Monitor 7 of 2022 – Ministerial Responses

Contents

Attorney-General

Reference: MC22-019971

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

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

Dear Senator

I am writing in response to correspondence of 8 September 2022 from the Senate Standing Committee for the Scrutiny of Delegated Legislation, seeking further advice on the *Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Rules Amendment Instrument 2021 (No.2)* [F2021L01658].

Section 229(1) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) empowers the AUSTRAC CEO to make Rules (the AML/CTF Rules) prescribing matters permitted by any other provision of the Act. One such provision is sub-section 247(3) of the AML/CTF Act, which allows the AML/CTF Rules to specify circumstances in which the AML/CTF Act does not apply to the provision of a designated service. The AML/CTF Rules are solely contained in the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*.

The *Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Rules Amendment Instrument 2021 (No.2)* (the 'Instrument') was made because the regulation of litigation funding schemes under the AML/CTF framework as Managed Investment Schemes (MIS) was an unintended consequence of changes made to the *Corporations Regulations 2001* in 2020. The effect of the Instrument is to exempt the issuing of an interest in a litigation funding scheme from the operation of the AML/CTF Act.

In correspondence with the former Minister for Home Affairs between February 2022 and April 2022, the Committee raised two questions for consideration with respect to the Instrument:

- the exemption of the Instrument from sunsetting requirements of the *Legislative Instruments Act 2003* in Regulation 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*, and
- the Instrument's proposal to provide exemptions from primary legislation (the AML/CTF Act).

Exemption to sunsetting

I note that the AML/CTF Rules are designed to be enduring and were exempted by the Governor-General from the sunsetting provisions of the *Legislative Instruments Act 2003* in Regulation 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

Ceasing exemptions after three years would be inconsistent with the decision to exempt AML/CTF Rules from sunsetting, and will have a negative impact on the expectation of reporting entities and exempted entities that the AML/CTF Rules will continue on an ongoing

basis, and reduce the regulatory certainty which industry requires and relies on when making significant investments in their AML/CTF systems and procedures.

It is not necessary for exemptions to cease after three years given the ongoing process of development, review and refinement to which the AML/CTF Rules are subject. This process involves scrutiny by, and feedback from, a wide range of stakeholders including international organisations (the Financial Action Task Force and Asia/Pacific Group on Money Laundering), Australian Government agencies (including the Attorney-General's Department, the Treasury and the Australian Taxation Office), law enforcement agencies (including Australian Federal Police and Australian Criminal Intelligence Commission), industry and other interested parties.

The close interest stakeholders have in the AML/CTF Rules results in an almost continual assessment of their relevance and appropriateness, and ensures that AUSTRAC is notified by relevant stakeholders of any concerns regarding the Rules and their operation. The number of additions and amendments made to the Rules since they commenced in 2007 indicates that the policy intention of the AML/CTF Rules is being fulfilled.

I note the former Committee's request that future explanatory statements to similar instruments made under the AML/CTF Act to explain the reasons for such instruments to be exempt from the sunsetting requirements provided in *Legislative Instruments Act 2003* in Regulation 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*. I confirm that AUSTRAC will include such advice in future explanatory statements.

Exemption from the operation of primary legislation

In response to the Committee's second question, I note that the Replacement Explanatory Memorandum to *Anti-Money Laundering and Counter-Terrorism Financing Bill 2006* stated:

> *The framework of the legislation is established in the Bill, however the legislative detail is set out in the Rules which can be amended to adapt to changing situations and circumstances.*

The inclusion of exemptions in the Rules ensures that the AUSTRAC CEO has sufficient flexibility to make, amend, and repeal exemptions as circumstances require without being delayed by infrequent and lengthy legislative amendment processes. This is particularly important in the context of the AML/CTF framework, which is risk-based. Money laundering and terrorism financing risk is dynamic and it is important that where the risk posed by an exemption shifts, it can be promptly amended or repealed to manage the evolving risks appropriately. Inclusion of exemptions in primary legislation after a fixed time period would inhibit this and would therefore be inconsistent with the risk-based nature of the regime.

I would, however, like to advise the Committee that subsequent to the Instrument being made, the Full Federal Court in *LCM Funding Pty Ltd v Stanwell Corporation Limited [2022] FCAFC 103* found the Court's earlier decision in *Brookfield Multiplex Ltd v International Litigation Funding Partners Pty Ltd (2009) 180 FCR 11*, that litigation funding schemes are subject to the Managed Investment Schemes regime, was incorrect.

Proposed amendments to the Corporations Regulations have been released for consultation by Treasury. The proposed amendments clarify in the Corporations Regulations the status of the law following the Full Federal Court's decision and reverse the effect of amendments made by the *Corporations Amendment (Litigation Funding) Regulations 2020.*

The AUSTRAC CEO will revisit the AML/CTF Rules in light of this change. This will occur

after the completion of Treasury's consultation and Parliament's consideration of any amendments to the *Corporations Regulations*. This illustrates the ongoing review and revision process to ensure the Rules are adapted to changing circumstances, as outlined above.

I trust this information will assist members of the Committee in their consideration of the motion. If the Committee has further questions, I would be happy to provide further information to the Committee.

Yours sincerely

THE HON MARK DREYFUS KC MP
4 / 10/2022

Julie Collins MP

Minister for Housing
Minister for Homelessness
Minister for Small Business

Ref: MS22-002022

Senator Linda White
Chair of the Committee
Senate Standing Committee for the Scrutiny of Delegated Legislation
Department of the Senate
Room S1.111
Parliament House
CANBERRA ACT 2600

Dear Senator White

I am writing in relation to the Senate Standing Committee for the Scrutiny of Delegated Legislation's comments in Monitor 5 of 2022 concerning the *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022* [F2022L00471] (the instrument).

Your correspondence has been referred to me as the matter falls within my portfolio responsibilities as Minister for Small Business.

In particular, the Committee has requested advice as to:

- why the instrument does not require a written report of the review of the industry code regulation instrument under new clause 53J to be tabled in Parliament, and
- whether the instrument could be amended to include such a requirement.

I have attached a detailed response to the Committee in Attachment A. I trust this information will be of assistance to the Committee.

I appreciate the Committee's consideration of the instrument and look forward to working cooperatively with the Committee on future delegated legislation.

I have copied this letter to the Treasurer.

Yours sincerely,

Julie Collins MP

5 /10/ 2022

Enc:
Attachment A

CC: The Hon Jim Chalmers MP, Treasurer

Attachment A

The *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022* [F2022L00471] (the instrument) amends the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* (the Franchising Code) to introduce a public register of information about franchisors, to increase transparency of the operation and structure of franchise systems. Provisions establishing the register and related matters are found in Part 5A of the Franchising Code, inserted by item 4 of Schedule 1 to the instrument.

The instrument requires that a review of the operation of Part 5A be undertaken, and a written report of the review to be provided to the Minister by 30 June 2024 (see clause 53J of Part 5A). The report may be, but is not required to be, tabled in Parliament.

The instrument is not required to be tabled in Parliament because:

- the review has an operational focus and is not significant;
- the Parliament will have the opportunity to scrutinise the new provisions through the sunsetting process within a year of the review as the Franchising Code sunsets on 1 April 2025; and
- other reviews within the industry codes framework generally do not include tabling requirements.

