the basis that the person meets the criteria mentioned in Item 7 of the table in subregulation 6(1), and comes within subregulation 6(2); that is, they are a person that the Minister is satisfied is:

- providing support to the Syrian regime; and
- contributing to the proliferation of weapons of mass destruction.

Each entity listed in Schedule 3 of the 2017 List is designated by the Minister pursuant to paragraph 6(1)(a) of the Regulations on the basis that the entity meets the criterion mentioned in paragraph (a) of Item 7 of the table in subregulation 6(1); that is, it is an entity that the Minister is satisfied is:

- providing support to the Syrian regime.

Each entity listed in Schedule 4 of the 2017 List is designated by the Minister pursuant to paragraph 6(1)(a) of the Regulations, and designated by the Minister pursuant to paragraph 6(2)(a) of the Regulations. This is on the basis that the entity meets the criteria mentioned in Item 7 of the table in subregulation 6(1), and comes within subregulation 6(2); that is, it is an entity that the Minister is satisfied is:

- providing support to the Syrian regime; and
- contributing to the proliferation of weapons of mass destruction.

The new sanctions comprise financial and travel restrictions on the following 40 persons and financial restrictions on the following 14 entities.

<u>Persons</u>

- Ahmad Ballul
- Saji' Darwish
- Muhammed Ibrahim
- Badi' Mu'alla
- Suhayl Hasan Al-Hasan
- Muhammad Nafi Bilal
- Muhammad Mahmud Mahalla
- Tahir Hamid Khalil
- Jawdat Salbi Mawas
- Yasin Ahmad Dahi
- Ali Wanus
- Samir Da’bul
- Zuhayr Haydar
- Habib Hawrani
- Firas Ahmad
- Salah Habib
- Iyad Mohammad Esam Mahrous
- Ghassan Abbas
- Bayan Bitar
- Amr Armanzi

- Aziz Allouch
- Muhammed Bin-Muhammed Faris Quwaydir
- Hala Sirhan
- Ayman Ahmad
- Yusuf Al-Hatum
- Mashhur Al-Husayn
- Haytham Asmar
- Lu-ay Da-ud
- Rajab Dayyub
- Tha'ir Dayyub
- Ma'n Ghanim
- Farhan Mahfud
- Yusuf Ma'tuq
- Misbah Mirdash
- Zuhayr Rabah
- Iyad Salim
- Muzhir Sharba
- Muhammad Khayr Sukhaytah
- Akram Sulayman
- Muhammad Hisham Fu'ad Yusuf

Entities

- Syriss Logistics and Services
- Mahrous Group
- Mahrous Trading FZE
- Higher Institute of Applied Science and Technology
- Expert Partners
- Organisation for Technological Industries
- National Standards and Calibration Laboratory
- Megatrade
- Yona Star International
- Sigma Tech
- Technolab
- Syrian Company for Information Technology
- Shadi for Cars Trading
- Denise Company

The legal framework for the imposition of autonomous sanctions by Australia, of which the Regulations and the 2017 List are part, was the subject of extensive consultation with governmental and non-governmental stakeholders.

In order to meet the policy objective of prohibiting unauthorised financial transactions involving the persons specified in the 2017 List, the Department is satisfied that wider consultations beyond those it has already undertaken would be inappropriate (subsections 17(1) and (2) of the *Legislation Act 2003*).

The Office of Best Practice Regulation (OBPR) has advised that a Regulation Impact Statement is not required (OBPR reference: 22550).

Statement of Compatibility with Human Rights

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

Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017

The *Autonomous Sanctions (Designated Persons and Entities and Declared Persons – Syria) List 2017* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

A person subject to designation or declaration, and an entity subject to a designation, under regulation 6 of the Regulations may apply to the Minister for the revocation of those decisions (regulation 11 of the Regulations). Decisions under both regulations 6 and 11 of the Regulations are judicially reviewable.

The targeted financial sanctions imposed on the persons and entities designated under regulation 6 of the Regulations do not affect the title to any asset owned or controlled by the designated person or entity. A designated person may apply for a permit to draw on frozen assets, or receive assets from other sources, to meet basic expenses, including for foodstuffs, rent or mortgage, medicines or medical treatment, taxes, insurance premiums, public utility charges, reasonable professional fees, reimbursement of expenses associated with the provision of legal services, or fees or service charges that are in accordance with a law in force in Australia for the routine holding or maintenance of frozen assets (regulations 18 and 20 of the Regulations).

Similarly, a designated person or entity may apply for a permit to draw on frozen assets they own or control to satisfy any pre-existing judicial, administrative or arbitral lien or judgement awarded to another (non-designated) person or entity, as well as to make payments required under contracts, agreements or obligations made before the date on which those assets became frozen.

Regulation 19 authorises the Minister to waive the operation of a declaration under regulation 6 so as to allow the person to travel to, enter or remain in Australia, either on the grounds that it would be in the national interest or on humanitarian grounds.

The Hon Darren Chester MP
Minister for Infrastructure and Transport
Deputy Leader of the House
Member for Gippsland

26 OCT 2017

PDR ID: MC17-004984

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1. 111
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Senator Williams

Thank you for your letter of 19 October 2017 regarding the Competition and Consumer (Inland Terminals) Declaration 2017 [F2017L01077].

I have sought advice from the Department of Infrastructure and Regional Development in relation to the Committee's request for information on the nature of the consultation undertaken on the instrument and for the Explanatory Statement to be updated.

The Department has advised that stakeholders were provided with a copy of the proposed new instrument, along with an analysis of the proposed changes, prior to finalisation of the instrument. The stakeholders also had the opportunity to provide feedback to the Department on the proposed new instrument. The Department has further advised that the Explanatory Statement will be replaced with a new one that clarifies how the consultation occurred.

Thank you for raising this matter with me.

Yours sincerely

DARREN CHESTER

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MC16-000129

Chair
Senate Regulations and Ordinances Committee
Suite S1.111
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Canberra ACT 2600

Dear Chair

Standing Committee on Regulations and Ordinances –
Remuneration Tribunal Determination 2017/15

Thank you for your letter of 14 September 2017 concerning Remuneration Tribunal Determination 2017/15 and its Explanatory Statement.

