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

MC21-002338

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

Dear Chair Concetta

Thank you for your letter of 14 April 2021 regarding your consideration of the Australia's Foreign Relations (State and Territory Arrangements) Rules 2020 (the Rules).

You have requested advice as to:

- whether the instrument can be amended to provide that it sunsets after five years; and
- whether the statutory review of the Act under section 63A will include consideration of the operation of the instrument, including consideration of whether significant matters prescribed in the rules would be more appropriate for inclusion in the Act.

As you know, section 50 of the *Legislation Act 2003* provides that the sunset period for legislative instruments is set at ten years unless the enabling legislation provides otherwise. As the Act does not prescribe a sunset period for the Rules, the default ten year period applies. In order to provide for a sunset period of five years, the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (the Act) would need to be amended.

However, the three year review of the Act under section 63A provides an appropriate mechanism for the Act, and Rules established under the Act, to be further considered, including whether significant matters prescribed in the Rules would be more appropriate for inclusion in the Act. This will occur before any five or ten year sunsetting period and, therefore, obviates the need to amend the Act at this time. As part of the three year review, consideration can also be given to amending the Act to include a shorter sunsetting period than the default ten years.

Implementation of the Act is currently at a critically important stage. Over 1,100 arrangements have been notified to me under the Foreign Arrangements Scheme and I expect many more notifications before 10 June 2021, when pre-existing local government, university and sub-national level arrangements are due. An amendment to the Act at this time could divert resources from implementation of the Scheme, including the notification and assessment of arrangements. This would create uncertainty for States, Territories, public universities and local government, who have so far engaged constructively with the Scheme.

I acknowledge the Committee's view that regular review of the instrument is important. I can assure you that the Rules will be subject to ongoing consideration to ensure they appropriately reflect the intention of the Act and to enable the effective administration of the Scheme. The operation of the Scheme will also be subject to regular parliamentary scrutiny under section 53A of the Act, which requires me to table an annual report on the exercise of my decision-making powers before each House of Parliament. Further, as required by the Senate's Procedural Order of Continuing Effect 9E, this report will also be referred to the Senate Foreign Affairs and Trade Legislation Committee for inquiry and report.

Thank you, once again, for your interest in the Rules. I would also like to thank you for your strong engagement on the Committee that inquired into the Bill.

Yours sincerely

MARISE PAYNE

07 MAY 2021

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-001091

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

Dear Senator Fierravanti-Wells

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation requesting further advice regarding the *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020* (the Amendment Rules).

In that letter, the Committee sought my further advice in relation to the following:

- **Issue 1:** Why it is considered necessary and appropriate to include significant penalty provisions in rules 5.34 and 9.3 (not merely why it is necessary for the Act to enable penalties to be set out in the *Competition and Consumer (Consumer Data Right) Rules 2020* generally);

- **Issue 2:** Whether including these penalty provisions in primary legislation was considered when the Consumer Data Right regime (CDR regime) and *Competition and Consumer (Consumer Data Right) Rules 2020* (the Rules) were being developed;

- **Issue 3:** Whether the *Guide to Framing Commonwealth Offences* was considered when including these penalty provisions in the Rules.

Issue 1: Inclusion of significant penalties in rules 5.34 and 9.3

Rule 5.34 allows the Accreditation Registrar to make a temporary direction to an accredited person to refrain from making consumer data requests or to a data holder to cease disclosing consumer data in response to a request, where the Registrar reasonably believes it is necessary to ensure the security, integrity and stability of the Register of Accredited Persons (the Register) or associated database. The Register contains accreditation details of entities that are accredited under the CDR regime and information that is used by data holders to verify the identity of accredited persons to facilitate the secure sharing of consumer data.

Given the function performed by the Register, the accuracy and reliability of the information held in the Register are critical features of the CDR regime. For example, among other things, the Register is admissable as *prima facie* evidence such that where a person has taken the matters contained in the Register as being correct and acted on that basis, the person cannot be taken to be at fault.