I acknowledge the Committee's comments on the importance of tabling reports of reviews into significant matters to support parliamentary awareness and debate, and to further the objectives of transparency and accountability which underpin the instrument. However, I consider that this review is merely operational and as a result does not need to be tabled in Parliament.

The review mandated by clause 53J considers operation of a specific part of the Franchising Code, rather than a significant portion of the Code. This is an operational matter, and the review is merely to ensure that the amendments inserted by the instrument are operating effectively.

Tabling of the report in Parliament was also not required by the instrument in light of the proximity of timing of the Part 5A review with the sunsetting of the Franchising Code. As noted in the explanatory statement, the timing of the review of Part 5A is expected to align with the normal sunsetting review process, which would be expected to occur in 2024 before the Franchising Code sunsets on 1 April 2025. As such, Ministerial oversight of the review of Part 5A in 2024 was deemed sufficient ahead of Parliamentary scrutiny of the Franchising Code as a whole through the sunsetting process in 2025.

Further, from a legislative framework perspective, it is important to take a consistent approach across industry codes to support coherency of legislation and common understanding.

Statutory reviews of industry codes made under the *Competition and Consumer Act 2010* generally do not require a report of the review to be tabled in Parliament. This approach reflects the operational nature of such reviews. The Franchising Code ensures transparency of the review and its outcomes by including public consultation, and the explanatory statement notes that the report will be published. Any amendments to the Franchising Code resulting from the review would be subject to Parliamentary scrutiny through the usual process.

This approach to oversight of the review of Part 5A of the Franchising Code aligns with that of statutory reviews of other industry codes including the:

- Dairy Code, per clause 6 to the *Competition and Consumer (Industry Codes - Dairy) Regulations 2019*;
- Food and Grocery Code, per clause 37E to the *Competition and Consumer (Industry Codes - Food and Grocery Code of Conduct) Regulation 2015*;
- Sugar Code, per clause 7 to the *Competition and Consumer (Industry Codes - Sugar) Regulations 2017*; and
- Wheat Port Code, per clauses 5 and 6 to the *Competition and Consumer (Industry Code - Port Terminal Access (Bulk Wheat) Regulation 2014*.

While clause 53J of the instrument could be amended to include a tabling requirement, it is preferable not to do so to maintain consistency of the legislative framework of industry codes and in light of Parliament's accompanying scrutiny of the Franchising Code through the sunsetting process.

The Hon Catherine King MP

Minister for Infrastructure, Transport, Regional Development and Local Government
Member for Ballarat

Ref: MS22-001727

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

via: sdlc.sen@aph.gov.au

Dear Senator Linda,

I refer to the Notice of Motion on 7 September 2022 to disallow the Air Navigation the Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021 (the Regulations) and for bringing the questions from the Standing Committee for the Scrutiny of Delegated Legislation (the Committee) on the Regulations to my attention. I have considered the matters raised by the Committee and provide the following response.

What standards or considerations are used to determine whether a Remotely Piloted Aircraft (RPA) poses a low, medium or high risk

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 regulations provide exemptions for drone operations that are considered 'minimal risk', including for drones weighing 250 grams or below and drone operations conducted in line with standard operating conditions, which include:

- operating at least 30m from people;
- not operating over populous areas; and
- operating only during the daytime.

Where an operation does not meet the criteria for the above, the Department of Infrastructure, Transport, Regional Development, Communications and the Arts then considers whether the drones:

- will be flying over noise sensitive areas, such as schools, residences or significant environmental sites; and
- will be flying frequently over the same area or weighing over 150kg.
-

If they do not meet these criteria, the drone operation is deemed as low risk and granted an approval through the automated system.

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Any other operations are deemed medium or high risk, with the scale of risk determined through a full assessment done by a departmental official in conjunction with the applicant. It includes such factors as:

- the size of the drone;
- proposed flight paths and existing land use;
- frequency of planned operations;
- noise mitigation measures; and
- what community outreach the applicant has done.

The use of drones for emergency services operations, such as policing or fire-fighting responses, are exempt from the noise regulations due to the time critical nature of these operations, and high community tolerance for noise arising from emergency services. For example, firefighters wanting to assess a bushfire using a drone should not be delayed by seeking a noise approval. The activity requires a timely response and is critical for the protection of life and property.

I have enclosed a copy of the department's decision making tree for your information.

Can the standards or guidance used to inform the risk level be included in the instrument

Section 6 (2A) of the Regulations captures what constitutes minimal risk. For the other categories, I have provided additional information in the Explanatory Statement, as this document was best placed to draw out the principles and factors considered in noise risk.

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. The department is closely monitoring the evolving nature of drone noise and may adjust the risk assessment process from time to time to ensure it accurately reflects the impact of drone noise and community sentiment. Including the guidance in the Explanatory Statement instead of the instrument will help ensure the instrument is sufficiently adaptable.

Further, the International Civil Aviation Organization (ICAO) is considering the RPA industry guidance materials and whether to recommend or mandate regulatory standards, including around noise.

Under Section 49 of the *Legislation Act 2003,* the Regulations will sunset on 1 April 2032. This will provide an opportunity to review the instrument in the light of developments in the domestic and international RPA industry.

Can the instrument be amended to clarify that applicants will have the option to request that a departmental officer conduct the assessment

Section 22A does not preclude applicants from having a departmental officer conduct the assessment. I propose that, the Explanatory Statement (see **Attachment A**) is clarified to make clearer that applicants have the option to request a departmental officer conduct the assessment. This information is also included on the website where the application form is hosted, together with the department's contact details.

Can the instrument or the explanatory statement be amended to include information about the available complaint mechanism via Airservices Australia, as detailed in the former Minister's response of 21 March 2022.

In the proposed amendments to the Explanatory Statement at **Attachment A**, I have included information about the complaint mechanism (directly to the department rather than via Airservices, as advised by the former Minister). This mechanism will be available through the government's new website (www.drones.gov.au) from 1 October 2022.

I would appreciate your advice on whether the Committee's concerns will be met by the additional information provided in my letter and the proposed amendments to the Explanatory Statement. If so, I will ensure the Replacement Explanatory Statement is placed on the Federal Register of Legislation as soon as possible.

Thank you for taking the time to write to me on this matter.

Yours sincerely

Catherine King MP

29 /9 / 2022

Enc.

Decision tree for drone noise approval process

Are you a Remote Operator Certificate (ReOC) holder:

Or does your operation require you to apply to CASA and receive a ReOC?

NO → Exempt from a noise approval

YES

Are you flying for a commercial reason <u>other than</u>:

i) agricultural operations
ii) environmental operations
iii) fire-fighting/medical/police
iv) sport and recreation

NO → Exempt from a noise approval

YES

Are you flying outside CASA's Standard Operating Procedures?

CASA's standard operating procedures are:

i) within visual line of sight
ii) at or below 400 feet
iii) > 30m from people
iv) away from populous areas

NO → Exempt from a noise approval

YES

Does your drone weigh more than 250g?

NO → Exempt from a noise approval

YES

MUST GAIN A NOISE APPROVAL (DRONES.GOV.AU)

Will you be flying over noise sensitive sites?

NO → Automated noise approval (drones.gov.au)

YES

Are you frequently flying over the same area?

NO → Does your drone weigh more than 150kg?

