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

27 JUN 2017

PDR ID: MC17-002929

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

/ John

Dear Senator Williams

Thank you for your letter of 15 June 2017 regarding two instruments included in the Standing Committee on Regulations and Ordinances Delegated Legislation Monitor No 6 of 2017.

Civil Aviation Order 95.10 Instrument 2017 [F2017L00480]
The Civil Aviation Safety Authority (CASA) has pointed to the reference to the Australian Airspace Policy Statement being included in a note to paragraph 6.1(d) of Civil Aviation Order 95.10. The note states *Classes of airspace are defined in the Australian Airspace Policy Statement*, clarifying the requirement for the aircraft to be flown in class A, B, C, or D airspace in accordance with the requirements of paragraph 6.4. There is no entry in the Explanatory Statement relating to the content of the note.

CASA has advised that in its view, mention of the Australian Airspace Policy Statement in this way is not an incorporation by reference, but simply a guidance note for where a person can ascertain the scope of the classes of airspace.

Thank you again for taking the time to write and inform me of your concerns on this matter.

Yours sincerely

DARREN CHESTER

The Hon Michael McCormack MP
Minister for Small Business
Federal Member for Riverina

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

John
Dear ~~Senator~~

Thank you for your Committee's correspondence of 15 June 2017 concerning three recent legislative instruments I made under the product safety provisions of the Australian Consumer Law (ACL) contained in Schedule 2 to the *Competition and Consumer Act 2010*:

- the *Consumer Goods (Babies' Dummies and Dummy Chains) Safety Standards 2017* [F2017L00516];
- the *Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017* [F2017L00452]; and
- the *Extension of the Ban Period for the Interim Ban on Certain Decorative Alcohol Fuelled Devices* [F2017L00518].

Classification of legislative instruments as subject to disallowance

I appreciate the Committee drawing my attention to the explanatory statements to the above legislative instruments which describe the instruments as subject to disallowance under the *Legislation Act 2003*. As the Committee notes, subsection 44(1) of the *Legislation Act 2003* provides that legislative instruments are not subject to disallowance if they are made under certain legislation facilitating the operation of an intergovernmental scheme.

I can advise the Committee the ACL facilitates the operation of an intergovernmental scheme and the above legislative instruments are not subject to disallowance. The contrary references in the explanatory statements are incorrect and will be rectified shortly.

Access to Australian standards incorporated by reference

I note the Committee's concerns about the incorporation of Australian and international standards in the *Consumer Goods (Children's Nightwear and Limited Daywear and Paper Patterns for Children's Nightwear) Safety Standard 2017* and public access to those standards.

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minister.mccormack@treasury.gov.au

I appreciate the issue of access to incorporated documents is an issue of ongoing concern to the Committee. On 28 September 2016, the Australian Competition and Consumer Commission (ACCC) advised the Committee of the need to incorporate Australian and international standards in product safety standards and the ACCC's processes for providing limited public access to standards free of charge. It is not possible to make these standards freely available more broadly because independent standards organisations own the copyright in the standards and are only willing to grant limited licences to the Government.

I have enclosed a copy of the ACCC's advice to the Committee as the advice remains relevant to the issues raised in the Committee's recent correspondence.

Power to vary instruments

I appreciate the Committee's suggestion that explanatory statements refer to subsection 33(3) of the *Acts Interpretation Act 1901* where a legislative instrument varies or revokes a principal instrument in reliance on that subsection. Future legislative instruments made under the ACL and relying on subsection 33(3) to vary or revoke an instrument will include wording in the explanatory statement on this point to improve the clarity of the instrument to anticipated users.

I thank the Committee for taking the time to write.

Yours sincerely

MICHAEL McCORMACK
27/6 /2017

Australian Competition & Consumer Commission

EXECUTIVE OFFICE

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28 September 2016

Chair
Senate Standing Committee on Regulations and Ordinances
Room S1.111
Parliament House CANBERRA
(c/- Committee Secretary Toni Dawes)

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

Dear Senator

Australian Consumer Law: Interim ban on hoverboards that do not meet specific safety requirements [F2016L00357]

We refer to the Committee Secretariat's letter on 15 September 2016 about the incorporation of extrinsic material in the *Australian Consumer Law interim ban on hoverboards that do not meet specific safety requirements* [F2016L00357]. That letter also referred to the previous committee's pre-election letter dated 4 May 2016.

The instrument

The instrument was an interim ban that could only operate for a limited period of 60 days, plus a maximum of two extensions of 30 days each. The Hon Kelly O'Dwyer MP, the Minister for Small Business and Assistant Treasurer, imposed the interim ban on 18 March 2016, extended it to 16 June 2016, and then extended it for a further 30 days and it lapsed on 16 July 2016. The instrument is no longer in effect.

Extrinsic material

The instrument did not expressly state that the standards specified were the versions that applied at its commencement. However, the titles of the specified International Electrotechnical Commission (IEC) standards are unique identifiers that reflect the publication date for that particular version of the standard. That is, the instrument incorporates the standards IEC 62133 Edition 2.0 2012-12, IEC 60335-1 Edition 5.1 2013-12 and AS/NZS 60335.1:2011. The underlined sections (added) specify the edition of the standard incorporated by the instrument. In each case, this was the standard as it applied at the date of commencement.

The instrument also incorporates the UL 2272 standard that Underwriters Laboratories Inc. developed earlier this year and that applied at the date of commencement. When the Minister made the instrument, there was only one version of this standard.

Access to extrinsic material

We also note the Committee's comments in relation to the best-practice approach in providing access to extrinsic material. In this case, as the Committee has commented, it is likely that access to these standards would primarily be sought by testing laboratories and by hoverboard designers and manufacturers.

Where practicable, product safety legislative instruments are complete, self-contained instruments that do not reference extrinsic material. However, many product safety legislative instruments need to incorporate extrinsic technical standards. For this reason, the ACCC has over several years attempted to negotiate free public access to those extrinsic standards with Standards Australia. Unfortunately, those negotiations have been unsuccessful.

Product safety standards tend to be long, complex and technical in nature, and people outside the specific regulatory or commercial sphere to which they relate are highly unlikely to seek them. In practice, consumers and retailers cannot verify compliance with standards themselves and only need to identify the standards so they can specify them in purchasing agreements and when they submit goods for assessment by test laboratories.

Safety standard instrument

On 5 July 2016, the Minister made a safety standard for self-balancing scooters, previously known as hoverboards [F2016L01180] that started on 17 July 2016 and is in force for two years. It effectively replaced the interim ban and has the same technical requirements. The safety standard instrument addresses the issues raised by the Committee:

- The safety standard instrument expressly specifies the versions of the referenced standards including the dates of publication and purchasing instructions.
- The explanatory statement advises that we can make copies of the referenced standards available for viewing free of charge at ACCC offices in all state and territory capital cities and in Townsville.

To date, no member of the public has approached the ACCC for access to any of the standards incorporated in any of these legislative instruments.

Yours sincerely

Rayne de Gruchy
Chief Operating Officer

ATTORNEY-GENERAL

CANBERRA

27 JUL 2017

17/6186
MS17-001543

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

Dear Senator Williams John

Thank you for your letter of 15 June 2017 regarding the *Legal Services Directions 2017* (2017 Directions). In your letter, you ask for further advice about the 2017 Directions.

Request for advice - Manner of incorporation

I note the Committee's acknowledgement of my prior response on the issue of incorporation of the Legal Services Multi-Use List (LSMUL) from time to time. I also note the Committee's statement of its understanding that 'as the LSMUL is not a Commonwealth disallowable legislative instrument, it may only be incorporated as in force at a particular time, unless authorising or other legislation alters the operation of section 14 of the *Legislation Act 2003*' ('Legislation Act').

The reference to the LSMUL in the 2017 Directions does not apply, adopt or incorporate any matter within the meaning of section 14 of the Legislation Act.

The 2017 Directions prescribe that certain Commonwealth entities may only contract with an external legal services provider to undertake Commonwealth legal work if the external legal services provider is included on the LSMUL. The 2017 Directions simply make reference to the LSMUL as an administrative document, and the firms listed on the LSMUL change regularly as new firms are added or old ones removed.

Request for advice - Matter more appropriate for parliamentary enactment

The Committee acknowledges my advice about the legislative basis for the power to impose sanctions for non-compliance with the 2017 Directions. I also referred the Committee to a document published by the Office of Legal Services Coordination in my Department entitled 'Compliance Framework'.

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The Compliance Framework outlines the sanctions contemplated by the Directions 2017 at paragraph 20, which states:

> *Pursuant to s 55ZF(1)(b) of the Judiciary Act, the Attorney-General may issue a direction to an agency that is to apply generally to Commonwealth legal work, or in relation to a particular matter. Such a direction may be made in order to enforce and/or direct compliance with an existing requirement under the Directions, or to address a risk not adequately addressed by the Directions.*

The range of sanctions is thus set out in the Judiciary Act itself.

Yours faithfully

(George Brandis)

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MC17-012703

Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 22 June 2017, in which the Committee requested further information about the *Migration Amendment (Review of the Regulations) Regulation 2016* and the *Legislation (Exemptions and Other Matters) Amendment (Sunsetting and Disallowance Exemptions) Regulation 2016.*

Formal consultations between the Department of Immigration and Border Protection, the Office of Parliamentary Counsel and the Attorney-General's Department began in February 2016 in relation to the sunsetting of the *Migration Regulations 1994* (the Migration Regulations). As a result of these discussions, and the briefing provided to me, I wrote to the Attorney-General seeking an exemption from the sunsetting regime.

The Attorney-General agreed to this proposal, on the condition that a review requirement was incorporated into the Migration Regulations. This requirement was inserted by the *Migration Amendment (Review of the Regulations) Regulation 2016* in November 2016.

The Committee has queried:

- why an extension was not sought to delay the sunsetting of the Migration Regulations for an additional year to allow time for the initial review of the Migration Regulations to be conducted as part of the sunsetting scheme; and
- why the new process for review of the Migration Regulations introduced by these regulations does not include a statutory requirement to re-make the Migration Regulations after each review.

The answers to both these questions are inter-related, since the decisions to introduce a review process into the Migration Regulations, and to exempt these regulations from sunsetting, were not taken because there was insufficient time available to conduct a review of the Migration Regulations. Instead, these decisions were made because – for the reasons outlined below – it was considered inappropriate for the Migration Regulations to sunset.

The Migration Regulations are large and complex, and underpin Australia's visa framework. This framework supports the Government's international priorities and obligations by facilitating:

- temporary entry of people into Australia to undertake education, tourism, working holidays or skilled work (more than 7.7 million temporary visas were granted in 2015-16); and
- permanent migration.

Remaking the Migration Regulations would incur significant costs, and place a high impost on Government resources, with limited effect on the reduction of red tape, the delivery of clearer law or the alignment of the existing legislation with current Government policy.

In addition, a remake of the Migration Regulations would require complex and difficult to administer transitional provisions. It is likely that this would have a significant impact on any undecided visa and sponsorship applications, as well as causing significant uncertainty for:

- the millions of visa holders whose visa conditions and the grounds on which their visa is held, including when that visa ceases, are determined by the Migration Regulations;
- the millions of current or future visa applicants whose eligibility for an Australian visa is determined by the Migration Regulations;
- sponsors and potential sponsors; and
- industries where the conduct of business is reliant on migrants, either as employees or clients.

The Migration Regulations were exempted from sunsetting on the basis that the new review process met the objectives of the sunsetting regime set out in Part 4 of Chapter 3 of the *Legislation Act 2003* (the Legislation Act), which are *'to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed'* (see section 49).

There is no question that the Migration Regulations are still needed – as described above, they are in constant use to support Australia's migration programme. There is also no question that the Migration Regulations are kept up to date and fit for purpose; the regulations are regularly reviewed and amended, often extensively, to reflect current Government priorities and to respond to economic and social developments. Amendments are also made several times each year to address changing policy and administrative requirements.

In addition, as a deregulation measure, in 2012-2013 the Migration Regulations were comprehensively reviewed and were amended in 2014 to remove redundant provisions and regularise terminology (see the *Migration Amendment (Redundant and Other Provisions) Regulation 2014* for further details about these amendments). The process involved individual consideration of every provision of the Migration Regulations and categorisation as 'still required', 'possibly redundant', and 'redundant'. The relevant policy area was then consulted to provide instructions to repeal, or justification to keep the provisions. The process also involved updating cross references and terminology, and certain drafting practices.

In future, the Migration Regulations will continue to be reviewed and improved to ensure they are up to date and align with Government policy, including the announcements made on 9 May 2017, as part of the 2017-18 Budget, that the Government:

- has committed $95.4 million in the 2017-18 Budget to support new technologies for my Department to bolster the prosperity of the nation and to protect Australia into the future; and
- will initiate a long-term programme of work to enhance the visa system and deal with the increasing number of movements across Australia's border (more than 700,000 people arrive in or depart from Australia each week, and this number is expected to increase by about 20 per cent over the next few years).