I am advised that the Remuneration Tribunal has been requested to issue an amending determination at its next formal meeting on 26 October 2017 that will delete the reference to "(or its successor)" in Clause 3.11 of *Remuneration Tribunal Determination 2017/15: Official Travel by Office Holders*.

The attached revised Explanatory Statement has been amended consistent with the Committee's Guideline on Incorporation. In particular I draw your attention to paragraphs 6-11 of the Explanatory Statement. The Tribunal's secretariat will arrange for its registration on the Federal Register of Legislative Instruments.

Yours sincerely

Senator the Hon Michaelia Cash
20/ 10 /2017

REMUNERATION TRIBUNAL

Explanatory Statement: Determination 2017/15

Official Travel by Office Holders

1. The *Remuneration Tribunal Act 1973* (the Act) establishes the Remuneration Tribunal (the Tribunal) as an independent statutory authority responsible for reporting on and determining the remuneration, allowances and entitlements of key Commonwealth office holders. These include members of parliament, Judges of Federal Courts, most full-time and part-time holders of public offices including Specified Statutory Offices and Principal Executive Offices.

Consultation

2. Section 11 of the Act advises that in the performance of its functions the Tribunal:

   - may inform itself in such manner as it thinks fit;
   - may receive written or oral statements;
   - is not required to conduct any proceeding in a formal manner; and
   - is not bound by the rules of evidence.

3. The Tribunal normally receives submissions on remuneration from a portfolio minister, or a secretary, program manager or employing body (in respect of a Principal Executive Office) with responsibility for the relevant office(s). The Tribunal will normally seek the views of the relevant Portfolio Minister prior to determining remuneration for an office.

4. The Tribunal may reach a decision based on the information provided in the submission and other publicly available information such as portfolio budget statements, annual reports, corporate plans, legislation and media releases. On occasion it may wish to meet with relevant parties or seek further information from the relevant minister or person making the submission.

5. Amongst other relevant matters in deliberating on appropriate remuneration for an office the Tribunal informs itself on:

   - the main functions, responsibilities and accountabilities of the office;
   - the organisational structure, budget and workforce;
   - the requisite characteristics, skills or qualifications required of the office holder(s); and
   - the remuneration of similar, comparator, offices within its jurisdiction.

Review of Travelling Allowance

6. There was no consultation on this matter as it is the Tribunal's practice to review, each year, the travelling allowance rates available to office holders for which it determines remuneration. In conducting this review, making this Determination and adjusting travelling allowance rates the Tribunal has taken account of the Australian Taxation Office's (ATO) Determination TD 2017/19: *Income tax: what are the reasonable travel and overtime meal allowance expense amounts for the 2017-18 income year?*

7. Amongst other things the ATO Determination sets out the amounts that the ATO Commissioner considers are reasonable for the substantiation exception in Subdivision 900-B of the *Income Tax Assessment Act 1997* for the 2017-18 income year in relation to claims made by employees for domestic travel expenses and overseas travel expenses.

8. Taxation Determination TD 2017/19 (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

9. In conducting its travel review the Remuneration Tribunal exercises its powers under sub-sections 5(2A), 7(3) and 7(4) of the *Remuneration Tribunal Act 1973*. In making Remuneration Tribunal Determination 2017/15 the Tribunal decided that the arrangements set out at Table 9 (Table of countries) of TD 2017/19 are appropriate for office holders in its jurisdiction to cover meal and incidental expenses incurred while travelling overseas. Rather than replicate the detailed tables and related allowance rates in its determination the Tribunal has incorporated these by reference to TD2017/19. The Tribunal has aligned the cost groups contained in TD2017/19 to the travel tiers that it sets from time to time for office holders.

10. Taxation Determination TD 2017/19 is available online for free at http://law.ato.gov.au/atolaw/view.htm?docid=%22TXD%2FTD201719%2FNAT%2FATO%2F00001%22.

11. Remuneration Tribunal Determination 2017/15 includes substantively similar provisions to the previous Determination with minor adjustments to most travelling allowance rates. Changes to travelling allowance rates are consistent with the ATO Determination.

Retrospectivity

12. Any retrospective application of this Determination is in accordance with subsection 12(2) of the *Legislation Act 2003* as it does not affect the rights of a person (other than the Commonwealth or an authority of the Commonwealth) to that person's disadvantage, nor does it impose any liability on such a person.

The power to repeal, rescind and revoke, amend and vary

13. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Details of the determination are as follows:

PART 1 - GENERAL

14. Clauses 1.1 to 1.3 of Part 1 specify the authority for, and the date of effect of, the Determination and notes that it supersedes and revokes the previous Principal Determination 2016/07 – Official Travel by Office Holders.

15. Clause 1.4 notes that the travel tier relevant to individual office holders is determined in the Determinations that set out remuneration for those office holders. It also sets out the interaction between the provisions of this Determination and other Determinations that may contain specific provisions for an office or group of offices. In such a case, the specific provision in another Determination will apply to the extent of any inconsistency.

16. Clause 1.5 outlines the offices to which the Determination applies.

17. Clause 1.6 sets out the definitions of certain words and phrases used in the Determination.

18. Clause 1.7 sets out the general principles that apply to travel on official business, including a requirement for office holders to consider any travel-related administrative guidelines put in place by their agency.

19. The provisions in Part 1 are unchanged from those contained in Part 1 of the superseded determination.

PART 2 – TRAVEL ON OFFICIAL BUSINESS

20. Clauses 2.1 to 2.4 of Part 2 set out provisions relating to class of travel, including travel by the office holder when accompanying a person travelling at a higher class of travel or when accompanied by a spouse/partner.

21. Clause 2.5 encourages office holders to use their agency's travel-related preferred provider arrangements where these exist.

22. Clause 2.6 provides that frequent flyer points accrued at the Commonwealth's expense should not be used for private purposes.

