Monitor 5 of 2022 – Ministerial Responses

Contents

The Hon Barnaby Joyce MP

Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Leader of The Nationals
Federal Member for New England

Ref: M22-000621

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
PO Box 886
Parliament House
CANBERRA ACT 2600

21 March 2022

Dear Senator

Thank you for your letter of 10 March 2022 regarding the *Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021* (the Regulations).

I note concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) about the use of automated decision making in the regulation of noise from Remotely Piloted Aircraft (RPA) under the Regulations.

Automated decision making will have a limited role in the administration of the Regulations and is intended only to support a self-assessment process as part of a risk-based approach to regulating RPA noise. This approach was developed through extensive public consultation, and is necessary to enact a fair and efficient regulatory process for a unique industry sector undergoing rapid growth and change.

The new regulatory framework is being developed with a range of safeguards to ensure the use of automated processes remains consistent with administrative law values. Enclosed is additional information which provides detailed responses to the committee's questions.

I thank the Committee for its attention to these matters and trust this information will assist in finalising consideration of the Regulations.

Yours sincerely

Barnaby Joyce MP

The Hon Barnaby Joyce MP
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Advice to Senate Standing Committee for the Scrutiny of Bills

March 2022

Background on Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021 and RPA Noise Regulation

A key requirement under the 'Air Navigation (Aircraft Noise) Regulations 2018' (the regulations) is for certain aircraft to only engage in air navigation if they have a noise certificate or an approval to operate without a certificate. Almost all traditionally piloted aircraft in operation hold a noise certificate, and the Department is only required to consider a small number of requests for aircraft to operate without a certificate.

Under the Regulations, RPAs are classified as 'aircraft' and are therefore subject to this requirement. There are currently no recognised domestic or international standards for certification of RPAs, and no process for RPA operators or manufacturers to have their aircraft certified.

The amendments are designed to support a new process for managing RPA noise that functions in the absence of certification standards and processes. The amendments reflect recommendations from a review of the regulations conducted in 2019-20.

The new regulations are intended to support a risk-based approach to management of RPA noise. This will allow the regulatory burden and level of oversight to be proportionate to the risk of noise impacts on the public associated with a particular drone operation.

This approach is driven by a number of considerations:

- There are a very large number of RPA operators and operations in Australia[1].
- The overwhelming majority of lawful RPA operations do not create significant noise impacts. This is due to a range of factors, including:
    - The operating profile of a RPA tends to be significantly quieter with a more contained noise profile than traditionally piloted aircraft, comparable to many other noises that typically occur in noise sensitive settings such as residential neighbourhoods;
    - RPA safety regulations require most operators to operate at least 30m from people populous areas, and only during the daytime - all of which have the effect of mitigating noise impacts; and
    - The majority of RPAs have limited flight times (approximately 30 minutes), and most RPA operations are limited in duration and rarely occur in the same location on an ongoing basis.
- The RPA industry is rapidly evolving, and the regulations will need to be adaptable for new types of RPAs and RPA operations into the future. This includes future RPA operations which may pose greater risk of noise impacts on the public than current RPA operations.

[1] As at 17 February 2022 there were 2,259 certified commercial RPA operators and 24,167 licensed remote pilots. In addition, research has indicated there are likely hundreds of thousands of commercial and recreational RPA users who do not require certification or licenses to operate. It is estimated that millions of RPA operations are conducted in Australia every year.

Why it is considered necessary and appropriate for section 22A of the instrument to provide for automated decision-making in relation to decisions made under section 16A.

Automated decision making will have a limited role in the administration of the regulations and is intended only to support a self-assessment process as part of the risk-based approach to regulating drone noise.

Under the new framework: RPA operators with a minimal risk of noise impacts are exempt under the regulations by effect of the definition of 'exempt RPA' in section 4 and subsection 6(2A)(b).

RPA operators that are not exempt will be required to undertake a self-assessment process supported by an expert system through a form on the Department's website. This process is designed to identify the risk of the operations having a significant noise impact on the public. Where the self-assessment process determines a low risk of impact, an automated approval will be issued.

Where the self-assessment process identifies a medium or high risk of noise impacts, drone operators will be required to gain an approval through a comprehensive assessment process managed by a person.

The use of automated approvals based on self-assessment for low-risk operations is necessary and appropriate as:

- They allow approvals to be issued for most non-exempt operations with minimal regulatory burden for operators and administrative cost to government, proportionate to the low risk of noise impact associated with the operations. Manual processes would impose disproportionate regulatory impacts for operations in this risk category and would expend significant departmental resources to process applications for little benefit, undermining the administrative law value of efficiency.
- They provide flexibility for further intervention and regulatory action by the Department if the operator does create significant noise impacts despite the ostensible low-risk nature of their operation. This would not be the case if these operations were made exempt from the regulations.
- No RPA operators will be denied a request for approval through an automated process. The self-assessment process can only issue an automated approval or require further assessment by a person. This minimises the risk of adverse treatment of RPA operators as a result of the design of the automated process.
- Where a RPA operator would prefer not to undertake a self-assessment through the automated process, they may request a departmental officer undertake the assessment instead.

It is also noted that by effect of the definition of RPA exemptions in section 4, only commercial RPA operators undertaking complex operations will be required to undertake the self-assessment process. This is a group with a high degree of familiarity and expertise with digital systems and it is unlikely that the use of an automated process will represent a significant barrier to operators in this category. As noted above, the option to have a departmental officer conduct the assessment process is available if requested by an RPA operator.