Further information about these changes can be found here: http://www.minister.border.gov.au/peterdutton/2017/Pages/budget-2017-18.aspx.

In light of the above, I consider that the Migration Regulations currently meet the objectives of Part 4 of Chapter 3 of the Legislation Act, and that the review arrangements inserted by the *Migration Amendment (Review of the Regulations) Regulation 2016* formalise, and add to, what is effectively an ongoing review process. I note, moreover, that each time amendments are made to the Migration Regulations the changes are subject to Parliamentary scrutiny, including possible disallowance.

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

Yours sincerely

PETER DUTTON 13/07/17

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MC17-012708

Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 22 June 2017, in which the Committee requested further information about the *Migration Amendment (Working Holiday Maker Visa Application Charges) Regulations 2017* (the WHM VAC Regulations) and the *Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017.*

I am writing to respond to the Committee's remarks in relation to the WHM VAC Regulations. Advice in relation to the *Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017* will follow.

The Committee requested further advice about the appropriateness of introducing amendments to the Working Holiday Maker visa application charges (VACs) via delegated legislation rather than primary legislation, in light of the changes made by the *Treasury Laws Amendment (Working Holiday Maker Reform) Act 2016* on 24 November 2016.

The WHM VAC Regulations give effect to the decision made by Government in the Mid-Year Economic and Fiscal Outlook to maintain the VACs for Working Holiday Maker visas at $440, in order to help fund the Government's upcoming Seasonal Worker Incentives trial. As noted by the Committee, this trial will provide incentives for eligible Australian job seekers to undertake horticultural seasonal work.

I consider that it was appropriate to make these changes via delegated legislation, in light of subsection 13(5) of the *Legislation Act 2003*, which provides that an amendment of a legislative instrument by an Act does not prevent the instrument, as so amended, from being amended or repealed by a person who is currently authorised under the enabling legislation for the instrument to make instruments of the same kind.

I therefore consider there is a clear basis for changing the VACs for the Working Holiday Maker visas via delegated legislation, rather than by parliamentary enactment.

The Committee also requested advice in relation to the basis on which the amount of the VACs for Working Holiday Maker visas has been calculated.

As noted by the Committee, the effect of the WHM VAC Regulations is to maintain the VACs for Working Holiday Maker visas at $440. This has been the VAC amount for these visas since 1 July 2015, when the VACs were indexed from $420 to $440. Continuation of the VAC of $440 is not expected to have a negative impact on demand as the VAC is relatively small compared to the costs and expenses of travel to and staying in Australia. The pricing of the Working Holiday Maker visa products is not expected to change Australia's relative position against similar international countries. In addition, I note that this VAC amount does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*. I therefore consider that $440 is an appropriate VAC for these visas.

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

Yours sincerely

PETER DUTTON 13/07/17

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MC17-012708

Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 22 June 2017, in which the Committee requested further information about the *Migration Amendment (Working Holiday Maker Visa Application Charges) Regulations 2017* and the *Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017*.

I previously responded to the Committee's remarks in relation to the *Migration Amendment (Working Holiday Maker Visa Application Charges) Regulations 2017*. I am now writing to provide further advice in relation to the *Migration Legislation Amendment (2017 Measures No. 2) Regulations 2017*.

The Committee requested further advice in relation to the basis on which the amount of the visa application charge (VAC) for the Skilled Independent (subclass 189) (New Zealand stream) visa has been calculated.

The Australia-New Zealand bilateral relationship is one of the closest and most comprehensive bilateral relationship Australia has with any country. It has been built on the Trans-Tasman Travel Arrangement (TTTA) and the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA or CER).

In line with the 2016 Government announcement, the Skilled Independent (subclass 189) (New Zealand stream) visa pathway was created within the Skilled Independent category of the General Skilled Migration (GSM) component of Australia's annual Migration Programme. The pathway is directly aimed at New Zealand citizens who have made, and continue to make, a demonstrated economic contribution to Australia, which is consistent with the GSM parameters.

The visa application charge (VAC) imposed on the New Zealand stream under the Skilled Independent (subclass 189) is the lowest of the range of skilled visas. Other pathways to permanent residence for New Zealand citizens under other skilled or family streams attract a higher VAC.

Further, in recognition of the special bilateral relationship, concessional arrangements to the VAC were introduced solely for the New Zealand stream. Applicants need only pay 20 per cent of the overall VAC at the time of application (as the first instalment of the VAC). The remaining 80 per cent of the overall VAC is charged as the second instalment of the VAC, which is only payable by the applicant before the visa is granted.

I note that the amount of the VAC does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997*. For this reason, and in light of the above, I consider the VAC for these visas is appropriate.

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

Yours sincerely

PETER DUTTON

Australian Government
Attorney-General's Department

31 May 2017

Ms Toni Dawes
Committee Secretary
Senate Regulations and Ordinances Committee
PO BOX 6100
Parliament House
Canberra ACT 2600

By e-mail: regords.sen@aph.gov.au

Dear Ms Dawes

Foreign Evidence (Certificate to Adduce Foreign Government Material) Prescribed Form 2015

I am writing in relation to the *Foreign Evidence (Certificate to Adduce Foreign Government Material) Prescribed Form 2015* (the Instrument). In particular, I am writing to provide an explanation for the delay in registering the Instrument which I trust will assist the Senate Regulations and Ordinances Committee's consideration of the Instrument.

The Instrument was made pursuant to subsection 27B(4) of the *Foreign Evidence Act 1994* (Cth) (FEA), as amended by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). Pursuant to subsection 27B(3) of the FEA the certificate attached to the Instrument enables the Attorney-General to certify that he or she is satisfied that it was not practicable to obtain foreign government material through mutual assistance processes, thereby enabling material obtained through agency-to-agency channels to be considered as evidence.

The Attorney-General signed the Instrument on 23 January 2015. However, due to an administrative oversight at Departmental level, the requirements of the *Legislation Act 2003* (Cth) regarding registration and the need for accompanying documents were not fulfilled. When the Department became aware of the issue, steps were taken to satisfy those requirements as soon as practicable.

Subsection 27B(3) and the proposed certificate have not been relied on to date and accordingly no-one has been impacted by the failure to register the Instrument earlier.

We would have no objection to the Committee publishing the Department's advice above regarding the delay in registration.

Should the Committee require any further information, the responsible officer for this matter

is Toni Burgess,

Yours sincerely

Catherine Hawkins
First Assistant Secretary
Criminal Justice Policy and Programmes Division

THE HON MICHAEL KEENAN MP
Minister for Justice
Minister Assisting the Prime Minister for Counter-Terrorism

MC17-005668

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

27 JUN 2017

Dear Senator John

Thank you for the Committee's letter of 15 June 2017 regarding the Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No.1) (Instrument No.1).

The letter indicates that the Senate Standing Committee on Regulations and Ordinances seeks advice about how the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime* (the Protocol) is incorporated into Instrument No.1. The Committee also seeks advice on access to the Protocol.

Request for Advice – Manner of Incorporation

Section 14(1)(b) of the *Legislation Act 2003* provides that if enabling legislation authorises provision to be made in relation to any matter by a legislative instrument, the instrument may, unless the contrary intention appears, make provision in relation to that matter (subject to s 14(2)), by incorporating any matter contained in any other writing existing at the time the instrument commences.

Section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* provides that the AUSTRAC CEO may, by writing, make rules prescribing matters required or permitted by any other provision of the Act. Section 75H(1) provides that the rules may make provision for and in relation to the suspension of registrations on the Remittance Sector Register by the AUSTRAC CEO. Accordingly, Chapter 59 of the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (AML/CTF Rules) sets out matters to be considered by the AUSTRAC CEO when deciding to suspend a registration – including whether a registered remitter or any of its key personnel has been charged, prosecuted and/or convicted in relation to people smuggling. The amendments to Chapter 59 in Instrument No. 1 allow the AUSTRAC CEO to consider 'significant money laundering, financing of terrorism or people smuggling risk' when deciding whether or not to cancel a remittance dealer's registration.

The definition of 'people smuggling' in Chapter 59, which incorporates a reference to the Protocol, was first introduced into the AML/CTF Rules in 2011 by the Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2011 (No.7) (Instrument No. 7). Instrument No. 7 was registered on 28 October 2011 and commenced on 1 November 2011.

However, as Instrument No. 1 will repeal and substitute Chapter 59 of the AML/CTF Rules, the definition in the new Chapter 59 will now incorporate the Protocol as it exists at the time of the commencement of Instrument No. 1. This is despite the fact that the amendments to Chapter 59 made by Instrument No. 1 did not include any changes to the definition of people smuggling.

Matter to which attention is drawn – Access to incorporated documents

The Committee has commented that Instrument No 1 incorporates the Protocol but the Explanatory Statement does not contain a description of the Protocol, or indicate how the Protocol may be obtained.

The Protocol seeks to 'prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants'[1] and is available at: www.treaties.un.org.

To further address the concerns of the Committee, an approved replacement Explanatory Statement, will be lodged on the Federal Register of Legislation and is attached for your reference.

Thank you again for writing on this matter.

Yours sincerely

Michael Keenan

Encl: Replacement Explanatory Statement

[1] Article 2, *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime*, United Nations Treaty Collection, *Treaty Series*, www.treaties.un.org (accessed 22 June 2017).

Australian Government

AUSTRAC

Explanatory Statement – *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1)* amending the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)*

Purpose and operation of Anti-Money Laundering/Counter-Terrorism Financing Rules (AML/CTF Rules) amending Chapter 59 and adding Chapter 74.

1. Section 229 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) provides that the AUSTRAC Chief Executive Officer (AUSTRAC CEO) may, by writing, make AML/CTF Rules prescribing matters required or permitted by any other provision of the AML/CTF Act.

Amendments to Chapter 59

2. Chapter 59 specifies the grounds on which a remittance dealer's registration can be suspended by the AUSTRAC CEO from the Remittance Sector Register. The amendments to Chapter 59 were prompted by the following key factors.

Post-Implementation Review recommendation

3. During 2014 and 2015, Chapters 58 and 59 of the AML/CTF Rules were subject to a 'Post-Implementation Review' (PIR) as required by the Office of Best Practice Regulation. A PIR is conducted after a regulatory policy decision is made (in this case the registration of the two chapters), in order to test whether the regulation is performing as intended and is still relevant and needed. The final PIR report is available on the Draft AML/CTF Rules page of the AUSTRAC website.

4. The PIR recommended that Chapter 59 should be amended to clarify the range of matters which the AUSTRAC CEO may consider in deciding whether to suspend the registration of a remittance service provider.

Allowing the AUSTRAC CEO to suspend a remitter's registration without prior notice

5. There may be circumstances where it is appropriate for the AUSTRAC CEO to suspend a remittance dealer's registration without prior notice and this is now

expressly stated in the chapter. These circumstances relate to high money laundering, financing of terrorism or people smuggling risk. The affected remitter will have the opportunity to apply for an internal review of the delegate's decision.

6. A 'suspension' decision is not a 'reviewable decision' under the AML/CTF Act and therefore the remitter is not able to appeal to the Administrative Appeals Tribunal (AAT). However, a suspension decision may result in cancellation of the remitter's registration on the Remittance Sector Register, and such a decision is reviewable by the Tribunal.

Legally delegating the AUSTRAC CEO's responsibility for making a suspension of registration decision

7. To facilitate the internal review process for suspension of registration decisions, the chapter has been amended to expressly state that the AUSTRAC CEO is a delegate for the purpose of considering whether a person has contravened a civil penalty provision of the AML/CTF Act, whether there are reasonable grounds to commence an action to cancel a registration, whether a person has contravened an imposed condition or a provision of the AML/CTF Act or Rules, whether a person may contravene a provision of the AML/CTF Act and whether information provided by the person was not true or correct or was misleading.

Aligning the grounds for suspending remitter registrations with those for cancelling remitter registrations

8. 'Significant money laundering, financing of terrorism or people smuggling risk' is already a factor which the AUSTRAC CEO may consider in deciding whether or not to cancel a remittance dealer's registration. To ensure consistency between decisions to suspend or cancel a remittance dealer's registration, amendments have been made to ensure that the 'suspension grounds' are substantially similar to the grounds for 'cancellation'.