A breach of rule 5.34 could seriously impede the Registrar's ability to maintain and manage the security, integrity and stability of the Register, given the critical nature of the information it contains. Therefore a maximum penalty that underlines the seriousness of the obligations provided in rule 5.34 is appropriate and proportionate.

Subrules 9.3(1) and (2) set out obligations on data holders and accredited data recipients to keep and maintain records of a range of specified matters relating to disclosure of CDR consumers' data. The CDR regulators (Office of the Information Commissioner (OAIC) and Australian Competition and Consumer Commission (ACCC)) may require data holders and accredited data recipients to provide copies of these records, as needed in the performance of their statutory functions. CDR consumers may also require data holders and accredited data recipients to provide them with copies of certain kinds of records required to be kept by rule 9.3.

Compliance with these record keeping requirements is critical to support effective enforcement of the CDR obligations by the ACCC and OAIC, and to enable consumers to obtain records to enable them to engage the dispute resolution processes available under the CDR regime to take direct action against a CDR participant. These obligations reflect the importance of the availability and accuracy of records to enable the effective operation of the CDR regulatory framework and the maximum penalties in relation to these obligations reflect the importance of compliance and are therefore appropriate and proportionate.

The *Competition and Consumer Act 2010* (the Act) provides that where a civil penalty does apply to a breach of the Rules, the Rules may specify a lower penalty amount than the default maximum. If the Rules do not specify an amount, then the maximum civil penalty is as per the amount worked out under paragraph 76(1A)(b) of the Act. The penalties that attach to rules 5.34 and 9.3 are examples of where a lower penalty amount than the default maximum has been specified.

Issue 2: Consideration given to including the penalties in primary legislation

The enforcement and remedy regime under the CDR is applied through obligations and penalty provisions contained in both the Act and the Rules.

Under the CDR framework, key elements of the regime are governed by the Rules including turning on a consumer's rights to access and disclose CDR data in designated sectors. The rule making power is intentionally broad to enable the Rules to be tailored to different sectors of the Australian economy and to leverage off existing organisational arrangements, technological capabilities and infrastructure. The Rules are a key mechanism for the protection of consumers and their data, as well as ensuring that the competition elements of the CDR, such as the right to access and transfer CDR data, are able to be enforced.

Obligations that relate to more specific aspects of the regime such as the Registrar's management of the Register in rule 5.34, and the maintenance of records in rule 9.3 were considered more appropriate to be included in the Rules. Given this, it is important that the Rules also contain appropriate penalties for serious breaches of these specific obligations.

Only some of the obligations that may attract civil penalties are provided in the Act. These are typically higher-level obligations that have general application across the whole CDR regime, for example, engaging in misleading or deceptive conduct in relation to requests for disclosure of CDR data (s.56BN) or holding out that a person is accredited when they are not (ss.56CC and 56CD).

More broadly, the balance between specifying civil penalties in the Act and the Rules was carefully considered when the CDR framework was developed. The Explanatory Memorandum to the *Treasury Laws Amendment (Consumer Data Right) Act 2019* states that*:*