The extent to which discretion is involved in relation to decisions made under section 16A

Decisions made under section 16A can involve a significant degree of discretion to reflect the highly varied and rapidly evolving nature of aircraft operations subject to regulation under this section. Decisions under 16A and 16B involve consideration of a wide range of factors including

- The specific noise profile of the RPAs being operated
- The time and location of operations and their proximity to noise sensitive sites
- Noise mitigation strategies employed by the operator
- Community engagement by the RPA operator
- Community sentiment towards the operation, including support for the operation and complaints made against the operator.

The discretion available under section 16A is consistent with existing sections of the Regulations, such as section 17 'Approval for other aircraft to which no standards apply'.

It is noted, however, that this discretion is typically only relevant to RPA operations with a medium or high risk of significant noise impacts. Decisions to issue approvals to low-risk operations does not require discretion, and decision makers retain the ability to exercise discretion in relation to these approvals after they are made using subsection 16A(5)(b) as well as through conditions issued under subsection 16A(4)(b). The use of a self-assessment process assisted by an expert system which can issue automated approvals is considered appropriate in this context.

What safeguards are in place to ensure that the decision-maker exercises their discretionary powers personally and without fetter?

As noted above, a range of safeguards will be implemented in the new framework, including:

- The use of an expert system to support a self-assessment process will only be used to support a risk-based approach to the regulation of RPA noise.
- The system will only have the ability to issue approvals in situations where RPA operators self-assess as low risk.
- The system will not have the ability to deny a request for approval. This decision can only be made by a person.
- Where an approval to operate is granted by an automated process, decision makers will retain the power to exercise discretion in relation to the approval under subsection 16A(5)(b) as well as through conditions issued under subsection 16A(4)(b).

The Department will regularly review the operation of the self-assessment process to ensure it is meeting the objectives of the framework and is consistent with best practice for automated decision making processes.

Whether any review rights or complaints mechanisms exist for those who are not the owner or operator of a relevant RPA, and if so, details of this

Airservices Australia is responsible for managing complaints and enquiries about aircraft noise through its Noise Complaint and Information Service (NCIS). Airservices provides details about RPA noise complaints to the Department to inform the administration of the regulations.

Due to the emerging nature of the RPA industry, it is recognised that members of the community may not be aware of the appropriate mechanism for making complaints. A range of approaches are employed to ensure community feedback is monitored effectively:

- Medium and high-risk operations are issued conditions of approval that require RPA operators to provide reports to the department detailing community feedback and complaints received.
- The department engages with local government agencies where high-risk operations are occurring to gain information about complaints and feedback provided to those agencies.
- The Department is also developing a new online complaints process to make it easier for the public to provide feedback on RPA operations to inform the administration of the regulations.

Feedback from the community, including complaints made about noise from RPAs, plays an important role in how the department manages RPA noise. Community feedback about noise from RPA operations may result in:

- The department revoking an automated approval and requiring a RPA operator to undertake a further application process assessed by a person.
- The department adding mandatory conditions to a RPA operator's approval to mitigate noise impacts. This may include limitations on the times of day RPAs are operated, the types of RPAs used or the frequency of flights.
- If effective mitigation of significant noise impacts is not possible, denying or revoking an approval to operate.

None of these actions will be undertaken through an automated process.

It is also noted that community concerns related to privacy are not within the scope of these regulations and are the subject by a range of other Commonwealth and State legislation.

Whether the automated assistance in the decision-making process complies with the best practice principles set out in the Administrative Review Council's report on Automated Assistance in Administrative Decision Making, and, if not, why not.

The automated assistance in the decision making process is consistent overall with the best practice principles, and these principles are reflected in the design of the process and system being implemented. In particular, it is noted that:

With regard to principle 2, whilst the decision making power in section 16A can involve a significant degree of discretion, automated assistance is limited to supporting a risk-based self-assessment process. Automated decisions are only issued in circumstances where the risk of significant noise impacts is low and little discretion in the decision making process is required.

Consistent with principle 27, the use of automated assistance in the self-assessment process does not replace direct human services and operators retain the option to request consideration by a person.

THE HON KAREN ANDREWS MP
MINISTER FOR HOME AFFAIRS

Ref No: MC22-015229

Senator the Hon Concetta Fierravanti-Wells
Chair
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Dear Senator

Thank you for your correspondence of 31 March 2022, seeking further advice on the Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Rules Amendment Instrument 2021 (No.2) [F2021L01658]. I confirm that AUSTRAC will include in future Explanatory Statements to AML/CTF Rules that the Rules are exempt from sunsetting under Regulation 12 of the Legislation (Exemptions and Other Matters) Regulation 2015 and the justification for the exemption from sunsetting.

In response to your request for further advice as to why it is considered necessary and appropriate to use delegated legislation to set out an exemption from the operation of primary legislation in the case of litigation funders, I note that the AML/CTF Rules are more flexible and responsive to changes in relevant sectors and emerging risks than the AML/CTF Act. This is reflected by the number of additions and amendments made to the Rules since they commenced in 2007, and the reason why many chapters of the AML/CTF Rules relate to the exemption powers under the AML/CTF Act.

The timeframe required to progress the exemption through legislation is considerably longer than that required for delegated legislation. In the absence of the exemption, litigation funders would be required to conduct the applicable customer identification procedures on any claimant that wishes to become a member of a scheme, including those that are passive members (unknown to litigation funders). This would likely result in litigation funders ceasing their activities pending the exemption, and risks impacting access to justice through open class actions.

I trust this information will assist the Committee in its consideration of the matter. If the Committee has further questions, I would be happy to discuss further with you.