9. **Section 14(1)(b) of the *Legislation Act 2003* provides that if enabling legislation authorises provision to be made in relation to any matter by a legislative instrument, the instrument may, unless the contrary intention appears, make provision in relation to that matter (subject to s 14(2)), by incorporating any matter contained in any other writing existing at the time the instrument commences.**

10. **The definition of 'people smuggling' in Chapter 59, which incorporates a reference to the Protocol, was first introduced into the AML/CTF Rules in 2011 by the Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2011 (No.7) (Instrument No. 7). Instrument No. 7 was registered on 28 October 2011 and commenced on 1 November 2011.**

11. **However, as Instrument No. 1 will repeal and substitute Chapter 59 of the AML/CTF Rules, the definition in the new Chapter 59 will now incorporate the Protocol as it exists at the time of the commencement of Instrument No. 1. This is despite the fact that the amendments to Chapter 59 made by Instrument No. 1 did not include any changes to the definition of people smuggling.**

12. **The Protocol seeks to 'prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants'[1] and is available at: www.treaties.un.org.**

Addition of Chapter 74

13. Chapter 74 exempts licensed trustees from specified provisions of the AML/CTF Act when they provide designated services in specified circumstances. A licensed trustee is an entity which holds an Australian Financial Services Licence authorising them to provide traditional trustee company services, under section 601RAA of the *Corporations Act 2001*. This is in contrast with public trustees which are established under legislation – such trustees are already exempted under the AML/CTF Act via several section 248 (Exemptions and modifications by the AUSTRAC CEO) exemptions.

14. Chapter 74 does not provide an exemption for licensed trustees in respect to the management of inter vivos trusts (trusts that commence when the settlor is alive). Exemptions for public trustees are currently in place under section 248 (Exemptions and modifications by the AUSTRAC CEO) of the AML/CTF Act, because it is considered that the governance, due diligence and clientele who use inter vivos trusts in the public trustee context are of lower money laundering and terrorism financing risk than those who use licensed trustees.

Statement of Compatibility with the *Human Rights (Parliamentary Scrutiny) Act 2011*

15. The *Human Rights (Parliamentary Scrutiny) Act 2011* requires a Statement of Compatibility declaring that the relevant instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.

16. The Statement of Compatibility for the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1)* is included in this Explanatory Statement at page 7. The AUSTRAC CEO, as the rule-maker of this legislative instrument, has stated that it 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*.

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[1] Article 2, *Protocol against the Smuggling of Migrants by Land, Sea and Air supplementing the United Nations Convention against Transnational Organised Crime*, United Nations Treaty Collection, *Treaty Series*, www.treaties.un.org (accessed 22 June 2017).

Notes on sections

Section 1

This section sets out the name of the Instrument, i.e. the *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1).*

Section 2

This section specifies that the Instrument commences on the day after it is registered.

Section 3

This section contains the details of the amendment:

Schedules 1 and 2 amend the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1).*

Schedule 1

This schedule amends Chapter 59.

Schedule 2

This schedule adds Chapter 74.

Notes on Paragraphs

Schedule 1

Chapter 59

Item 1

This item repeals the existing Chapter 59 and substitutes a new Chapter 59.

Paragraph 59.1

This paragraph specifies that these AML/CTF Rules have been made under section 229 of the AML/CTF Act for the purposes of subsection 75H(1) of the AML/CTF Act.

Paragraph 59.2

This paragraph specifies that a suspension is subject to the circumstances specified in paragraphs 59.3, 59.4 and 59.5 and has been amended to state that the AUSTRAC CEO can suspend a person's registration with or without prior written notice.

Paragraph 59.3

This paragraph now specifies that the AUSTRAC CEO may suspend a person's registration without prior notice. The 'Note' to this paragraph states that a person may request an internal review of the decision.

Paragraph 59.4

This paragraph specifies the matters to which the AUSTRAC CEO may have regard in considering whether a person's registration should be suspended. The language has been amended to provide clarity and certainty in regard to the delegable powers of the AUSTRAC CEO.

Paragraph 59.5

This paragraph sets out the notice and review provisions which must be followed if the AUSTRAC CEO decides to suspend a person's registration. In circumstances where the person being suspended is a remittance affiliate of a registered network provider, the chapter now requires that the network provider must be notified by the AUSTRAC CEO, in addition to the remittance affiliate, within seven days of the decision being made.

Paragraph 59.6

This paragraph specifies that a suspension cannot commence before the date specified in the notice.

Paragraph 59.7

This paragraph specifies that the AUSTRAC CEO may publish the notice or extracts from the notice on the AUSTRAC website or in any other manner.

Paragraph 59.8

Due to the amendments to subparagraph 59.5(1), this paragraph has been amended to remove the now redundant wording relating to the AUSTRAC CEO informing the registered network provider of the remitter affiliate's suspension.

Paragraph 59.9

This paragraph specifies that the entry for the suspended registration may be removed from the Remittance Sector Register for the period of the suspension.

Paragraph 59.10

This paragraph specifies that conviction of an offence includes orders relating to a person which have been made under section 19B of the *Crimes Act 1914*.

Paragraph 59.11

This paragraph specifies definitions for 'beneficial owner', 'enforcement action', 'fraud', 'key personnel', 'people smuggling', 'person', 'serious offence' and 'terrorism'.

The definition of 'people smuggling' incorporates the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime* (the Protocol). The Protocol is available at: www.treaties.un.org.

Schedule 2

Item 1

Paragraph 74.1

This paragraph specifies that these AML/CTF Rules have been made under section 229 of the AML/CTF Act for the purposes of subsection 247(4) of the AML/CTF Act.

Paragraph 74.2

This paragraph sets out the designated services to which the exemption applies and the provisions of the AML/CTF Act from which licensed trustee companies are exempted.

Paragraph 74.3

This paragraph lists the conditions that must be satisfied for the exemption to apply.

Paragraph 74.4

This paragraph specifies that the exemption does not apply where the person is acting in the capacity of a trustee of an inter vivos trust.

Paragraph 74.5

This paragraph defines the terms for 'licensed trustee company', 'statutory office holder' and 'inter vivos trust'.

Legislative instruments

These AML/CTF Rules are legislative instruments as defined in section 8 of the *Legislation Act 2003*.

Likely impact

The amendments to Chapter 59 and the addition of Chapter 74 will have impacts on reporting entities.

Assessment of benefits

The amendments to Chapter 59 will provide greater clarity and certainty for industry in knowing and understanding the basis on which the relevant AUSTRAC CEO powers are applied. Costings were not undertaken for the amendments to Chapter 59 as they are of a minor nature and do not substantially alter existing regulatory arrangements.

The addition of Chapter 74 will provide regulatory relief to licensed trustees from complying with certain provisions of the AML/CTF Act while leaving in place obligations which will identify, mitigate and manage ML/TF risk.

Consultation

The amendments to Chapter 59 were published on the AUSTRAC website from 12 January 2017 to 9 February 2017. Chapter 74 was published on the AUSTRAC website from 7 September 2016 to 5 October 2016.

AUSTRAC has consulted with the Australian Taxation Office, the Department of Immigration and Border Protection, the Australian Federal Police, the Australian Criminal Intelligence Commission and the Office of the Australian Information Commissioner.

Ongoing consultation

AUSTRAC will conduct ongoing consultation with stakeholders on the operation of these AML/CTF Rules.

Statement of Compatibility with Human Rights

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

Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2017 (No. 1)

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

Overview of the legislative instrument

The Instrument amends Chapter 59 and will provide greater clarity and certainty for industry in knowing and understanding the basis on which the AUSTRAC CEO can suspend a remittance dealers' registration.

The Instrument also adds Chapter 74 to the AML/CTF Rules, which exempts licensed trustees from specified provisions of the AML/CTF Act when they provide certain designated services in prescribed circumstances.

Human rights implications

It is considered that this Instrument does not engage any of the applicable rights or freedoms.

Conclusion

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

Peter Clark

Deputy Chief Executive Officer

Australian Transaction Reports and Analysis Centre

THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Senator

I refer to the letter from the Senate Standing Committee on Regulations and Ordinances (the Committee) of 22 June 2017 seeking my advice in relation to various matters arising from the *Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) (Documents) Instrument 2017* (the DPRK Documents list) (F2017L00539).

This legislative instrument gives effect in Australia to obligations imposed by United Nations Security Council Resolution (UNSCR) 1718 (2006) concerning the Democratic People's Republic of Korea (DPRK). As noted by the Committee, Australia is under an international legal obligation to implement UNSCR measures adopted under Chapter VII of the Charter of the United Nations into its domestic law.

Subregulation 5(3) of the *Charter of the United Nations (Sanctions – Democratic People's Republic of Korea) Regulations 2008* (the Regulations) provides that the Minister for Foreign Affairs may, by legislative instrument, specify documents for subparagraph 5(1)(c)(i) of the Regulations. The DPRK Documents list specifies seven documents listing items that are prohibited under the Regulations for export to, importation from, or related service provision to the DPRK, as required by UNSCR 1718.

These seven documents or their predecessors are named in several UNSCRs as listing items subject to the prohibitions in UNSCR 1718. Five of the documents are issued by the UN Security Council Committee established pursuant to UNSCR 1718. The other two documents, which were referred to in the Committee's *Delegated legislation monitor 7 of 2017*, are issued by the Nuclear Suppliers Group and have been circulated by the International Atomic Energy Agency. The documents are written in a standard format for export control lists, which require descriptions of items to be concise with a precise scope.

+61 2 6277 7500 Parliament House, Canberra ACT 2600, Australia foreign.minister@dfat.gov.au

Accordingly, I confirm the documents specified by the DPRK Documents list are an internationally accepted reference for those industries, persons and companies that trade in such goods.

I also confirm the Department of Foreign Affairs and Trade provides a free service which can make determinations as to whether a good is an import or export sanctioned good under the DPRK Documents list.

I trust this information is of assistance.

Yours sincerely

Julie Bishop

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

REF: MS17-001304

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

Dear Senator Williams

I refer to the Committee Secretary's letter dated 22 June 2017 sent to my office seeking further information about items in the following instruments:

- the *Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2017*; and
- the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017*.

The Ministers who are responsible for the items in these instruments have provided responses to the Committee's requests. The response at Attachment A includes responses from the Minister for Communications, Senator the Hon Mitch Fifield; and the Minister for Health, the Hon Greg Hunt MP. I trust this advice will assist the Committee with its consideration of the instruments.

An advance copy of the replacement explanatory statement referenced in the Minister for Health's response is also attached for the Committee's information at Attachment B.

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

Kind regards

Mathias Cormann
Minister for Finance

2 August 2017

Attachment A

Financial Framework (Supplementary Powers) Amendment (Communications and the Arts Measures No. 1) Regulations 2017

Provided by the Minister for Communications

Response to the Senate Standing Committee on Regulations and Ordinances – Delegated Legislation Monitor 7 of 2017

I thank the Committee for its request for advice about the amendment of Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulations 1997* (the FFSP Regulations) to establish legislative authority for government provision of a loan to NBN Co Limited (nbn).

The Australian Government (the Government) has committed to delivering high-speed broadband to all Australian homes and businesses over the National Broadband Network (the network) by 2020. The forecast base case for funding the network is $49 billion, with $29.5 billion provided by the Government as equity and up to $19.5 billion delivered through a loan to nbn on commercial terms.

As detailed in the Explanatory Statement, the Government has capped the amount of equity contributions to nbn at $29.5 billion which is expected to be fully utilised in 2017. nbn will require up to $19.5 billion in additional funding to complete the rollout of the network, which the Government has decided to provide through a loan on commercial terms from 2017-18, with the full amount of the loan to be repaid by 30 June 2021. The loan will ensure nbn has certainty that the full cost of funding the rollout is secured on commercial terms and will enable the company to focus on completing the rollout.

The Government's decision to proceed with legislative authority through delegated legislation rather than primary legislation for the loan to nbn was undertaken having regard to a range of constitutional and other legal considerations. An amendment to the FFSP Regulations is appropriate as the loan to nbn is a one-off commercial loan agreement for a specific purpose for a short, fixed duration.

In its request, the Committee has drawn attention to scrutiny principle 23(3)(d) of the Committee's terms of reference. In consideration of this principle, legislative authority required for government provision of this loan does not fundamentally change the law, is not lengthy or complex, does not change relationships or community attitudes and is not part of a uniform laws scheme.

As announced by Shareholder Ministers on 18 November 2016, a Government loan on commercial terms represents the most cost effective way to raise debt and secure funding to complete the rollout of this important national infrastructure project.

In taking account of the above matters, I consider it remains appropriate for legislative authority for government provision of a loan to nbn to occur through delegated legislation.

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017

Provided by the Minister for Health

Response to the Committee's questions about item 217 inserted into Schedule 1AB to the *Financial Framework (Supplementary Powers) Regulation 1997* by way of the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017.*

Commonwealth executive power and the express incidental power

Item 217 references the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix) of the Constitution). The Commonwealth executive power in section 61, together with section 51(xxxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

The Youth Cancer Services program (the program) listed in **item 217** will support a national approach to improve cancer treatment services for adolescents and young adults with cancer.