> 1.412. The consumer data rules may specify that a civil penalty applies to breaches of the rules. Where a civil penalty does apply to a breach of the rules the rules may also specify a lower penalty amount than the default maximum. If the rules do not specify an amount, then the maximum civil penalty is as per the amount worked out under section 76 of the CC Act.
>
> 1.413. This is considered necessary because the consumer data rules are a key mechanism through which consumers and their data are protected (in conjunction with the Privacy Safeguards). This will also ensure that the competition elements of the CDR, such as the right to access and transfer CDR data, are able to be enforced.
>
> 1.414. High penalties reflect the importance of consumer data rules (together with the Privacy Safeguards) to the core protections for consumers and their data. It is through the rules that the ACCC will be able to enforce the data standards that are a fundamental element of those protections. Significant penalties recognise the potential damage where contraventions expose sensitive personal data and provide flexibility as other sectors are brought within the regime and the potential to include derived or value-added data.
>
> 1.415. It is also appropriate for the high maximum penalties to apply equally to small business and large multi-nationals. The application of such penalties has been successfully managed by the ACCC and the courts for other contraventions and has not had the effect of deterring normal business conduct. It would align with the introduction of higher penalties under the Australian Consumer Law.
>
> 1.416. The CC Act allows the ACCC the discretion to determine the appropriate enforcement tool to apply to small businesses and multi-nationals who may have engaged in misconduct. In selecting the appropriate enforcement tool, the ACCC considers a range of factors including: the size of the business, the capacity of the business to benefit from the misconduct, and the sophistication of the business' compliance strategies. If the ACCC successfully litigates against a business, the court decides the appropriate penalty amount up to the maximum. The court considers similar factors including:
>
> - the nature and extent of the contravening conduct;
> - the amount of loss or damage caused;
> - the circumstances in which the conduct took place;
> - the size of the contravening company;
> - the degree of power it has, as evidenced by its market share and ease of entry into the market;
> - the deliberateness of the contravention and the period over which it extended;
> - whether the contravention arose out of the conduct of senior management or at a lower level;
> - whether the company has a corporate culture conducive to compliance with the CC Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; and
> - whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the CC Act in relation to the contravention.
>
> 1.417. It is appropriate that the court retain the discretion to impose a penalty that is appropriate in the particular circumstances. Those circumstances will cover a broad range of conduct and may vary significantly across different sectors. It is expected that the maximum penalty would be imposed in the most serious of circumstances, and not in circumstances involving, for example, honest mistakes.

Issue 3: Consideration of the *Guide to Framing Commonwealth Offences*

The *Guide to Framing Commonwealth Offences* was considered when the penalty provisions were included in the Rules. However, given the civil penalty scheme that applies to the CDR regime, and having regard to the objective of deterring non-compliance, it was deemed appropriate to include these penalties for rules 5.34 and 9.3.

Explanatory Statement for the Rules

In addition to the request for further advice on the above issues, the Committee requested the ACCC amend the explanatory statement to the Rules to include:

- additional information about the kinds of "similar documents" that could contain product data a data holder might need to include as part of a product data request under rule 2.4; and
- information about how to access the documents (ASAE 3150 and CDR Accreditation Guidelines) incorporated by reference in clause 2.1 of Schedule 1 to the Rules, in compliance with paragraph 15J(2)(c) of the *Legislation Act 2003*.

The ACCC has undertaken to lodge a replacement explanatory statement that will include the requested information.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

27 May 2021

CC: Minister for Superannuation, Financial Services and the Digital Economy

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

Reference: MC21-032949

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

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

Dear Chair

Thank you for your letter of 13 May 2021 to Senator the Hon Amanda Stoker, Assistant Minister to the Attorney-General, requesting further advice on the *Law Enforcement Integrity Commissioner Amendment (Law Enforcement Agencies) Regulations 2020* (2020 Regulations) and the Commonwealth Integrity Commission (CIC) Bills.

The Australian Government is committed to establishing the CIC and has recently completed an extensive consultation process on the CIC Bills. Feedback from this process will inform further refinements to the CIC Bills prior to their introduction in Parliament. The Government intends to introduce the CIC Bills in 2021. The measures in the 2020 Regulations will be given effect via legislation once the CIC Bills commence and the agencies currently under the jurisdiction of the Australian Commission for Law Enforcement Integrity (ACLEI) are brought under the jurisdiction of the CIC.

Timing for the passage of the CIC Bills will be subject to parliamentary processes. The Government intends for the CIC to commence operations six months after the date of Royal Assent. This will provide sufficient time to establish the CIC as an independent entity and undertake the necessary transitional arrangements for ACLEI.

While I note the Government's commitment to establish the CIC, the Senate Standing Committee for the Scrutiny of Delegated Legislation's suggestion that the 2020 Regulations sunset after three years is reasonable. I will write to the Prime Minister seeking his approval to undertake the necessary amendments as soon as possible.