Yours sincerely

KAREN ANDREWS

22 / 4 / 2022

SENATOR THE HON JANE HUME
MINISTER FOR SUPERANNUATION, FINANCIAL SERVICES AND THE DIGITAL ECONOMY
MINISTER FOR WOMEN'S ECONOMIC SECURITY

Ref: MS22-000336

28 MAR 2022

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegate 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, originally directed to the Treasurer, concerning the *Competition and Consumer Amendment (Consumer Data Right) Regulations 2021*. Your correspondence has been referred to me as I have responsibility for this matter.

You have sought advice on:

Privacy and adequacy of explanatory materials

- whether it is possible the Australian Energy Market Operator (AEMO) could hold private or personal consumer data in the future; and
- why it is considered necessary to remove the privacy safeguards applicable to AEMO.

Exemption from the operation of primary legislation and exemption from sunsetting

- why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to exempt the AEMO from the operation of privacy safeguards in the *Competition and Consumer Act 2010* (the Act);
- why the principal instrument is exempt from sunsetting, noting that this means that the measures in this instrument will remain in force within the principal instrument until they are proactively repealed;
- whether the *Competition and Consumer Regulations 2010* (the principal instrument) can be amended to provide that the measures inserted into the principal instrument by this instrument cease three years after they commenced; and

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- whether there is any intention to conduct a review of the relevant provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation.

Advice

Privacy and adequacy of explanatory materials

Is it possible the Australian Energy Market Operator (AEMO) could hold private or personal consumer data in the future?

AEMO's functions are set out under subsection 49(1) of the *National Electricity Law*, and include administering the National Electricity Market, registering participants in the market, managing dispatch and scheduling in the market, maintaining power system security and facilitating retail customer transfers, metering and retail competition. Its role in supporting metering, customer transfer and retail competition is focussed on administering systems and infrastructure. AEMO does not perform any consumer-facing roles in carrying out these functions. While AEMO receives and holds information about connection points in the National Electricity Market, it does not hold information that would enable it to identify individual electricity consumers, such as customer names. Each connection point in the National Electricity Market is allocated a unique National Metering Identifier, which is used when retailers request consumer data right (CDR) data from AEMO.

Under the existing legislative framework of the National Electricity Market AEMO will not hold private or personal consumer data in the future in relation to the data sets being shared under CDR.

Why is it considered necessary to remove the privacy safeguards applicable to AEMO?

Privacy safeguards only apply to CDR data for which there are one or more CDR consumers (see subsection 56EB(1) of the Act). For the privacy safeguards to apply, there needs to be at least one person who is identifiable, or reasonably identifiable, from the CDR data or from related information (see paragraph 56AI(3)(c) of the Act).

AEMO cannot identify a consumer from the CDR data (metering data) it holds. Prior to AEMO providing CDR data it holds to a retailer in response to a consumer data request, the data is not CDR data 'for which there are one or more consumers' and the privacy safeguards do not apply. However, where AEMO responds to a consumer data request and provides CDR data to a retailer, information held by the retailer means that the retailer can identify the consumer from the CDR data. In these circumstances the CDR data held by the retailer becomes CDR data 'for which there are one or more consumers' to which the privacy safeguards apply. At the point the AEMO CDR data held by a retailer becomes CDR data 'for which there are one or more consumers', technically the CDR data that AEMO shared with the retailer, and which AEMO continues to hold, may also be deemed to be CDR data 'for which there are one or more CDR consumers'. This is the case even though AEMO itself cannot identify a consumer from that CDR data. Given this unintended consequence it is appropriate to modify the operation of the privacy safeguards applicable to AEMO.

The exemption of AEMO from these specific privacy safeguards must also be considered in connection with the application of these safeguards to energy retailers that can identify consumers from the AEMO CDR data disclosed to them, as introduced by this instrument. For each of privacy safeguards 1, 10 and 13, the removal of a privacy safeguard from AEMO is matched with a requirement for an energy retailer to apply these safeguards as though they were the data holder under the energy designation. As such, the resulting net privacy protections of consumers has not been reduced, but instead moved to a consumer-facing entity capable of having policies which give effect to the safeguards requirements. The exception to this is privacy safeguard 11 – which imposes a requirement to ensure the quality of CDR data – as it is not practicable for energy retailers to be obligated to maintain the quality of CDR data that they do not hold (in this case, the data that is held by AEMO). Further, there is a comprehensive process for quality assurance of AEMO held data under the National Electricity Law. Exempting AEMO from safeguard requirements that are imposed elsewhere is necessary to ensure that data holders may have a clear understanding of the law and their obligations.

Exemption from the operation of primary legislation

The CDR regime is structured to have the fundamental principles of general application set out in the primary legislation (Part IVD of the Act) with the detailed provisions that apply these principles to specific sectors and circumstances set out in designation instruments, regulations and the CDR Rules. The Act empowers the Minister to designate new sectors of the economy to be subject to the CDR, and within such designations, to determine what data is CDR data and what classes of people are data holders as well as specific gateways of such CDR data. The Act does not identify any specific data holders or designated gateways, and as such makes no reference to AEMO. Rather, AEMO falls within the CDR regime by virtue of the *Consumer Data Right (Energy Sector) Designation 2020*, which designates AEMO as a data holder.

Consistent with the existing structure of the CDR legislation, the exemption of AEMO from privacy safeguards, and application of those privacy safeguards to relevant retailers, are imposed through regulations as it is an exceptional circumstance, and only applies to a small number of entities.

Paragraph 1.478 and 1.479 of the explanatory memorandum to the Treasury Laws Amendment (Consumer Data Right) Bill 2019 explains that regulations can be made to declare that provisions of the CDR legislation are modified or varied, including exempting a person from the provisions of the CDR regime. As such, it is my view that the use of the regulation making powers in this way was foreseen by Parliament and it is appropriate to include this exemption in regulations.