The program will provide a clear national mechanism for providing adolescents and young adults with cancer access to clinical trials across the nation. The clinical trials are of national importance as they will build the capacity of medical research for the nation.

The program will establish a national minimum dataset on adolescents and young people with cancer. The program will facilitate the collection of nationally consistent and coordinated data.

The Explanatory Statement for the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017* will be replaced to correct the omission of the reference to sections 61 and 51(xxxix) of the Constitution for item 217.

Attachment B

REPLACEMENT EXPLANATORY STATEMENT

This Explanatory Statement replaces the Explanatory Statement registered on 18 May 2017 for the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017* [F2017L00544] to correct the constitutional powers referenced in table item 217.

Issued by the Authority of the Minister for Finance

Financial Framework (Supplementary Powers) Act 1997

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017

The *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) confers on the Commonwealth, in certain circumstances, powers to make arrangements under which money can be spent; or to make grants of financial assistance; and to form, or otherwise be involved in, companies. The arrangements, grants, programs and companies (or classes of arrangements or grants in relation to which the powers are conferred) are specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the Principal Regulations). The FF(SP) Act applies to Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013*.

Section 65 of the FF(SP) Act provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

Section 32B of the FF(SP) Act authorises the Commonwealth to make, vary and administer arrangements and grants specified in the Principal Regulations. Section 32B also authorises the Commonwealth to make, vary and administer arrangements for the purposes of programs specified in the Principal Regulations. Schedule 1AA and Schedule 1AB to the Principal Regulations specify the arrangements, grants and programs.

The Regulations amend Schedule 1AB to the Principal Regulations to establish legislative authority for government spending on a number of initiatives administered by the Department of Health.

Funding will be provided for:

- the Mental Health in Multicultural Australia program to improve accessibility and the quality of mental health services for people from culturally and linguistically diverse backgrounds;
- the Quality Use of Pathology Program to improve health outcomes from the quality use of pathology in health care;
- the Youth Cancer Services Program to improve cancer treatment services, support and the coordination of care for adolescents and young adults aged 15 to 25 years with cancer;

- the Health Workforce Program to strengthen the capacity of the health workforce to deliver high quality care and improve health outcomes of people living in rural, regional and remote locations;
- the Australian College of Mental Health Nurses to develop a new mental health nursing workforce model that is responsive to the mental health needs of the Australian community;
- a grant to Surf Life Saving Australia for: the delivery of preventative safety measures at local beaches; technology updates; expanded volunteer training; skills development for existing supervisors, trainers and assessors; and expanded recruitment and recognition of supervisors, trainers and assessors; and
- tobacco control initiatives and activities to reduce the prevalence of smoking and the associated health (including preventable deaths and disabilities), social and economic costs, and inequalities that it causes.

Details of the Regulations are set out at Attachment A. A Statement of Compatibility with Human Rights is at Attachment B.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*. The Regulations commence on the day after registration on the Federal Register of Legislation.

Consultation

In accordance with section 17 of the *Legislation Act 2003*, consultation has taken place with the Department of Health.

A regulation impact statement is not required as the Regulations only apply to non-corporate Commonwealth entities and do not adversely affect the private sector.

Attachment A

Details of the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017*

Section 1 – Name

This section provides that the title of the Regulations is the *Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017*.

Section 2 – Commencement

This section provides that the Regulations commence on the day after registration on the Federal Register of Legislation.

Section 3 – Authority

This section provides that the Regulations are made under the *Financial Framework (Supplementary Powers) Act 1997*.

Section 4 – Schedules

This section provides that the *Financial Framework (Supplementary Powers) Regulations 1997* are amended as set out in the Schedules to the Regulations.

Schedule 1 – Amendments

Item 1 – In the appropriate position in Part 3 of Schedule 1AB (table)

This item adds two new table items to Part 3 of Schedule 1AB to establish legislative authority for government spending on certain activities administered by the Department of Health.

New **table item 17** establishes legislative authority for government spending on the Mental Health in Multicultural Australia (MHiMA) program.

The MHiMA program aims to strengthen the capacity of individuals, communities and health service providers to address the mental health needs of Australia's culturally and linguistically diverse (CALD) population, including immigrants and refugees, in a culturally inclusive and responsive manner.

This phase of the MHiMA program is part of the Government's response of 26 November 2015 to *Contributing Lives, Thriving Communities – Review of Mental Health Programmes and Services* which is available at http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-review-response.

The Australian Government has funded a national transcultural mental health program since 1995. The MHiMA program has been funded by the Government since 2011.

Mental Health Australia has been the most recent service provider for the MHiMA program. In September 2015, the Department of Health funded Mental Health Australia to manage the program and prepare advice to the Government on future program directions. Funding arrangements with Mental Health Australia finished on 31 December 2016.

The Department of Health will engage a lead organisation to further develop and implement the Framework for Mental Health in Multicultural Australia (the Framework) and undertake other activities to support the adaptation of the Framework. The Framework has been designed for the Australian mental health services. It supports mental health service providers to respond to the changing population demographics in their local catchment areas and improve the quality and accessibility of their services.

The Framework has been developed under the MHiMA program and contributes to the accessibility of mental health services for CALD consumers by assisting service providers to determine how culturally responsive they are, develop a continuous improvement plan and track progress over a period of time.

The target groups for the MHiMA program are mainstream mental health services, the mental health workforce, and Australia's CALD population, including immigrants and refugees. The key outcome areas for CALD consumers and carers include improved mental health care and greater participation and decision-making in the type of care offered by service providers. The key outcome areas for mental health service providers include support through implementation of the Framework to respond to the needs of CALD communities.

The core responsibility of the lead organisation will be the adaptation of the Framework to make it suitable for Primary Health Networks and the organisations they commission to deliver mental health services. This will include working with individual organisations as they implement the Framework, providing support to ensure mental health services are accessible to the CALD community, and providing expert advice on cultural competency. Other activities of the lead organisation will include: sector and community development to improve CALD communities' understanding of mental health; enhancement of the Mental Health in Multicultural Australia website; mental health promotion; suicide prevention; development of resources for the sector; and data collection and reporting.

A new lead organisation for the MHiMA program will be selected through a targeted competitive grant opportunity. Mainstream mental health organisations with a background in working with CALD communities will be invited to apply. Funding will be offered for a three-year period commencing in 2017-18. The updated MHiMA Program Guidelines will outline the funding purpose, objectives and outcomes, the approach to market selection process and assessment criteria. The guidelines will be made available to the organisations that are invited to apply and will also be available at http://www.health.gov.au/internet/main/publishing.nsf/Content/Listing+of+Tenders+and+Grants-1.

An assessment committee of officials from the Department of Health will assess the applications and make a recommendation to the decision-maker. The assessment committee may seek input from external advisers, including individuals from a CALD background with a lived experience of mental illness, to inform the assessment process.

The decision-maker is the delegate of the Secretary of the Department of Health, who will make a determination on the awarding of funding grants and the terms and conditions on which funding is provided. Decisions will be made in accordance with the relevant legislation, including the *Commonwealth Grants Rules and Guidelines* and the *Public Governance, Performance and Accountability Act 2013*, and in particular whether it is an efficient, effective and ethical use of Commonwealth resources.

Information on the successful applicant will be posted on the Department's website 14 days after approval, as required by the *Commonwealth Grants Rules and Guidelines*, at http://www.health.gov.au/internet/main/publishing.nsf/Content/pfps-grantsreporting.

The MHiMA program is not considered suitable for independent merits review because it will involve the allocation of a finite resource to fund one organisation to provide national support and services. Consistent with the Government's approach of engaging mainstream organisations to deliver its mental health reforms, only national mental health organisations with a record of specifically working with CALD communities will be invited to apply.

The Department's Grant and Procurement Complaints Procedures which are available at http://www.health.gov.au/internet/main/publishing.nsf/content/pfps-complaintsprocedures apply to complaints that arise in relation to grant and procurement processes.

Complaints are able to be lodged by contacting the relevant departmental contact officer within six months of the outcome of a process. Complaints are acknowledged within ten days of lodging. The departmental contact officer and their supervisor will try to resolve the matter and advise the decision within a reasonable timeframe.

If a complainant is not satisfied with the Department's decision then they can apply for independent internal departmental review of the complaint. People are also able to seek review from the Commonwealth Ombudsman or judicial review.

Funding of $3.9 million was included in the 2015-16 Mid-Year Economic and Fiscal Outlook under the measure 'Mental Health – streamlining' for a period of three years commencing in 2017-18. Details are set out in the *Mid-Year Economic and Fiscal Outlook 2015-16*, Appendix A: Policy decisions taken since the 2015-16 Budget at page 175.

Funding for this item comes from Program 2.1: Mental Health, which is part of Outcome 2. Details are set out in the *Portfolio Budget Statements 2016-17, Budget Related Paper No. 1.10, Health Portfolio* at page 56.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the purpose of the item references the following powers of the Constitution:

- the external affairs power (section 51(xxix));
- the communications power (section 51(v));
- the aliens power (section 51(xix));
- the immigration power (section 51(xxvii)); and
- the Commonwealth executive power (section 61).

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party. Australia has obligations regarding the right to health under Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights. In particular, these Articles require States Parties to take steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and to take steps necessary for 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

Under the program, funding will be provided for activities that improve the accessibility and quality of mental health services for Australia's culturally and linguistically diverse population. Activities will include workforce initiatives that respond to changing demographics.

Communications power

Under section 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Under the program, the Department will fund enhancements of the MHiMA website.

Naturalization and aliens power

Section 51(xix) of the Constitution supports laws with respect to 'naturalization and aliens'.

Under this program, the Department will fund activities directed to improving the mental health of non-citizens.

Immigration power

Section 51(xxvii) supports laws with respect to 'immigration and emigration'.

Under this program, the Department will fund activities that are directed to improving the mental health of migrant communities.

Commonwealth executive power

The program also involves funding activities that are taken in the exercise of the executive power of the Commonwealth, which is supported by the executive power in section 61 of the Constitution.

Some of the activities that are funded will generate information that will be used to further enhance the accessibility of mental health services for Australia's culturally and linguistically diverse population, including immigrant and refugee populations.

New **table item 18** establishes legislative authority for the Government to provide a grant to Surf Life Saving Australia.

The grant will support Surf Life Saving Australia to undertake activities in Australia which reduce the incidence of water-related injury and death; enhance the safety of water environments; improve the behaviour of people in, on and around water; and address priority areas and goals for water safety articulated in the Australian Water Safety Strategy. The Strategy was developed by the Australian Water Safety Council in 2008 and is supported by the Government.

Water-based sport and recreation activities are an important part of Australian society and culture but are associated with hundreds of drowning deaths each year and many more near-drowning incidents. The Government is committed to improving opportunities for community participation in sport and recreation in safe environments, and addressing the incidence of drowning through effective prevention and intervention. The Government has a long-standing history of providing support to water safety organisations in Australia.

As part of a 2016 federal election commitment, the Government will provide grant funding of $10 million to Surf Life Saving Australia over four years commencing in 2016-17. Activities that will be funded include up-skilling existing volunteer supervisors, trainers and assessors; updating Surf Life Saving Australia's technology to enhance training and reduce red tape; expanding the scope of volunteer training at clubs around the country, including induction and ongoing training for both members and volunteer training managers; and expanding recruitment and recognition of supervisors, trainers and assessors at clubs around the country.

Funding of $10 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook under the measure 'Support Australia's Surf Life Savers' for a period of four years commencing in 2016-17. Details are set out in the *Mid-Year Economic and Fiscal Outlook 2016-17*, Appendix A: Policy decisions taken since the 2016 PEFO at page 176.

On 27 June 2016, the then Minister for Vocational Education and Skills, Senator the Hon Scott Ryan, announced funding for Surf Life Saving Australia as part of 'The Coalition's Policy to Support Australia's Surf Life Savers' which is available at https://www.liberal.org.au/coalitions-policy-support-australias-surf-life-savers.

The Department of Health will use a closed non-competitive process to award the grant. The applicant will be invited to submit an application for the grant, which will be assessed against the eligibility and assessment criteria in the grant guidelines. The grant guidelines will outline the objectives and outcomes of the grant, the deliverables and specific performance indicators.

Following assessment of the application, advice will be provided to the funding Approver on the merits of the application. The Approver for this grant is the delegate of the Secretary of the Department of Health, who will make a determination on the awarding of grant funding and the terms and conditions on which funding is provided. The decision will be made in accordance with the relevant legislation, including the *Commonwealth Grants Rules and Guidelines* and the *Public Governance, Performance and Accountability Act 2013*, and in particular whether it is an efficient, effective and ethical use of Commonwealth resources.

The Approver's decision is final in all matters, including:

- the approval of the grant;
- the grant funding amount to be awarded; and
- the terms and conditions of the grant.