23. The provisions in Part 2 are unchanged from those contained in Part 2 of the superseded determination.

PART 3 – TRAVEL EXPENSES

24. Part 3 sets out general conditions applying to the payment of travelling expenses, with Clauses 3.5 to 3.9 focusing particularly on domestic travel and Clauses 3.10 to 3.11 on overseas travel.

25. Clauses 3.5 to 3.9 refer to Schedule A of the Determination, which sets out the new travelling allowance rates payable for travel to various Australian cities, towns and other centres, for each of the three travel tiers, with effect on and from 27 August 2017.

26. With the exception of the rate changes referenced above, the provisions in Part 3 are unchanged from those contained in Part 3 of the superseded determination.

PART 4 – OFFICIAL TRAVEL BY MOTOR VEHICLE

27. Part 4 provides that an office holder may choose to hire a vehicle or to use his or her own vehicle for the purposes of travel on official business where it is demonstrably in the interest of the Commonwealth to do so. In these cases, the Commonwealth will meet the cost of the rental vehicle or pay the per kilometre rate of motor vehicle allowance set out in Table 4A of the Determination.

28. The rates specified and the other provisions in Part 4 are unchanged from those contained in Part 4 of the previous amended Determination.

Authority: Subsections 5(2A), 7(3) and 7(4) of the Remuneration Tribunal Act 1973

Statement of Compatibility with Human Rights

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

Remuneration Tribunal Determination 2017/15

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

Overview of the Legislative Instrument

This Legislative Instrument, or Determination, supersedes and revokes the previous Principal Determination 2016/07 - *Official Travel by Office Holders*.

Its major purpose is to adjust the travelling allowance amounts for offices within the Remuneration Tribunal's jurisdiction, including judicial offices. In doing this, it closely reflects the amounts determined by the Australian Taxation Office as reasonable travel expense amounts in Taxation Determination TD 2017/19: *Income tax: what are the reasonable travel and overtime meal allowance expense amounts for the 2017-18 income year?*

The Determination includes substantively similar provisions to the previous Principal Determination, as amended, with minor adjustments to most allowance rates.

The instrument maintains the principle of just and favourable conditions of work.

Human rights implications

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

Conclusion

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

Remuneration Tribunal

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

REF: MS17-017626

Senator John Williams
Chair
Senate Standing Committee
on Regulations and Ordinances
Parliament House
CANBERRA ACT 2600

Dear Senator Williams

I refer to the Committee Secretary's letter dated 19 October 2017 sent to my office seeking further information about the item for the Prime Minister's Walk for Life Challenge in the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 5) Regulations 2017*.

The attached response has been provided by the Minister for Health, the Hon Greg Hunt MP, who has portfolio responsibility for the items in this instrument.

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

I have copied this letter to the Minister for Health. Thank you for bringing the Committee's comments to the Government's attention.

Kind regards

Mathias Cormann
Minister for Finance

7 November 2017

Response Provided by the Minister for Health

Response to the Committee's question about item 242 inserted into Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* by way of the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 5) Regulations 2017.*

External affairs power

Item 242 references the external affairs power (section 51(xxix) of the Constitution). The external affairs power supports legislation which implements a treaty to which Australia is a party. In particular, the power supports Commonwealth legislation:

- to implement the particular terms of a relevant treaty
- providing for the partial implementation of a treaty.

Many treaties to which Australia is a party leave it to the individual parties to choose the precise measures they will take to fulfil their obligations.

Item 242 relates to a measure being taken to fulfil Australia's obligations under the *International Covenant on Economic, Social and Cultural Rights* [1976] ATS 5 (ICESCR) and the *Convention on the Rights of the Child* [1991] ATS 4 (CRC).

Article 12(1) of the ICESCR recognises the 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. Pursuant to Article 2(1), Australia relevantly undertakes to 'take steps… to the maximum of its available resources, with a view to achieving progressively the full realization' of this right by all appropriate means. Article 12(2) provides a non-exhaustive list of 'steps' to be taken by the State Parties to achieve the full realisation of the right to health recognised in Article 12(1).

The particular steps listed in Article 12(2) define with a degree of specificity that which the State Parties to the ICESCR are obliged to do with respect to the right to health recognised in Article 12(1). One category of steps listed in Article 12(2) is 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' (Art 12(2)(c)). The Prime Minister's Walk for Life Challenge is directed at preventing, treating or controlling diseases.

Article 24(1) of the CRC recognises the 'right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'. Art 28(1) provides 'States Parties recognize the right of the child to education'. Pursuant to Article 4, Australia is required to 'undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention'.

The particular steps listed in Article 24(2) define with a degree of specificity that which the State Parties to the CRC are obliged to do with respect to the right to health recognised in Article 24(1). The steps listed in Article 24(2) include '[ensuring] that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition' (Article 24(2)(e)) and '[developing] preventive health care' (Article 24(2)(f)).

The Prime Minister's Walk for Life Challenge is directed in part to ensuring that parents and children are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition.

The objectives listed in Article 29(1) define with a degree of specificity that which the State Parties to the CRC agree to do with respect to the right to education recognised in Article 28(1). The steps listed in Article 29(1) include ensuring that education is directed to 'the development of the child's … mental and physical ability to their fullest potential' (Article 29(1)(a)). The Prime Minister's Walk for Life Challenge is directed in part to ensuring that education is directed to the development of the child's mental and physical ability.

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-018079

Senator John Williams
Chair
Standing Committee on Senate Regulations and Ordinances
Room S1.111
Parliament House
CANBERRA ACT 2600

10 NOV 2017

Dear Chair

Healthcare Identifiers Amendment (Healthcare Identifiers of Healthcare Providers) Regulations 2017

Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017

Sections 20 and 25D of the *Healthcare Identifiers Act 2010* (HI Act) enable regulations to authorise the collection, use, disclosure or adoption of healthcare identifiers for health-related purposes, and were included in the HI Act in 2015 as a result of a recommendation made by the *Healthcare Identifiers Act and Service Review, Final Report – June 2013* (the HI Review). The HI Review recognised a number of uses of healthcare identifiers that were not anticipated by the HI Act but would have the potential to deliver significant improvements in healthcare, and recommended that the Australian Health Ministers' Advisory Council (AHMAC) consider amending the HI Act to provide a regulation-making power to prescribe additional organisations that could handle healthcare identifiers.