Exemption from sunsetting

The principal instrument was exempt from sunsetting by the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting Exemptions) Regulations 2017*. The principal instrument is integral to the operation of the various intergovernmental schemes that establish the Australian Consumer Law.

It is highly unlikely that there would ever be changes to AEMO's holding of CDR data such that AEMO could independently identify individual consumers, as this has been the status quo since the National Electricity Market commenced in 1998. As these circumstances are ongoing and not likely to change in the future, it would not be effective or appropriate for the modifications of this instrument to cease operating within three years of their commencement. Additionally, repealing these provisions in three years would lead to the removal of privacy safeguards applied to retailers, leaving uncertainty for AEMO, retailers and consumers.

A review of the provisions to determine if they remain necessary and appropriate, including whether it is appropriate to include the provisions in delegated legislation, can be considered in the context of the statutory review of the CDR legislation that has been initiated recently under section 56GH of the Act.

I trust this information will be of assistance to you.

Yours sincerely

Senator the Hon Jane Hume

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

04 APR 2022

MC22-001533

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

Dear Chair Concetta

Thank you for your letter of 10 March 2022 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding your consideration of the *Autonomous Sanctions Amendment (Magnitsky-style and Other Thematic Sanctions) Regulations 2021* (the Regulations).

You have requested advice as to:

- why it is considered necessary and appropriate to use delegated legislation, rather than primary legislation, to provide for new thematic sanctions and the criteria upon which the minister can list an individual or entity
- whether any safeguards or limitations beyond those set out in the instrument apply to the exercise of the power to list a person or entity in regulation 6A, and whether these safeguards are contained in law or policy
- why procedural fairness is not provided in relation to listing decisions, and
- the meaning of the terms 'significant cyber incident' and 'serious corruption'.

Use of delegated legislation to provide for new thematic sanctions regimes and listing criteria

As recommended by the Joint Standing Committee on Foreign Affairs, Defence and Trade - Human Rights Sub-Committee in its report *Criminality, corruption and impunity: Should Australia join the Global Magnitsky movement?* (the JSCFADT Report), thematic sanctions have been implemented using existing processes and legislative schemes.

As outlined in the Government response to the JSCFADT Report, this ensures consistency of powers, offences and procedural safeguards across Australia's broader autonomous sanctions framework.

While the Regulations themselves establish a new thematic sanctions framework pursuant to which we can quickly coordinate with key partners where necessary to list in the national interest,

they do not alter the procedural operation of the autonomous sanctions framework, which was subject to extensive consultation when it was established in 2011.

Australia's legal framework for the imposition of autonomous sanctions consists of the *Autonomous Sanctions Act 2011* (the Act) and the *Autonomous Sanctions Regulations 2011* (the Principal Regulations). My powers, as the Minister for Foreign Affairs, to list persons and entities for autonomous sanctions are appropriately established in the Act, with the listing criteria for each autonomous sanctions regime established by Government clearly set out in the Principal Regulations.

This allows the Government to use autonomous sanctions to respond flexibly and swiftly to international situations of concern. Amending listing criteria or establishing listing criteria for a new sanctions regime requires amendments to the Principal Regulations, rather than the Act – which we would otherwise be required to do with reference to the relevant country, every time a different situation of concern arose. Establishing new thematic sanctions regimes has therefore enhanced the Government's ability to respond to international situations of concern as they arise.

You also note the Committee's concern that this instrument is likely to have a significant impact on the personal rights and liberties of listed individuals, including restrictions on the right to freedom of movement and the right to privacy. As you are aware, the objective of listing an individual or entity is to impose costs in response to their egregious activities. Notwithstanding this, I consider that the following aspects of the Principal Regulations, as amended by the Regulations, support the protection of human rights, should any of the rights you identify be impacted by listings made under Australian thematic sanctions:

- The Principal Regulations are transparent and targeted. When listing a person under the Principal Regulations for targeted financial sanctions or a travel ban, I use predictable, publicly available criteria. These criteria are designed to capture only those persons that I am satisfied are involved in egregious situations of international concern, as set out in regulation 6A.
- Once a listing has been made, I may revoke the listing at any time, either upon application or on my own initiative. The Principal Regulations provide that listings automatically expire after three years if not otherwise continued in effect by legislative instrument.
- The Principal Regulations allow me, upon application, to provide for certain payments to be made to a designated person and for a designated person's assets to be dealt with in certain circumstances, including in relation to food, housing, medicine and medical treatment. I may, upon my own initiative, provide for payments to be made to a designated person, or for a designated person's assets to be dealt with, if I am satisfied that to do so is in the national interest. The Principal Regulations also allow me to waive the operation of a travel ban on the grounds that it would be either in the national interest or on humanitarian grounds.
- In accordance with current sanctions listing practice, the specific human rights implications of particular listings will be set out in the Statement of Compatibility with Human Rights accompanying a legislative instrument listing persons when that instrument is made. Therefore, before listing persons for targeted financial sanctions or travel bans introduced under the new thematic sanctions regimes, consideration would be given to whether or not the instrument is compatible with human rights, and that any infringements on rights, if applicable, are reasonable and proportionate.

Safeguards or limitations beyond those set out in the instrument apply to the exercise of the power to list a person or entity in regulation 6A

As the Committee notes, regulation 6A of the instrument confers a broad discretionary power on me, as Minister for Foreign Affairs, in consultation with relevant Ministers as appropriate, to list an individual or entity if satisfied that they meet the relevant criteria. This is in line with

Recommendation 20 of the JSCFADT Report. It is appropriate that this discretion rests with the Minister of Foreign Affairs, as sanctions are a foreign policy tool aimed at achieving foreign policy goals. Notably, the Minister for Foreign Affairs will decide following consultation across Government.