The grant guidelines, assessment criteria and information about the Approver's decisions will be available at www.health.gov.au/internet/main/publishing.nsf/Content/pfps-grantsreporting.

The provision of grant funding to Surf Life Saving Australia to deliver initiatives to improve water safety within the community and to tackle the incidence of drowning in identified high risk areas, is not considered suitable for independent merits review because it is targeted, non-competitive and for a specific purpose. Surf Life Saving Australia is the only national provider with a capacity to meet government requirements, and is highly experienced in facilitating programs and initiatives aimed at educating the community about water safety risks and providing effective water safety interventions.

Funding for this item will come from Program 3.1: Support Australia's Surf Life Savers, which is part of Outcome 3. Details are set out in the *Portfolio Additional Estimates Statements 2016-17, Health Portfolio* at page 44.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)) of the Constitution.

The Australian Government is committed to improving opportunities for community participation in sport and recreation in safe environments. The Australian Government continues a long-standing history of providing support to water safety organisations in Australia.

Water-based sport and recreation activities are an important part of Australian society and culture but are associated with hundreds of drowning deaths each year and many more near-drowning incidents. The Australian Government is committed to addressing the incidence of drowning through effective prevention and intervention.

The executive power in section 61 of the Constitution, together with section 51(xxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

Under the program, the Department funds Surf Life Saving Australia being a body that provides surf life saving services on a national basis.

Item 2 – In the appropriate position in Part 4 of Schedule 1AB (table)

This item adds four new table items to Part 4 of Schedule 1AB to establish legislative authority for government spending on certain activities administered by the Department of Health.

New **table item 216** establishes legislative authority for government spending on the Quality Use of Pathology Program (the Program).

The Program aims to improve health outcomes from the quality use of pathology in health care through the pursuit of better practice amongst requesters/referrers and providers of pathology services and the development of knowledgeable and engaged consumers. Under the Program, grants are provided for innovative approaches that improve the provision of quality pathology services and promote informed consumer choice and needs, in particular initiatives designed to improve the delivery, management and/or consumption of Medicare-rebated pathology services.

The Program, which was established in 1999, targets entities within the pathology sector, including professional colleges or organisations; relevant interested parties such as academics, clinical institutions and consumer groups that have capabilities to undertake projects that will lead to an improvement in the provision of pathology services.

Under the Program, grant funding is provided to a range of entities through an approach to market, with the next approach expected to be advertised in mid-2017. The Program Guidelines will outline the program objectives and key themes for projects that will be considered for funding, eligibility criteria, assessment criteria and the assessment process. Unsolicited proposals will also be considered. Applications and unsolicited proposals will be assessed using the Program Guidelines. The project initiatives must be from eligible entities and must meet the Program Guidelines and assessment criteria in order to be recommended for funding support.

Grant recipients are funded to undertake their projects with the view of meeting the specified project objectives within the funding period and to provide a report on the project outcomes for publication. The project outcomes vary and may include outcomes such as the development of an electronic ordering system for a hospital, the development of quality assurance programs for molecular genetic testing that can be used by the pathology sector, or the development of systems that facilitate the interoperability of pathology reports with electronic health records.

Funding proposals must contribute to the continued innovation and improvement of the quality of pathology services which would lead to improved patient health outcomes. There may be a range of pathology quality initiatives submitted that could result in short-term or long-term, multi-year grant funding agreements.

The decision-maker for grant expenditure is the delegate of the Minister for Health, who will make a determination on the awarding of grant funding and the terms and conditions on which funding is provided. Decisions will be made in accordance with the relevant legislation, including the *Commonwealth Grants Rules and Guidelines* and the *Public Governance, Performance and Accountability Act 2013*, and in particular, whether it is an efficient, effective and ethical use of Commonwealth resources.

Details of the approach to market and the Program Guidelines will be available on the AusTender website at www.tenders.gov.au and the Department's website at www.health.gov.au/qupp. Successful grant recipients will be published on the Department's website.

The Program is not considered suitable for independent merits review given the limited allocation of funding and the nature of the Program that requires technical expertise and capabilities to undertake the pathology quality projects.

The Department's Grant and Procurement Complaints Procedures available at http://www.health.gov.au/internet/main/publishing.nsf/Content/pfps-complaintsprocedures apply to complaints that arise in relation to grant and procurement processes.

Complaints are able to be lodged by contacting the relevant departmental contact officer within six months of the outcome of a process. Complaints are acknowledged within ten days of lodging. The departmental contact officer and their supervisor will try to resolve the matter and advise the decision within a reasonable timeframe.

If a complainant is not satisfied with the Department's decision then they can apply for an independent internal departmental review of the complaint. People are also able to seek review from the Commonwealth Ombudsman or judicial review.

Funding for this item comes from Program 4.1: Medical Benefits, which is part of Outcome 4. Details are set out in the *Portfolio Budget Statements 2016-17, Budget Related Paper No. 1.10, Health Portfolio* at page 87. Funding of up to $8 million over 4 years commencing from 2016-17 has been allocated to support the Quality Use of Pathology program that is part of the Pathology Reform Implementation Program.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the external affairs power (section 51(xxix)); and
- the social welfare power (section 51(xxiiiA)).

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party. Australia has obligations regarding the right to health under Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights. In particular, these Articles require State Parties to take steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and to take steps necessary for 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

For example, under the Program, funding will be provided to promote evidence based practices in requesting and reporting of pathology services. Improved pathology services will assist in the better diagnosis and treatment of disease.

Social welfare power

Section 51(xxiiiA) of the Constitution empowers the Parliament to make laws with respect to the provision of various social welfare benefits and services, including medical services.

Under the program, funding will be provided to support innovative initiatives that contribute to improving the quality of medical (pathology) services provided to Australian consumers.

New **table item 217** establishes legislative authority for government spending on the Youth Cancer Services (YCS) program.

The YCS program aims to improve cancer treatment services, support and the coordination of care for adolescents and young adults aged 15 to 25 years with cancer. The program was established in 2013, with five specialist cancer treatment hubs located in hospitals across the nation (New South Wales/Australian Capital Territory, Victoria/Tasmania, South Australia/Northern Territory, Western Australia, and Queensland).

CanTeen, the national non-government support organisation for young people living with cancer, has been funded by the Government since 2013-14 to deliver the YCS program. CanTeen will use grant funding to support the five hubs by providing administrative and management support as well as funding for key roles within each of the five hubs. The hubs will be managed by the lead organisation for each hub.

CanTeen will also use funding for other activities under the YCS program such as: increasing network development to ensure collaboration and consistency across the five hubs; increasing access of adolescents and young adults with cancer to support services and clinical trials; building capacity in cancer clinicians and other health professionals to treat cancer in adolescents and young adults; implementing a national minimum data set, and implementing national and local strategies to assist the YCS hubs such as best practice policies to provide quality youth cancer services.

The YCS program will be managed by CanTeen in conjunction with lead organisations and the health services that they partner with to form the five hubs in hospitals across Australia to deliver services nationally to adolescents and young adults with cancer and their families. CanTeen will enter into individual agreements with each of the lead organisations and provide funding to them to employ a multidisciplinary team. Funding for CanTeen to deliver the next phase of funding for the YCS program is expected to commence in 2017-18 and continue for three years to ensure a seamless continuation of services for adolescents and young adults with cancer.

The delegate of the Secretary of the Department of Health will be responsible for spending decisions under the YCS program. The decisions will be made in accordance with applicable legislative requirements under the *Public Governance, Performance and Accountability Act 2013* and the *Commonwealth Grants Rules and Guidelines*. CanTeen will be responsible for the delivery of the program and will negotiate with the existing lead organisations on the level of funding to be provided to each of them and will enter into agreements with each of the lead organisations.

After finalisation of the funding agreement, CanTeen will be reported as a grant recipient together with the funding amount for the YCS program at http://www.health.gov.au/internet/main/publishing.nsf/Content/GSD-healthgrants-senateorder14-MinchinMotion.

The decision to fund CanTeen to continue its management of the YCS program is not considered suitable for independent merits review because CanTeen is the only organisation with the experience and capacity to deliver the YCS program in Australia. The Government has invested in the capital infrastructure to establish the specialist cancer treatment hubs for the YCS program through CanTeen. These hubs are vital in the delivery of the program to meet the Government's objective.

Re-consideration of this decision under merits review would substantially delay implementation of the program in an environment where there are no alternative providers with similar capacity to deliver the program nationally.

Funding of $18.2 million was included in the 2013-14 Budget under the measure 'World Leading Cancer Care – Youth Cancer Networks – additional funding' for a period of four years commencing in 2013-14. Details are set out in *Budget 2013-14, Budget Measures, Budget Paper No. 2 2013-14* at page 192.

Funding of $14.5 million has been allocated over three years commencing 2017-18 for CanTeen to continue to deliver the YCS program.

Funding for the YCS program comes from Program 2.4: Preventive Health and Chronic Disease Support, which is part of Outcome 2. Details are set out in the *Portfolio Budget Statements 2016-17, Budget Related Paper No. 1.10, Health Portfolio* at page 56.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the external affairs power, particularly the treaty implementation aspect (section 51(xxix));
- the social welfare power (section 51(xxiiiA));
- the statistics power (section 51(xi)); and
- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party. Australia has obligations regarding the right to health under Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights. In particular, these Articles require State Parties to take steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and to take steps necessary for 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

For example, under the program, funding will be provided to facilitate young people's access to clinical trials to improve the quality of services provided to young people living with cancer.

Social welfare power

Section 51(xxiiiA) of the Constitution empowers the Parliament to make laws with respect to the provision of various social welfare benefits and services, including medical services.

Under the program, funding will be provided for activities that engage health professionals to provide medical services to young people who have cancer.

Census and statistics power

Section 51(xi) of the Constitution empowers the Parliament to make laws with respect to 'census and statistics'.

Under the program, the Department will fund the implementation of a national minimum data set to ensure adolescents' and young adults' cancer data is collected in a nationally consistent and coordinated manner.

Commonwealth executive power and express incidental power

The Commonwealth executive power in section 61, together with section 51(xxxix), supports activities that the Commonwealth can carry out for the benefit of the nation.

The program will support a national approach to improve cancer treatment services for adolescents and young adults with cancer.

The program will provide a clear national mechanism for providing adolescents and young adults with cancer access to clinical trials across the nation. The clinical trials are of national importance as they will build the capacity of medical research for the nation.

The program will establish a national minimum dataset on adolescents and young people with cancer. The program will facilitate the collection of nationally consistent and coordinated data.

New **table item 218** establishes legislative authority for government spending on the Health Workforce Program.

The Health Workforce Program aims to strengthen the capacity of the health workforce to deliver high quality care and improve health outcomes of people living in rural, regional and remote locations by:

- facilitating the appropriate supply of health professionals, including general practitioners, nurses and allied health professionals;
- fostering the capability and qualification of health professionals;
- supporting students and health professionals who are Aboriginal persons, Torres Strait Islanders or those born outside of Australia; and
- addressing health workforce shortages in regional, rural and remote Australia.

This is an existing Program, which involves grant and procurement activities, as well as activities delivered on behalf of the Department of Health by third-party providers. Funding is provided through funding agreements with grant recipients, contracts with suppliers, and memoranda of understanding, such as a Memorandum of Understanding with the Department of Human Services.

Most program activities are available nationally, managed by the Department of Health, through direct/targeted and open/competitive grant processes. Depending on the activity, the process will vary depending on what is considered to be most appropriate and in line with the *Commonwealth Grants Rules and Guidelines*. The Department reserves the right to seek targeted applications to meet the aim, objectives and priorities for an activity where appropriate.

Activities under the Health Workforce Program can be grouped into four subprograms:

1. Training the Health Workforce;
2. Supporting the Aboriginal and Torres Strait Islander Workforce;
3. Recruitment, Retention and Support of Health Professionals Working in Regional, Rural and Remote Australia; and
4. Outreach Health Activities.

1. Training the Health Workforce

This subprogram is designed to ensure a capable and qualified workforce through training, incentives, scholarships and support activities. It includes general practice training activities, medical and clinical training activities, scholarships and rural training and support activities. Each activity operates under the broad Health Workforce Program guidelines, in addition to individual program guidelines and funding arrangements.

The subprogram aims to assist medical practitioners and other health professionals to achieve registered or accredited status as required by their respective professions. It also aims to assist with continuing professional development.

For example, the Professional Development and Vocational Training component includes the Australian General Practice Training (AGPT) program. The AGPT is a national program managed by nine training organisations across Australia that were appointed following an open competitive approach to market. Another example from the Clinical/Medical Training and Internships component is the Specialist Training Program, which is currently administered by the specialist medical colleges selected through closed non-competitive funding rounds.