NO → Automated noise approval (drones.gov.au)

YES

YES

Full noise assessment

PROPOSED REPLACEMENT EXPLANATORY STATEMENT

Issued by the authority of the Minister for Infrastructure, Transport, Regional Development and Local Government

Air Navigation Act 1920

Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021

Purpose and operation

The *Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021* (the Amendments) are made by the Governor-General under section 26 of the *Air Navigation Act 1920* (the Act). The Act gives effect to the International Convention on Civil Aviation (the Chicago Convention) which regulates all aspects of international air transport.

The Amendments amend the *Air Navigation (Aircraft Noise) Regulations 2018* (the Regulations) to control significant noise risks arising from the use of Remotely Piloted Aircraft (RPA), and to articulate regulatory procedures and obligations in seeking approval to engage RPA in air navigation.

The Amendments amend Parts 1, 2, 4, and 5 of the Regulations to:

(a) exempt specific types and operations of RPA from requiring approval under these Amendments to engage in air navigation;

(b) require that non-exempt RPA must apply for approval to be engaged in air navigation;

(c) specifies the manner in which an owner or operator of an RPA may seek approval to engage in air navigation, as well as the manner in which the approval is communicated or revoked; and

(d) provide that the Secretary may arrange for the use of a computer program to grant approval.

RPA owners or operators may be required to seek additional approvals to engage in air navigation under other relevant instruments. An approval or an exemption under these Amendments does not override the obligation to seek other approvals as required.

Exemption of specific types and operations of RPA

The Regulations make noise management provisions for traditional aircraft and require certain aircraft to hold a noise certificate or an approval to operate. RPA and drones are currently classified as 'aircraft' and subject to the same conditions. Therefore RPA owners or operators must either seek a noise certification, or an approval under the regulations. There are currently no noise certification standards for RPA, nor criteria or guidance on how approvals should be applied for RPA.

The nature and operational profiles of RPA and drones differ from those of traditional aircraft (such as passenger planes). Most RPA in use emit less noise (typically between 55dB and 69dB) than traditional aircraft (typically between 65dB and 95dB). Amending the Regulations to account for the unique nature of RPA will effectively control significant noise risks and clarify the regulatory framework to assist in the growth of the industry.
The Amendments provide a targeted and risk-based measure to regulate noise impacts arising from RPA use. The Amendments exempt micro RPAs (those that weigh 250g or less) and RPAs that are being operated for agricultural, environmental, fire fighting, medical, policing, sport or recreation purposes from requiring approval. Due to their size, use case and location of operation, these RPA types and operations present a low risk of significant noise impact to the community, or are reasonable in the circumstances (i.e. emergency response).

The Amendments also exempt RPA operating within existing standardised operating conditions, which contain community safeguards requiring RPA operators to:

* Operate the RPA within visual line of sight;
* Operate the RPA at or below 400 feet by day;
* Avoid operating the RPA within 30m from another person; and
* Avoid operating the RPA over a populous area.

Any RPA types or operations that do not fall under the exempt criteria must apply for an approval to be engaged in navigation.

Significant noise impact

Under Section 16(A), the Secretary may revoke an approval if the RPA operation has had, and is likely to continue to have, a significant noise impact on the public. Significant noise impact is the effect of disrupting persons' general amenity through noise generated by an RPA's operations.

Community feedback and complaints are an important part of informing the Secretary on whether there are or will be significant noise impacts. RPA noise complaints can be directed to dronenoise@infrastructure.gov.au. An online form is also available on the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department)'s website alongside the self-assessment computer process for noise approvals.

Non-exempt RPA must apply for approval to be engaged in air navigation

The Amendments require owners or operators of a non-exempt RPA to apply to the Secretary to engage in air navigation. As part of the application, an applicant must provide any information relating to the aircraft as is reasonably required by the Secretary, and will be notified of the outcome of the application in writing. The Secretary will also notify the period in which the aircraft may engage in air navigation, and any conditions upon which the applicant must comply. Where an operator of an RPA does not comply with the conditions, they commit an offence under the proposed Amendments.

The Amendments specify that strict liability applies to non-compliant RPA owners or operators.

The Secretary may arrange for the use of a computer program to grant approval

The Amendments allow for the Secretary to establish a self-service computer process, by which RPA owners and operators can seek approval. The Amendments do not preclude an applicant from having their application assessed by a person delegated by the Secretary.

Applicants can complete a questionnaire on a website that automatically assesses the responses, and RPA owners or operators may be granted approvals by a computer program to engage in air navigation where specific requirements are satisfied. The questionnaire is designed to determine the risk of the RPA operations having a significant noise impact, and considers factors such as the proximity to noise sensitive sites, the ongoing nature of operations, and the size of the RPA.

Applicants can also request a person delegated by the Secretary assess their application instead of a computer program.

Where applicants do not satisfy the automated approval requirements, they may apply to the Secretary for approval. Applicants must provide information such as:

* Operator details;
* Aircraft make/model;
* Maximum take-off weight;
* Description of the proposed operation;
* Area/s of operation;
* Proposed times of operation (daylight hours/weekdays);
* CASA Instrument of Approval for unmanned aircraft in an approved area reference number, in accordance with the Civil Aviation Safety Regulations 1998, Regulation 101.030, if one is held.

Where the above information is contained within a Remotely Piloted Aircraft Operator's Certificate (ReOC) application, applicants may provide their ReOC application.

Consultation

In June 2019, the Department conducted a consultative review into the performance of the Regulations to determine the appropriate scope and breadth of noise regulation in relation to RPAs. The Department received 92 submissions to the review. Many submissions were positive regarding the potential benefits of new and increasing services provided by RPA, but raised concerns about the potential for RPA noise to negatively impact the community, and recognised the need for policies and regulations to manage these impacts.

The Department accepted submissions for the review between noon Friday 27 September 2019, and close of business Friday 22 November 2019.

Regulatory impact assessment

The Department has prepared a Regulatory Impact Statement (RIS), which was assessed by the Office of Best Practice Regulation as compliant with the Best Practice Regulation requirements with a level of analysis commensurate with the likely impacts (OBPRD ID 01063).

The amended regulations will involve minor regulatory impacts on businesses and community organisations which conduct operations with a large number of drones. The

majority of users (particularly recreational users and commercial users operating within standard operating conditions) will be exempt from noise regulations.

Statement of Compatibility with Human Rights

A statement of compatibility with human rights for the purposes of Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* is set out at Attachment B.

Commencement and making

The Amendments are a legislative instrument for the purposes of the Legislation Act 2003.

ATTACHMENT A

Details of the Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021

Part 1 - Preliminary

Section 1 - Name

This section provides that the name of this instrument is the *Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021.*

Section 2 - Commencement

This section provides for the instrument to commence on the day after the instrument was registered.

Section 3 - Authority

This section provides that this instrument is made under the *Air Navigation Act 1920* (the Act).

Section 4 - Schedules

This section amends and repels each instrument specified in the Schedule as set out.

Schedule 1 - Amendments

Section 1 - Subsection 4(1)

The definition of '*exempt RPA'* is inserted after subsection 4(1) of the previous regulations.

This definition operates in conjunction with section 6(2A) to remove requirements for RPA owners or operators who present a low risk of causing significant noise impacts to seek approval to engage in air navigation.