Furthermore, when making thematic designations of persons or entities or declarations of persons, the Regulations require that I consult with the Attorney-General and any other Ministers I consider appropriate when considering thematic sanctions listings. This consultation requirement is an additional safeguard to ensure consideration of all relevant foreign policy considerations and risks given the additional flexibility within the thematic sanctions framework.

Further, the application of sanctions is only reserved for the most egregious violations and abuses of human rights.

While Regulation 26 of the Principal Regulations authorises me to delegate to certain employees in the department including the secretary, in practice I have not delegated any of my listing or relisting powers.

Procedural fairness in relation to listing decisions

As you observed, the Regulations do not include notice requirements, and I am not required to accord procedural fairness by consulting with affected persons or entities prior to listing them for the first time.

A requirement to give notice prior to making listing decisions would undermine the policy objective of issuing listing decisions, and there is no alternative means of allowing parties to be heard in advance of a decision that would still achieve the practical aims of listings. There is also the issue of expediency; it is necessary for these decisions to take effect immediately to ensure their effectiveness.

Putting a person or entity on notice of a listing or delaying the implementation of a listing would allow them an opportunity to remove assets from Australian jurisdiction or take other evasive action that would fundamentally undermine the effectiveness of the listing itself.

These listing decisions have important public policy aims in responding to situations of international concern, imposing a cost on perpetrators and enablers of such egregious abuses of human rights, and serious conduct such as malicious cyber attacks or corruption, ensuring they cannot benefit from democratic economies such as Australia, or find safehaven here for themselves or their ill-gotten gains. The limitations on procedural fairness are necessary to practically achieve these critical objectives.

As a matter of policy and in accordance with longstanding practice, once listed, my department updates the Consolidated List; a publicly available list of all persons and entities who are subject to targeted financial sanctions under Australian sanctions laws. Further, my department notifies all subscribers to its email list when new listings have been added to the Consolidated List.

Under section 10 of the Principal Regulations, I may revoke a listing at any time upon application by the person to which the listing applies, or my own initiative. Should the person not apply for the listing to be revoked, the Principal Regulations provide that listings automatically expire after three years if not otherwise continued in effect by legislative instrument.

As above, when considering whether to continue a listing, I invite submissions from the listed person or entity, or their authorised representatives to enable affected parties to be heard.

As you observe, listing decisions are subject to judicial review, but not merits review. This is in line with the principles developed by the Administrative Review Council, which identified certain types of decisions, such as those affecting Australia's relations with other countries, as being generally unsuitable for merits review. Listings are made by legislative instrument and, as explained above,

this ensures transparency and accountability. They are also accompanied by an explanatory statement and statement of compatibility with human rights, and they are disallowable by Parliament. Merits review would be out of step with key partners.

Meaning of the terms 'significant cyber incident' and 'serious corruption'

The Committee mentions that 'cyber incident' is not defined in the instrument. The Explanatory Statement provides clarification in this regard – a cyber incident is a cyber-enabled event (or a group of related cyber events) that results in, or seeks to cause, harm to Australia or another country or countries. By way of illustration, the Explanatory Statement further provides that this may include events that result in harm to individuals, businesses, economies or governments.

I acknowledge the Committee's concern that while the criteria in subregulation 6A(3) go to whether a 'cyber incident' is significant or not, paragraph 6A(3)(d) provides that I may have regard to 'any other matters the Minister considers relevant', introducing a lack of clarity in what amounts to a significant cyber incident. The Explanatory Statement confirms that the listed factors in 6(3) help determine whether the conduct of the person or entity was malicious or may constitute a serious threat to Australia's or another country's security, stability and prosperity. This list is non-exhaustive because factors which may be relevant for me to determine whether a 'cyber incident' is 'significant' will vary from case to case.

The Committee has also requested clarification on what amounts to 'serious corruption'. Subregulation 6A(6) provides a number of factors that I may have regard to when satisfying myself that an act of corruption is serious, including:

- the status or position of the person or entity
- the nature extent and impact of the conduct of the person or entity
- the circumstances in which the conduct occurred, and
- any other matters I consider relevant.

Each of these factors are elaborated on in the Explanatory Statement. For example, when considering the nature and extent of the conduct, the Explanatory Statement notes that I may have regard to whether the conduct is systemic, sophisticated or occurring over a long period of time; the financial value of the bribe, asset diverted, or benefit derived; and whether the conduct is recent. The Explanatory Statement also provides that the list is non-exhaustive because factors which may be relevant for me to determine whether corruption is 'serious' will vary from case to case and includes specific examples of sanctionable conduct.

I consider this information to be comprehensible to all persons interested in or affected by this instrument. The Government has struck the appropriate balance between removing misunderstanding and maintaining an appropriate level of Ministerial discretion to respond to the specific facts of any cyber incidents or acts of corruption.

I trust this information will assist the Committee and thank you again for your interest in the Regulations, including throughout the legislative process.

Yours sincerely

MARISE PAYNE

SENATOR THE HON JANE HUME
MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND THE DIGITAL ECONOMY
MINISTER FOR WOMEN'S ECONOMIC SECURITY

Ref: MS22-000192

Senator the Hon Concetta Fierravanti-Wells
Chair
Senate Standing Committee for the Scrutiny of Delegate Legislation
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28 MAR 2022

Dear Senator Fierravanti-Wells

I write in relation to your correspondence to the Treasurer on 25 January 2022 on behalf of the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) regarding the *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 1) 2021* and *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 2) 2021* (the Rules).