AHMAC, and subsequently Council of Australian Governments (COAG) Health Council in August 2015, agreed to amend the HI Act to establish this mechanism. At that time Health Ministers also agreed that AHMAC agreement would be sought on all legislative instruments under the HI Act, with escalation to Health Ministers as appropriate. This office and my Department continue to honour this commitment.

The mechanism to make these regulations enables the Government to provide new authorisations more quickly than would be possible if amendments to the Act were needed each time a new entity is identified, providing more responsiveness for supporting entities that provide health-related support to consumers.

The *Healthcare Identifiers Amendment (Healthcare Identifiers of Healthcare Providers) Regulations 2017* (the Amendment Regulations) reinstate, in part, authorisations that were inadvertently removed as part of the 2015 changes. The absence of these authorisations began having adverse effects on the effectiveness of healthcare identifiers – for example, primary health networks could not collect healthcare providers' healthcare identifiers as part of managing healthcare delivery in their region, which is important in enabling primary health networks to work together to facilitate and evaluate the delivery of healthcare. It also created a barrier to the delivery of certain types of mobile apps that could connect to the My Health Record system – apps that would otherwise help individuals to manage their health information.

The Amendment Regulations were made as an interim measure to provide these much needed authorisations until they could be reinstated in their entirety through amendments to the HI Act. A review of the HI Act is scheduled to begin in coming months for delivery by November 2018 and it is likely to recommend amendments to the HI Act. It is intended that the removed authorisations be reinstated as part of those amendments as soon as practicable after the review is delivered.

The *Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017* implements the Government's response to the recommendations of the Medicare Benefits Schedule (MBS) Review Taskforce (the Taskforce) in relation to obstetrics services. These recommendations were subject to consultation and public feedback prior to the finalisation of the Taskforce's recommendations, with most respondents supporting the recommendations.

I note the Committee's request for information around the nature of the mental health assessment required to be conducted for amended antenatal items 16590 and 16591 and new postnatal item 16407. The Government does not intend to prescribe the method by which practitioners undertake mental health assessments of their patients, as this should be a matter of clinical judgement based on the individual needs of the patient. However, it is recommended that when conducting mental health assessment screening practitioners have regard to the appropriate and current Australian Clinical Practice guidelines.

Alcohol or drug misuse are significant risk factors that can negatively affect both the mental health of the patient and the wellbeing of infants. As part of an antenatal (16590 and 16591) or postnatal (16407) service, it is expected that a medical practitioner be required to enquire about the mental wellbeing of the patient and undertake a more comprehensive assessment where agreed to by the patient. This would include a discussion about factors that pose a significant risk to mental health, such as drug and alcohol use and domestic violence. This would then enable monitoring or referral for appropriate assessment, support and treatment, and facilitate education about the inherent risks of drug and alcohol misuse in pregnancy.

It is not intended that the screening for drug and alcohol use would require diagnostic testing of the patient. It is also not intended that a patient would be ineligible for Medicare benefit if the patient declines to receive a comprehensive mental health assessment. In that scenario, a Medicare benefit would still be payable providing the medical practitioner had enquired about the patient's mental wellbeing. This is outlined in the explanatory notes that are available on www.mbsonline.gov.au to assist practitioners when seeking information and guidance around the billing of items under Medicare. A copy of this note is attached.

I acknowledge that the explanatory statement for this instrument is not clear with regards to consent. My Department will look to correct this in the explanatory statement when the *Health Insurance (General Medical Services Table) Regulations* are remade in mid-2018.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl 1 – MBS explanatory note

Technical requirements

In order to fulfill the item descriptor there must be a visual and audio link between the patient and the remote practitioner. If the remote practitioner is unable to establish both a video and audio link with the patient, a MBS rebate for a telehealth attendance is not payable.

Individual clinicians must be confident that the technology used is able to satisfy the item descriptor and that software and hardware used to deliver a videoconference meets the applicable laws for security and privacy.

TN.4.13 Mental Health Assessments for Obstetric Patients (Items 16590, 16591, 16407)

Items for the planning and management of pregnancy (16590 and 16591) and for a postnatal attendance between 4 and 8 weeks after birth (16407), include a mental health assessment of the patient, including screening for drug and alcohol use and domestic violence, to be performed by the clinician or another suitably qualified health professional on behalf of the clinician. A mental health assessment must be offered to each patient, however, if the patient chooses not to undertake the assessment, this does not preclude a rebate being payable for these items.

It is recommended that mental health assessments associated with items 16590, 16591, and 16407 be conducted in accordance with the National Health and Medical Research Council (NHMRC) endorsed guideline: *Mental Health Care in the Perinatal Period: Australian Clinical Practice Guideline* – October 2017, Centre for Perinatal Excellence.

Results of the mental health assessment must be recorded in the patient's medical record. A record of a patient's decision not to undergo a mental health assessment must be recorded in the patient's clinical notes.

TN.4.14 Extended Medicare Safety Net (EMSN) for Obstetric Services (Items 16531, 16533 and 16534)

The Extended Medicare Safety Net (EMSN) benefit is capped at 65% of the schedule fee for obstetric items 16531, 16533, and 16534. However, as these items are for in-hospital services only, the EMSN does not apply

TN.6.1 Pre-anaesthesia Consultations by an Anaesthetist - (Items 17610 to 17625)

Pre-anaesthesia consultations are covered by items in the range 17610 - 17625.

Pre-anaesthesia consultations comprise 4 time-based items utilising 15 minute increments up to and exceeding 45 minutes, in conjunction with content-based descriptors. A pre-anaesthesia consultation will attract benefits under the appropriate items based on **BOTH** the duration of the consultation **AND** the complexity of the consultation in accordance with the requirements outlined in the content-based item descriptions.

Whether or not the proposed procedure proceeds, the pre-anaesthetic attendance will attract benefits under the appropriate consultation item in the range 17610 - 17625, as determined by the duration and content of the consultation.