I trust this information will assist the Committee's consideration of the 2020 Regulations.

Yours sincerely

Senator the Hon Michaelia Cash
07/06/2021

Perth
44 Outram Street, West Perth WA 6005
Ph 08 9226 2000

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7300

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

Reference: MS21-000601

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

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

Dear Chair

Thank you for your letter of 8 June 2021 regarding Law Enforcement Integrity Commissioner Regulations 2017 (2017 Regulations).

I am writing to advise you that the Hon Ben Morton MP, Assistant Minister to the Prime Minister and Cabinet, on behalf of the Prime Minister, the Hon Scott Morrison MP, has agreed to my proposed amendments to the 2017 Regulations. These amendments would ensure provisions relating to the inclusion of additional agencies within the Australian Commission for Law Enforcement Integrity (ACLEI)'s jurisdiction, via regulation, would sunset by 2024.

I intend for the amended regulations to be considered by the Federal Executive Council during the Spring 2021 parliamentary sitting period.

I trust this information is of assistance in the Committee consideration of the 2020 Regulations.

Yours sincerely

Senator the Hon Michaelia Cash
16/6/2021

Perth
44 Outram Street, West Perth WA 6005
Ph 08 9226 2000

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7300

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-014125

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

28 MAY 2021

Dear Senator Connie

I refer to your correspondence of 13 May 2021 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee) concerning the National Health (Data-matching) Principles 2021 (Principles).

The Committee has requested advice on the following:

- availability of independent merits review
- parliamentary oversight – technical standards are not legislative instruments.

My advice on these matters can be found in the attached.

I trust this information will be of assistance to the Committee.

Yours sincerely

Greg Hunt

Encl (1)

MC21-014125

National Health (Data matching) Principles 2020 [F2021L00006]

Response to Senate Standing Committee for the Scrutiny of Delegated Legislation

Background

Data matching powers, duties and functions under the *National Health Act 1953* (National Health Act) are delegated from the Chief Executive Medicare (CEM) to officers within the Department of Health. Although the role of the CEM sits within Services Australia (SA), none of the CEM's data matching powers are delegated to SA officers.

As an Australian Government agency, the Department of Health is subject to the Australian Privacy Principles (APPs) as prescribed by the *Privacy Act 1988* (Privacy Act). The Department's data matching program for permitted Medicare compliance purposes, as enabled by the National Health Act, is also subject to the APPs. The intent of the *National Health (Data-matching) Principles 2020* (Principles), which were drafted in consultation with the Office of the Australian Information Commissioner (OAIC), is to provide additional safeguards which are specific to data matching. This means that in practice, the data matching facilitated by the Department of Health for Medicare compliance purposes aligns with both the APPs and the Principles. It is important to note, the Department's Medicare compliance responsibilities relate to health providers only and not individual patients.

As part of this approach, the Principles reflect the APPs (with subsection 18(6) particularly based on APP 13). As APP 13 still applies to the Department of Health it is worth noting that steps to correct information may be undertaken concurrently in line with both APP 13 and subsection 18(6). For example, the Data Matching Notice published on the Department's website provides guidance to individuals about how to request an update to their personal information.

During the development of the data matching legislation, it was intended that the Privacy Act would continue to apply, including the privacy functions it grants to the Australian Information Commissioner (Information Commissioner). The Information Commissioner has the ability to conduct an assessment in relation to data matching.

The responses to the specific questions raised by the Committee are as follows:

Scope of administrative powers

The Committee has asked for advice as to:

- **whether decisions made by the Chief Executive Medicare under subsection 18(6) are subject to independent merits review; and if not, what characteristics of the decision justifies the exclusion of independent merits review, by reference to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*; and**
- **whether the Information Commissioner has a merits review function in this context.**

Decisions made by the CEM under subsection 18(6) of the Principles are not subject to independent merits review, as these are preliminary decisions. This is in accordance

with the Administrative Review Council's guidance document, 'What decisions should be subject to merits review?'.