General Practice Training (Professional Development and Vocational Training)

This category of activities contributes to the Program's objectives of ensuring a capable and qualified workforce by increasing the supply of appropriately qualified general practitioners. It provides general practice training in urban, regional and rural locations; vocational training towards Fellowships of the relevant colleges; and education and training to support learning towards gaining general medical registration and/or specialist (general practitioner) registration.

Clinical/Medical Training and Internships

This category of activities includes training for health professionals, for the entire training continuum, with a focus on professional entry students undertaking health courses in higher education institutions. It provides clinical training opportunities beyond traditional teaching settings, inter-professional learning activities, support for clinical supervision in some settings, and support for innovative simulation projects.

Activities also include medical specialist training initiatives and junior doctor training initiatives such as the Commonwealth Medical Internships Program and Rural Junior Doctor Training Innovation Fund. These activities contribute to the Program's objectives of ensuring a capable and qualified workforce by providing opportunities for eligible medical graduates, specialist trainees and non-specialist medical staff to undertake training in a range of health care settings.

Scholarships

This category of activities provides scholarships for Aboriginal and Torres Strait Islander people and others undertaking courses to allow them to enter, remain in or upskill in relevant health workforces. It also provides scholarships to health students and/or professionals undertaking further education (scholarships may include return-of-service obligations) and reimburses students for costs associated with regional, rural and remote clinical placements.

Types of entities that may be funded under this category of activities include:

- specialist colleges;
- incorporated bodies;
- private hospitals and other private health care providers;
- universities; and
- individual health professionals.

2. Supporting the Aboriginal and Torres Strait Islander Health Workforce

This subprogram seeks to increase the capacity of the Aboriginal and Torres Strait Islander health and aged care workforce and the broader health and aged care workforce to provide culturally appropriate care to Aboriginal and Torres Strait Islander peoples. The aims are to:

- improve retention rates of Aboriginal and Torres Strait Islander health and aged care professionals;
- increase the number of non-Indigenous health care providers delivering culturally appropriate care to address the health and aged care needs of Aboriginal and Torres Strait Islander peoples;
- increase the number of Aboriginal and Torres Strait Islander students studying for qualifications in health and aged care; and
- improve completion rates for Aboriginal and Torres Strait Islander health and aged care students.

Funding may be provided to Aboriginal and Torres Strait Islander health professional organisations and other incorporated bodies as well as individuals who identify as Aboriginal or Torres Strait Islanders.

The majority of activities within this subprogram are located in Aboriginal and Torres Strait Islander communities – for example, programs specific to the Northern Territory or communities in Western Australia. Other activities, such as the Aboriginal and Torres Strait Islander specific training opportunities under the AGPT, are delivered nationally through regional training organisations.

3. Recruitment, Retention and Support of Health Professionals Working in Regional, Rural and Remote Australia

This subprogram seeks to encourage health professionals to work in regional, rural and remote Australia so that rural communities have better access to health care.

Activities within this subprogram involve separate selection processes. For example, the Dental Relocation and Incentive Support Scheme provides grants through funding rounds that require applicants to satisfy specific eligibility criteria. The General Practice Rural Incentives Program, which is managed by the Department of Human Services, and the Practice Nurse Incentive Program are demand-driven, entitlement activities. Funding is provided to applicants that satisfy stated eligibility criteria, subject to revision, suspension or abolition of the entitlement. Administration of the second stream of the General Practice Rural Incentives Program was awarded to Rural Workforce Agencies in 2010 through a targeted process.

Rural Training and Support

This category of activities comprises three elements:

- the Rural Health Multidisciplinary Training Program;
- training support for rural health clubs; and
- the John Flynn Placement Program.

The activities contribute to the Program's objectives of addressing health workforce shortages in rural, regional and remote Australia by training, retaining and supporting health professionals studying and working in rural, regional and remote Australia.

Incentives

This category of activities provides incentives to medical, nursing, allied health and dental professionals to work in, relocate to and remain in areas where they are most needed to deliver appropriate primary health care services. The aim is to encourage Aboriginal and Torres Strait Islander health professionals to move to, and remain in, rural, regional or remote locations; increase the number of appropriately qualified doctors, nurses, allied health and dental professionals working in regional and rural Australia; and expand and enhance the role of nurses, Aboriginal health workers and allied health professionals working in urban and rural general practices.

Workforce Support

This category of activities seeks to address health workforce shortages, including aged care workforce shortages and uneven supply in rural, regional and remote Australia. Support is provided for health practitioners to relocate and remain in rural, regional and remote

Australia, including funding to assist with continuing professional development, support to achieve vocational recognition, locum support, and the promotion of rural health careers.

Types of entities that may be funded under this category of activities include:

- specialist colleges;
- incorporated bodies;
- private hospitals and other private health care providers;
- universities; and
- individual health professionals.

4. Outreach Health Activities

This subprogram includes two elements:

- the Rural Health Outreach Fund; and
- the Primary Aeromedical Evacuations and Support Services.

The Rural Health Outreach Fund contributes to the Program's objectives of addressing health workforce shortages in rural, regional and remote Australia and improving health outcomes of people living in regional, rural, and remote locations by supporting the delivery of outreach health activities.

The Primary Aeromedical Evacuations and Support Services provide access to primary aeromedical evacuations and other primary health services in rural and remote areas beyond the normal medical infrastructure in areas of market failure.

Funding for the Health Workforce Program of $5.2 billion over four years from 2016-17 comes from Program 2.3: Health Workforce, which is part of Outcome 2. Details are set out in the *Portfolio Budget Statements 2016-17, Budget Related Paper No. 1.10, Health Portfolio* at page 56.

The Department of Health uses various selection processes to award funding under the Health Workforce Program. These include:

- open competitive grant funding rounds;
- targeted or restricted competitive grant funding rounds;
- non-competitive open grant processes;
- demand-driven grant processes;
- closed non-competitive grant processes;
- one-off grants; and
- procurement processes.

These processes are administered according to the *Commonwealth Procurement Rules* or the *Commonwealth Grants Rules and Guidelines*, as applicable.

Selection criteria relevant to each activity, and upon which spending decisions will be made, are provided to all potential tenderers/applicants for each activity. Selection criteria and guidelines for individual processes are published as appropriate on the Department's website at www.health.gov.au/internet/main/publishing.nsf/Content/work-prog.

All spending decisions for activities under the Health Workforce Program are made according to the *Commonwealth Procurement Rules*, the *Commonwealth Grants Rules and Guidelines* and the Health Workforce Program Guidelines which are available at www.health.gov.au/internet/main/publishing.nsf/Content/budget2011-flexfund-workforce18.htm.

Spending decisions are made by either the Minister for Health or his/her departmental delegates.

The Department reports information on individual grants and procurements at http://www.health.gov.au/internet/main/publishing.nsf/Content/health-contracts-index.htm and http://www.health.gov.au/internet/main/publishing.nsf/Content/pfps-grantsreporting.

Activities under the Health Workforce Program, which include grants or procurements, are subject to merits review arrangements. Requests for merits review and re-consideration are considered within the context of a finite level of funding.

The Department's Grants and Procurement Complaints Procedures apply to complaints, including requests for merits review that arise in relation to grant and procurement processes. The Complaints Procedures are available at http://www.health.gov.au/internet/main/publishing.nsf/Content/pfps-complaintsprocedures.

Complaints, including requests for merits review, are able to be lodged by contacting the relevant departmental contact officer within six months of the outcome of a process. Complaints are acknowledged within ten days of being lodged. The departmental contact officer and their supervisor will try to resolve the matter and advise the decision within a reasonable timeframe.

If a complainant is not satisfied with the Department's decision, they can apply for an independent internal departmental review of the complaint. People are also able to seek review from the Commonwealth Ombudsman or judicial review.

No further merits review is provided given these available avenues for review.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the following powers of the Constitution:

- the communications power (section 51(v));
- the naturalization and aliens power (section 51(xix));
- the social welfare power (section 51(xxiiiA));
- the races power (section 51(xxvi));
- the external affairs power (section 51(xxix));
- the territories power (section 122);
- the grants to states power (section 96); and
- the Commonwealth executive power and the express incidental power (sections 61 and 51(xxxix)).

Communications power

Under section 51(v) of the Constitution, the Commonwealth has power to legislate with respect to 'postal, telegraphic, telephonic and other like services'.

Under the Program, the Department will fund the delivery of internet-based communications to health practitioners and students to encourage them to relocate to rural and remote areas.

Naturalization and aliens power

Section 51(xix) of the Constitution supports laws with respect to 'naturalization and aliens'.

Under the Program, the Department will fund the recruitment, training and support of foreign health professionals.

Social welfare power

Section 51(xxiiiA) of the Constitution empowers the Parliament to make laws with respect to the provision of various social welfare benefits and services.

Under the Program, the Department will fund activities aimed at improving health outcomes for all Australians, with a particular focus for individuals living in regional, rural and remote areas by encouraging health professionals to work in these areas and by providing services to individuals living in areas of market failure such as through the Royal Flying Doctor Service and outreach activities.

Races power

Section 51(xxvi) of the Constitution empowers the Parliament to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'.

The race power supports laws for the benefit of Aboriginal and Torres Strait Islander Australians. Under the Program, activities will be funded that increase the capacity of the Aboriginal and Torres Strait Islander health and aged care workforce, and the capacity of the broader health and aged care workforce, to provide culturally safe care to Aboriginal and Torres Strait Islander people.

External affairs power

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party. Australia has obligations regarding the right to health under Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights. In particular, these Articles require State Parties to take steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and to take steps necessary for 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

Under the Program, the Department will fund training and education activities that improve the capacity, quality and distribution of the health workforce to meet the health needs of Australians.

Territories power

The provision of funding for activities in or in relation to a Territory is supported by the territories power in s 122 of the Constitution.

Under the Program, the Department may provide funding to Territories for the recruitment, retention and support of health professionals to work in regional, rural and remote areas.

Power to grant financial assistance to the States

Section 96 of the Constitution enables the Parliament to grant financial assistance to the States.

Under the Program, the Department may provide funding to the States for the recruitment, retention and support of health professionals to work in regional, rural and remote areas.

Commonwealth executive power and express incidental power

The Program involves funding activities that are taken in the exercise of the executive power of the Commonwealth. This funding is supported by the executive power in section 61 of the Constitution and the express incidental power in section 51(xxxix). For example, the Program funds activities that involve exchanging information about the health workforce between the Commonwealth and stakeholders.

New **table item 219** establishes legislative authority for government spending on a new mental health care workforce model to be developed by the Australian College of Mental Health Nurses (ACMHN).

A range of strategies is required to address not only the predicted shortfall for mental health nurses but also the mental health literacy of all nurses in all settings.

Improved mental health literacy, clinical skills and capability in mental health nurses and nurses in general practice will aim to be achieved through:

- an education program to improve mental health knowledge and skills in the primary health care nurse workforce; and
- a program to facilitate the transition of skilled specialist mental health nurses between acute, community and primary health care settings to enable flexibility in the primary health care workforce.

An education program is the first deliverable of the workforce model to strengthen the mental health literacy and clinical skills of the primary health care nurse workforce.

The second deliverable will be implemented in stages. In the first stage, the ACMHN will develop a program framework to identify education needs, mentoring, supervisory arrangements, and organisational support for mental health nurses. In the second stage, the

ACMHN will trial the program in selected Primary Health Networks (PHNs) in urban, regional and rural/remote areas. The final stage will involve an evaluation of the program.

The development of a more sustainable and flexible nursing workforce is needed to respond to a changing primary health care environment. Professional learning activities will be based on a 'stepped care' approach to ensure the delivery of services to the community at the appropriate level of care, with the delivery of mental health care services to be co-ordinated within the PHNs and local health areas. A 'stepped care' approach means ensuring an appropriate level of care is delivered in line with the severity of the mental illness being experienced by the client.

Funding of $1.5 million was included in the 2016-17 Mid-Year Economic and Fiscal Outlook under the measure 'Strengthening Mental Health Care in Australia' for a period of two years commencing in 2016-17. Details are set out in the *Mid-Year Economic and Fiscal Outlook 2016-17*, Appendix A: Policy decisions taken since the 2016 PEFO at page 175.

Funding to the ACMHN to develop a new workforce model is part of the Coalition's election commitment 'Strengthen Mental Health Care in Australia' released on 26 June 2016 which is available at www.liberal.org.au/coalitions-policy-strengthen-mental-health-care-australia.

The new mental health care workforce model will be delivered through a grant funding agreement with the ACMHN. The *Commonwealth Grants Rules and Guidelines* will apply. Information on the grant will be publicly reported at www.health.gov.au/internet/main/publishing.nsf/Content/GSD-healthgrants-senateorder14-MinchinMotion. Funding decisions will be approved by the delegate of the Secretary of the Department of Health.

The ACMHN will be responsible for the delivery of the primary components of the program and may engage sub-contractors to deliver education modules.