'RPA' (which is short for remotely piloted aircraft) has the same meaning as in the *Civil Aviation Safety Regulations 1998*. Regulation 101.021 provides:

> An RPA is a remotely piloted aircraft, other than the following:
>
> a) a balloon;
>
> b) a kite;
>
> c) A model aircraft.

An '*exempt RPA'* includes a 'micro RPA' which is defined in Regulation 101.022 of the *Civil Aviation Safety Regulations 1998* as an RPA with a gross weight of not more than 250g.

Section 2 - Subsection 4(2) (at the end of the definition of subsonic jet aircraft)

This amendment clarifies that 'a 'subsonic jet aircraft' is not an RPA within the meaning of the Regulation 101.021 of the *Civil Aviation Safety Regulations 1998*. This excludes the operation of subsonic jets from the amended regulations.

Section 3 - After subsection 6(2)

This amendment inserts explicit regulation that RPA pilots must not engage in air navigation unless an approval is in force under section 16A, and pilots comply with any conditions included in the approval. This section also excludes exempt RPA from the operation of this amendment.

Section 4 - Subsection 6(3)

This amendment constrains all non-exempt RPA to requiring approval under section 16A of the instrument. This amendment provides clarity for RPA owners and operators as to the correct approval pathway for RPA to engage in air navigation.

Section 5 - Paragraph 6(4)(b)

This amendment establishes that the operator of an RPA commits an offence if the operator does not comply with the proposed section 6(2A) of the amendments.

Section 6 - Subsection 6(5)

This amendment specifies that strict liability applies to an operator's failure to comply with section 6(2A)(a)(i). This amendment operates in conjunction with sections 2, 4, and 5 of the amendments.

Section 7 - Subsection 14(1)

This amendment clarifies that RPA are not applicable for the approval process under section 14 of the Regulations. The amendment will reinforce that an RPA operator must seek approval under the proposed section 16A of the amendments to ensure consistent and clear regulation.

Section 8 - After section 16

This amendment establishes an explicit pathway for RPA operators to seek approval to engage in air navigation. It provides that an owner or operator of an RPA may apply to the Secretary for an approval to engage in air navigation, and must provide relevant information in their application to engage in air navigation. The amendments also provide the manner in which conditions, obligations and revocations are attached to any approval given to owners and operators.

The owner or operator of an RPA must provide any information as reasonably required by the Secretary, in their application to the Secretary for approval to engage in air navigation. The Secretary may grant approval to engage in air navigation through written notice, and provides that the Secretary must include the duration of the approval, and any conditions attached.

Section 9 - Subsection 17(1)

This amendment substitutes "a supersonic aircraft" with ", a supersonic aircraft or an RPA" to specifically exclude RPA from the purview of section 17 of the Regulations. The exclusion reinforces that an RPA is an aircraft which is subject to the conditions set out in the sections 2A, 6(2A), and 16A of the amendments.

Section 10 - After section 22

This amendment inserts the proposed section 22A, providing that the Secretary may arrange for the use of computer programs to make decisions under Section 16A. This is the self-assessment mechanism referenced in the Regulatory Impact Statement in Annex 3: Option 3 Application Process.

This amendment enables the Secretary to make use of a computer program, under the Secretary's control, to streamline the application process. This amendment places regulatory obligations on the Secretary to take all reasonable steps to ensure the decisions made by a computer program are correct. Where the decisions are correct, the Secretary is taken to have made the decision by operation of the computer program. Where the Secretary is satisfied that the decision made by the computer program is incorrect, the Secretary may make a substitute decision.

Section 11 - Paragraph 23(b)

This amendment enables owners or operators of an RPA that have been refused an approval to engage in air navigation to seek review by using existing appeal pathways by inserting "16A(3)" into section 23(b) of the regulations. Owners or operators of an RPA may seek to have a refusal reviewed by the Administrative Appeals Tribunal for review of the decision.

Section 12 - Paragraph 23(c)

This amendment enables owners or operators of an RPA that have had a period of approval to engage in air navigation specified under the proposed Section 16A(4)(a) to seek review by using existing appeal pathways. Owners or operators may seek to have the specified period reviewed by the Administrative Appeals Tribunal.

Section 13 - Paragraph 23(d)

This amendment enables owners or operators of an RPA that have a condition imposed or varied in their approval to engage in air navigation to seek review by using existing appeal pathways. Applicants may seek to have the decision reviewed by the Administrative Appeals Tribunal.

Section 14 - Paragraph 23(e)

This amendment enables owners or operators of an RPA that have had an approval to engage in air navigation revoked by the Secretary to seek review by using existing appeal pathways. Applicants may seek to have the decision reviewed by the Administrative Appeals Tribunal.

Section 15 - At the end of Part 5

This amendment applies when owners or operators of an RPA had an approval to engage in air navigation under section 17, or applied for approval to engage in air navigation under section 17. The amendment allows for this approval, or application for approval, to continue as if it had been granted or submitted, respectively, under section 16A of this instrument.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Air Navigation (Aircraft Noise) Amendment (2021 Measures No. 1) Regulations 2021

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

Overview of the Disallowable Legislative Instrument

The legislative instrument amends the *Air Navigation (Aircraft Noise) Regulations 2018* to introduce targeted regulations to reduce the risk of significant noise impact. The instrument requires RPA owners or operators to be approved by the Secretary to engage in air navigation and comply with any conditions of the approval.

The legislative instrument introduces targeted regulations by establishing specific RPA as exempt from requiring approval, on the basis of low or reasonable risk to causing significant noise risk. The legislative instrument provides the manner and process for RPA owners or operators to seek and be granted approval, with or without conditions.

The legislative instrument also enables the Secretary to provide a computer program to streamline the approvals process.

Finally, the legislative instrument makes amendments to clearly delineate the processes for RPA owners and operators to seek approval to engage in air navigation, as distinct from aircraft that is a subsonic jet aircraft, or a supersonic aircraft.

Conclusion

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

Minister for Infrastructure, Transport, Regional Development and Local Government, the Hon Catherine King MP.

Attorney-General

Reference: MC22-023148

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

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

Dear Senator

I refer to the Senate Standing Committee for the Scrutiny of Delegated Legislation and its concerns with the Bankruptcy Amendment (Service of Documents) Regulations 2022, as detailed in Delegated Legislation Monitor 6 of 2022. I appreciate the time the Committee has taken to bring these matters to my attention.

I acknowledge the Committees' concerns about the current drafting of section 102(3) of the *Bankruptcy Regulations 2021* (Bankruptcy Regulations) that were made by the previous Coalition government. To clarify the drafting and address the Committee's concerns, I will instruct my department to pursue an amendment to repeal current section 102(3) and replace it with a new s102(3) as a matter of priority, so as to clearly engage the exemption provided by section 9(3) of the ETA. I envisage the amended regulation would explicitly prescribe specific requirements for the electronic service of documents.

I trust that taking this step will address the Committee's technical scrutiny concerns, while avoiding the legal uncertainty and regulatory gap that would occur if the instrument were disallowed. For completeness, my response to the Committee's request for further advice is enclosed with this letter. I trust this information is of assistance to the Committee.