The decision to take reasonable steps to correct or not correct personal information is not a 'discretionary decision with the capacity to affect rights, liberties, obligations or interests'. It is merely a precursor to potential substantive decisions.

Preliminary or procedural decisions

Preliminary or procedural decisions may include decisions that facilitate, or that lead to, the making of a substantive decision. In the Council's view, this type of decision is unsuitable for review.

This is because review of preliminary or procedural decisions may lead to the proper operation of the administrative decision-making process being unnecessarily frustrated or delayed. In the case of preliminary or procedural decisions, the beneficial effect of merits review is limited by the fact that such decisions do not generally have substantive consequences. The benefits are outweighed by the cost of potentially frustrating the making of substantive decisions.[1]

Any decisions made under subsection 18(6) are preliminary decisions rather than substantive decisions, as these decisions alone do not have the potential to adversely affect an individual.

There are no practical consequences to an individual as a result of the CEM's decision to correct or not correct information in a matched dataset. The nature of the information analysed via data matching informs the Department as to whether further compliance assessment is necessary.

Only further compliance decisions have the potential to affect rights, liberties, obligations or interests. All matched information which informs compliance assessment or action is further manually verified by Department officials as part of the compliance process.

Affected individuals such as health providers are afforded procedural fairness throughout the compliance process, and as such, have the ability to review and contest the accuracy of data either before any substantive decisions are made or as part of the opportunity for review of the substantive decision.

In practice, the compliance business model used by the Department of Health requires an identified risk to be considered and approved by governance bodies before a case is moved into compliance assessment and treatment. Data matching is one of many identification and analytics methods by which potential compliance concerns are identified. **Figure 1** demonstrates how potential non-compliance concerns are detected and assessed for possible compliance treatment.

All substantive decisions are undertaken by trained personnel during the compliance assessment and treatment process. The treatment of compliance cases involves procedural fairness and those subject to compliance action are offered the process to review or appeal decisions.

---

[1] Administrative Review Council, *What decisions should be subject to merits review?* 1999, available at https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999 [para 4.3-4.4].

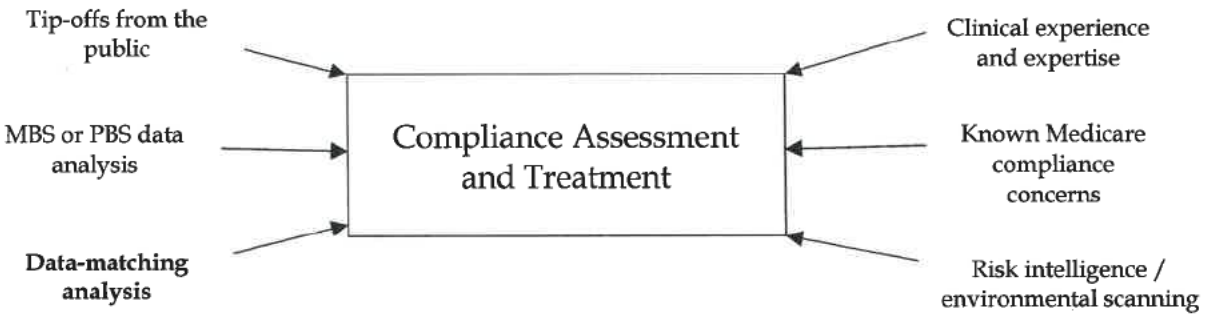

***Figure 1**: Data matching within the compliance process*

Data matching is a process undertaken for specific permitted purposes related to Medicare compliance. Matched information is a copy of original information made for data matching and to be analysed for compliance concerns. Destruction provisions in Part 5 of the Principles state that when the matched information is no longer required for the permitted purpose for which it was matched or the information will not be used to inform compliance processes, it must be destroyed.

It would not be appropriate to subject this preliminary decision to review as it will likely inform a later substantive decision, and there will be an opportunity to contest the use of any incorrect information in relation to that substantive decision.