The following provides further guidance on utilisation of the appropriate items in common clinical situations:

(i) Item 17610 (15 mins or less) - a pre-anaesthesia consultation of a straightforward nature occurring prior to investigative procedures and other routine surgery. This item covers routine pre-anaesthesia consultation services including the taking of a brief history, a limited examination of the patient including the cardio-respiratory system and brief discussion of an anaesthesia plan with the patient.

(ii) Item 17615 (16-30 mins) - a pre-anaesthesia consultation of between 16 to 30 minutes duration AND of significantly greater complexity than that required under item 17610. To qualify for benefits patients will be undergoing advanced surgery or will have complex medical problems. The consultation will involve a more extensive examination of the patient, for example: the cardio-respiratory system, the upper airway, anatomy relevant to regional anaesthesia and invasive monitoring. An anaesthesia plan of management should be formulated, of which there should be a written record included in the patient notes.

ATTORNEY-GENERAL

9 NOV 2017

CANBERRA

MS17-002492

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
Parliament House
CANBERRA ACT 2600

Dear Chair John

I thank the Senate Standing Committee on Regulations and Ordinances (the Committee) for its letter of 19 October 2017 requesting further information in relation to the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017* (the 2017 Exemptions Regulations).

The Committee has requested information about scrutiny issues identified in relation to the 2017 Exemptions Regulations, which are detailed in the Committee's *Delegated legislation monitor 13 of 2017*. In particular, the Committee has requested answers to the following questions:

- *why it is appropriate to exempt significant pieces of delegated legislation, including the Corporations Regulations 2001, from sunsetting through delegated rather than primary legislation, particularly having regard to the terms of subsection 54(1) of the Legislation Act 2003; and*
- *why it is appropriate to remove Parliament's effective periodic oversight of each of the 19 instruments exempted by these regulations, and how Parliament will retain regular and effective oversight of those instruments.*

Exempting significant instruments in delegated legislation

I acknowledge that the Committee, in considering whether the instrument contains matter more appropriate for parliamentary enactment, remains concerned about the use of delegated legislative power to exempt substantial pieces of delegated legislation from the sunsetting framework.

As outlined in my letter to the Committee of 4 October 2017 in relation to the *Legislation (Exemptions and Other Matters)Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016* (the 2016 Exemptions Regulations), it is critical that the sunsetting regime remain flexible, in order to ensure that it does not undermine the proper functioning of government. For this reason, the *Legislation Act* 2003 (the Legislation Act) enables exemptions by legislative instrument, and the *Legislation (Exemptions and Other Matters) Regulation 2015* (the 2015 Exemptions Regulation) provides a list of all specific exemptions from sunsetting. The combined effect of these provisions is to ensure that all exemptions are

identified in a clear and transparent manner, and that all new exemptions are considered in light of the express purpose of Part 4 of Chapter 3 of the Legislation Act and are granted on consistent grounds.

Accordingly, when deciding whether or not to grant an exemption from sunsetting, I give careful consideration to whether at least one of the following five longstanding policy grounds is made out in relation to the relevant instrument:

- the rule-maker has been given a statutory role independent of the Government or is operating in competition with the private sector;
- the instrument is designed to be enduring and not subject to regular review;
- commercial certainty would be undermined by sunsetting;
- the instrument is part of an intergovernmental scheme; or
- the instrument is subject to a more rigorous statutory review process.

I am satisfied that at least one ground has been made out in relation to the instruments included in the 2017 Exemptions Regulations.

The *Corporations Regulations 2001*

In respect of the proposed exemption of the *Corporations Regulations 2001* (the Corporations Regulations) more specifically, I acknowledge the Committee's observation that subsection 54(1) of the Legislation Act exempts legislative instruments from sunsetting if the enabling Act facilitates an intergovernmental scheme involving the Commonwealth and one or more States, except if the relevant Act is the *Corporations Act 2001* (the Corporations Act). The effect of subsection 54(1) of the Legislation Act is that instruments made under the Corporations Act are not automatically exempted from the sunsetting framework by reason only that the instrument facilitates the establishment or operation of an intergovernmental scheme.

However, I do not consider that this prevents an instrument made under the Corporations Act from otherwise being exempted from sunsetting through delegated legislation. This is particularly so as there is no suggestion that Parliament intended that subsection 54(1) should override the operation of paragraph 54(2)(b). As such, while the Corporations Regulations are not automatically exempt from sunsetting under subsection 54(1), I consider that Parliament's intention was that they could nonetheless be exempted by other means, including through delegated legislation.

The Corporations Regulations do not merely form part of an 'intergovernmental scheme involving the Commonwealth and one or more States'. They are integral to the Corporations Agreement 2002 between the Australian Government and State and Northern Territory Ministers on corporate regulation in Australia (the Agreement) and, ordinarily, amendments to the Corporations Regulations must be approved by the Legislative and Governance Forum for Corporations. Allowing the Corporations Regulations to sunset would bypass this requirement, contrary to the Commonwealth's obligations under the Agreement.

Further, allowing the Corporations Regulations to sunset would significantly undermine commercial certainty, as the Agreement is intended to be an enduring arrangement and is

integral to long-term decision making by the relevant stakeholders. These stakeholders include corporations, investors, banks and other parties.

I acknowledge the Committee's comment that problems or uncertainties caused by sunsetting could be avoided by reviewing and remaking the relevant instrument prior to its scheduled repeal. However, I consider that this approach is not practicable (or, indeed, even necessarily desirable) in respect of many of the delegated legislative instruments included in the 2017 Exemptions Regulations given their scope and complexity. This is particularly so in the case of the Corporations Regulations.

I also note that the Corporations Regulations have been subject to regular amendment since they were made, providing an opportunity for parliamentary oversight. However, remaking the Corporations Regulations in their entirety would be unnecessarily costly for both the Commonwealth and relevant stakeholders, in circumstances where the regulations are otherwise considered fit for purpose.

I consider these factors provide further strong justification for exempting the Corporations Regulations from sunsetting.