Yours sincerely

THE HON MARK DREYFUS KC MP
18 /10/2022

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

Response to Senate Standing Committee for the Scrutiny of Delegated Legislation

Source of authority for the instrument

The Committee has requested my further advice as to the source of authority relied upon to create the exemption to the *Electronic Transactions Act 1999* (ETA), noting that the *Bankruptcy Act 1966* (Bankruptcy Act) does not appear to contain an express exemption-making power by regulation equivalent to section 7A of the ETA.

The Bankruptcy Regulations were made by the Governor-General on the recommendation of the former Government. I understand that the intent of subsection 102(3) of the Bankruptcy Regulations as currently drafted was to prescribe an electronic service rule that engages subsection 9(3) of the ETA – that is, documents may be served electronically in accordance with the ETA without the recipient's consent.

However, as noted in my covering letter, I acknowledge the Committee's comments and concerns that delegated legislation can fill out the detail of an Act but cannot extend it. I agree that regulations made under paragraph 315(2)(g) of the Bankruptcy Act could not override primary legislation in the absence of a specific statutory provision allowing this to occur. I will instruct my department to pursue an amendment to repeal current section 102(3) and replace it with a new s102(3) as a matter of priority, to clarify the drafting and address the Committee's concerns.

Scope of the instrument

At paragraph 1.14 of Delegated Legislation Monitor 6 of 2022, the Committee has requested my advice on the scope of the exemption, including whether the exemption applies in relation to bankruptcy notices.

As you are aware, section 102 of the Bankruptcy Regulations directs attention to section 28A of the *Acts Interpretation Act 1901* (AIA) which sets out the general rules for legislation to provide service on natural persons and bodies corporate, such as rules with respect to courier service. Section 28A of the AIA provides that a document may be served '[f]or the purposes of any Act that requires or permits a document to be served on a person, whether the expression "serve", "give" or "send" or any other expression is used'.

Section 28A of the AIA also contains a note stating that the ETA deals with giving information in writing by means of an electronic communication. Section 9 of the ETA is the relevant provision that regulates the provision of information in writing by electronic means. Notably, paragraphs 9(1)(d) and 9(2)(d) of the ETA requires a person to have consented to information being given documents electronically.

The Bankruptcy Act and Bankruptcy Regulations contain several provisions which permit or require documents to be served on a natural person who are neither Commonwealth entities nor persons acting on behalf of Commonwealth entities. Accordingly, pursuant to section 9 of the ETA, any requirement for a document to be given or sent to, or served on, a person under the Bankruptcy Act, or the Bankruptcy Regulations, will be effective where the document is given, sent to, or served by way of

electronic communication, provided the recipient has consented to being served documents electronically.

The inclusion of subsection 102(3) in the Bankruptcy Regulations has the effect that prior consent will not be required to use electronic communication where a person is either required or permitted to give information in writing under the Bankruptcy Act and/or Bankruptcy Regulations, including with respect to the service of bankruptcy notices. It has a wide application because it is meant to facilitate the electronic communication of documents in line with the overall purpose of the ETA framework.

There are many instances of requirements to serve, give or send other kinds of documents under the Bankruptcy Act and Bankruptcy Regulations. For example, trustees must inform parties of certain matters under the Bankruptcy Act, notably with respect to the notice of distribution of dividends of a bankrupt's estate to creditors as required by section 140 of the Bankruptcy Act. From a general administration perspective, there are often multiple parties that must receive notifications and there would be significant inefficiencies if consent of the receiving party had to be given each time a trustee needed to send a notification. Consent requirements for electronic communications could make service far costlier because it may result in a reliance on other and potentially slower means of serving documents, such as courier service or hand-delivery, as a means to ensure valid service.

Furthermore, as noted in my previous correspondence to the Committee, a requirement to seek consent prior to any electronic communication would be a significant obstruction to the effective and efficient administration of the Bankruptcy Act. For example, a debtor could simply claim that they did not consent to receive a bankruptcy notice electronically to frustrate the bankruptcy process, even where they have previously corresponded electronically with the party giving the bankruptcy notice. Such issues led to the setting aside of a sequestration order recently, in circumstances where s102(3) was absent from s102 (see *Pegios in his own capacity and as trustee for Pegios Superannuation Fund v Arambasic* [2022] FedCFamC2G 17, at [19]).

Senator the Hon Katy Gallagher

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

REF: MS22-001075

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

Dear ~~Chair~~ Linda

I refer to the request of 29 September 2022 from the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) secretariat on behalf of the Committee.

The request seeks an amendment to the explanatory statement to the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 9) Regulations 2021* (the Health Regulations) to include further information about the funding arrangements relating to the mRNA vaccines and treatments program (the program).

Consistent with the response of 26 August 2022 provided by the Minister for Health and Aged Care, the Hon Mark Butler MP, who has policy responsibility for the program, I confirm that it is the intention of the Australian Government to provide greater clarity around the amount of funding allocated for the Moderna mRNA Partnership under the program.

To ensure confidential commercial information in the agreements between the Commonwealth and Moderna is maintained and to ensure that disclosure is in line with the final contract terms, I undertake to amend the explanatory statement to the Health Regulations once the contract negotiations are finalised.

My Department will arrange for the registration of the replacement explanatory statement on the Federal Register of Legislation, and advise the Committee secretariat when the replacement explanatory statement has been registered.

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

19 OCT 2022

Katy Gallagher

02 6277 7400 | Parliament House Canberra ACT 2600

Senator the Hon Katy Gallagher

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

REF: MS22-001075

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

Dear Chair Linda

I refer to the request of 29 September 2022 from the Senate Standing Committee for the Scrutiny of Delegated Legislation (the Committee) secretariat on behalf of the Committee.

The request seeks further information about the *Financial Framework (Supplementary Powers) Amendment (Prime Minister and Cabinet Measures No. 11) Regulations 2021* [F2021L01825], which inserted item 529 in Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997.*

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

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

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

Yours sincerely

Katy Gallagher

19 OCT 2022

02 6277 7400 | Parliament House Canberra ACT 2600

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

Response provided by the Minister for Indigenous Australians

Matters more appropriate for parliamentary enactment

1.39 The committee initially raised concerns that the establishment and maintenance of a nationally significant scheme appears to be a matter more appropriate for parliamentary enactment and should therefore be included in primary legislation, rather than delegated legislation. In light of this concern, the committee sought the former minister's advice as to why it was considered necessary and appropriate to use delegated legislation to provide for the Scheme.

Minister's response

1.40 In her response of 26 August 2022, the minister explained that the Scheme is 'largely administratively based' and 'only those elements required to be in legislation to facilitate the establishment and administration of the Scheme have been included in the legislation'. On her advice, the key benefit of this approach is that the Scheme can be:

> established and adapted in a timelier and more flexible manner than a legislative scheme... if any issues or unintended consequences for applicants are identified during the administration of the Scheme, they can be addressed more promptly, as most changes would not require legislation to pass Parliament.

Committee view

1.41 The committee thanks the minister for her advice; however, the committee generally does not accept a need to be more 'timely and flexible' to be a sufficient justification for including a significant matter in delegated legislation, rather than primary legislation. As the committee previously indicated, it appears that the Scheme is nationally significant with the potential to impact several thousand applicants. Accordingly, it remains unclear why it is necessary and appropriate for the Scheme to be included in delegated legislation.

1.42 The committee therefore draws to the attention of the Senate the inclusion of matters more appropriate for parliamentary enactment in delegated legislation.