Additional considerations

It would be inadvisable to correct an individual's information after matching has occurred. Correcting the information at this stage would likely:

- jeopardise the integrity of the future compliance process if the matched data is being kept to inform an investigation into fraud;
- lead to version control and data integrity issues;
- result in the potential inaccuracies arising again if the matched data (a copy) is corrected but the original source data is not.

The matched information represents a 'point in time' result which cannot be changed without affecting the results of the match.

Although the decision is preliminary, given that all data matching is for compliance purposes, having review rights apply at the appropriate stage in the compliance process minimises the risk of jeopardising 'investigation of possible breaches and subsequent enforcement of the law'.[2]

In addition, as matched information is necessarily transient and a copy, there would be limited benefits to an individual to seek review of a decision of the CEM made under subsection 18(6), when it would be more appropriate for the individual to request, under APP 13, for the original information to be updated. Enabling review of preliminary decisions would be of limited benefits to the individual and would inhibit the progress towards any substantive decisions to be made as part of the compliance process.

---

[2] Administrative Review Council, *What decisions should be subject to merits review?* 1999, available at https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999 [para 4.31-4.32].

Australian Information Commissioner Review

As the APPs already apply to data matching, the Principles are intended to provide additional and complementary obligations. Subsection 18(6) was intended to operate concurrently to the APPs, particularly APP 13; the Explanatory Statement to the Principles states that subsection 18(6) is intended to operate in accordance with the Privacy Act.

A breach of the CEM's obligations under Part VIIIA of the National Health Act could be an interference with the privacy of an individual, entitling an individual to make a complaint about this to the Information Commissioner under Part V of the Privacy Act (see section 132E of the National Health Act). Part V of the Privacy Act sets out processes for privacy complaints, which includes Information Commissioner conciliation and determinations.

Although this is not specifically referred to in the Principles or its Explanatory Statement, in practice this means that the Information Commissioner has an independent oversight role of subsection 18(6) decisions and personal information as used in data matching.

If individuals are not satisfied with the CEM's decision under subsection 18(6) in relation to their personal information, they have the opportunity to complain to the Information Commissioner. This means an independent body will assess their privacy complaint.

Part IX of the Privacy Act provides that an application may be made to the Administrative Appeals Tribunal for review of a privacy determination made by the Information Commissioner. As a result, although there is no provision for independent merits review within the Principles, the structure of the National Health Act and the Principles, and their interaction with the Privacy Act, effectively provide individuals with alternate opportunities to seek review of the CEM's decisions under subsection 18(6).

Parliamentary oversight

The Committee has asked for advice as to:

- **why it is considered that the technical standards are not legislative instruments; and**
- **why it is considered appropriate that the technical standards are not subject to publication.**

To provide further context around this issue, extensive stakeholder consultations for the data matching legislation were conducted from 2018 with peak bodies. The Department of Health committed to ensuring the Principles would contain appropriate governance, provide privacy protections and set out standards for the use of matched data. Section 6 was included in the Principles after the Department agreed with requests made by stakeholders that the Principles should require technical standards reports.

The technical standards are administrative rather than legislative in nature, and therefore it is not appropriate for them to be a legislative instrument.

Section 6 of the Principles sets out specific requirements for the matters which must be dealt with in technical standards in relation to each authorised data-matching program. The CEM and authorised Commonwealth entities are required to comply with those technical standards.

The wording in subsection 6(1) requires the CEM to 'prepare and maintain' technical standards. It does not require the CEM to refer to the 'making' of technical standards. This is an important distinction which demonstrates that the technical standards are administrative, as they are prepared and maintained on an ongoing basis. If the technical standards were legislative, it is expected they would be "made", and then left in force for the CEM or authorised Commonwealth entity to comply with.