The provision of funds to the ACMHN to develop a new workforce model is not considered suitable for independent merits review because it is of a short-term, time-limited and one-off nature of a small scale. The direct source arrangement is considered appropriate based on the ACMHN being the only peak body organisation for mental health nursing with the appropriate capability to deliver this program.

Funding for this item will come from Program 2.3: Health Workforce, which is part of Outcome 2. Details are set out in the *Portfolio Additional Estimates Statements 2016-17, Health Portfolio* at page 17.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the external affairs power (section 51(xxix)) of the Constitution.

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party. Australia has obligations regarding the right to health under Articles 2 and 12 of the International Covenant on Economic, Social and Cultural Rights. In particular, these Articles require State Parties to take steps necessary for 'the prevention, treatment and control of epidemic, endemic, occupational and other diseases' and to take

steps necessary for 'the creation of conditions which would assure to all medical service and medical attention in the event of sickness'.

Under the program, the Department will fund activities that support skills development of nurses in mental health and facilitate the movement of mental health nurses across health service delivery settings to meet areas of need.

Item 3 – In the appropriate position in Part 4 of Schedule 1AB (table)

This item adds a new table item to Part 4 of Schedule 1AB to establish legislative authority for government spending on an activity that is administered by the Department of Health.

New **table item 227** establishes legislative authority for government spending on the tobacco control initiatives and activities to reduce the prevalence of smoking and the associated health (including preventable deaths and disabilities), social and economic costs, and inequalities that it causes.

The program entitled 'Investment in Preventive Health – Drug Strategy (Tobacco Harm Minimisation) was first established in 1998 to meet the commitments of the then Government in its response to a December 1995 report of the Senate Community Affairs References Committee. The report 'The Tobacco Industry and the Costs of Tobacco-Related Illness' is available at www.aph.gov.au/~/media/wopapub/senate/committee/clac_ctte/completed_inquiries/pre1996/tobacco/report/report_pdf.ashx.

The program provides funding for tobacco control initiatives and activities that support the Government's tobacco control and cessation priorities, policy development and implementation in relation to current and emerging tobacco control issues. The tobacco control initiatives and activities also intend to positively impact the health of the Australian community, including smokers in particular and non-smokers.

Program initiatives and activities fall within the following categories:

- undertaking research, policy development, evaluation, administration, coordination, capacity and capability building, and implementation relating to current and planned government tobacco control priorities. This category includes, for example, work relating to new and emerging tobacco products and other products resembling tobacco products and/or devices associated with tobacco products, including under the *National Tobacco Strategy 2012-2018* (and its future iterations) and the *National Drug Strategy 2010-2015* (and its future iterations) which are available at www.nationaldrugstrategy.gov.au/internet/drugstrategy/publishing.nsf/Content/home;
- development (including data development), evaluation, monitoring and review activities in relation to the *National Tobacco Strategy 2012-2018* (and its future iterations). This category includes, for example, the commissioning of a 'mid-point review' of the *National Tobacco Strategy 2012-2018*, which assessed national progress on the implementation of key priority areas in the Strategy, and will include the commissioning of an 'end-point review' of the Strategy covering the period 2012-2018;
- researching, developing, implementing and evaluating graphic health warning images on tobacco products;

- meeting Australia's ongoing national and international funding obligations, such as providing 'voluntary assessed contributions' and 'extra budgetary contributions' to support work mandated by the World Health Organization's Conference of the Parties established under Part VIII of the *Framework Convention on Tobacco Control*;
- undertaking research, policy development, evaluation, coordination and implementation relating to Australia's obligations as a Party to the World Health Organization's *Framework Convention on Tobacco Control*;
- building capacity and capability with states and territories, government and non-government organisations, and educational facilities to promote and facilitate tobacco control and cessation. This category includes, for example, the provision of funding to the Cancer Council Victoria from 2017 to 2020 to develop and maintain the publication *Tobacco in Australia: Facts and Issues*, which provides a comprehensive resource detailing national and international developments in tobacco research, legislative development, policy development and implementation. This category also includes the provision of funding to non-government organisations such as the McCabe Centre for Law and Cancer in 2017 and 2018 to support its functions as a World Health Organization knowledge hub; and
- collaboration and cooperation, including through the sponsorship of international and national conferences and meetings related to tobacco control. This category includes, for example, the provision of funding to sponsor Oceania Tobacco Control Conferences in 2017 and beyond.

The program operates through the provision of funding to a range of entities, such as state and territory governments (including entities owned or controlled by state and territory governments), state and territory Cancer Councils, non-government organisations, tertiary education institutions, and the World Health Organization's Conference of the Parties. These entities are responsible for undertaking work associated with the initiatives and activities outlined in the categories above.

Various processes are used to provide funding to a range of entities to allow them to undertake initiatives and activities which support the Government's tobacco control priorities. Direct, open and competitive sourcing processes are expected to be used with respect to the provision of funding for some initiatives and activities.

Two specific projects of national significance have been funded jointly by the Australian Government and states and territories under cost-shared arrangements. These include work associated with a 'mid-point review' of the *National Tobacco Strategy 2012-2018*, which assessed national progress on the implementation of key priority areas in the Strategy, and work associated with the development of options to minimise the risks associated with the use and marketing of electronic cigarettes. It is expected that similar cost-shared arrangements may be used to support the provision of funding for future tobacco control initiatives and activities of national significance.

The recipients of program funding are responsible for delivering the relevant components of each activity or initiative efficiently and effectively and reporting to the Department of Health. This enables the Department to comply with legislative reporting obligations under the *Commonwealth Grants Rules and Guidelines*.

Recipients are required to provide the Department of Health with reports for an activity containing information in relation to expenditure and deliverables produced, and in

accordance with the timeframes and terms specified in the grant agreements. Specific reporting requirements form part of grant recipients' agreements with the Department.

The future provision of funding to relevant entities will be approved by the Minister for Health or departmental delegates of the Minister for Health, who will make a determination on the awarding of grant funding and the terms and conditions on which funding is provided.

The decisions will be made in accordance with the relevant legislation, including the *Commonwealth Grants Rules and Guidelines* and the *Public Governance, Performance and Accountability Act 2013*, and in particular whether it is an efficient, effective, ethical and economical use of Commonwealth resources. All procurement decisions will be made in accordance with the *Commonwealth Procurement Rules*.

There are no scheduled funding rounds at this time. Program guidelines and eligibility/selection criteria relevant to the initiatives and activities upon which spending decisions will be made will be provided to all potential tenderers/applicants for future funding rounds and will be made publicly available in due course. Grant decisions will be published at www.health.gov.au/internet/main/publishing.nsf/Content/GSD-healthgrants-senateorder14-MinchinMotion.

The provision of funding under the program is not considered suitable for merits review because funding has generally been provided to entities, which have been targeted according to their experience and expertise in tobacco control matters. Such entities have generally been funded under long-term arrangements, such as state and territory Cancer Councils. Additionally, the provision of funding to these specific entities is non-competitive, and for specific purposes.

Other entities, such as the World Health Organization's Conference of the Parties, have been funded in order to meet Australia's international funding obligations under the Framework Convention on Tobacco Control. Merits review is not appropriate for these funding activities.

Any funding, which has been, or will be, provided through direct sourcing or grants will be targeted, non-competitive, time-limited and for a specific purpose. Any funding which has been, or will be, provided through open and competitive sourcing will be targeted, time-limited and for specific purposes. Therefore, merits review will not be applicable to these processes.

The tobacco control initiatives and activities are part of Program 2.4: Preventive Health and Chronic Disease Support, which is part of Outcome 2. Funding for Program 2.4 of $1.6 billion over four years from 2016-17 has been included in the 2016-17 Budget. Details are set out in the *Portfolio Budget Statements 2016-17, Budget Related Paper No. 1.10, Health Portfolio* at page 56.

Funding of $45 million for social marketing to discourage tobacco use, complementing the plain packaging initiative, was included in the 2012-13 Mid-Year Economic and Fiscal Outlook under the measure 'Preventive Health – investing in preventative health initiatives' for a period of four years commencing in 2012-13. Details are set out in the *Mid-Year Economic and Fiscal Outlook 2012-13*, Appendix A: Policy decisions taken since the 2012-13 Budget at page 236. This is an ongoing measure.

Noting that it is not a comprehensive statement of relevant constitutional considerations, the objective of the item references the external affairs power (section 51(xxix)) of the Constitution.

Section 51(xxix) of the Constitution empowers the Parliament to make laws with respect to 'external affairs'. The external affairs power supports legislation implementing treaties to which Australia is a party. Australia has obligations regarding tobacco control and prevention under the World Health Organization's Framework Convention on Tobacco Control. Article 5, for example, requires a State Party to 'develop, implement, periodically update and review comprehensive multisectoral national tobacco control strategies, plans and programmes in accordance with this convention and the protocols to which it is a Party'. Article 5 also requires a Party to 'establish or reinforce and finance a national coordinating mechanism or focal points for tobacco control' and 'adopt and implement effective legislative, executive administrative and/or other measures and cooperate, as appropriate, with other Parties in developing appropriate policies for preventing and reducing tobacco consumption, nicotine addiction and exposure to tobacco smoke'.

Under the program, funding will be provided for activities such as development (including data development), evaluation, monitoring and review in relation to the *National Tobacco Strategy 2012-18* and its future iterations.

Attachment B

Statement of Compatibility with Human Rights

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

Financial Framework (Supplementary Powers) Amendment (Health Measures No. 2) Regulations 2017

These Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

Overview of the Legislative Instrument

Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (the FF(SP) Act) authorises the Commonwealth to make, vary and administer arrangements and grants specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (the FF(SP) Regulations) and to make, vary and administer arrangements and grants for the purposes of programs specified in the Regulations. Schedule 1AA and Schedule 1AB to the FF(SP) Regulations specify the arrangements, grants and programs. The FF(SP) Act applies to Ministers and the accountable authorities of non-corporate Commonwealth entities, as defined under section 12 of the *Public Governance, Performance and Accountability Act 2013.*

The Regulations amend Schedule 1AB to the FF(SP) Regulations to establish legislative authority for government spending on a number of initiatives administered by the Department of Health.

Funding will be provided for:

- the Mental Health in Multicultural Australia program to improve accessibility and the quality of mental health services for people from culturally and linguistically diverse backgrounds;
- the Quality Use of Pathology Program to improve health outcomes from the quality use of pathology in health care;
- the Youth Cancer Services Program to improve cancer treatment services, support and the coordination of care for adolescents and young adults aged 15 to 25 years with cancer;
- the Health Workforce Program to strengthen the capacity of the health workforce to deliver high quality care and improve health outcomes of people living in rural, regional and remote locations;
- the Australian College of Mental Health Nurses to develop a new mental health nursing workforce model that is responsive to the mental health needs of the Australian community;
- a grant to Surf Life Saving Australia for: the delivery of preventative safety measures at local beaches; technology updates; expanded volunteer training; skills development for existing supervisors, trainers and assessors; and expanded recruitment and recognition of supervisors, trainers and assessors; and
- tobacco control initiatives and activities to reduce the prevalence of smoking and the associated health (including preventable deaths and disabilities), social and economic costs, and inequalities that it causes.

The Minister for Health has portfolio responsibility for these matters.

Human rights implications

The Regulations do not engage any of the applicable rights or freedoms.

Conclusion

These Regulations are compatible with human rights as they do not raise any human rights issues.

Senator the Hon Mathias Cormann
Minister for Finance

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

25 JUL 2017

PDR ID: MS17-001449

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

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances (the committee) for its letter of 22 June regarding the Fuel Tax (Road User Charge) Determination 2017 [F2017L00532] (the instrument).

I understand the Committee has noted that the Explanatory Statement accompanying the instrument does not contain information in relation to consultation, as required under the *Legislation Act 2003* (the Act). I note the Committee requests advice in relation to this matter; and requests that the Explanatory Statement be updated in accordance with the Act.

I am advised that the omission of information in relation to consultation was an oversight on the part of the Department of Infrastructure and Regional Development and that, upon further investigation, appropriate consultation has been undertaken in relation to the rate of the Road User Charge. An amended Explanatory Statement describing the nature of the consultation undertaken in relation to the instrument is enclosed as requested.

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

Yours sincerely

DARREN CHESTER
Encl

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Infrastructure and Transport

Fuel Tax Act 2006

Fuel Tax (Road User Charge) Determination 2017

Heavy vehicles with a gross vehicle mass of more than 4.5 tonnes and used on public roads for business purposes are charged to recover that part of the road construction and maintenance costs that are attributable to heavy vehicles (cost recovery). A portion of the costs are recovered by states and territories through heavy vehicle registration charges and a portion by the Commonwealth through the fuel based Road User Charge.

The *Fuel Tax Act 2006* (the Act) establishes a mechanism for the collection of the Road User Charge by reducing the fuel tax credit provided to eligible businesses and non-profit bodies.