Parliamentary oversight of exempted instruments

The Committee has sought advice about Parliament's oversight of each of the instruments exempted from sunsetting by the 2017 Exemptions Regulations. As noted by the Committee, the purpose of sunsetting is to ensure that legislative instruments are kept up to date and only remain in force for as long as they are needed. Where an instrument is remade, this provides Parliament with the opportunity to maintain oversight of legislative instruments. However, this oversight is the by-product, rather than the purpose, of sunsetting. It is not inconsistent with the purpose of sunsetting to grant an exemption where one of the longstanding policy criteria justifying an exemption is met.

As stated above, when deciding whether or not to grant an exemption from sunsetting, I give careful consideration to the key relevant question of whether at least one of the longstanding policy grounds that may justify an exemption from sunsetting is met. In relation to the 2017 Exemptions Regulations, and as explained in the Explanatory Statement, I was satisfied that each exemption was justified on at least one of these grounds. Taking this approach ensures that clarity and consistency in relation to sunsetting exemptions can be maintained.

Further, as the Committee is aware, and as stated in my correspondence to the Committee of 4 October 2017 in relation to the 2016 Exemptions Regulations, parliamentary oversight of delegated legislation can occur in a variety of ways. This includes the Committee's consideration of instruments at the time they are made, cooperation between the government and scrutiny bodies in relation to the implementation of instruments, and scrutiny of the application of instruments through Senate Estimates, Question Time, and other parliamentary processes. These processes will continue to apply in relation to each of the instruments exempted by the 2017 Exemptions Regulations.

I appreciate that an exemption from the sunsetting requirements of the Legislation Act is a significant matter. For this reason, I can assure the Committee that I am satisfied that each exemption prescribed by the 2017 Exemptions Regulations was justified on the grounds described in the Explanatory Statement.

The responsible adviser for this matter in my Office is Ms Sarida McLeod, who can be contacted on 6277 7300.

I trust that this information is of assistance to the Committee.

Yours faithfully

(George Brandis)

Cc: The Hon Scott Morrison MP, Treasurer

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Urban Infrastructure
PDR ID: MS17-002278

Senator John Williams
Chair
Senate Standing Committee on Regulations and Ordinances
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

Motor Vehicle Standards (Road Vehicles) Determination 2017

I refer to the letter dated 19 October 2017 from the Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee) regarding the Motor Vehicle Standards (Road Vehicles) Determination 2017 (the Determination).

The Committee raised two scrutiny issues in the Determination concerning the incorporation of European standards and one in relation to subsection 33(3) of the *Acts Interpretation Act 1901*. I would like to provide the following advice to the Committee in response to these matters as they appear in the Delegated Legislation Monitor No. 13 of 2017.

1. Manner of incorporation

European Standards EN 15194:2009 and EN 15194:2009+A1:2011, Cycles - Electrically power assisted cycles - EPAC Bicycles, specify safety requirements and test methods for the design and assembly of electrically power assisted bicycles. As the standards are not legislative instruments, subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* (the Legislation Act) have the effect that the Determination can only incorporate the standards as in force at the time the Determination commenced (14 September 2017), and not 'as in force or existing from time to time'.

I note the Committee's comments on facilitating the public's ability to understand the operation of the Determination. For this reason, I instructed the Department of Infrastructure and Regional Development to amend the Explanatory Statement (ES) to explicitly state that the Determination incorporates the European standards as in force at its date of commencement.

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2. Access to incorporated documents

I understand the importance of ensuring persons interested in or affected by an instrument have adequate access to its terms, including any incorporated documents. The European standards incorporated in the Determination are freely available through the National Library of Australia (NLA) eResources system, which provides access to the British Standards Online database. As a licensed resource, a library card is required to access the database and anyone with an Australian residential address is eligible to request one.

In line with best-practice and consistent with section 15J of the Legislation Act, I instructed the Department to amend the ES to include a description of these standards as well as details of how to access them through the NLA.

3. Reliance on subsection 33(3) of the *Acts Interpretation Act 1901*

I note the Committee's comments in relation to identifying the relevance of subsection 33(3) and, in line with the Committee's advice, I instructed the Department to incorporate the suggested form of words into the ES where the repeal of the previous Motor Vehicle Standards (Road Vehicles) Determination 2003 is detailed.

A marked up copy of the revised ES, as amended by the Department, to address the issues raised by SSCRO is provided for your information at Attachment A. I understand the replacement ES will shortly be registered on the Federal Register of Legislation.

I trust this information supports the Committee in finalising its consideration of the Determination.

Yours sincerely

Paul Fletcher

2/ 11 /2017

Motor Vehicle Standards (Road Vehicles) Determination 2017

Made under section 5B of the *Motor Vehicle Standards Act 1989*

Replacement Explanatory Statement

Issued by the authority of the Minister for Urban Infrastructure

~~September~~ October 2017

CONTENTS

1. LEGISLATIVE CONTEXT

The Motor Vehicle Standards (Road Vehicles) Determination 2017 (the Determination) is made under the *Motor Vehicle Standards Act 1989* (the Act). The Act sets standards for road vehicles to ensure they are safe, environmentally friendly, energy efficient and secure from theft when they are supplied to the Australian market, whether manufactured locally or imported from overseas. These vehicle standards are called the Australian Design Rules (ADRs) and they cover aspects of vehicle design such as braking, lighting, impact occupant protection and the emission of pollutants.

Section 5B(1) of the Act allows the Minister to determine, by legislative instrument, that vehicles of a particular class or description are not road vehicles for the purposes of the Act and so are not required to meet the ADRs (or any other part of the Act). One intention of this section is to prevent wheeled machines that are not designed or intended to be used as road vehicles from being inadvertently captured under the definition of a road vehicle under the Act.

In 2003, the first determination under section 5B(1) was gazetted. The Motor Vehicle Standards (Road Vehicles) Determination 2003 determined that motorised wheelchairs (as defined in the determination) were not road vehicles and was scheduled to sunset on 1 October 2017.