The Committee has indicated that section 132B(3) of the National Health Act requires an authorised Commonwealth entity to comply with technical standards. In fact, section 132B(3) requires an authorised Commonwealth entity to comply with any other terms and conditions relating to the matching of information as determined by the CEM. The technical standards are not terms and conditions for the purposes of section 132B(3) and would not be considered terms and conditions unless they are determined to be so in writing, by the CEM.

Subsections 6(3) and 6(4) of the Principles do require compliance with the technical standards, but only by the CEM and any authorised Commonwealth entity. There are no requirements for any other entity to comply with technical standards, nor do the technical standards affect the rights or obligations of an individual.

Commonwealth entities must be authorised to match data on behalf of the CEM, under subsection 132B(2) of the National Health Act, before being required to comply with any technical standards. In practice, this will occur by mutual agreement between the authorised Commonwealth entities.

Effectively, the technical standards were intended to operate as a plan and a statement of intent as to how a data match will be conducted, to ensure that the CEM and/or any authorised Commonwealth entity are aware of the intended parameters. This is supported by the Explanatory Statement to the Principles, which states that subsections 6(3) and 6(4) are intended to ensure that technical standards are 'considered, documented and complied with, to promote clarity and consistency with matching information under section 132B(1) [of the National Health Act]'.

The technical standards will be very detailed from a process and technological perspective, and will vary across data matching programs. There may be several technical standards being maintained for different authorised data-matching programs operating concurrently.

Technical standards will also require frequent updating. It is important that technical standards be able to be updated immediately while an authorised data-matching program is ongoing. If an issue with the data matching program is identified (such as the data fields or security features) it is critical the technical standards are able to be urgently updated. The updated technical standards are then kept as a record.

The requirements associated with amending a legislative instrument would limit the flexibility for the CEM to deal with issues associated with the operation of the technical standards as they arise, resulting in risks to the integrity of the data matching program.

It is not intended that the technical standards will be published. Publication of the technical standards may undermine compliance processes and activities due to the types of detailed information they will contain.

For example, publishing the specifications of data matches, specific risks, controls and security features could allow people to structure false claiming to avoid detection, or plan IT cyber-attacks, based on this information. There is a public interest in ensuring the integrity of Medicare programs and this outweighs the possible benefits of making technical aspects of the compliance program publicly available.

With regards to publishing the technical standards, the 'Guidelines on data matching in Australian Government administration', issued by OAIC, do not recommend publication of the technical standards reports (which set out data fields).

During consultation with the OAIC, it was cognisant of concerns about prejudicing compliance action by publishing specifics. When the Department of Health agreed to include the requirement for technical standards to be made in relation to data matching, the OAIC did not raise any concerns with this approach.

For these reasons, it is not appropriate for technical standards to be made as legislative instruments.

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

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

MC21-004046

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

Dear Senator

Thank you for your letter of 13 May 2021 concerning the *Telecommunications (Fibre-ready Facilities – Exempt Real Estate Development Projects) Instrument 2021* (the Instrument). The Committee has asked whether the Instrument can be amended so that it ceases within three years from commencement, and whether the upcoming review of the Instrument can consider whether the exemptions can be included in Part 20A of the *Telecommunications Act 1997* (the Act).

As indicated in my letter to you of 1 May 2021, the exemption powers in the Act provide important flexibility. They are currently used to save developers the cost of installing underground pit and pipe in rural and remote areas where telecommunications will be provided by wireless or satellite. Developers are likely to be concerned by the winding back of the exemption, prior to any future change in legislation. However, given the Committee's concerns, I have prepared an amendment to the Instrument that would see it sunset three years after the date of commencement. This is a better option than having the instrument disallowed, providing developers with no relief.

As this amendment would be a legislative instrument, there is a need to consult stakeholders on it. The Department of Infrastructure, Transport, Regional Development and Communications will undertake this consultation and I envisage making a final decision on the amendment early in June 2021.

In relation to the Committee's second question, as I advised in my letter of 1 May 2021, the future review could and would consider whether the matters dealt with by the Instrument could be incorporated into the Act.

Yours sincerely

Paul Fletcher

25/5/2021

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