While the Scheme is important for all Stolen Generations survivors, it directly impacts only those Stolen Generations survivors removed from the Northern Territory, Australian Capital Territory and Jervis Bay Territory, and is not a national scheme. It is estimated that around 3,600 applicants from across Australia will be eligible for the Scheme, which is a relatively small cohort.

With many Stolen Generations survivors now of an advanced age and suffering significant health conditions, they face complex health and ageing needs. For this reason, it is important to have a Scheme that is able to respond quickly to the range of unique circumstances of applicants' removals so that applicants can receive timely outcomes.

An administratively based Scheme provides the flexibility of operations needed to efficiently and effectively manage any changes that may be required and to provide the discretion to consider individual and unique circumstances that may arise. By way of example, the Scheme recognises there may be absent or inadequate historical records

regarding the removal of First Nations children from their families or communities, and the evidentiary standard has been selected taking this into account. In addition, the removal of First Nations children from their families or communities occurred over decades and through a range of different ways. If eligibility criteria and evidentiary requirements were to be fixed in primary legislation this would limit the ability to apply discretion.

A legislative scheme, while providing Scheme transparency, does not provide the flexibility to respond quickly to any changes to the Scheme that may be required. This could adversely affect applicants through delays in determinations and advice of outcomes while any changes pass through parliament.

Relevant policies and information will be included on the Scheme's website and in an amended explanatory statement to the instrument to provide transparency and certainty for potential applicants and for parliamentary oversight.

Parliamentary oversight

1.43 The committee raised concerns with the former minister about a lack of parliamentary oversight of the Scheme, noting that neither the instrument nor the explanatory statement specifies key elements of the Scheme, including the eligibility criteria and evidentiary requirements. The committee sought the former minister's advice about whether key aspects of the Scheme could at least be included in delegated legislation subject to disallowance by the Parliament.

Minister's response

1.44 The minister explained that the maximum value of redress payments is included in the explanatory statement; however, other elements of the Scheme, such as the eligibility criteria and evidentiary requirements, are set out in policies, procedures and guidelines to allow the Scheme to be 'more accessible and understandable'. The minister also advised that some further detail is contained in the explanatory memoranda for the *Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021* and the *Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021* (now Acts).

Committee view

1.45 While the committee appreciates the minister's advice about this matter, it remains concerned that key elements of the Scheme are in policies, procedures and guideline documents, which are not subject to parliamentary oversight, and could impact legal and administrative certainty for applicants.

1.46 The committee further notes that the inclusion of key information, such as eligibility criteria, across various documents and explanatory materials could hamper accessibility and understanding of the Scheme. This concern is heightened by the fact that there is no independent merits review provided for decisions in relation to the Scheme, such as who is eligible or the redress that will be provided to them, as discussed in more detail below.

1.47 The committee therefore requests the minister's advice as to:

- ***the relevant policies, procedures and guidance documents relevant to the Scheme referred to in the response, including where they may be accessed, and whether the explanatory statement to the instrument can be amended to include links to these documents; and***
- ***whether, at a minimum, the explanatory statement to the instrument can be amended to include further information about the eligibility criteria for the Scheme.***

The relevant policies addressing eligibility criteria and evidentiary requirement include:

- Territories Stolen Generations Redress Scheme Eligibility Criteria
- Definition of Stolen Generations
- Relevant prior payment
- Effect of relevant prior payments
- Prior payments – CPI
- Deceased applicants

The National Indigenous Australians Agency (NIAA) will make these policies available on the Scheme's website upon approval of the amendments to the explanatory statement and before the end of 2022, noting that the Scheme website and the notes section of the Application form are more likely sources of information for potential Scheme applicants than the explanatory statement.

In the interest of certainty for potential applicants and parliamentary oversight, the NIAA will commence amending the explanatory statement to the instrument, to include further detail on the Scheme's eligibility criteria, with a view for the amendments to be completed by the end of the disallowance period, subject to internal approvals and ongoing liaison with the Department of Finance.

Delegation of administrative powers and functions

1.48 The explanatory statement to the instrument indicates that certain decisions relating to the Scheme, including who will receive payments and final spending decisions, will be made by appropriate delegates. Noting the significance of these decisions, the committee sought the former minister's advice as to who would have authority to make decisions under the Scheme as delegates, and whether there are any limitations or safeguards on the exercise of their powers.

Minister's response

1.49 The minister advised that final decisions in relation to who will receive payments under the Scheme will be made at the Senior Executive Service Band 1 level or above, and they will be required to have the appropriate 'subject matter expertise'. The minister also provided comprehensive information as to the limited circumstances in which delegations may be exercised by alternative delegates and explained that limiting the delegations to specified positions 'ensures the Scheme decision-makers are qualified and informed to make an appropriate and considered decision. Moreover, fewer decision-makers ensures greater consistency in the decision-making process'.

Committee view

1.50 The committee welcomes the further information provided by the minister about this issue and is satisfied that the information provided alleviates its scrutiny concern about the delegation of administrative powers. The committee considers that this would be useful information to be included in the instrument's explanatory statement

1.51 The committee thanks the minister for this additional information and requests that it be included in the explanatory statement to the instrument.

The explanatory statement to the instrument will be amended by the end of the disallowance period, subject to internal approvals and ongoing liaison with the Department of Finance, to include relevant information on the delegation of administrative powers.

Availability of independent merits review

1.57 The explanatory statement to the instrument advises that around 3,600 survivors may be eligible for the Scheme, and financial payments of up to $75,000 per person, as well as non-monetary redress may be provided. It also advises that:

> the framework for decision making, and review of decisions on eligibility, is currently being developed. It may include procedural fairness arrangements before a decision is made and a formal internal merits review process on final decisions, where requested by an applicant.

1.58 However, the explanatory statement does confirm that independent merits review is not available for redress decisions under the Scheme, on the basis that such review 'could result in delays to delivery of the Scheme'. It further explains that:

> As many of Stolen Generations survivors are now elderly and suffering life-threatening illnesses, a delay in the provision of payments involves a significant public interest element.

1.59 In correspondence with the former minister, the committee expressed concern about this justification, noting that the issue of redress for the Stolen Generations has been known for many years, and the provision of review would not, of itself, necessarily result in extensive delays to the administration of the Scheme.

1.60 The committee therefore requested the former minister's advice about whether independent merits review, either by the Administrative Appeals Tribunal (AAT) or another person or body, can be provided for in relation to redress decisions made under the Scheme, noting its significance.

Minister's response

1.61 The minister advised that at the time the explanatory statement for this instrument was being prepared, the review process for the Scheme was in development. The review process has now been determined, and the minister confirmed that applicants can request an internal review of the decision, which will be conducted by an Independent Assessor who was not previously involved with the application. The minister also advised that decisions under the Scheme have not been designed for review by the AAT, but it 'would be open to an applicant to request a review by the AAT, and ultimately up to the AAT to decide if it has jurisdiction'.

Committee view

1.62 The committee generally expects that discretionary decisions impacting on individuals' rights, obligations or interests will be subject to independent merits review. As discussed above, the committee's concern regarding the absence of independent merits review under the Scheme is heightened by the fact that the eligibility criteria and evidentiary requirements for the Scheme are not set out in the law in primary, or even delegated, legislation but rather in informal policies, procedures and guidelines which are not subject to parliamentary oversight. Further, the committee does not consider the

potential for delays to be a sufficient reason to exclude merits review where it is otherwise appropriate.