The Committee requested advice in relation to:

- the justification for including significant penalties in the Rules and whether the justification is the same as the justification provided in the Treasurer's response to the Committee dated 27 May 2021 in relation to the *Competition and Consumer (Consumer Data Right) Amendment Rules (No. 3) 2020* [F2020L01688] (the 2020 amendment Rules); and if so
- whether the explanatory statements for both instruments can be amended to include this justification.

I wish to advise that the justification provided in relation to the 2020 amendment Rules is the same as that for the queried civil penalty provisions in the Rules. In order to ensure complete clarity about the objectives of the relevant provisions of the *Competition and Consumer (Consumer Data Right) Rules 2020* and how the civil penalties attached to them help achieve those objectives, revised Explanatory Statements for the Rules will be registered on the Federal Register of Legislation as soon as practicable.

I trust this information satisfactorily resolves the Committee's questions and I request the removal of the disallowance motion for this item.

Yours sincerely

Senator the Hon Jane Hume

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Senator the Hon Simon Birmingham

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

REF: MS22-000193

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

Connie,

Dear Senator Fierravanti-Wells

I refer to your letter dated 10 February 2022 seeking additional information about the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021* [F2021L01430], which inserted item 506 'COVID-19 vaccine claims scheme' in Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*.

The Minister for Health and Aged Care, the Hon Greg Hunt MP, who has policy responsibility for the COVID-19 Vaccine Claims Scheme (the Scheme), has provided the information in the attached response. I also agree to replace the explanatory statement for the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021* to include further information on the privacy protections under the Scheme, as requested by the Committee and the responsible Minister.

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

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

Yours sincerely

Simon Birmingham

7 April 2022

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Financial Framework (Supplementary Powers) Amendment (Health Measures No. 6) Regulations 2021 **[F2021L01430]**

Response provided by the Minister for Health and Aged Care

The Committee has raised a number of questions in relation to the *Financial Framework (Supplementary Powers) Amendment (Health Measures No.6) Regulations 2021* (the Health Regulations) and the responses in relation to these questions are provided below. It should be noted that the establishment of the COVID-19 Vaccine Claims Scheme (the Scheme) under the Health Regulations was an express decision of the Government, after considering the issues in the Scheme design related to both primary legislation and delegated legislation. The Government, after careful consideration of the issues, specifically determined that the funding authority for the Scheme be established with legislative authority provided under the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations) with the appropriation of funds provided through an existing Appropriation Bill 1, demand-driven annual appropriation.

Parliamentary enactment

The Committee requested detailed advice in relation to the following matters:

- *why was there insufficient time for the Scheme to be established by primary legislation, noting that the vaccine rollout commenced on 21 February 2021;*
- *whether at least high-level parameters in relation to the scope of the Scheme can now be set out in primary legislation; and*
- *if not, detailed justification as to why it is not possible for the Scheme to now be given effect to by primary legislation.*

The Prime Minister initially announced the establishment of a no-fault indemnity scheme on 28 June 2021. The Government then undertook work on the design of the scheme with further detail announced by the Minister for Health and Aged Care on 28 August 2021, following careful consideration and further decisions of the Government about detailed parameters. The Government determined that the Scheme would be established under the Principal Regulations to enable rapid claiming and payment of compensation to individuals who suffered harm following the administration of a vaccine for the treatment of COVID-19 that had been approved by the Therapeutic Goods Administration (TGA).

The development of the Scheme followed significant consultation and consideration of a range of policy options based on the evolving nature of the pandemic. To ensure no-one who had suffered an adverse event due to a COVID-vaccination was disadvantaged, the Government decided to backdate the Scheme to cover any harm suffered following vaccination from 22 February 2021 when the national roll-out of COVID-19 vaccines commenced.

The Government's objective in introducing the Scheme was to support public confidence in the COVID-19 vaccination roll-out program, by providing reassurance to the community that compensation would be available in rare cases where a person suffered moderate to significant harm following the administration of a COVID vaccine. It was paramount to the Government, given the unique nature of the pandemic, that compensation be quickly available as part of the national vaccination roll-out program to support the small number of people impacted. The need for a rapid response was strongly reinforced by the advice from peak medical bodies who indicated at the time that health

practitioners essential to support vaccination rates were considering withdrawing from participating in the national roll-out until the Scheme was in place.

Furthermore, risks were considered in relation to the international re-insurance market for insurers and their policy holders, and consistency in support for patients accessing vaccines through different sources. Consultation with state and territory governments, medical defence organisations and health practitioners assisted with development of the final Scheme design, to ensure it was fit for purpose.

The stability of insurance for medical practitioners in support of pandemic measures was a key outcome of the decision of the Government to develop the Scheme and the rapid action to put appropriate measures in place. The overlapping responsibilities of medical practitioners, their medical defence organisations, state and territory governments, manufacturers and regulators all required careful consideration and design to put in place an effective and fit for purpose Scheme able to open in December 2021. These issues were reviewed through consultation and given appropriate consideration before determining the best outcome for patients would be through implementation under the Health Regulations.

The Scheme was purposefully established administratively by the Government to ensure, as much as possible, that claims for compensation would be considered and determined within timeframes that were relatively contemporaneous to the adverse event. This is in contrast to legal proceedings, where cases often take years to resolve, particularly due to the requirement for fault to be found.

The Scheme is intended to operate for a limited duration, intended to be open for a period of two years following the expiration of the emergency declaration period under the *Biosecurity Act 2015*. Currently, this means that claims under the Scheme may continue until 17 April 2024.

The enactment of primary legislation would have delayed establishment of the Scheme and determination of claims, and posed a significant risk to safe and confident implementation of the COVID vaccine program by practitioners for the community benefit.