2. CONTENT AND EFFECT OF THE DETERMINATION

2.1. Overview of the Determination

The Determination repeals and replaces Motor Vehicle Standards (Road Vehicles) Determination 2003. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

~~It determines~~ The Determination provides for not only motorised wheelchairs but a series of other vehicle classes, such as power-assisted pedal cycles and quad bikes (as defined in the Determination), as not road vehicles for the purposes of the Act. Prior to this Determination, vehicles of these classes were being assessed on an administrative basis. The new Determination will provide clarity and certainty and so reduce the burden on industry and the public seeking to import these non-road vehicles.

The Determination is not exclusive. That is, while it identifies vehicle classes not subject to the Act, any other vehicle or vehicle class can continue to be assessed on its own merits on an administrative basis.

Inclusion in the Determination of particular vehicle classes does not indicate permission for use. State and territory governments regulate in-service vehicle use and, as such, vehicle users will need to familiarise themselves with local requirements.

2.2. Effect of the Determination

The Determination provides clarity to vehicle manufacturers, importers and members of the public about vehicle classes which are not required to meet the Act.

2.3. Incorporated Documents

The Determination incorporates references to European Standards EN 15194:2009 and EN 15194:2009+A1:2011, Cycles - Electrically power assisted cycles - EPAC Bicycles. These standards specify safety requirements and test methods for the design and assembly of electrically power assisted bicycles. They are intended to cover electrically power assisted cycles of a type which have a maximum continuous rated power of 250 Watts, of which the output is progressively reduced and finally cut off as the bicycle reaches a speed of 25 km/h, or sooner, if the cyclist stops pedalling.

In accordance with subsections 14(1)(b) and 14(2) of the *Legislation Act 2003* these standards are incorporated as in force at the commencement of the Determination.

The standards may be freely accessed online through the National Library of Australia (NLA) eResources system, which provides access to the British Standards Online database. A library card is required and can be obtained by anyone with an Australian residential address. The NLA website is https://www.nla.gov.au/.

3. BEST PRACTICE REGULATION

3.1. Business Cost Calculator

The Determination will have no regulatory impacts as only vehicle classes that have previously been assessed on an administrative basis as non-road vehicles are being determined. It is estimated that the Determination will provide savings of $20,000 a year for vehicle and other machine manufacturers and importers through reduced administrative burden.

3.2. General Consultation Arrangements

It has been longstanding practice to consult widely on proposals related to vehicle standards. For many years there has been active collaboration between the Commonwealth and the state/territory governments, as well as consultation with industry and consumer groups. Much of the consultation takes place within institutional arrangements established for this purpose. The analysis and documentation prepared in a particular case, and the bodies consulted, depend on the degree of impact the proposal is expected to have on industry or road users.

Depending on the nature of the proposed changes, consultation could involve the Austroads Safety Taskforce Safe Vehicle Theme Group (SVTG), Strategic Vehicle Safety and Environment Group (SVSEG), Australian Motor Vehicle Certification Board (AMVCB),

Technical Liaison Group (TLG), Transport and Infrastructure Senior Officials' Committee (TISOC) and the Transport and Infrastructure Council (the Council).

- SVTG consists of senior representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator.
- SVSEG consists of senior representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry (including organisations such as the Federal Chamber of Automotive Industries and the Australian Trucking Association) and of representative organisations of consumers and road users (particularly through the Australian Automobile Association).
- AMVCB consists of technical representatives of government regulatory authorities (Australian and state/territory) that deal with technical standards and other general vehicle issues, as well as the National Transport Commission and the National Heavy Vehicle Regulator (the same organisations as represented in SVTG).
- TLG consists of technical representatives of government agencies (Australian and state/territory), the National Transport Commission and the National Heavy Vehicle Regulator, the manufacturing and operational arms of the industry and of representative organisations of consumers and road users (the same organisations as represented in SVSEG).
- TISOC consists of state and territory transport and/or infrastructure Chief Executive Officers (CEOs) (or equivalents), the CEO of the National Transport Commission, New Zealand and the Australian Local Government Association.
- The Council consists of the Australian, state/territory and New Zealand Ministers with responsibility for transport and infrastructure issues.

Proposals that are regarded as significant need to be supported by a Regulation Impact Statement meeting the requirements of the Office of Best Practice Regulation (OBPR) as published in the *Australian Government Guide to Regulation* and the Council of Australian Governments' *Best Practice Regulation: A Guide for Ministerial Councils and National Standard Setting Bodies*.

3.3. Specific Consultation Arrangements for this Determination

The need to replace the sunsetting 2003 determination was discussed with SVTG in September 2016 and a draft replacement was presented in March 2017.

Consultation continued out-of-session with SVTG and AMVCB and an updated draft was presented to AMVCB in May 2017. A final consultation period followed.

As the Determination does not impose any additional regulatory burden there is no need for further consultation through TISOC, the Council or the public comment process.

3.4. Regulation Impact Statement

As the Determination will not impose any impact on business, and will reduce regulatory burden when compared to the status quo of allowing the existing determination to sunset, a Regulation Impact Statement is not required.

Since the proposal is not considered significant, the Office of Best Practice Regulation requirements have been met for this regulatory proposal (OBPR Reference ID 22092).

4. STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The following Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.1. Overview of the Legislative Instrument

The Motor Vehicle Standards (Road Vehicles) Determination 2017 repeals and replaces the Motor Vehicle Standards (Road Vehicles) Determination 2003. It determines a series of vehicle classes as not road vehicles for the purposes of the *Motor Vehicle Standards Act 1989*.

4.2. Human Rights Implications

This Determination does not engage any of the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

4.3. Conclusion

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

THE HON KAREN ANDREWS MP
ASSISTANT MINISTER FOR VOCATIONAL EDUCATION AND SKILLS

Our Ref MC17-006469

27 OCT 2017

Senator John Williams
Chair
Senate Regulations and Ordinances Committee
Suite S1.111
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CANBERRA ACT 2600

Dear Senator John

I am writing in response to the letter of 19 October 2017 from Ms Anita Coles, Committee Secretary of the Senate Standing Committee on Regulations and Ordinances (the Committee), which noted scrutiny issues identified in *Delegated legislation monitor* 13 of 2017, concerning two recent legislative instruments required to implement the VET Student Loans program.