1.63 The committee notes the minister's advice that it 'would be open to an applicant to request a review by the AAT, and ultimately up to the AAT to decide if it has jurisdiction'. However, it remains unclear to the committee how a decision could be reviewed by the AAT in the absence of a legislative basis for the review. In this regard, the committee considers that merits review could be made available if the Scheme were set out in primary legislation or otherwise expressly provided for in delegated legislation.

1.64 The committee therefore requests the minister's further advice as to:

- ***the extent to which 'Independent Assessors' conducting internal review of decisions under the Scheme are independent from the original decision-makers; and***
- ***whether independent merits review can be expressly provided for in relation to decisions made under the Scheme, either by the Administrative Appeals Tribunal or another form of independent merits-based review.***

Independent Assessors are engaged by the NIAA under a fee for service arrangement after being selected via an extensive merit selection process. Indigenous recruitment agencies were used to identify potential candidates, based on specified position and candidate requirements. Following an interview process conducted by the NIAA, successful candidates were selected and appointed as Independent Assessors.

Independent Assessors are obliged under the terms of their engagement to identify and disclose to the NIAA any actual, potential or perceived conflicts of interests that may arise, or which the Independent Assessor may become aware of, in the course of providing assessments.

If an Independent Assessor recommends an application as ineligible for redress, the application is referred to a second Independent Assessor for review, before a recommendation to the delegate for final decision. Independent Assessors are not permitted under any circumstances to contact each other and discuss cases that have been assessed as ineligible. This directive also extends to when an applicant requests a review after being formally notified by a Scheme representative of a decision as it relates to Scheme eligibility.

The NIAA ensures the new Independent Assessor undertaking the review has all relevant information, including any information provided by the applicant with their request for review. The new Independent Assessors do not have access to assessment notes created by any previous Independent Assessors assigned to the applications and stored on the Scheme case management system.

The eligibility criteria for redress under the Scheme is relatively simple, and the standard of proof on an applicant is low. As at 2 October 2022, the Scheme has made determinations on 305 applications, with only three of those applicants found ineligible for redress. This means less than 1 per cent of decisions have been adverse to the applicant. To amend the Scheme to provide for external independent merits review at this stage would require legislative amendment and significant engagement with other agencies, including the AAT and the Attorney-General's Department. The Scheme, including the review process, has a strong focus on trauma-informed practices, with the overarching aim of 'doing no further harm'. There is a risk that an external merits review process may not be consistent with these key practices and could reinvigorate a person's trauma.

To date no applicants have sought an internal review of a decision. Given the high likelihood that adverse decisions will remain very low throughout the life of the Scheme, it

is the NIAA's view that an external merits review is not necessary or appropriate for decisions made under the Scheme at this time. If the profile of the decisions on applications under the Scheme changes over time, this will be revisited.

Information about the internal review process is contained within the Offer Letter sent to Scheme applicants and through the advice from the Scheme's free independent legal advice and financial counselling support service. Applicants are encouraged to seek this free legal advice throughout the entire application process. At the same time the Scheme eligibility policies are published on the Scheme website, the NIAA will also publish a factsheet on the review process to ensure Scheme applicants are fully informed about the application process, internal review process and support available throughout the entire application process.

The Scheme's internal review approach is consistent with the review mechanism for the National Redress Scheme for people who experienced institutional child sexual abuse (the National Redress Scheme), which is a significantly larger and more complex scheme. Having different review mechanisms could create an unintended negative inference for the National Redress Scheme, as well as disparity between two Commonwealth redress schemes.

THE HON CHRISTOPHER BOWEN MP
MINISTER FOR CLIMATE CHANGE AND ENERGY

MS22-001658

The Chair of the Senate Standing
Committee for the Scrutiny of
Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Senator

I am aware of concerns raised by the Committee in relation to the Industry Research and Development (Underwriting New Generation Investments Program) Instrument 2021 [F2021L01708] (the instrument) which was made to provide legislative authority for the UNGI program. I am also aware that the Committee has given notice of a motion to disallow the instrument 15 sitting days from 7 September 2022, in line with the Committee's usual practice where it has concerns that have not been resolved in the time available for notices of motion to be given.

To address these concerns, I write to inform you of my intention that the instrument be repealed.

While the UNGI program sits under my portfolio as Energy Minister, the UNGI instrument was made under the *Industry Research and Development Act 1986* and only a Minister in the Industry, Science and Resources portfolio has power to revoke or amend the instrument, or to delegate that power. I have therefore written in parallel to the Minister for Industry and Science, the Hon Minister Husic MP, requesting that he repeal the instrument.

Yours sincerely

CHRIS BOWEN

cc The Hon Ed Husic MP
Minister for Industry and Science

THE HON STEPHEN JONES MP
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS22-002013

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

Dear Senator Linda

I am writing in relation to the Senate Standing Committee for the Scrutiny of Delegated Legislation's comments in Monitor 5 of 2022 concerning the *Competition and Consumer Amendment (Consumer Data Right) Regulations 2021* [F2021L01617]. This matter has been referred to me as the matter falls within my portfolio responsibilities.

The committee has request advice as to:

- whether the statutory review of the Consumer Data Right legislation considered the use of delegated legislation to exempt the Australian Energy Market Operator (AEMO) from privacy safeguard obligations and, if so, any outcomes of that review; and

- whether the provisions exempting the AEMO from certain privacy safeguard obligations under the *Competition and Consumer Act 2010* (the Act) could be time-limited to facilitate greater parliamentary oversight.

I appreciate the committee's diligence in reviewing delegated legislation to ensure that principles of parliamentary oversight are maintained and want to thank the committee for raising their concerns about these regulations. I have provided information in response to the committee's questions below.

Statutory review of the Consumer Data Right (CDR)

The CDR statutory review was tabled on 29 September 2022 and did not consider this specific issue.
Time-limiting the exemption

I note the committee's longstanding view that provisions which modify or exempt persons or entities from the operation of primary legislation should generally be included in primary rather than delegated legislation. However, these regulations exist within the broader CDR framework, which is structured around a hierarchy of legislative instruments that enable or engage with the fundamental principles of application of the CDR regime contained in Part IVD of the Act.

In isolation, Part IVD does not impose the CDR's privacy safeguards onto any individual or entity. Rather, the Act empowers the Minister to designate new sectors in the economy to be subject to the CDR, and each of these designations in turn set out what classes of people are data holders for CDR data (and therefore subject to the provisions of the Act). For designated sectors, the Act empowers the Minister to make Rules that apply to participants within these sectors. Parallel to these instruments are the regulation-making powers, which allow for modifications and exceptions to the Act to ensure the CDR regime operates as intended. 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 all or part of their CDR obligations. The explanatory material further notes that such regulations "will only seek to declare that provisions of the CDR are modified or varied in exceptional circumstances".

Unlike other data holders, the AEMO holds consumer data without being able to independently identify any given consumer, and as such they are unable to independently fulfill each of the privacy safeguards contained in the Act. This is exceptional when compared with any other currently designated data holder, so falls within the expected use of the regulation-making power. These regulations therefore ensure consumer privacy by applying the safeguard obligations to the energy retailers who can meet the privacy safeguard's requirements, and I believe this is the appropriate place within the CDR legislative hierarchy for such a modification to be contained.