The Government considered both the importance of public scrutiny and public health, and determined in favour of the Scheme being prescribed in the Principal Regulations so that it may provide rapid support to those who have suffered moderate to significant harm following a COVID-19 vaccine whilst being transparent through publishing detailed scheme advice.

A detailed Scheme Policy was developed through consultation with the Australian Government Actuary, Services Australia and internal and external legal advice. This policy runs to 66 pages and has been published on the Department of Health's (Health) website. This approach allows the Scheme to be rapidly updated to respond to emerging information to benefit the community, such as the approval of a new COVID vaccine, Novavax on 20 January 2022, and new clinical conditions warranting consideration of compensation without undue delay. This flexibility is key to ensuring support through a rapidly changing global pandemic for the relatively few families who have been impacted significantly.

The Scheme has operated since 13 December 2021 and has generated considerable public interest. Over 1,000 claims have been received by Services Australia. A change in the operation of the Scheme would negatively impact existing and future claimants, and

would undermine confidence in this Scheme, and potentially the range of health measures in support of the Australian community during the pandemic.

Parliamentary oversight – executive expenditure

The Committee reiterated its request for a high level indication as to the total amount of funding that is expected to be expended on the Scheme, noting the importance of effective parliamentary oversight of executive expenditure.

It is difficult to provide a precise estimate of the cost of the program given uncertainty over the nature of the claims that may be made. The Government has used advice from the Australian Government Actuary to make a provision in the budget to ensure appropriation as needed is available to support payments from the Scheme.

As more claims are finalised by Services Australia, the Government will be in a better position to estimate likely scheme costs, noting that the Scheme is being administered as a demand driven program within a Bill 1 appropriation, and all valid claims will be paid.

Parliamentary oversight – scope of the Scheme

The Committee has enquired whether the detailed content of the Scheme, such as the list of conditions for which a claim may be (or may not be) payable, could at least be set out in disallowable delegated legislation; and, if this is not possible, the Committee has sought detailed advice as to why that is the case.

While it would be possible to include a list of clinical conditions that are recognised by the Scheme in table item 506 of Schedule 1AB to the Principal Regulations, as published on Health's website within the policy, any such inclusion would limit the flexibility to add new clinical conditions to the Scheme in a timely fashion, including those associated with new vaccines. Changes to the relevant schedule to the Health Regulations are typically only considered for making by the Governor-General in Federal Executive Council meetings. This would limit timely access to compensation for individuals who have suffered harm if new clinical conditions emerge or as vaccines are added.

It is a requirement that the Scheme Policy can only be updated to include the addition of a new vaccine or clinical condition following advice from the TGA and the Australian Technical Advisory Group on Immunisation as the appropriate medical experts. Enumerating such details in the Scheme Policy allows for their expeditious updating following advice from these bodies, consistent with the patient centric approach being taken.

Availability of independent merits review

The Committee has enquired whether an alternative form of independent review to that of review by the Administrative Appeals Tribunal (AAT) could be provided for in relation to decisions made under the Scheme; and if this is not possible, the Committee has requested detailed justification as to why this is the case.

The Scheme has a free, robust and transparent appeals process under which a claimant who is dissatisfied with the decision made in respect of their claim may seek a reassessment by another decision maker at a higher level in the public service. The decision maker on review would be at the Senior Executive Service (SES) level, when the original decision maker is Executive Level 2 (EL2).

Prior to a settlement deed for compensation being executed, an application for review may be submitted by the claimant and undertaken by Services Australia. The claimant may provide further evidence or information in support of their claim for review within 28 days of submitting their application for review.

The decision maker on review will review the original decision and determine whether the claimant is entitled to compensation and, if so, the amount of compensation that should be paid to the claimant. The decision maker on review may involve or seek input from the independent expert panel and/or a relevant medical officer in relation to the review of a claim. The decision of the decision maker on review will supersede the original decision. The anticipated turnaround time for such reviews is expected to be faster than reviews conducted by the AAT.

The availability of this internal review process is intended to ensure that administrative decisions in relation to the Scheme are correct and made in accordance with the Scheme Policy. The objective is to ensure the fair treatment of all persons affected by a decision, and consistency, openness and accountability of all decisions made. Judicial review of any decision made under the Scheme is also available under section 39B of the *Judiciary Act 1903* and section 75(v) of the Constitution. The basis for seeking review under these mechanisms is broadly the same as the grounds on which judicial review may be sought under section 5 of the *Administrative Decisions (Judicial Review) Act 1976.*

Delegation of administrative powers and functions – conferral of discretionary powers

The Committee has enquired whether a claim under $20,000 could be considered sufficiently complex to be escalated for consideration by a member of the SES and what this process would involve; and whether safeguards and limitations on the exercise of discretionary powers under the Scheme may be set out in disallowable delegated legislation.

A claim under $20,000 (being, a Tier 1 claim under the Scheme) could be considered sufficiently complex to be escalated for consideration by a member of the SES provided a claimant sought a review of a decision made by an EL2 delegate in the first instance; or the delegate considered a decision could not be made based on independent medical or legal advice provided by the independent expert panel established to assist in the effective and consistent application of the Scheme.

Services Australia has implemented safeguards and limitations on the exercise of the discretionary powers through delegation guidelines; the use of independent medical and legal panels to review evidence and to make recommendations and processing guidance as issues arise. Relevantly, all claims relating to harm resulting from the administration of the vaccine are currently being referred for expert medical advice to provide further expert support to delegates at Services Australia.

Revised explanatory statement

The Committee has requested advice as to whether a revised explanatory statement could be registered as a matter of urgency to reflect the reduced claims threshold of $1,000; and information as to the relevant privacy protections.

The Minister for Health and Aged Care agreed to these changes and will liaise with the Minister for Finance to make arrangements for that revised statement to be approved and registered on the Federal Register of Legislation. The Government agreed that it would be

beneficial to reduce the threshold for access to the Scheme from $5,000 to $1,000 of eligible costs, such as lost earnings for persons who suffered harm. This was intended to further encourage those persons yet to be vaccinated (for fear of experiencing adverse events and any resulting losses) to participate in the vaccination program and ensure more Australian's could access support, should they need it, for the approved adverse reactions.

As part of an application for compensation under the Scheme, claimants are required to provide personal information, including medical information, to enable the Commonwealth to confirm that an injury has occurred following the administration of a TGA-approved COVID-19 vaccine, and to assess the claim and relevant amounts payable. Personal information is only collected, used and disclosed under the Scheme with the consent of the claimant.

As Australian Privacy Principles entities, Services Australia and Health are bound to comply with the *Privacy Act 1988*. Services Australia and Health have jointly commissioned a privacy impact assessment in relation to the Scheme to ensure privacy risks have been identified and addressed throughout the development of the Scheme, and to confirm that the Scheme's implementation will not give rise to unacceptable privacy outcomes.

THE HON ANGUS TAYLOR MP
MINISTER FOR INDUSTRY, ENERGY AND EMISSIONS REDUCTION

MS21-001985

30 MAR 2022

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 Chair

Thank you for your letter of 2 December regarding the *Industry Research and Development (Supporting Critical Transmission Infrastructure Program) Instrument 2021* [F2021L01312] (the Instrument).

As you identify in your letter, the purpose of the Instrument is to prescribe the Supporting Critical Transmission Infrastructure Program (the Program). The Program is intended to provide financial support for electricity transmission projects that have potential electricity price, reliability or security benefits. You have raised that the Explanatory Statement does not identify the amount of Commonwealth funding being provided for the Program.

Instruments made under section 33 of the *Industry, Research and Development Act 1986* (section 33 instruments) authorise Commonwealth spending on the programs that are prescribed within them. They do not authorise the expenditure of any particular amount of Commonwealth funds, since the allocation of funds is dealt with through appropriations.

Explanatory statements for section 33 instruments contain information about the context in which an instrument is made, including the amount of funding available where it is known at the time that the instrument is made, and where it is appropriate at that time to disclose it.

As my Department identified in its correspondence with your secretariat on 4 November 2021, there is no current appropriation for funding that would be authorised by the Instrument, and the support being provided is subject to ongoing commercial negotiations. That is the primary reason that a funding amount was not included in the Explanatory Statement.

At this time, the maximum expected value of Commonwealth support for the Program is in the order of $500 million. However, the support includes underwriting and similar arrangements such that any Commonwealth funding is likely to be substantially lower than this figure. I am also not able to provide a more precise figure due to the ongoing negotiations and speculative nature of the estimate.

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I note that the Program remains open to scrutiny through other parliamentary avenues, such as Senate Estimates hearings and parliamentary questions. Program expenditure is also dealt with in the relevant budget process.

I trust this information assists the Committee.

Yours sincerely

ANGUS TAYLOR

THE HON KAREN ANDREWS MP
MINISTER FOR HOME AFFAIRS

Ref No: MS22-000509

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

I refer to your correspondence of 10 March 2022 requesting advice in relation to the *Telecommunications (Interception and Access) Amendment (2021 Measures No. 1) Regulations 2021* (the Amendment Regulations).

As part of the Cyber Security Strategy 2020, the Government is committed to supporting the telecommunications industry to implement threat blocking technology to prevent the proliferation of scams over the telecommunications network and protect the public. Malicious scams have had, and continue to have, a significant impact on the Australian community and malicious actors continue to use a range of methods to send harmful SMS messages at scale.

Based on advice from telecommunications industry stakeholders, the scale of malicious SMS messages can have an adverse impact on the functioning and integrity of a number of telecommunications systems. In some instances, the nature and volume of these messages has resulted in carriers not being able to effectively deliver telecommunication services to the public. Accordingly, the ability to detect, treat and prevent these messages may be reasonably necessary to ensure the ongoing effective operation and maintenance of these telecommunication systems.

Subsection 7(1) of the *Telecommunications (Interception and Access) Act 1979* (TIA Act) prohibits the interception of communications, with some exceptions. Relevantly, subparagraph 7(2)(a)(ii) provides an exception in relation to actions by an employee of a carrier, where those actions are reasonably necessary in connection with the operation or maintenance of a telecommunications system. There are similar provisions relating to accessing stored communications.

Importantly, the Amendment Regulations do not declare that identifying and blocking malicious SMS messages *will* be in connection with the operation or maintenance of a telecommunications system. This remains a matter for carriers, and ultimately a court, to determine.

However, the Amendment Regulations support carriers, and ultimately courts, to make decisions as to when actions by employees of carriers to identify and block malicious SMS messages *are reasonably necessary* to perform their duties effectively in connection with the operation and maintenance of their systems. In making this assessment, a court must consider the matters set out in the Amendment Regulations.

The Amendment Regulations therefore provide the telecommunications service providers with greater assurance to deploy their capabilities to block malicious SMS messages and protect their networks, their services, and ultimately the Australian community. The Amendment Regulations guide industry (and the courts) on when acts or things done for the purposes of identifying and blocking malicious SMS messages may be reasonably necessary for the operation or maintenance of a telecommunications system,.

I have copied this letter to the Minister for Communications, Urban Infrastructure, Cities and the Arts, the Hon Paul Fletcher MP.

I trust this information is of assistance to the Committee's consideration of the Amendment Regulations.

Yours sincerely

KAREN ANDREWS

29 / 3 / 2022