The Committee requested my response by 3 November 2017 in relation to:

- the inclusion of a late payment penalty in the *VET Student Loans Amendment Rules (No. 2) 2017*, and
- the omission of a Statement of Compatibility with Human Rights to accompany the Explanatory Statement to the *VET Student Loans (Approved Course Provider Application Fee) Determination 2017*.

Please find my response enclosed.

I thank the Committee for raising these issues and providing me with the opportunity to respond.

Yours sincerely

Karen Andrews MP

Encl.

Response to Senate Regulations and Ordinances Committee

Delegated legislation monitor 13 of 2017

Vet Student Loans Amendment Rules (No. 2) 2017

Noting the above concerns regarding the imposition of penalties or levies in delegated legislation, the committee requests the minister's advice as to:

- **the specific legislative authority under which the late payment penalty is imposed;**
- **the specific basis on which the amount of the penalty has been calculated; and**
- **why it would not be more appropriate to impose the penalty – either as a civil penalty, a cost-recovery levy or taxation – through principal legislation.**

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

The legislative basis for the penalty associated with late payment of the approved course provider charge is subsection 116(6) of the *VET Student Loans Act 2016* (VSL Act). As noted by the Committee, subsection 116(6) of the Act states:

> (6) The rules [i.e. *VET Student Loans Rules 2016*] may provide for the collection and recovery of approved course provider charge (within the meaning of the *VET Student Loans (Charges) Act 2016).*

I note the Committee's concern that the late payment penalty, "although it is described as a penalty, ... is not drafted in the manner of a civil penalty, nor with reference to a fixed number of dollars or penalty units, but appears to be more in the nature of an additional fee or charge".

The late payment penalty does not form part of the approved course provider charge itself, which is imposed under the *VET Student Loans (Charges) Act 2016*, the amount of which is set out in the *VET Student Loans (Charges) Regulations 2017.*

Rather, the late payment penalty is in the nature of an administrative measure, which is imposed to assist with the recovery of the approved course provider charge, and in particular the timely collection of the charge. Accordingly, the late payment penalty forms part of the collection and recovery process dealt with in the provisions of the *VET Student Loans Amendment Rules (No.2) 2017.*

The formula contained in section 159 of the Rules (inserted by the *VET Student Loans Amendment Rules (No.2) 2017*) was developed to allow for calculation of a penalty that aligns with the intent of a recovery measure, whilst also fairly and transparently taking into account the specific circumstances of each provider in determining the amount of the penalty.

This formula is calculated based on the unpaid amount and number of days which the approved course provider charge is unpaid, as opposed to prescribing a uniform penalty. This provides an incentive for providers to pay in a timely manner, whilst ensuring that the amount of the penalty is appropriate and specific to each provider.

The use of a formula to calculate a late payment penalty that is appropriate and proportionate to the amount owed has precedents in a number of other pieces of legislation considered during the development of the *VET Student Loans Amendment Rules (No.2)* 2017, including the *Education Services for Overseas Students Act 2000* and the *Australian Transaction Reports and Analysis Centre Industry Contribution Act 2011.*

The *VET Student Loans Amendment Rules (No.2)* 2017 also inserted section 160, which allows for the Secretary to waive all or part of a late payment penalty if he or she considers it appropriate to do so, either on the Secretary's own initiative or on application by the provider. This allows for the consideration of specific circumstances of the provider in deciding whether to require payment the late payment penalty and to address potential unforeseen circumstances in the administration of the charge.

I also note that the Senate Standing Committee on Scrutiny of Bills, in its comments on the VET Student Loans (Charges) Bill 2016 in its *Alert Digest No.8 of 2016*, sought the Minister for Education and Training, the Hon Simon Birmingham's advice in connection with the setting of the amount of the approved course provider charge by legislative instrument under that Bill. The Scrutiny of Bills Committee noted:

> *"As the setting of the amount of [approved course provider] charges is a significant matter, the committee seeks the Minister's advice as to whether the bill [VET Student Loans (Charges) Bill 2016] can be amended to provide greater legislative guidance as to how the charge amount is to be determined and to limit the amount that may be imposed."*

In response to the Scrutiny of Bills Committee, Minister Birmingham noted:

> *"The detail about the calculation methodology, amounts and limits to charges are still being worked through by the Department in consultation with the Department of Finance.*
>
> *The reputation of the vocational education and training sector has been impacted by unscrupulous providers, driven by financial gain with poor student outcomes. Urgent reform is required to address these problems. In developing the Bill, it was felt that the demand for urgent reform outweighed the benefit of delaying introduction to enable more detail to be included in the Charges Bill. This decision was made having regard to the other controls in place to ensure the appropriateness of the charge and the calculation methodology:*
>
> *a. the detail will be contained in regulations which will be subject to Parliamentary scrutiny through being subject to disallowance for 15 sitting days after tabling in both Houses of Parliament; and*
>
> *b. the Department will need to comply with and meet the requirements of the Australian Government Cost Recovery Guidelines when formulating the charges calculation methodology and determining the appropriate charge amounts. A cost recovery implementation statement will also need to be prepared to further facilitate transparency and accountability.*
>
> *There is also benefit in providing the detail in regulations as it will allow for greater flexibility to deal with the evolution of the program and to ensure that charge methodology and amounts remain appropriate."*

VET Student Loans (Approved Course Provider Application Fee) Determination 2017

The committee requests the minister's advice as to why a statement of compatibility was not included in the ES; and requests that the ES be updated in accordance with the requirements of the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003.*

I thank the Committee also for bringing this matter to my attention.

The absence of a Statement of Compatibility with Human Rights accompanying the Explanatory Statement to the *VET Student Loans (Approved Course Provider Application Fee) Determination 2017* [F2017L01060] was due to an inadvertent omission. I apologise for this oversight.

A human rights assessment of the instrument has been undertaken and the instrument has been assessed as compatible with human rights and meeting the requirements under the *Human Rights (Parliamentary Scrutiny) Act 2011* and the *Legislation Act 2003.*

A replacement Explanatory Statement including a Statement of Compatibility with Human Rights will be lodged for registration with the Federal Register of Legislation as soon as practicable.