As noted in previous correspondence to the committee, the AEMO's function as a data holder and its inability to independently meet the privacy safeguards is unlikely to change at any point in the future. Time limiting the exemption would subject the AEMO and relevant retailers to the uncertainties inherent in the subordinate legislation making process and add an administrative burden to Treasury, portfolio agencies, and OPC in tracking and remaking the provisions.

The preferable position, given the structure of the CDR regime and to avoid the significant commercial and compliance risks that this uncertainty would cause, is to maintain the permanency of the AEMO privacy safeguard exemption in the delegated legislation.

Yours sincerely

The Hon Stephen Jones MP

Senator the Hon Katy Gallagher

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

REF: MS22-000970

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

Dear ~~Chair~~ Linda

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

The request seeks information about the *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022* [F2022L00357], which amended item 87 in Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997*.

The Attorney-General, the Hon Mark Dreyfus KC MP, who has policy responsibility for item 87 – Justice Services – Community Legal Services Program, has provided the attached response to the Committee's request for information.

I have copied this letter to the Attorney-General.

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

Yours sincerely

Katy Gallagher

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Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022 [F2022L00357]

Response provided by the Attorney-General

The Committee has requested 'more detailed advice as to how the instrument might properly be characterised as a law with respect to 'post, telegraphic, telephonic and other like services' and whether there are additional constitutional heads of power providing authority for the implementation and delivery of the training package'.

A law with respect to 'post, telegraphic, telephonic and other like services'

The *Financial Framework (Supplementary Powers) Amendment (Attorney-General's Portfolio Measures No. 1) Regulations 2022* (the Regulations) amendment to item 87 of Part 4 of Schedule 1AB of the *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Regulations) provides legislative authority for government spending under the Justice Services – Community Legal Services Program (CLSP) for the Mental Health Training Package for the Legal Assistance Sector (the training package).

The training package for the legal assistance sector is a component of the *Supporting people with mental health conditions to access the justice system* measure announced in the 2021-22 Budget. As part of this measure, the previous Government provided $2.5 million over four years from 2021-22. The funding will be used to develop and deliver training to enable legal assistance service providers to better identify mental health issues and support people in distress by:

- delivering client-centric services informed by the needs of people experiencing mental health issues; and
- building legal assistance service providers' capacity of legal assistance services providers to improve access to justice for people experiencing mental health issues.

The funding will be delivered under the CLSP and administered by the Attorney-General's Department in accordance with the *Commonwealth Grant Rules and Guidelines 2017*, relevant legislation and Community Grants Hub processes.

The objective of the grant activity is to improve service delivery by the legal assistance sector to people who are experiencing mental health issues or at risk of suicide. This objective will be achieved through the development of a compassion-based, trauma-informed metal health training package for the legal assistance sector. In accordance with the amended item 87(b) and the relevant Grant Opportunity Guidelines and Grant Agreement, the training package is required to be delivered online so that it is accessible nationally to the approximately 170 Commonwealth-funded legal assistance providers across Australia and their employees. This includes all legal aid commissions, community legal centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services.

The amendment to item 87(b) of Part 4 to the Regulations agreed by the Governor-General at the Federal Executive Council meeting of 17 March 2022 inserted the words 'and receive mental health training' to establish legislative authority for government spending on the development of a compassion-based, trauma-informed mental health training package for the legal assistance sector. In full, item 87(b) provides for funding to organisations to 'provide legal assistance services and deliver and receive mental health training through the use of telephone and online communication services'.

The amended item authorises funding to organisations to 'deliver and receive mental health training through the use of telephone and online communication services'. The Explanatory Statement explains that the mental health training package for the legal assistance sector will be delivered exclusively online. Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the communications power (section 51(v)) of the Constitution. Section 51(v) of the Constitution empowers the Parliament to make laws with respect to 'postal, telegraphic, telephonic and other like services'.

Consistent with this, the relevant, unamended reading down provision in item 87 states that 'This objective also has the effect it would have if it were limited to providing support for activities (c) with respect to telegraphic, telephonic, and other like services'.

Additional constitutional heads of power

As the training package for the legal assistance sector is required to be provided exclusively online in accordance with the amended item 87(b), government spending on it is supported wholly by the communications power (section 51(v) of the Constitution. For that reason, no other heads of power are specifically referenced in relation to the training package. However, other heads of power may provide support. For example, the territories power (section 122) of the Constitution would support the funding where it is for the legal assistance sector in a territory.

THE HON STEPHEN JONES MP
ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS22-002014

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

Dear Senator

I am writing in relation to the Senate Standing Committee for the Scrutiny of Delegated Legislation's comments in Monitor 5 of 2022, concerning the *Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021* [F2021L01080] (the regulations). The matter has been referred to me as it falls within my portfolio responsibilities.

The committee has sought advice as to whether the regulations can be amended to provide that the exemptions to the primary law contained in the regulations cease to operate three years after they commence.

I appreciate the committee's diligence in reviewing delegated legislation to ensure the principles of parliamentary oversight are maintained and want to thank you for raising your concerns about this instrument. I have provided information in response to the committee's questions below.

Appropriateness of time limiting

While noting the committee's position on provisions that modify or exempt persons from the operation of the primary law, given the particular circumstances of this regulation I do not consider that the matters in the regulation should be time limited.

It is broadly accepted that there is a legitimate place for delegated legislation within the overall legislative framework. The Australian Law Reform Commission has reiterated in its interim reports into the Financial Services Legislation that delegated legislation has an important role to play in removing prescriptive detail from the primary law so as to ensure that the key principles and obligations are clear on the face of the primary law. I consider that the regulations are consistent with this position.

As you may be aware, the regulations are made under a specific power in the *Corporations Act 2001*, located within the broad prohibition on making offers to sell or issue financial products to consumers in the course of, or because of, unsolicited contact (hawking). The power allows the regulations to prescribe kinds of interactions that are not subject to the general prohibition on unsolicited conduct.

The regulation-making power sits alongside listed circumstances that are also not subject to the general prohibition, which are set out in the primary law as they apply to financial products at large, are broader, or span multiple financial products (for example, the exemption for persons providing financial advice). By contrast, the circumstances listed in the regulations are narrower and not suitable to include in the primary law.

It is important that stakeholders undertaking activities listed in the regulations have certainty as to their operations. As such, I do not consider that it would be appropriate to time-limit them. This would not only result in uncertainty for stakeholders, but also add an administrative burden to Treasury, portfolio agencies and the Office of Parliamentary Counsel to ensure that the provisions continue in force.

I would welcome an opportunity to meet with the committee to further discuss the role of delegated legislation within the Treasury portfolio and the approach going forward.

Treasury consultation

I would also like to draw the committee's attention to Treasury's recent consultation on amendments to the *Corporations Act 2001* and other legislation to move matters currently in legislative instruments made by the Australian Securities and Investments Commission into the primary law and regulations. Consultation closed on 20 September 2022 and the draft legislation is available at https://treasury.gov.au/consultation/c2022-310999. The proposed amendments reflect the Government's commitment to clarity in the corporations legislation, including that it is appropriately structured.

Thank you again for your letter.

Yours sincerely

The Hon Stephen Jones MP