Division 41 and 43 of the Act provide that businesses registered or required to be registered for Goods and Services Tax and non-profit bodies are entitled to a partial fuel tax credit for fuel used on a public road for business purposes in registered vehicles with a gross mass of more than 4.5 tonnes. The fuel tax credit claimable is equal to the amount of the effective fuel tax (excise) that is payable on the fuel *minus* the Road User Charge.

In November 2015 the Transport and Infrastructure Council (the Council) agreed to hold heavy vehicle charges revenue constant at 2015-16 levels for an initial two years. Subsequently, on 4 November 2016, the Council approved a reduced Road User Charge of 25.8 cents per litre to apply from 1 July 2017, to give effect to the decision to hold revenues constant.

Subsection 43-10(8) of the Act provides that the Transport Minister may determine, by legislative instrument, the rate of the Road User Charge. The Fuel Tax (Road User Charge) Determination 2017 (the Determination) sets the rate of the road user charge at $25.8 cents per litre.

Public consultation on the level of the Road User Charge was undertaken by the National Transport Commission (NTC) as part of its development of the 2014 Heavy Vehicle Charges Determination. The NTC undertook further public consultation in 2016 on '*Options for improving the accuracy and stability of the PAYGO heavy vehicle charges methodology*'. During those consultations, industry stakeholders were generally supportive of a reduced Road User Charge and were also generally supportive of further changes to be considered by governments in the future. States and territories have also been consulted.

The Determination revokes all previous road user charge determinations. This is consistent with subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that if an Act confers a power to make any instrument of a legislative or administrative character, the power is construed as including a power exercisable in like manner and subject to the like conditions to repeal, rescind, revoke, amend, or vary any such instrument.

The Determination is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Authority: Subsection 43-10(8) of the
Fuel Tax *Act 2006*

Statement of Compatibility with Human Rights

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

Fuel Tax Act 2006

Fuel Tax (Road User Charge) Determination 2017

This Disallowable 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

Subsection 43-10(8) of the *Fuel Tax Act 2006* provides that the Transport Minister may determine, by legislative instrument, the rate of the Road User Charge.

In accordance with section 43-10(8) of the *Fuel Tax Act 2006*, this Disallowable Instrument determines the rate of the Road User Charge applied to taxable fuel used on a public road for business purposes in registered vehicles with a gross mass of more than 4.5 tonnes.

Heavy vehicle charges are based on a combination of a fuel-based Road User Charge, collected by the Commonwealth, and registration charges, which are collected by the states and territories.

Human rights implications

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

Conclusion

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

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MC17-012018

Chair
Senate Standing Committee on Regulations and Ordinances
Suite S1.111
Parliament House
Canberra ACT 2600

Dear Chair

I thank the Senate Standing Committee on Regulations and Ordinances for its letter of 15 June 2017, in which the Committee requested further information about the *Migration Legislation Amendment (2017 Measures No. 1) Regulations 2017* and the Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/040.

Amendments to the *Migration Agents Regulations 1998* made by the *Migration Legislation Amendment (2017 Measures No. 1) Regulations 2017*

Classification of 'instrument in writing'

The Committee has requested confirmation that an 'instrument in writing' made under new regulation 9M of the *Migration Agents Regulations 1998* (the Migration Agents Regulations) will be a disallowable legislative instrument. I confirm that the instrument in writing referred to by the Committee is a legislative instrument and is subject to disallowance.

Instruments in writing referred to in the Migration Agents Regulations are generally legislative instruments and are subject to disallowance. The only exception is the Minister's approval in writing of a form for the purposes of paragraph 9M(2)(a). By virtue of item 6 of the table in regulation 6 of the *Legislation (Exemptions and Other Matters) Regulations 2015*, instruments prescribing or approving forms are not legislative instruments.

Merits review

The Committee has requested advice about whether a decision to cancel an approval as a continuing professional development (CPD) provider is subject to merits review and, if not, why it is justified to exclude such a decision from merits review.

I confirm that no provision is made for merits review of a decision to cancel approval as a CPD provider. This is because such a provision would not be appropriate within the context of the arrangements for CPD providers under the regulations, as outlined below.

A person may be approved as a CPD provider only if the person meets the requirements set out in new regulation 9P. This requires a rigorous assessment before approval may be given. Approval will be for a period of two years. A condition of approval is that the CPD provider must comply with the standards specified for CPD providers.

If it came to notice that a CPD provider had failed to comply with the conditions of approval, the Office of the Migration Agents Registration Authority (the OMARA) within the Department of Immigration and Border Protection would place the initial emphasis on assisting the CPD provider to remedy the failure. The OMARA would aim to work with the CPD provider over time to ensure the quality of CPD activities delivered.

Cancellation of approval would be a final option. It is expected that it would occur, if at all, only in exceptional circumstances. I note that under the current regulations, approval as a provider of approved activities may be revoked if the person fails to comply with the conditions to which approval is subject (see paragraph 9H(1)(b) of the current *Migration Agents Regulations 1998*). To date, no revocations have occurred.

As the period of approval is only for two years, approval is likely to expire while any failure to comply with conditions of approval is under consideration. This makes cancellation unnecessary. The benefits of merits review in this situation would be greatly reduced or even negligible because if a cancellation decision was made the decision would operate for such a short period of time its effect would be spent by the time of review. The position will remain the same after these amendments come into effect.

The Attorney-General's Department, Administrative Review Council guidelines, *What decisions should be subject to merits review?* (1999), to which the Committee refers, include as a factor that may justify excluding merits review an exception extending to decisions which operate for such a short period that their effect would be spent by the time of review (paragraph 4.50).

In the circumstances described above, it is considered that this exception appropriately applies to a decision to cancel approval as a CPD provider.

A decision to cancel approval as a CPD provider would be subject to judicial review. The requirements of lawful decision making include the requirement that in making a decision to cancel approval, the rules of natural justice (or procedural fairness) must be observed. The process followed by the Department would ensure that a CPD provider who is considered to have failed to comply with the specified standards or other conditions of approval is fully informed of the failure and given the opportunity to rectify it.

A decision to cancel approval would not be made until the person had been given the opportunity to address the issues. If a decision to cancel approval as a CPD provider was made, the written notice of the decision that is required to be given to the person would include the full reasons for it.

Sub-delegation

The Committee has requested further information about new regulation 9U of the *Migration Agents Regulations 1998*, which provides that the Minister for Immigration and Border Protection (the Minister) may delegate to an Australian Public Service (APS) employee in the Department any or all of the Minister's functions under new Part 3C (Approval of CPD providers), other than the power to make, vary or revoke a legislative instrument.

The power of delegation in new regulation 9U reflects the Minister's power of delegation under the *Migration Act 1958* of functions related to migration agents. Subsection 320(1) provides that:

> *The Minister may delegate any of the Migration Agents Registration Authority's powers or functions under this Part to a person in the Department who is appointed or engaged under the* Public Service Act 1999, *for any period when the* [Migration Institute of Australia] *is not appointed under section 315.*

This power of delegation leaves details such as the level of the delegate's position to the Minister's discretion, requiring only that the delegate must be an APS employee in the Department. New regulation 9U is in similar terms. The delegation power in new regulation 9U applies only to the Minister's functions in new Part 3C (Approval of CPD providers).

The terms of the power give the Minister sufficient flexibility to ensure that the relevant functions may be delegated appropriately as required to ensure efficient administration of the regulations.

Powers would be delegated to occupants of positions in the Department where the criteria of the position ensured that the occupant would have qualifications relevant to exercise of the function. The positions to which the delegation is made could include positions in the Senior Executive Service.

In practice, the delegation of the Minister's functions under new Part 3C would only be made to an officer of the Office of the Migration Agents Registration Authority (the OMARA) who is trained in the exercise of those functions. Key decisions, such as a decision to grant approval as a CPD provider, would be made by the Director of the OMARA, which is an Executive Level 2 position.

Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/04

The Committee has requested advice as to whether all instruments made under Schedules 1 and 2 of the *Migration Regulations 1994* (the Migration Regulations) are exempt from disallowance by virtue of table item 20 in section 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Exemption Regulation), or whether there are any exceptions to this.

I confirm that all instruments made under Schedules 1 and 2 of the Migration Regulations are exempt from disallowance by virtue of table item 20 in section 10 of the Exemption Regulation.

However the instrument in question, *Specification of Occupations, a Person or Body, a Country or Countries Amendment Instrument 2017/04* (IMMI 17/040, F2017L00450) specified matters under provisions in Parts 1, 2A and 5 and Schedules 1 and 2 of the Migration Regulations.

In relation to these provisions, only an instrument or a provision of an instrument specifying matters under Part 2A of the Migration Regulations is disallowable. Consequently, the Explanatory Statement for IMMI 17/040 should have identified which parts of the instrument were or were not disallowable, rather than stating that the instrument as a whole was disallowable. However I note that the instrument amended by IMMI 17/040 was itself repealed on 2 July 2017 by the *Migration (IMMI 17/081: Specification of Occupations, a Person or Body, a Country or Countries) Repeal Instrument 2017* and replaced with the following instruments, which do not combine disallowable and non-disallowable provisions:

> *Migration (IMMI 17/060: Specification of Occupations – Subclass 457 visa) Instrument 2017*;
> *Migration (IMMI 17/071: Specification of Occupations – Subclass 407 visa) Instrument 2017*;
> *Migration (IMMI 17/072: Specification of Occupations and Assessing Authorities) Instrument 2017*; and
> *Migration (IMMI 17/080: Specification of Occupations and Assessing Authorities – Subclass 186 visa) Instrument 2017*

In future, disallowable and non-disallowable provisions will not be combined in one instrument.

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

Yours sincerely

PETER DUTTON

Senator the Hon Fiona Nash
Minister for Regional Development
Minister for Local Government and Territories
Minister for Regional Communications
Deputy Leader of The Nationals

PDR ID: MC17-003098

10 JUL 2017

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

Dear Senator

Thank you for your letter of 22 June 2017 regarding the Senate Standing Committee on Regulations and Ordinances (the Committee's) request for further information published in the *Delegated Legislation Monitor 7* of 2017 on the Norfolk Island Continued Laws Amendment (2017 Measures No. 1) Ordinance 2017 (the Ordinance).

In relation to the Committee's query concerning the provision allowing the Child Welfare Officer to delegate his or her functions to any 'public sector employee' I can provide the following advice. The power to delegate to that class of persons was in the *Child Welfare Act 2009* (NI) prior to the Ordinance commencing. Section 32(a) of the *Child Welfare Act 2009* (NI) was enacted in the Ordinance to preserve rather than expand that particular delegations power. Its inclusion in the Ordinance was therefore a change in form rather than substance.

However, having considered the provision in light of the Committee's comments, I accept the power of the Child Welfare Officer to delegate functions to any public sector employee is broader than required. I therefore undertake to bring forward a legislative change to narrow the scope of this delegation power. I intend to introduce this change later in 2017.

Concerning the Committee's request for information on the provision establishing an acting Manager of the Norfolk Island Health and Residential Aged Care Service (NIHRACS) I can provide the following information. NIHRACS is a small entity of around 50 staff whose operations are overseen by the NSW Government on behalf of the Commonwealth. The small size and relatively flat structure of NIHRACS mean it would not be straightforward to define legislatively who is qualified to be appointed as an acting Manager of NIHRACS.

In addition, the Department of Infrastructure and Regional Development considered it undesirable to include qualifications for an acting Manager of NIHRACS given there are no such requirements specified in the *Norfolk Island Health and Residential Aged Care Service Act 1985* (NI) for a person to be a Manager of NIHRACS. It would not be appropriate to have additional or more stringent qualification requirements for an acting position than for a permanent position.

The NSW Government provides advice to the Australian Government on staffing of NIHRACS, and this helps ensure only suitable persons are appointed to senior positions in NIHRACS. The Australian Government would consult NSW officials as part of their oversight role before my delegate or I appoint an acting Manager of NIHRACS. I am satisfied this process of consultation with experts in NSW will ensure only appropriately qualified persons are appointed as acting NIHRACS managers.

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

Yours sincerely

FIONA NASH

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-011125

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

26 JUL 2017

Dear Chair

I refer to your letter of 15 June 2017 concerning the Private Health Insurance (Health Insurance Business) Rules 2017 [F2017L00504] (the Rules). I regret the delay in responding.

As you note, the Rules commenced on 1 July 2017, therefore subrule 17(2) (which creates an exemption until 1 July 2008) would appear to be unnecessary. It appears most likely that subrule 17(2) has been inadvertently carried over from previous versions of the Rules, resulting in the current non-operational provision.

I can confirm that it is no longer necessary to include any form of subrule 17(2) in the Rules. On that basis, I will ensure that this issue will be addressed when the Rules are next amended or remade.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt