SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT

MS23-000520

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

scrutiny.sen@aph.gov.au

Dear Senator

Export Control Amendment (Streamlining Administrative Processes) Bill 2022 (Bill)

Thank you for your letter of 9 February 2023 on behalf of the Senate Scrutiny of Bills Committee in relation to the above Bill. I am writing to respond to the issues identified by the committee in the committee's *Scrutiny Digest 1 of 2023*.

Privacy - Significant matters in delegated legislation

The committee has requested more detailed advice in relation to why it is both necessary and appropriate to include new rulemaking powers in proposed section 397E, proposed paragraph 397F(1)(e), and in the definition of 'entrusted person' in the proposed amendment to section 12.

By way of an overarching comment, I note that any rules made pursuant to proposed new section 397E, proposed paragraph 397F(1)(e), and in the definition of 'entrusted person' in the proposed amendment to section 12, would be subject to disallowance and parliamentary scrutiny. This would ensure that the rules are subject to parliamentary oversight and allow privacy concerns to be raised if relevant.

Prescribing other Commonwealth officers as an 'entrusted person'

The proposed rule-making power to prescribe other Commonwealth officers as an 'entrusted person' in the proposed amendment to section 12 is necessary to ensure that other officers not employed by the Department can be authorised to use and disclose information in appropriate circumstances. An example where this rule-making power would be needed is where officers from another agency are seconded to the Department to work on an inter-agency taskforce. Allowing for rules to specify additional persons would also ensure that the appropriate protections for protected information would extend to those persons.

Prescribing the use or disclosure of relevant information in other circumstances – section 397E

As noted in the statement of compatibility, one of the reasons for the rule-making power in proposed section 397E is to cover those classes of person who only have functions and powers under the various export control rules, but who are not mentioned in the *Export Control Act 2020* (Act). An example is qualified marine surveyors, who perform functions and powers pursuant to the *Export Control (Plants and Plant Products) Rules 2021* in carrying out bulk vessel surveys for the purpose of deciding whether the vessel is suitable to transport prescribed plants or plant products.

The proposed rule-making power will enable the Secretary to prescribe the kinds of information that may be used or disclosed, the classes of persons who may use or disclose the information, and the purposes for the use or disclosure, including any specific conditions.

This level of specificity would not be possible to set out in the Act given that the structure of the export control legislation provides for the rules to specify the detailed arrangements for each export commodity. Without a rule making power, the powers under the Act for the use or disclosure of information would need to be drafted more broadly to cover the range of uses and disclosures by the various entities which are (and may in future be) prescribed to perform functions and powers under the Act.

Prescribing additional kinds of protected information – subsection 397F(2)

As noted in the Explanatory Memorandum, and highlighted by the committee, the Australian Government considers that it is necessary to allow the rules to be able to prescribe additional kinds of protected information, in order to be able to quickly adapt to changing circumstances, technology and, potentially Australia's international obligations, in the future.

Enforceable consultation requirements

The government does not support the committee's recommendation to provide enforceable consultation requirements on rules made pursuant to the new rule-making powers. Section 17 of the *Legislation Act 2003* imposes an obligation on rule-makers to be satisfied before making a legislative instrument that any consultation that is considered by the rule-maker to be appropriate and is reasonably practicable has been undertaken.

Consistent with this obligation, the Department undertakes consultation on proposed rules to be made by the Secretary under the *Export Control Act*. As also noted above, rules made pursuant to the new rule-making powers are subject to disallowance.

Reversal of the evidential burden of proof

I thank the committee for seeking further information about the proposed reversal of the onus of the evidential standard of proof in relation to the defences in proposed subsections 397G(3) and (4) to the proposed offence of using or disclosing protected information.

As the committee notes, proposed subsection 397G(3) provides that the offence does not apply if the use or disclosure of the information is required, or authorised, by the *Export Control Act* or a law of the Commonwealth, or a state or territory law that is prescribed by the rules. Proposed subsection 397G(4) provides that the offence does not apply if the use or disclosure occurred in good faith and was undertaken in the performance of functions and duties or assisting another person in the performance of their functions or duties.

I consider that the reversal of the onus of proof in the defence in proposed subsection 397G(3) is justified on the basis that it would be both significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter, and the relevant matter is peculiarly within the knowledge of the defendant. If subsection 397G(3) were amended to provide that the disclosure was not authorised by law as an element of the offence, the Commonwealth would have to prove that no other Commonwealth law (or less relevantly, prescribed state law) applies to require or authorise the use or disclosure.

If the onus of proof is reversed as proposed, the defendant needs only to prove that one law applied to require or authorise the use or disclosure. In circumstances where a defendant used or disclosed information in reliance on a law, information about which law they were purporting to rely on is peculiarly within the knowledge of the defendant.

For similar reasons, I consider that the reversal of the onus of proof in the defence in proposed subsection 397G(4) is justified on the same grounds. Information about whether the defendant acted in good faith in the performance of functions and duties or assisting another person in the performance of their functions or duties is information which is peculiarly within the knowledge of the defendant who would be expected to understand their reasons for disclosure as part of their employment duties in any event. Whether a defendant has acted in good faith would require consideration of the defendant's subjective belief about why they considered they were authorised to use or disclose the information when performing their functions or duties or assisting another person in the performance of their functions or duties. It would be significantly more difficult and costly for the prosecution to prove that the defendant did not act in good faith.

This provision is consistent with the equivalent secrecy provision in section 580 of the *Biosecurity Act 2015* to be inserted by item 18 of Schedule 3 to the Biosecurity Amendment (Strengthening Biosecurity) Bill 2022 when it commences. As many officers will be operating in accordance with both the export control and biosecurity information management provisions simultaneously, while performing duties or functions for both purposes, it is important that these two regimes are consistent.

I would like to thank the committee for bringing these matters to my attention. I trust that the information provided above will support the committee in its consideration of the Bill.

Yours sincerely

MURRAY WATT 21 / 02 / 2023

The Hon Jason Clare MP
Minister for Education

Reference: MC23-000606

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

Dear Chair

Thank you for the correspondence of 9 February 2023 regarding the *Higher Education Support Amendment (Australia's Economic Accelerator) Bill 2022* (the Bill). Please see below my responses to paragraphs 1.40 to 1.46 and paragraphs 1.47 to 1.54 as set out in Scrutiny Digest 1 of 2023.

Tabling of documents

The research commercialisation strategy is expected to be a complex document that will require time for the Minister to properly consider (including seeking expert advice, where appropriate). A requirement to table the strategy in both Houses of Parliament within 15 sittings days of the Minister receiving the strategy may mean that the Minister is not able to properly scrutinise the document before it is tabled.

It may also mean that the Minister is not able to seek expert advice where appropriate. For example, the Minister may wish to seek legal advice on issues raised by elements of the strategy, and if the Minister is not able to do so prior to tabling the document, there is the risk that the strategy will not provide both Houses of Parliament with all the necessary information to assess the operation of the Australia's Economic Accelerator Program. The Minister will endeavour to table the strategy as soon as practicable after full consideration and quality assurance processes have been completed.

Although ultimately a matter for the AEA Advisory Board, it is expected the investment plan will contain several written policies that will need to be completed in order for the program to operate effectively against its objectives. These are likely to be analytical and administrative in nature. The core of which will provide detailed advice and guidance to universities on research and relevant developments within areas of national priority.

Additionally, these policies may contain from time to time certain sensitive commercial and financial information, and it may not be appropriate to table these documents in both Houses of Parliament due to the risks associated with that information being broadly disseminated.

The Bill also provides at proposed subsection 42-5(2) that the AEA Advisory Board must

ensure that these policies in the investment plan are consistent with the research commercialisation strategy at section 42-1.

Reversal of the evidential burden of proof

Proposed subsection 181-15(1) creates an offence for the disclosure, or the making of a copy or other record, of 'Australia's Economic Accelerator program information'.
Proposed subsections 181-15(2), (3) and (4) provide for 3 kinds of exceptions to the offence as set out in subsection 181-15(1). Subsections (2) to (4) add exceptions to the offence and do not broaden the offence or remove any existing burden on the prosecution to establish that offence, and consequently are beneficial for defendants.

The 3 kinds of exceptions added to the offence are:

(a) the person to whom the information relates has consented to the disclosure, or the making of the copy or record
(b) the disclosure or the making of the copy or record is authorised by Division 181
(c) the disclosure, or the making of the copy or record, is required by a law of the Australian Government.

Exceptions (b) and (c) are formulations of the "lawful authority" defence. It appears as a defence in section 10.5 of the Criminal Code, to which section 13.3 of the Criminal Code applies. 'Lawful authority' is a defence of general application to a criminal offence and is neither an element of the relevant offence or an offence-specific defence as referred to in the Guide to Framing Government Offences (the Guide).

Exceptions (b) and (c) recreate the 'lawful authority' defence of general applicability found in section 10.5 of the Criminal Code. The defence of lawful authority was inserted in the Criminal Code by the *Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000*, in recognition of the fact that a defence of lawful authority was a longstanding common law principle which would need to be recognised in the Criminal Code if it were to continue to apply. Exceptions (b) and (c) do not extend to any scenarios where the general Criminal Code defence of lawful authority does not already apply.
Under subsection 13.3(2) of the Criminal Code, the defence bears the evidential burden for a defence of lawful authority. Given exceptions (b) and (c) are intended to operate identically to the existing defence of lawful authority (in relation to the offence created by subsection 181-15(1)), it is appropriate that the defendant bears an evidential burden for exceptions (b) and (c).

In relation to exception (a), the question of whether a person to whom the information protected by the offence provision has consented to the relevant use or disclosure by the alleged offender will, in those cases where a prosecution is brought, be a matter peculiarly within the knowledge of the defendant. The principal purpose of including exception (a) is to enable an officer to use and disclose 'Australia's Economic Accelerator program information' with the consent of individuals to whom the information relates. This consent will typically be provided in forms filled out by the individuals to whom the information relates. Consequently, the Government will generally have a record of the consent provided by a relevant individual to the use or disclosure of their information.

In circumstances where an offence under subsection 181-15(1) is alleged to have occurred,

it will be the case that the Government Director of Public Prosecutions, advised of all the consents to use or disclosure of which the Government is aware, is satisfied that no such consent has been given. Any consent to an otherwise unlawful use or disclosure of the protected information that is not in the form of written consents obtained by the Australian Government as part of its usual administration of the *Higher Education Support Act 2003* will have been given by an individual to the defendant independently through some action of the defendant, such as requesting the individual's consent. Such a matter is peculiarly within the knowledge of the defendant. Accordingly, it is appropriate that evidence of consent that is not in the Government's possession is provided by the defendant.

Providing that the defendant bears an evidential burden of proof in establishing whether a person has consented to the use or disclosure of 'Australia's Economic Accelerator program information' giving rise to the alleged offence is consistent with the principles on defence-specific offences in the Guide.

I trust this information is of assistance.

Yours sincerely

JASON CLARE

22/2/2023

Attorney-General

Reference: MC23-004021

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Dear Chair

I refer to the Senate Standing Committee for the Scrutiny of Bills' (the Committee) request in *Scrutiny Digest 1 of 2023*, dated 8 February 2023, for further information on the Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022 (the Bill).

I appreciate the time the Committee has taken to consider the Bill. Please find below my response in relation to the questions raised by the Committee.

Paragraph 1.63 – Abrogation of privilege against self-incrimination

The Committee has sought further advice regarding:

- whether the Bill could be amended to provide derivative use immunity; or
- at a minimum, provide that the Inspector-General must consider whether less coercive avenues are available to obtain the information prior to compelling a person to give information in circumstances which would abrogate the privilege against self-incrimination.

The *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) provides the Inspector-General of Intelligence and Security (IGIS) with the necessary powers to review the activities of intelligence agencies, including powers that enable the IGIS to obtain information in abrogation of the privilege against self-incrimination. As much of the activities of the intelligence agencies are by necessity conducted in secret, it is important the IGIS has the appropriate powers to allow them to gather the information necessary to support their inquiries and ensure appropriate oversight of the agencies. These powers were provided to the IGIS at its inception in 1986.

Subsection 18(6) of the IGIS Act currently provides for a limited use immunity, which applies to information provided, documents produced or answers to questions, except in the prosecution of certain offences which generally relate to providing false or misleading information. The Bill would expand the list of existing exceptions to capture a range of conduct relating to providing false documents or obstructing an IGIS investigation.

The ability for the IGIS to use and disclose information derived from information obtained in abrogation of the privilege against self-incrimination is necessary to review the activities of intelligence agencies for legality, propriety and consistency with human rights, in circumstances where those activities might not otherwise have an avenue for review. This is particularly important in respect of covert powers, with the benefit of effective oversight, outweighing the impacts on the privilege against self-incrimination.

Therefore, I do not consider it necessary to amend the Bill to provide derivative use immunity. Further, I do not think it necessary or appropriate to require the IGIS to consider whether less coercive avenues are available to obtain the information prior to compelling a person to provide information as such an amendment could prejudice the work of the IGIS.

Paragraph 1.70 – broad delegation of administrative powers or functions

The Committee has requested advice as to whether subsection 32AA(1A) of the Bill could be amended to limit the class of persons to whom powers or functions may be delegated or to set out with more specificity the powers or functions that may be delegated. The Bill would empower the IGIS to delegate any or all of the IGIS's functions under the IGIS Act and any other acts, except the IGIS's functions in relation to employing a person to assist with an inquiry under section 32(3) of the IGIS Act. This exception is appropriate to ensure the IGIS retains control over situations where a person is employed under section 32(3), as this requires ministerial approval under section 32(4).

The Bill clearly articulates the scope of functions that can be delegated, limits the delegation to those persons who have appropriate expertise, and states that delegated functions would be exercised in accordance with written directions. There is a strong practical need for these powers and functions to be delegated. These amendments seek to modernise the IGIS Act to enable efficient and effective oversight of Australia's intelligence agencies.

I thank the Committee for raising these issues for my attention and trust this response is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
23 / 2 /2023

THE HON ED HUSIC MP
MINISTER FOR INDUSTRY AND SCIENCE

MS23-000276

22 FEB 2023

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Dear Chair Dean,

Thank you for your correspondence of 9 February 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills in relation to the National Reconstruction Fund Corporation Bill 2022.

The National Reconstruction Fund Corporation Bill 2022 (the Bill) gives effect to the Government's election commitment to establish the National Reconstruction Fund Corporation (the Corporation). The Corporation will invest to support, diversify and transform Australia's industry and economy to secure future prosperity and drive sustainable economic growth.

The Committee has sought advice in relation to:

- the Corporation's power to provide "grants of financial assistance" to the states and territories as conferred by section 96 of the Constitution;
- the Minister for Finance and Minister for Industry and Science's (the Ministers) joint power to credit amounts to the Corporation's Special Account;
- investment mandates issued by the Ministers not being subject to disallowance; and
- the delegation of administrative powers or functions by the Chief Executive Officer of the Corporation (the CEO).

Section 96 grants of financial assistance

Why is it considered necessary and appropriate to confer a broad power to make grants of financial assistance in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised?

Can the Bill be amended to include at least high-level guidance as to the terms and conditions on which financial assistance may be granted?

Subclause 63(1)(d) of the Bill, read jointly with the Bill's definition of "financial accommodation" under clause 5, gives the Corporation power to provide various forms of debt to States and Territories, including loans and guarantees but specifically not equity interests or monetary grants. Subclause 63(1)(d)(ii) of the Bill uses the words "grants of financial assistance" to refer to section 96 of the Constitution, which is the source of Commonwealth power to deal financially with the States.

While the legal mechanism to make payments to the States would be considered a "grant" under section 96, these payments would be subject to terms and conditions consistent with the forms of financial accommodation set out in the Bill. In light of the requirements for 'financial accommodation' set out in the Bill and the information provided in the Explanatory Memorandum about those requirements, I do not consider it necessary to provide further guidance about how financial accommodation might specifically be provided to the states.

Can the Bill be amended to include a requirement that written agreements with the States and Territories for grants of financial assistance made under clause 66 are:

- *tabled in the Parliament within 15 sitting days after being made; and*
- *published on the internet within 30 days after being made?*

As I have indicated above, 'grants of financial assistance' to States or Territories would be subject to the same requirements as other forms of financial accommodation in the Bill – that is, they cannot be by way of an acquisition of equity or a grant that is equivalent to a gift. Any agreement with a state or territory in relation to financial accommodation would contain commercial terms, which may also affect the interests of other entities. As a result, consistent with its nature as a commercial entity, it would be inappropriate for the Corporation to table its agreements for the provision of financial accommodation with any counterparties including the states and territories. On that basis, I do not support the proposed amendment to the Bill.

I appreciate the need for transparency and accountability to Government and Parliament, and draw the Committee's attention to the comprehensive accountability mechanisms provided for by the Bill. As a Corporate Commonwealth Entity, the Corporation will be subject to standard disclosure requirements under the *Public Governance, Performance and Accountability Act 2013,* including the need to respond to any requests for information from the Ministers (under paragraph 19(b)) and publish detailed annual financial statements and an annual report which must include detailed information about operations, governance and performance (see paragraph 39(1)(b), subclause 43(4) and clause 46).

In addition to these requirements, the Bill requires the Corporation to include information about payments to and from its Special Account and the realisation of any investments in each annual report (clause 84), report to the Ministers any failure to comply with the Investment Mandate (subclause 74(5)(a)), and publish quarterly investment reports (clause 82). I consider the degree of accountability provided by these provisions and by processes such as Senate Estimates to be appropriate having regard to the functions and independence of the Corporation.

Discretionary power to credit amounts to the Corporation's Special Account

Can the Bill be amended to:

- *Limit the Ministers' broad discretionary power to credit amounts to the National Reconstruction Fund Corporation Special Account under subclause 52(2), including consideration of amending the bill to set limits on the amounts that may be credited under subclause 52(2), or, at a minimum, to provide an inclusive list of matters which the Ministers may take into account prior to making a determination?*

- *Provide that determinations made under subclause 52(2) are subject to disallowance to ensure that they receive appropriate parliamentary oversight?*

The appropriation of $15 billion for investment through the Corporation, consistent with the Government's election commitment, is subject to Parliamentary approval as part of the scrutiny of the Bill. The Bill provides for statutory credits to the Corporation's Special Account (the Account) totalling $15 billion:

- $5 billion credited upon commencement (under subclause 52(1)(a)); and
- $10 billion to be credited before 2 July 2029 (under subclauses 52(2) and 52(4)), at such times and instalments as jointly determined by the Ministers through delegated legislation.

The design of the $15 billion statutory credit mechanism is a measured approach to:

1. Signal and assure a total investment envelope, with a commitment to industry that Government is addressing market gaps through a clear mandate to crowd in private sector finance to support, transform and diversify seven priority areas of the Australian economy; and
2. Strengthen the independence of the Corporation in line with its legislative framework, enabling it to deliver $15 billion in total investment as and when most appropriate and to develop a medium-long term investment pipeline that is not tied to restrictive annual or biennial statutory credits.

The Ministers' power to credit the remaining $10 billion (once the initial $5 billion has been credited at commencement) therefore primarily deals with the *timing* of credits to the Account, with a view to facilitating the effective management of the Corporation's cashflows. While these credits may be in amounts and at times determined by the Ministers, there is certainty that the total amount must be equal to $10 billion before 2 July 2029 (subclause 52(4) refers). Any amounts to be credited beyond the $10 billion that the Ministers are required to effect by legislative instrument would need to be appropriated by the Parliament (subclause 52(3) refers).

The Corporation's investment cashflows may vary considerably over the course of the initial seven years of operation depending on the market conditions across its seven priority areas. The Corporation may, for example, see the need to either 'frontload' or 'backload' its investments in response to emerging opportunities in several different sectors. Providing for the Ministers' ability to credit the Account via a non-disallowable determination under subclause 52(2), rather than appropriating the full amount at the outset, or providing for an inflexible schedule in the Bill, allows the Government to better manage these variations.

On this basis, I do not consider it necessary to amend the Bill to further limit the Ministers' discretionary powers to credit amounts to the Account.

Exemption of disallowance of the investment mandates

Can the Bill be amended to provide that investment mandates are subject to disallowance to ensure that they receive an appropriate level of parliamentary oversight?

Investment Mandates made under clause 71 of the Bill would not, as the Committee's report suggests, authorise Commonwealth expenditure. That is done by the Bill, particularly the provisions in Part 6, Division 2 that deal with the Corporation's investment powers, and supplemented by the declaration of priority areas of the Australian economy under clause 6, which is subject to disallowance. The most significant guardrails on the Corporation's investment functions and powers will therefore be subject to Parliamentary scrutiny and disallowance procedures.

The Investment Mandate, on the other hand, is intended to provide directions to the Board on *how* it exercises the Corporation's investment functions and powers, with a primary focus on financial parameters such as the target portfolio rate of return, portfolio risk appetite, and minimum financing levels in certain priority areas. It would provide constraints as to how the Corporation is to operate on commercial terms (such as the target rate of return, pursuant to paragraph 71(3)(a)) and in the achievement of broader economic objectives (such as the allocation of investments within the priority areas, under paragraph 71(3)(b)). It is appropriate that such directions be issued as a non-disallowable instrument since this allows the Government of the day, in consultation with the Corporation's Board, to flexibly adjust the Mandate's parameters in response to evolving economic and regulatory conditions, and to provide certainty to the Corporation when those parameters are set that they will not be changed without further consultation.

Ministerial directions being exempt from disallowance is an established operational model that is consistent with, and has worked well for, similar Commonwealth specialist investment vehicles such as the Clean Energy Finance Corporation (CEFC), Northern Australia Infrastructure Facility (NAIF), and National Housing Financing and Investment Corporation (NHFIC), all of which are guided by non-disallowable investment mandates. As set out in the Explanatory Memorandum, those investment mandates are not subject to disallowance because they fall within an existing exemption set out in the *Legislation (Exemption and Other Matters) Regulations 2015* (at item 3 of the table in subsection 6(1)).

On this basis, I do not support amendments to the Bill that would provide for the Corporation's Investment Mandate to be subject to disallowance.

Delegation of administrative powers or functions

Why is it necessary and appropriate to allow the CEO to make a delegation under subclause 90(1), or a subdelegation under subclause 90(2), to any member of staff referred to under clause 46?

Can the Bill be amended to provide legislative guidance as to the scope of powers that might be delegated, or to further limit the categories of people to whom those powers might be delegated.

The power provided for under subclauses 90(1) and 90(2) of the Bill permits the CEO to delegate or subdelegate their powers and functions to any member of staff of the Corporation. This power is essential to the effective and efficient governance of the Corporation. Allowing the CEO to delegate or subdelegate their powers or functions to a staff member (who would then undertake the task concerned) facilitates the efficient and effective performance of the Corporation's functions.

It is envisaged the CEO would carefully consider the skills and experience of relevant staff before making any delegation or subdelegation. It is also envisaged the CEO would be held accountable by the Board for monitoring and managing the activities of staff who perform activities that have been delegated or subdelegated by the CEO. The level of the CEO's accountability to the Board is captured by clause 39 of the Bill, which provides that the CEO would hold office during the Board's pleasure and their appointment may therefore be terminated at any time, subject to consultation with the Ministers under subclause 39(2).

The circumstances in which delegations may be necessary are difficult to predict, particularly where the Corporation is intended to operate independently, and the CEO and Board will therefore be responsible for determining the Corporation's staffing and the allocation of duties to those staff. For this reason, I consider it inappropriate to be prescriptive as to the categories of powers that the CEO may delegate or subdelegate, or the class of persons to whom they could be delegated or subdelegated. Some powers will be exercised routinely and may appropriately be exercised by relatively junior staff, while others, including significant spending decisions, would be reasonably be expected to be limited to very senior members of staff.

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

Yours sincerely

Ed Husic MP

The Hon Mark Butler MP
Minister for Health and Aged Care

Ref No: MS23-000230

Senator Dean Smith
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Dear ~~Chair~~ Dean

Thank you for your correspondence of 9 February 2023 on behalf of the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) in relation to the Private Health Insurance Legislation Amendment (Medical Device and Human Tissue Product List and Cost Recovery) Bill 2022 (PHI Bill).

I note that the Scrutiny Committee has requested my advice as to whether the PHI Bill could be amended to provide a list of considerations, or limitations, in relation to the broad discretionary powers set out in sections 72-20 and 72-25 of the PHI Bill.

I appreciate the Scrutiny Committee's consideration of the PHI Bill. As a result, the Australian Government will be moving amendments to the PHI Bill to guide the discretionary powers in sections 72-20 and 72-25 of the PHI Bill, consistent with the views expressed by the Scrutiny Committee.

A Government amendment to the PHI Bill would require the Minister to have regard to whether the exercise of these discretionary powers would adversely affect the interests of policy holders (patients) or significantly and adversely limit the professional freedom of medical practitioners (clinicians).

Thank you for writing on this matter.

Yours sincerely

Mark Butler

27 / 02 / 2023

Attorney-General

MS23-000232

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

Dear Chair

I am writing in response to the issues raised by the Senate Scrutiny of Bills Committee in *Scrutiny Digest 1 of 2023* regarding the Public Interest Disclosure Amendment (Review) Bill 2022.

Please see further information in response to the Committee's request as follows.

Reversal of the evidential burden of proof

The Committee has requested advice as to why determining whether conduct is reasonable administrative action is considered peculiarly within the knowledge of the defendant.

New subsection 19(4) of the Bill provides that reasonable administrative action taken to protect a person from detriment is a defence to the redrafted reprisal offence. This amendment ensures actions that may constitute a reprisal action in some contexts, such as moving a discloser into a new team, will not breach the reprisal offence in new section 19 if the purpose of the action was to protect a person from detriment. This ensures that public officials can take reasonable actions to protect disclosers from detriment without the risk of unintentionally breaching the reprisal offence.

New subsection 19(4) of the Bill will reverse the evidential burden of proof for the defendant for the purposes of establishing the reason why the defendant engaged in the conduct. The reason why a person engaged in conduct is information that will be peculiarly within their knowledge. For example, if a public official has made a disclosure of wrongdoing involving their supervisor, a principal or authorised officer may change the public official's supervision arrangements to reduce the potential for the public official to have reprisal action taken against them by the supervisor whose wrongdoing they disclosed. However, the reason for engaging in this conduct may not be clear on its face. If a discloser considers that this conduct causes them detriment, they may argue that it constitutes a reprisal action. Reversing the burden of proof will better enable the reason for the relevant conduct to come to light as the defendant is best placed to point to evidence as to why they engaged in the relevant conduct, including to demonstrate why, in their view, the conduct was reasonable in the circumstances.

As the committee has noted, the question of whether particular administrative action was 'reasonable' to protect the person is an objective test. The assessment of whether such action was reasonable to protect the person will depend on the facts and circumstances known to the defendant at the time they took the relevant administrative action. While each case would turn on

its facts, whether particular administrative action was reasonable to protect the person would generally be informed by considerations such as:

- whether the defendant apprehended that there was a risk that the person would be subjected to reprisal action and, if so, the likelihood of that risk and the reasons for that apprehension;
- what, if any, alternative means may have existed within the particular work environment to protect the discloser from reprisal action;
- any likely secondary benefits or risks associated with any such alternative means of protecting the discloser, and
- the reasons for which the defendant elected to take the administrative action.

The facts that inform these considerations will typically be peculiarly within the knowledge of the defendant. For example, in the case where the defendant is alleged to have engaged in reprisal action by changing the discloser's supervision arrangements, matters that would be peculiarly within the defendant's knowledge would likely include:

- the defendant's assessment of the risk of reprisal action at the time that they took the administrative action, and the facts known to the defendant that informed that assessment;
- the defendant's understanding of the professional and personal relationships between supervisors within the relevant work area (which may be relevant to the question of whether assigning a particular supervisor would be likely to mitigate any risk of reprisal) and the skills, capabilities and expertise of each supervisor (which may be relevant to the question of whether a particular supervisor would be an appropriate, alternative supervisor), and
- the professional judgments made by the defendant, in reaching their decision to take particular administrative action.

Once the defendant has adduced evidence that suggests a reasonable possibility that their conduct was administrative action that was reasonable to protect the person from detriment, or pointed to evidence already adduced by the prosecution that suggests that reasonable possibility, the onus will shift back to the prosecution to prove beyond reasonable doubt that the conduct was not reasonable administrative action. Whether the conduct was reasonable administrative action will ultimately be a matter for the court to determine.

Additional information will be included in the explanatory memorandum to clarify the intended operation of the reverse onus of proof in relation to the defence of reasonable administrative action.

Redrafting a reasonable administrative action as an exception to the reprisal offence

The Committee also requested advice on whether it may be appropriate for the Bill to be amended to provide that a reasonable administrative action is specified as not an element of the offence, rather than as an exception to the offence.

Existing section 13 of the *Public Interest Disclosure Act 2013* (Cth) (PID Act) provides the definition of 'takes a reprisal' for the purposes of the Act. The current formulation of that section provides that a person does not take a reprisal to the extent that the person takes administrative action that is reasonable to protect the other person from detriment, as per existing subsection 13(3). The offence for taking a reprisal is contained separately in existing section 19, which provides that a person commits an offence if the person takes a reprisal (as defined in section 13) against another person. The prosecution must prove the elements of the offence beyond reasonable doubt.

Consequently, a prosecutor must prove that the relevant conduct was not reasonable

administrative action (as per the definition in existing subsection 13(3)) in order for conduct to constitute 'taking a reprisal' under the section 19 offence. That is, the prosecution must prove beyond reasonable doubt that the defendant was aware there was a substantial risk the conduct was not administrative action that is reasonable to protect the second person from detriment and, in all the circumstances known to the defendant, it was unjustifiable to take that risk. This is an unjustifiably difficult onus for the prosecution to discharge.

Reframing reasonable administrative action as a defence to the reprisal offence, rather than being an element of the offence, enables the evidential burden of proof for the defence to be reversed to address the difficulty that is otherwise faced by the prosecution. Proposed subsection 19(4) places the onus on the defendant to point to evidence that suggests a reasonable possibility that their action was reasonable administrative action in the circumstances, in recognition that the reasons for the conduct will be peculiarly within their knowledge. Once this evidence is adduced, the onus will shift back to the prosecution to prove beyond reasonable doubt that the conduct was not reasonable administrative action.

This approach is consistent with the Attorney-General's Department's *Guide to framing Commonwealth offences infringement notices and enforcement powers,* which provides that a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the offence, where:

- it is peculiarly within the knowledge of the defendant, and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Broad delegation of administrative powers or functions

The committee has requested advice as to why it is necessary and appropriate to allow any or all of the powers or functions of a principal officer to be delegated to a public official who belongs to the agency (which includes any APS employee at any level and contractors).

The Bill provides that a principal officer may, by writing, delegate any or all of the principal officer's functions or powers under this Act to a public official who belongs to the agency. The existing delegation power in the PID Act distinguishes the delegation powers of principal officers of agencies other than the Ombudsman and the IGIS, and the Ombudsman and the IGIS. This amendment will align the delegation powers of the Ombudsman and the IGIS with the existing delegation power of principal officers of other agencies under the PID Act.

Allowing principal officers to delegate any or all of their functions or powers to APS employees of any level is necessary to facilitate effective investigations for all agencies under the PID Act. The PID Act applies broadly across the Commonwealth public sector, including both small and large agencies. The principal officer is primarily responsible for conducting investigations under the PID Act. In some cases, there may be a real or perceived risk of bias or conflict of interest during an investigation in an agency where there is a limited pool of appropriately senior or experienced staff to conduct an investigation. It may also hinder efficient investigation of disclosures if agencies are unable to delegate these functions and powers to a lower level, particularly if there are limited numbers of senior staff with appropriate expertise in an agency. Allowing a principal officer to delegate their functions or powers under the PID Act to an APS employee of any level in the agency, or a contractor, will assist in managing these issues by broadening the scope of staff who can conduct an investigation, or part of an investigation.

Further, this broad delegation power is necessary to allow a principal officer to delegate parts of their powers to staff with appropriate expertise as needed, who may not be confined to senior staff. For example, a principal officer may need to delegate fact-finding aspects of the investigation to an APS employee of a non-senior level, whilst retaining ultimate principal

officer decision-making power for the final investigation report. This flexibility ensures that the most appropriate officer in an agency can undertake components of the PID investigation as required by that particular agency, which would not be possible by legislatively confining the scope of powers or class of persons to whom these powers may be delegated.

Additionally, the principal officer's powers and functions are primarily focused on investigating disclosures within their own agency and preparing reports in specified time frames, based on complaints made internally. The principal officer's powers and functions are not coercive in nature and are not of such a significant nature that it would be inappropriate to delegate them to non-senior APS staff.

This amendment would also provide greater flexibility to the Ombudsman and the IGIS to delegate their functions under the PID Act, including to undertake PID investigations. The engagement of contractors to undertake specific work is a common practice in Commonwealth agencies. Some disclosures require expertise in a particular area or type of investigation, for which it would be appropriate for the Ombudsman or the IGIS to engage external contractors in order to harness the necessary expertise to address disclosures of wrongdoing.

The Bill introduces a safeguard for all delegations, including by the Ombudsman and the IGIS, by requiring that a person exercising functions or powers under a delegation must comply with any directions of the principal officer who delegated the function or power. This applies in relation to all delegations by the principal officer, including to APS employees and contractors. This amendment ensures appropriate oversight of the exercise of the functions or powers delegated by a principal officer, while also providing the necessary flexibility to principal officers to delegate their functions as required to support compliance with the requirements of the PID Act.

Appropriate training, qualifications and experience to appropriately exercise delegated powers or functions

The Committee has queried whether the Bill could be amended to require that a principal officer, when making a delegation under proposed subsection 77(1), must be satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated powers or functions.

The delegation provision is intended to allow the principal officer to delegate any of their functions or powers under the Act as required. The principal officer, when delegating functions or powers under the Act, can consider the training, qualifications and experience of a person to ensure this is appropriate to the powers and functions they would be exercising under the delegation. The Bill does not prevent the principal officer from considering such matters as part of a delegation. However, the principal officer will likely need to balance a range of considerations when making a delegation. In particular, the Bill and Act place several positive obligations on the principal officer, including the duty to provide ongoing training about the PID Act relating to integrity and accountability, and the duty to establish procedures for facilitating and dealing with public interest disclosures relating to the agency. Further, the established procedures for dealing with public interest disclosures, such as the need to complete investigations within 90 days, will need to be taken into account when making any delegation decisions.

Therefore, while a principal officer is encouraged to consider the training, qualifications and experience of a person to whom they propose to delegate functions or powers, it is important that there is sufficient flexibility in the delegation provision so that delegations by the principal officer can be informed by all relevant matters, including compliance with obligations under the PID Act.

Further guidance will be provided in the explanatory memorandum to explain that when making a delegation under proposed section 77, the principal officer should consider, among other matters, whether a person has the appropriate training, qualifications or experience to exercise the powers or functions that the principal officer is proposing to delegate. The explanatory memorandum will further clarify that the principal officer should consider their additional obligations set out in section 59 when making a delegation decision, including their obligation to facilitate public interest disclosures, consider the procedures for dealing with public interest disclosures, and providing ongoing training and education to public officials.

Limiting delegations to specified categories of people

The Committee has requested advice as to whether the Bill could be amended to confine the delegation of a principal officer's powers or functions to specified categories of people.

The PID Act applies broadly across the Commonwealth public sector, and therefore, requires additional flexibility to accommodate investigations across both small and large agencies. The level of principal officer delegates varies across agencies. Smaller agencies in particular require flexibility when delegating principal officer functions and powers, as the size of the agency can mean that there are limited persons to whom functions and powers can be delegated, and it may not always be possible for the principal officer to delegate functions to persons of a particular level.

A wide delegation power for principal officers is therefore necessary to ensure that the functions and powers of the principal officer can be delegated to an appropriate number of persons in the agency, to ensure there is a sufficient number of people to carry out such functions. This flexibility ensures that the most appropriate officer in an agency can exercise the powers and functions of the principal officer as required by that particular agency, which would not be possible by legislatively confining the scope of powers or class of persons to whom these powers may be delegated.

Immunity from civil and criminal liability

The Committee has requested more detailed advice as to why it is considered necessary and appropriate to give an individual providing assistance in relation to a public interest disclosure under proposed section 12A, and a person assisting a principal officer of an agency or a delegate of the principal officer under proposed paragraph 78(1)(c), with immunity from civil liability, such that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

Proposed section 12A of the Bill

Proposed section 12A of the Bill will expand protections for witnesses so they are the same as those afforded to the discloser, consistent with recommendation 28 of the Moss Review. The Bill will provide witnesses, defined to mean persons providing assistance in relation to a disclosure, with protections from reprisal and immunity from administrative liability (including disciplinary action). This amendment builds on the existing protections for witnesses in the PID Act, being immunity from civil and criminal liability for providing information to someone conducting a disclosure investigation.

Expanding protections for witnesses is necessary to ensure witnesses to wrongdoing feel confident to come forward and provide assistance in relation to a disclosure investigation. The PID Act currently offers protections for witnesses to give information to someone conducting a PID investigation when requested to do so by the person conducting the investigation. This

means that a witness who voluntarily provides information without being requested does not receive protections under the PID Act, and may be subject to criminal, civil or administrative liability. However, a disclosure investigation may be hampered if a witness does not provide such assistance. Providing strong protections to witnesses who voluntarily provide information, produce a document or answer a question in relation to an investigation supports them to come forward and helps agencies conduct more comprehensive investigations. This ultimately reduces the possibility that wrongdoing will flourish or go unaddressed.

Protections for witnesses provided by the Bill are subject to limitations. The witness' liability for their own conduct is not affected by the immunities from civil, criminal and administrative liability. That is, a witness cannot provide assistance in relation to a disclosure to shield themselves from liability for their own wrongdoing. Furthermore, the immunities do not apply in relation to false or misleading statements by witnesses, including liability for relevant offences in the Criminal Code. The Bill thereby strikes an appropriate balance between ensuring agencies can effectively address wrongdoing and the rights of affected individuals.

Section 78 of the PID Act

Section 78 of the PID Act provides the following PID officers with immunity from criminal and civil liability, and disciplinary action, for actions done in good faith in the performance of functions or exercise of powers under the PID Act:

- principal officers and their delegates
- authorised officers, and
- supervisors of persons who make a disclosure.

The Bill will amend this provision to extend these immunities to public officials who assist the principal officer or their delegate in the performance of their functions or exercise of their powers under the PID Act.

These protections correspond to the obligations on public officials to use their best endeavours to assist:

- the principal officer of an agency in the conduct of an investigation (existing subsection 61(1) of the PID Act), and
- any other public official to exercise a right, or perform a function under the PID Act (Sch 1, item 61 of the Bill).

Providing immunities to public officials who assist a principal officer or their delegate with performing functions or exercising powers under the Act is appropriate in light of these obligations. Public officials should be provided with protections to support them to fulfil these obligations, particularly where assisting in this manner may involve engaging with criminal or civil liability, or risking disciplinary action. These obligations, coupled with the immunities for actions done in faith, work to support a pro-disclosure culture in which public officials are encouraged to report wrongdoing, and are provided with appropriate protections when doing so.

Protections afforded to an affected individual

The Committee has noted that its consideration of this issue will be assisted if the advice addresses what, if any, alternative protections are afforded to an affected individual given that the normal rules of civil liability have been limited by the Bill.

Supporting the disclosure and investigation of wrongdoing in the public sector wrongdoing is a legitimate aim. Where a person has a reasonable belief that another person has engaged in wrongdoing, it is appropriate that there is an avenue through which they can report it, and be protected for doing so, particularly in the event that such wrongdoing is later proven.

Affected individuals will continue to have access to legal remedies where false or misleading statements have been made about them. Protections for both disclosers and witnesses do not apply where they have knowingly made a statement that is untrue. This is an appropriate limitation to ensure that persons cannot make disclosures of wrongdoing about another person that are completely unfounded. This ensures that the public interest disclosure scheme is not misused by persons who wish to cause detriment, including reputational damage, to another person by making knowingly false allegations against them in the form of a disclosure. In this circumstance, the legal remedies available to an affected individual would not be limited by the immunities under the PID Act.

Affected individuals will also have access to remedies where actions by a PID officer, or a person assisting a principal officer or their delegate, are not undertaken in good faith. This is an appropriate limitation as it ensures that these persons cannot rely on the protections under the PID Act where they have acted recklessly, or intentionally, to cause detriment to the affected person in the course of performing functions under the Act.

While not expressly provided for in the PID Act, affected individuals must also be afforded procedural fairness in the course of a disclosure investigation, in accordance with principles of administrative law. This requires affected persons to be given an opportunity to express their views in relation to allegations made against them in the course of a disclosure, especially where there may be an adverse decision that affects that person's rights, interests or legitimate expectations.

I trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP

24/2/2023

Senator the Hon Don Farrell

Minister for Trade and Tourism
Special Minister of State
Senator for South Australia

REF: MC23-000323

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

7 MAR 2023

Reply by email: scrutiny.sen@aph.gov.au

Dear Senator

Thank you for your correspondence dated 9 February 2023 requesting further information about the *Referendum (Machinery Provisions) Amendment Bill 2022* (the Bill). I am pleased to provide the below additional information about the Bill in response to the Committee's request.

The Government introduced the Bill on 1 December 2022 to amend the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) to ensure a consistent voter experience across elections and referendums. The Bill ensures that referendums reflect contemporary federal election voting processes and aligns the conduct of referendums with equivalent transparency and integrity measures in the *Commonwealth Electoral Act 1918* (Electoral Act) to support voter confidence in referendums. The Bill also makes consequential amendments to the Electoral Act where relevant.

Reversal of the burden of proof

You have requested further advice in relation to the appropriateness of an offence-specific defence for contraventions of authorisation requirements for "referendum matter". At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.

Consistent with the *Guide to Framing Commonwealth Offences*, the offence-specific defence does not displace the prosecutor's burden.

The Bill inserts new section 3AA into the Referendum Act, with new subsections 3AA(1) and (2) defining "referendum matter" based on the definition of "electoral matter" in the Electoral Act, adapted to a referendum context. Proposed subsection 3AA(6) provides exceptions for matter that is not "referendum matter".

Where contravention of the authorisation of referendum matter is raised, the Bill would require a person or entity to raise specific defences. The matters in proposed subsection 3AA(6) go to the intended communication of the matter, for example if the dominant purpose of the communication was intended to be private communication, or satirical (see proposed subsections 3AA(6)(b) and (c)). As detailed in paragraph 73 of the Explanatory Memorandum to the Bill, this approach is consistent with the guidance provided by the *Guide to Framing Commonwealth Offence* as these are matters that would be peculiarly within the knowledge of the defendant and would be significantly more difficult and costly for the prosecution to prove than for the defendant to establish.

The amendments appropriately place the burden of proof on the defendant in this context because the defendant would have the knowledge as to the purpose and form of the matter and also noting the difficultly and cost for the prosecution to prove.

As such, I consider it necessary and appropriate for the Bill to require a person to raise specific defences, and that those amendments are consistent with the *Guide to Framing Commonwealth Offence* and similar provisions under the Electoral Act.

Henry VIII Clause

The Bill amends the Referendum Act to allow the Electoral Commissioner to modify the operation of the Referendum Act, or specified provisions of the Act, by legislative instrument to allow a timely response to an emergency situation.

To ensure any modifications are appropriate, the Electoral Commissioner will only be able to modify the operation of the Referendum Act if they are satisfied on reasonable grounds that it is necessary or conducive to the due conduct of the referendum. This is consistent with section 396 of the Electoral Act.

This enables the AEC to conduct a referendum safely by minimising the risk of harm to voters, employees and contractors when a Commonwealth emergency law in in force, while maintaining transparency of the referendum process.

As detailed in paragraph 262 of the Explanatory Memorandum to the Bill, the modification mechanism would allow the Electoral Commissioner to consider whether provisions in the Referendum Act should be adjusted to ensure the safe and successful delivery of a referendum. This is designed to ensure the core activities that occur as part of in-person voting, such as canvassing for votes, are protected and allow referendums to occur as close as possible to their ordinary conduct.

The power of the Electoral Commissioner to modify the operation of these provisions is limited to matters concerning the grounds for which voters can apply for a postal or pre-poll vote (for example, if an emergency has prevented a voter attending a voting place), to enable certain travel necessary or conducive for the due conduct of the referendum (for example, travel of a scrutineer notwithstanding a public health order limiting or prohibiting such travel) and to allow for the conduct of certain prescribed activities within 100 metres of the entrance of a polling booth or pre-poll voting office in an emergency area.

The Electoral Commissioner's powers are further regulated by requiring notification in writing to both the Prime Minister and the Leader of the Opposition of the Commissioner's intention to make such an instrument, including the reasons why it is necessary to do so, as well as the publication of the instrument on the Electoral Commission's website. In addition, the powers are limited to an emergency declared under Commonwealth law for a particular geographic location only.

As such, I consider it necessary and appropriate for delegated legislation to modify the operation of the Referendum Act in the circumstances of an emergency situation.

Broad discretionary power – Significant matters in delegated legislation

The Bill would also allow the Minister to specify, by legislative instrument, additional laws for the definition of Commonwealth emergency laws. The Minister's power to specify a law is limited to specifying an existing Commonwealth law under which an emergency can be declared.

The use of delegated legislation by the minister under subsection 144A(9) would facilitate a timely response to unforeseen emergencies to assist the Electoral Commissioner in ensuring the safe and successful delivery of a referendum. It is necessary and appropriate that responses to unforeseen emergencies occur in a timely manner, particularly during the referendum period.

Any legislative instrument that proposes an amendment to the definition of commonwealth emergency law would be accompanied by an Explanatory Statement, which would describe the reasons for the proposed amendment and set out the relevant factors that led to the minister's decision.

Amending the Bill to provide high-level guidance as to the circumstances as to when the power in subsection 144A(9) could be used is not appropriate due to the evolving and uncertain nature of emergencies. As per paragraph 260 of the Explanatory Memorandum to the Bill, the use of delegated legislation in this instance ensures a timely response to unforeseen emergency situations so that Australians can exercise their franchise.

Legislative instruments made under subsections 144A(2), (3) and (9) would be subject to scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation and disallowance in accordance with the *Legislation Act 2003*.

I also note that should the Joint Standing Committee on Electoral Matters, or any other Committee of Parliament, inquire into the conduct of the referendum, such an instrument made under subsections 144A(2), (3) and (9) would be subject to review and consideration by the Committee.

Broad discretionary power – 'Designated Electors'

The Bill will also allow the Electoral Commissioner to declare that an elector is a 'designated elector'. This power can be exercised where the Electoral Commissioner reasonably suspects that the elector has voted more than once in a referendum.

The designation of an elector does not deprive an elector of their legal right to cast a vote. Designated electors may vote by declaration vote, which includes a postal vote, a pre-poll declaration vote, an absent vote, or a provisional vote. This also does not affect an elector's ability to vote early or through mobile polling.

Amending the Bill to include guidance as to the factors the Electoral Commissioner may consider when determining that an elector should be declared a 'designated elector' would not be appropriate noting that is a wide range of extenuating circumstances that may be taken into account to ensure that only appropriate electors are declared to be 'designated electors'. Providing a 'list' of considerations may limit or prejudice the Electoral Commissioner's ability to appropriately consider these circumstances and other operational matters.

As per paragraphs 263 and 237 of the Explanatory Memorandum, a Note will be inserted in subsections 130(1A) and 130(1C) to provide guidance that the Electoral Commissioner may declare that a person convicted of voting and/or intentionally voting more than once in the same referendum as a designated elector.

There are also appropriate safeguards and mechanisms in place to allow designated electors to request reasons as to why they have been declared a designated elector and for internal and external review.

For these reasons, I do not consider that an amendment is required to the designated elector framework.

As the Committee may be aware, the Joint Standing Committee on Electoral Matters (JSCEM) has also released an advisory report on the Bill on 13 February 2022. That report recommends that, subject to recommendations about strengthening enfranchisement opportunities and the provision of clear, factual and impartial information, the Bill be passed. The Government will respond to that report in due course.

I thank you again for writing. I trust that this information will assist you in finalising your consideration of the Bill.

Yours sincerely

Don Farrell

THE HON CHRIS BOWEN MP
MINISTER FOR CLIMATE CHANGE AND ENERGY

MS23-001087

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Chair

I refer to correspondence of 9 February 2023 from Ms Fattimah Imtoual, Acting Committee Secretary, regarding the Senate Standing Committee for Scrutiny of Bills (Committee) request seeking further information regarding the Safeguard Mechanism (Crediting) Amendment Bill 2022 (Bill) as set out in Scrutiny Digest 1 of 2023.

I have considered the Committee's request and carefully considered how the Bill balances what matters are to be in primary legislation and what matters are in delegated legislation. I am satisfied that the approach taken ensures the effective functioning of the reformed Safeguard Mechanism framework and that it would not be appropriate to further amend the Bill so that more detail is in primary legislation. My detailed response is in the Attachment.

I thank the Committee for the opportunity to respond. I have copied this letter to the Assistant Minister for Climate Change and Energy, Senator the Hon Jenny McAllister.

Yours sincerely

CHRIS BOWEN

Enc Attachment – Response to the Senate Standing Committee for Scrutiny of Bills

cc: Assistant Minister for Climate Change and Energy
Senator the Hon Jenny McAllister

ATTACHMENT

Response to Senate Standing Committee for the Scrutiny of Bills: Scrutiny Digest 1 of 2023

Safeguard Mechanism (Crediting) Amendment Bill 2022

Significant matters in delegated legislation

Committee comments:

The Committee requests the Minister's detailed advice as to:

- why it is considered necessary and appropriate to leave much of the information relating to the scope and operation of the amended Safeguard Mechanism framework to delegated legislation; and
- whether the bill can be amended to include further detail in relation to the framework on the face of the primary legislation.

Response:

1. As noted by the Committee, many details of the reformed Safeguard Mechanism framework are to be contained in delegated legislation. These design elements include, for example, issuance of Safeguard Mechanism Credit units (SMCs), requirements relating to application processes and the surrender of prescribed carbon units.

Issuance of Safeguard Mechanism Credit units

2. An important element of the Bill is that it provides for SMCs to be issued to facilities covered by the Safeguard Mechanism. This provides an incentive for all covered facilities to reduce their emissions and access lowest cost emission reductions. It is expected that delegated legislation would provide detail on the circumstances in which SMCs will be issued to a facility based on the difference between its covered emissions and its baseline. As noted in the explanatory memorandum to the Bill, baseline determinations are also set out in the existing *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rules 2015* (the Safeguard Rules).

3. It is appropriate that the Safeguard Rules set out how baselines are calculated for the new framework because of the complexity involved, technical factors and flexibility required. The Safeguard Rules specify around 90 production variables. Having them in the Safeguard Rules provides the flexibility required in case there is any need to be updated quickly due to changes in activities carried out by industry or technological advances, so not to include undue regulatory burden.

4. Under the reforms to the Safeguard Mechanism framework, all baselines will adjust with production. This approach builds on elements of the Safeguard Mechanism's existing design, including production variables and industry average emissions intensities. These design elements have been developed in close consultation with a broad range of stakeholders and implemented through previous changes to the Safeguard Rules.

5. It is expected that the Safeguard Rules would provide for some exceptions to the number of SMCs issued being equal to the difference between the facility's covered emissions and its baseline. These exceptions relate to other matters that are set in the Safeguard Rules, including the setting of baselines, borrowing arrangements, and multi-year monitoring periods.

    a. It is proposed that facilities are not able to receive credits in relation to a financial year in which the facility accessed borrowing arrangements to adjust their baseline or are on a multi-year monitoring period, and landfill facilities are not eligible to receive credits.

    b. Facilities have a minimum baseline of 100,000 tonnes carbon dioxide equivalent (t CO_2-e), but it is proposed this minimum be disregarded when the number of credits is calculated. This is relevant to facilities that drop below the Safeguard Mechanism's coverage threshold. To retain the incentive for facilities to reduce their emissions when they are operating close to the Safeguard Mechanism's coverage threshold of 100,000 t CO_2-e, the Safeguard Rules provide for facilities to continue to receive credits if they drop below the threshold. These arrangements ensure that these facilities are credited an appropriate number of SMCs.

Requirements relating to applications

6. It is anticipated that the Safeguard Rules would provide for applications for emissions intensity determinations and applications for a facility to receive 'trade-exposed baseline adjusted' status to be accompanied by an audit report. They also specify the levels of assurance required in these audit reports. These applications are relevant for setting Safeguard baselines and closely relate to how emissions are measured and reported under the *National Greenhouse and Energy Reporting Act 2007* (NGER Act), including details that are specified in delegated legislation, including the *National Greenhouse and Energy Reporting Regulations 2008* and the *National Greenhouse and Energy Reporting (Measurement) Determination 2008*.

7. It is appropriate for these application processes and audit requirements to be in the Safeguard Rules because of their close relationship with Safeguard Mechanism baselines and their interactions with other pieces of delegated legislation. Any changes to related legislation will enable the Safeguard Rules to be quickly updated so that the overall scheme is streamlined and does not cause any unnecessary regulatory burden.

Provisions relating to surrender of units

8. As noted by the Committee, the Bill provides for rules to be made relating to the surrender of credits to reduce the net emissions of covered facilities. It is expected that the Safeguard Rules would be able to prevent facilities from surrendering credits in relation to compliance periods (referred to as monitoring periods in the legislation) that have not commenced. The Bill also enables the Safeguard Rules to place limits on the number of specified kinds of units that can be surrendered and enables these rules to specify the number of specified kinds of units that must be surrendered in order to reduce the net emissions of a facility by one tonne.

9. These reforms will create a market in SMCs and impact the Australian Carbon Credit Units (ACCU) market because demand for ACCUs from Safeguard-covered facilities is likely to increase. Providing for matters relating to surrender in the Safeguard Rules allows for flexibility in case issues that affect these markets, or their integrity, arise. Preventing Safeguard facilities from surrendering in relation to future compliance periods prevents them from bypassing any such rules in the event that they are made in the future.

Conclusion

10. Overall, as shown by the examples above, the amended Safeguard Mechanism framework would rely on a large amount of technical detail in order to operate as intended. That detail would reflect a range of factors, including market dynamics, industry practices and the available technologies. It is therefore appropriate for details of the Safeguard Mechanism framework to be set out in delegated legislation so that any changes in any of these factors can be quickly reflected and not cause any unintended consequences or burden. This would ensure that the Bill is able to achieve its aim of contributing to Australia's emissions reduction targets and thereby, contributing to Australia complying with its international obligations.

11. Further, the Bill adds a reference to ensuring that the aggregate net covered emissions from the operation of facilities covered by the Safeguard Mechanism decline (Item 1 of Schedule 1) to the second object of the NGER Act, so that it would state that:

> The second object of this Act is to contribute to the achievement of Australia's greenhouse gas emissions reduction targets by ensuring that:
>
> (a) net covered emissions of greenhouse gases from the operation of a designated large facility do not exceed the baseline applicable to the facility; and
>
> (b) aggregate net covered emissions from the operation of designated large facilities decline.

12. Given the important role of delegated legislation, the Bill requires the Minister to only make Safeguard Rules if the Minister is satisfied that they are consistent with the second object of the NGER Act (Item 37 of Schedule 1). This provides an appropriate constraint on delegated legislation and helps to ensure that it is consistent with the intent of primary legislation.

13. Penalty arrangements for an excess emissions situation are currently contained in regulations. To reflect better practice regulation, the Bill updates penalty arrangements for an excess emissions situation so that they would be contained in primary legislation. This change, as well as the changes to the objects of the NGER Act, reflect that the Government has carefully considered what matters should be in primary legislation and what matters should be in delegated legislation.

14. Taking account of the factors outlined above, I am comfortable with how the Bill provides for matters to be covered by delegated legislation, and do not consider it appropriate to further amend the Bill to include more detail of the framework.

The Hon Michelle Rowland MP

Minister for Communications
Federal Member for Greenway

MS22-005074

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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scrutiny.sen@aph.gov.au

Dear Chair Dean

Thank you for your letter of 9 February 2023 regarding the Senate Scrutiny of Bills Committee *Scrutiny Digest 1 of 2023*, which requests further advice to assist its scrutiny of the Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022 (the Bill).

I appreciate the time the Committee has taken to consider the Bill, and the opportunity to clarify the operation and scope of the proposed amendments. Please find a response to the requests for further advice on amendments to the *Telecommunications Act 1997* (the Act) below.

The Committee requests the Minister's further advice as to whether the Bill could be amended to explicitly limit who may receive information or a document under subsection 285(1B) or, at a minimum, whether the explanatory memorandum can be updated to clarify this.

As outlined in my response to the Committee's *Scrutiny Digest 8 of 2022,* access to information in the IPND – including storage, transfer, use, or disclosure of unlisted information – is strictly regulated through the Act, legislative instruments, and enforceable industry codes and standards. In practice, disclosures are always limited to emergency services (police, fire or ambulance).

Noting the Committee's request, the Government will draw attention to the constraining nature of these other instruments through amendments to the explanatory memorandum of the Bill.

The Committee requests the Minister's further advice as to whether the term 'affairs or personal particulars' can be defined in the Telecommunications Act 1997 or, at a minimum, in the explanatory memorandum, including by providing examples of what may or may not be included in the definition.

Division 2, Part 13 of the Act sets out a range of disclosure offences for carriers, carriage service providers, number-database operators, emergency call persons, and their respective associates in relation to the authorised disclosure of:

- the contents of communications carried by carriers or carriage service providers;
- carriage services supplied by carriers and carriage service providers; and
- the affairs or personal particulars of other persons (including location information).
-

Section 287 of the Act reads:

> Division 2 does not prohibit a disclosure or use by a person (the ***first person***) of information or a document if:
>
> (a) the information or document relates to the affairs or personal particulars (including any unlisted telephone number or any address) of another person; and
>
> (b) the first person believes on reasonable grounds that the disclosure or use is reasonably necessary to prevent or lessen a serious and imminent threat to the life or health of a person.

The exception in section 287 of the Act, and the proposed amendment, does not allow for the content or substance of a communication to be made available in any circumstance, given the exception does not apply to such information. The proposed measure in the Bill will not change or increase the type of information which can be requested and disclosed through the provision.

Noting that restrictions on the term 'affairs or personal particulars' would reduce the scope of information to which a disclosure offence applies under Division 2, Part 13 of the Act, a general construction provides additional flexibility to safeguard and protect types of information that might otherwise not be captured (similar to the general construction of 'personal information' under the *Privacy Act 1988*).

However, additional clarification will be provided on the types of information covered by the term 'affairs or personal particulars' through amendments to the explanatory memorandum of the Bill, which will be tabled in the Senate at the next earliest opportunity.

I trust this information is of assistance to the Committee.

Yours sincerely

Michelle Rowland MP

22 / 2 / 2023

The Hon Mark Butler MP
Minister for Health and Aged Care

Ref No: MC23-003038

Senator Dean Smith
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600
scrutiny.sen@aph.gov.au

Dear Chair Dean

I refer to the request of the Senate Scrutiny of Bills Committee (Committee) for further information about a number of aspects of the Therapeutic Goods Amendment (2022 Measures No. 1) Bill 2022 (Bill).

The below addresses each of the Committee's questions about the Bill.

Reversal of the evidential burden of proof (paragraph 1.176, Scrutiny Digest 1/23)

The Committee has asked for advice as to why it is proposed to use a defence of reasonable excuse (which reverses the evidential burden of proof) for proposed subsection 45AC(3).

Proposed new subsection 45AC(3) provides a defence of reasonable excuse for the offence of failing to comply with a notice from the Secretary requiring the production of information or documents. The note to the subsection provides that the defendant bears an evidential burden in relation to the matter.

It is considered that a defence of reasonable excuse is appropriate in this context because, in line with the *Guide to Framing Commonwealth Offences*:

- the matters comprising such a defence would, in most instances, be peculiarly within the knowledge of the defendant
- it would be significantly more difficult for the prosecution to disprove than for the defendant to establish the matter and
- the proposed defence only involves an evidential burden for the defendant, in relation to adducing or pointing to evidence that suggests a reasonable possibility that the matter comprising the excuse exists, rather than a legal burden of proof.

The offence that would be introduced by proposed new section 45AC relates to a failure to comply with a notice to produce information or documents, and the proposed defence would provide an opportunity for a defendant to justify the defendant's failure to comply with the notice. Reasonable excuse defences are provided under the Act for a range of offences for failing to produce documents or information under statutory notices.

The defence is appropriate because there may be a range of reasons, outside the knowledge of the Therapeutic Goods Administration (TGA), as to why a person may not be able to provide the requested information or documents to the Secretary, including for instance where the documents or information do not exist or otherwise cannot be produced, personal circumstances (such as illness or natural disasters) that may make it impossible for the person to comply with the notice within the stated timeframe, or other situations that the TGA may not have knowledge of when the notice is issued.

The inclusion of the defence is therefore appropriate as it is designed to reflect that in most instances it would be significantly more difficult and costly for the prosecution to, in effect, prove a negative, i.e. that there was no reasonable excuse for a defendant, as the matters that might comprise such a reasonable excuse would likely be peculiarly within the knowledge of the defendant (for instance, if documents were stored at a location that was affected by a fire or a flood).

A reasonable excuse defence is also appropriate because of the breadth of potential reasons why a person or entity may be unable to comply with a notice due to circumstances beyond their control. As those circumstances would invariably be personal to the recipient of the notice, it is appropriate to place the evidentiary burden on the recipient to prove that those circumstances exist.

The general mistake of fact defence available under the *Criminal Code* would not apply to circumstances of the kind set out above, as that defence is only available where a person is under a relevant mistake of fact. The circumstances dealt with by the reasonable excuse defence include cases where a person correctly understands that a notice has been issued, and they are required to comply with it, but circumstances beyond their control prevent them from doing so.

Similarly, it is not possible to frame a more narrowly tailored defence, or an exception in the offence provision itself, given the wide range of circumstances where a person might reasonably be unable to comply with a notice. There would be a risk that such an approach may not comprehensively reflect the range of circumstances that may be relevant to whether a person may not be able to provide information or documents. A reasonable excuse defence is therefore consistent with the *Guide to Framing Commonwealth Offences* and a fair and appropriate way to ensure that persons are not criminally responsible for failures to comply arising from illness, natural disaster or other exceptional circumstances.

Strict Liability (paragraph 1.183, Scrutiny Digest 1/23)

The Committee has drawn its scrutiny concerns to the appropriateness of imposing a strict liability offence under proposed subsection 45AD(2), noting that the penalties for that offence are above what is recommended in the *Guide to Framing Commonwealth Offences*.

Proposed subsections 45AC(2) and 45AD(2) contain strict liability offences for failure to comply with a notice to produce information or documents (proposed subsection 45AC(2)), and for giving false or misleading information or documents in compliance or purported compliance with such a notice (proposed subsection 45AD(2)), with both offences subject to a penalty of 100 penalty units.

While the penalty is higher than that noted in the *Guide to Framing Commonwealth Offences* for a strict liability offence, this is justified in the particular context of the regulatory scheme for therapeutic goods, given the potentially significant consequences for public health and safety if there were to be a failure to comply with a notice under the proposed amendments. For instance, a failure to produce information or documents could delay the investigation of a contravention of the Act, with the effect that patients may suffer harm before the contravention is identified. The provision of information that is false or misleading in a material particular might lead the TGA to conclude that a therapeutic good is safe for use by patients, in circumstances where in fact it may not be.

The 100 penalty unit maximums for the proposed new strict liability offences reflect the seriousness of the potential risk to public health that could arise as a result of not complying with a notice, or providing false or misleading information in connection with a notice, as illustrated by the above examples. The conduct involved is sufficiently serious that, if a defendant were convicted of an equivalent fault-based offence, a significantly higher penalty could be imposed.

While notices may be issued in some circumstances to individuals, they may also be issued to larger entities such as banks, pharmaceutical companies, wholesalers, retailers and other service providers. The individuals to whom such notices could be issued may include medical practitioners or pharmacists running enterprises manufacturing or selling therapeutic goods, whose resources are likely to substantially exceed those of others in the community. Given the entities to whom these notices can be issued, it is important that penalties be set at a level that allows a court to impose a sentence that will be more than merely the cost of doing business, so as to secure compliance.

It is also important to recognise that the specified penalty is a maximum. A sentencing court would take into account the circumstances of the individual defendant in determining the fine to be imposed in relation to any offence. The higher end of the penalty range would likely only be used where the size and financial resources of the defendant, and the circumstances of the offence, make it appropriate in the view of the sentencing court to impose a sentence of that magnitude.

The penalties are modified for corporations by section 4B of the *Crimes Act 1914* (Cth), with the result that the maximum penalty for a body corporate is 500 penalty units. As a result, there is a distinction between the maximum penalties for individuals and bodies corporate.

Procedural fairness (paragraph 1.190, Scrutiny Digest 1/23)

The Committee has asked for advice as to:

- why it is considered necessary to provide a broad exclusion to procedural fairness within the bill, noting the flexibility that is already applied by the courts when considering the extent to which procedural fairness obligations might apply in a particular circumstance
- whether, at a minimum, the amendment can be narrowed to exclude procedural fairness to circumstances where disclosure is required for urgent public safety reasons.

In relation to the first of these questions, a broad exclusion is necessary in the specific context of the release of therapeutic goods information under section 61 of the Act, principally because of the importance of ensuring that all information about the safety, quality and efficacy or performance of therapeutic goods, including critical health and safety information, is able to be communicated in a timely manner and without delay, given its nature and significance and the associated risks to public health if this is not able to be assured.

As explained in the explanatory memorandum, any delay in the ability to release critical health and safety information as a result of observing the natural justice hearing rule could well have very grave consequences for patients and public health, if such information is not able to be disclosed in a timely manner. This could even include the risk of death – for instance, if the public were not able to be informed about the risks posed by a particular product and continued to use the product, or if State or Territory health departments were not able to be alerted to particular adverse events associated with a product and were not able to work with practitioners or providers to limit (or cease) the use of the product.

It is important to note that this concern is not limited to information that, in and of itself, is clearly urgent, but it is also relevant to the release of information that, once shared with others (such as State and Territory health departments, the National Centre for Immunisation Research and Surveillance, or specialist health professionals) and combined with other health information, may contribute to the identification of urgent safety concerns.

A requirement to consult third parties (such as sponsors, manufacturers or advertisers of therapeutic goods) would also significantly compromise the TGA's ability to administer the Act and undermine the effective regulation of the therapeutic goods regulatory scheme, noting that section 61 includes powers to release certain kinds of information (such as information relating to counterfeiting or tampering) to health and law enforcement bodies to support compliance efforts. Such a requirement would also impact international arrangements, as section 61 includes powers to release information to national regulators of other countries, and international organisations, with which the Commonwealth has cooperative arrangements. Such an outcome could curb information-sharing arrangements with international partners that assists in identifying safety issues with therapeutic goods and enables cooperation to share, and shorten, the evaluation of new medicines to support their availability for patients.

It is these concerns in particular that underline the public interest in displacing the natural justice hearing rule as proposed, in relation to prioritising public health and safety over the interest that a sponsor or manufacturer of therapeutic goods may have, in some circumstances, in preventing the release of information about their products, and the need for a broad exclusion to ensure clarity and certainty in relation to the capacity to release information as necessary in the circumstances, without the risk of delay.

There are also important practical reasons why observing the natural justice hearing rule, or a narrower exclusion of the rule, would be administratively unworkable in the context of the release of therapeutic goods information under section 61, including that:

- section 61 is relied upon to release significant volumes of information – up to thousands of reports per month in the case of adverse event reports which keep the public and other stakeholders aware of up-to-date information about adverse events relating to therapeutic goods. It is important to note that it would not be feasible to observe the natural justice hearing rule in such circumstances
- similarly, the range of other circumstances under which information may be released under section 61 is not limited to formal regulatory processes and may include where TGA officers receive verbal queries from stakeholders, such as a State or Territory health department enquiring about the stock of a medicine
- the range of various kinds of information that may be released under section 61 could itself create uncertainty as to the application of the rule in the different possible contexts. if a court decided that the rule applied in one particular circumstance, this would likely create ambiguity about the application of the rule in other circumstances.

Further, the difficulty of considering the scope of procedural fairness obligations that would apply in practice would likely lead to delays that may pose a risk to public health. If a person were to seek to challenge a proposed disclosure, without having access to the full range of data that the TGA may have considered, such a challenge (even with a court applying flexibility) could delay the release of the information, with potentially very serious risks to public health. Additionally, challenges to the legality of already disclosed information may have a cooling effect on future potential releases of information, further risking public health and safety.

The above concerns demonstrate the risks and unworkability of observing the natural justice hearing rule, or an exclusion of the rule other than a broad exclusion, in the context of the release of therapeutic goods information, as either option would delay the release of information relevant to the safety of therapeutic goods.

In relation to the second of these questions, the scope of the exclusion to procedural fairness was considered during the development of this proposed measure, but a clear formulation for a narrower approach that would not pose safety concerns and that would be workable in practice could not be identified.

A number of adverse impacts of a narrower conceptualisation of the natural justice hearing rule exclusion were identified, including that a limited exclusion (however framed) may:

- be administratively unworkable. As outlined in the response to the first question, there are a range of kinds of information that may be released under section 61, a variety of circumstances in which those releases occur and very significant volumes of information may also be involved. A limited exclusion may require potentially complex factual and legal considerations for each proposed release of information
- be ambiguous and difficult to apply in practice, leading to delays that may pose a risk to public health. In particular, if a person were to seek to challenge the legality of a proposed disclosure (or an already effected disclosure) in relation to whether the requirements for a limited exclusion applied, such a challenge could delay, or possibly prevent, the release of the information (and could also impact future releases of such information)
- imply an intention that the natural justice hearing rule should apply in all other circumstances (as the explicit exclusion would only apply in limited circumstances), undermining the purpose of the proposed amendment.

There would also be a significant risk that a narrower approach to exclude the natural justice hearing rule, based on where disclosure is required for urgent public safety reasons, would not be comprehensive, due to the difficulty in identifying all possible circumstances in which disclosure may be needed for urgent public safety reasons. It is likely that such an approach would result in urgent safety concerns arising that would not be covered by the exclusion. It is also likely that a narrower approach would preclude the timely sharing of therapeutic goods information which may not itself appear to be urgent safety information but, once shared with others or combined with other health information, may contribute to the identification of urgent safety concerns.

The proposed amendment, with a broad exclusion of the requirement to observe the natural justice hearing rule, is therefore designed to provide clarity and certainty for the TGA to be able to proceed to release information as necessary in the circumstances, without needing to consider precisely how a court might apply the requirement to observe the natural justice hearing rule in each particular circumstance.

Incorporation of external material as existing from time to time (paragraph 1.195, Scrutiny Digest 1/23)

The Committee has asked for advice as to whether material incorporated from time to time will be made freely and readily available to all persons interested in the law, in relation to proposed new subsections 3C(3), 26BF(6), 28(2AA), 36(5) and 61(8C) which would provide that instruments made under the relevant sections may incorporate any matter contained in an instrument or other writing as in force or existing from time to time.

The TGA's approach is to ensure that, wherever possible, material that is proposed to be incorporated in an instrument made under the Act is freely and readily available to persons interested in the terms of the law, and that the instrument, or its explanatory statement is able to explain this and how to access the material (for instance, therapeutic goods regulations, and other instruments, have adopted European and New Zealand legislation, and World Health Organization documents, that are freely available on the internet).

In some limited circumstances, however, this may not be possible, for instance where a document is a particularly critical international benchmark for quality and safety requirements relating to therapeutic goods, such as the British Pharmacopoeia, European Pharmacopoeia or United States Pharmacopeia-National Formulary, or documents published by the International Organization for Standardization.

In such circumstances, it is anticipated that the persons who would be required to comply with the incorporated material (principally, sponsors and manufacturers of therapeutic goods) would have arrangements in place to ensure access in order to conduct or carry out their business.

However, the TGA also endeavours to ensure that where incorporated material is not freely available, members of the public may arrange to view the material at the TGA office in Fairbairn, ACT.

If you have any further questions regarding the Bill, please do not hesitate to contact Will Freebairn, Principal Lawyer (02 6289 3556; Will.Freebairn@health.gov.au) or Navreen Kular, Principal Lawyer (02 6289 7891; Navreen.Kular@health.gov.au).

Yours sincerely

Mark Butler

11 / 01 /2023

THE HON STEPHEN JONES MP

ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Ref: MS23-000283

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing in relation the Senate Standing Committee for the Scrutiny of Bill's comments in Scrutiny Digest 1 of 2023.

Below are my responses to the Committee's questions about the Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022 (the Bill).

Why is retrospective validation sought in relation to the amendments introduced by item 103 of Schedule 4 to the Bill?

Division 21 of the Bill seeks to amend regulation 51 of the *National Consumer Credit Protection Regulations 2010* (Credit Regulations), with retrospective effect to 13 June 2014, to ensure that the process for determining whether a continuing credit contract is exempt from the National Credit Code under subsection 6(5) of the National Credit Code operates in accordance with the original policy intention and practice.

Subsection 6(5) of the National Credit Code provides that the National Credit Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, the National Credit Code will apply if the charge exceeds the maximum charge prescribed in regulation 51 of the Credit Regulations.

Current regulation 51 came into effect on 13 June 2014, and the policy intention from that time has been that the calculation of the maximum charge occur only by reference to continuing credit contracts that already fall within the exception in subsection 6(5) of the National Credit Code. To ensure consistency with the policy intention, which the regulator, industry and consumers have adopted in practice, Division 21 of the Bill seeks to repeal and replace regulation 51 to ensure the calculation of the maximum charge occur by reference to 'eligible contracts' only, being continuing credit contracts under which the consumer is a debtor and that are already exempt from the application of the National Credit Code under subsection 6(5).

Are any persons likely to be adversely affected by the retrospective application of the provisions, and the extent to which their interests are likely to be affected?

The amendment to the exemption applies to a very small number of consumers, as it will only affect non-bank providers of both regulated and unregulated continuing credit contracts. It is possible that some individual consumers who have particular kinds of credit from these providers may be adversely affected, as

they would no longer be able to rely on the National Credit Code protections that the current drafting of regulation 51 affords them. However, it is unlikely that any of these consumers would have accessed the protections in the National Credit Code, as the prevailing regulator, industry and consumer practice has been consistent with the original policy intention and the amendments in the Bill.

I trust that the information above provides further context about the drafting of the bill and assists with the Committee's deliberations.

Yours sincerely

The Hon Stephen Jones MP

The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House

Reference: MS23-000170

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Parliament House
CANBERRA ACT 2600

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

Dear Chair Dean

I refer to the matters raised by the Senate Scrutiny of Bills Committee (the Committee) in Scrutiny Digest 1 of 2023 in relation to the Work Health and Safety Amendment Bill 2022 (the Bill). I welcome the opportunity to respond and have provided further explanation about the relevant measures below.

Rationale for the inclusion of negligence as an additional fault element in section 31 (Category 1 offence)

Item 4 of Schedule 1 amends paragraph 31(1)(c) of the *Work Health and Safety Act 2011* (WHS Act) to broaden the Category 1 offence. Currently a Category 1 offence is established where a person has a health and safety duty and the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness, and the person is reckless as to the risk to an individual of death or serious injury or illness. The Bill inserts a lower threshold of negligence.

As the Committee notes, this measure gives effect to a recommendation of Ms Marie Boland in the *Review of the model Work Health and Safety laws – Final report* (Boland Review). The Boland Review noted that there have been very few successful Category 1 prosecutions under harmonised work health and safety laws, in part due to difficulties associated with proving the fault element of recklessness. It was considered that the threshold to prove the fault element of recklessness was too high, and thus difficult to establish, which meant the offence was not meeting its objective to ensure compliance through deterrence. Recommendation 23a of the Boland Review was that 'gross negligence' should be included as a fault element in the Category 1 offence. I consider that these findings of the Boland Review support the necessity of this amendment.

The inclusion of negligence is also consistent with the considerations outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) which notes the use of negligence is supported where the context of negligence is a well-established indication of liability. The Guide expressly references work health and safety laws as an example. This is because work health and safety duties require the proactive identification and management of risks. Failure to do so, even without intent or recklessness, should be part of the Category 1 offence. Negligence is also important in this context because intent and recklessness can be difficult to prove, particularly in the case of larger businesses where decision making is diffuse.

The Category 1 offence specifies significant penalties, including 5 years imprisonment for an individual because of the harm that may result. A breach of work health and safety duties can have very harmful consequences for workers, including serious injury, illness or death. While negligence would not usually attract significant financial penalties and imprisonment terms there is strong justification here because of the harm that may result.

For the reasons outlined above I consider negligence to be an appropriate threshold and note that this amendment will also ensure that the Commonwealth work health and safety laws are aligned with the model and other jurisdictions as intended.

Use of 'reasonable excuse' defence in relation to the prohibition on insurance for work health and safety fines

New section 272A would prohibit insurance and other similar arrangements that cover the costs of a monetary fine or penalty imposed on a person under the WHS Act. It would create new offences for persons who provide or enter into these arrangements, with a defence available if the person can show they had a reasonable excuse for entering the contract or arrangement, providing the insurance or indemnity, or taking the benefit of the contract, arrangement or indemnity.

The WHS Act adopts in the Commonwealth jurisdiction the model work health and safety laws and is part of a harmonised framework which relies on consistency between jurisdictions. I note that the Guide cautions against the use of 'reasonable excuse' defences in Commonwealth laws and provides that the preference is to either rely on the *Criminal Code Act 1995* (the Criminal Code) or specific defences.

I consider the imposition of an evidential burden on the defendant to be appropriate in this situation. As the explanatory memorandum notes a reasonable excuse may be that the person granted the indemnity under duress, or entered the insurance contract based on negligent legal advice that led them to reasonably believe the contract did not cover monetary penalties under the WHS Act. The circumstances around the entering into a prohibited contract are matters which are likely to be peculiarly within the knowledge of the defendant and significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. For example, a defendant may be able to produce minutes from a board meeting where the insurance was discussed or waive legal privilege to produce the advice.

It is not possible to rely on the defences in the Criminal Code for this offence. In some sections the WHS Act relies on the Criminal Code, for example the definition of 'negligence' is adopted for Item 4 of the Bill. In this case however, it is not possible to rely solely on the defences in the Criminal Code because the defence of mistake of fact does not necessarily cover all situations which would be covered by reasonable excuse.

It is also not appropriate, on balance, to draft specific defences. Wherever possible, preference is given to alignment with the model work health and safety laws rather than bespoke drafting. I do not consider it appropriate to draft specific defences for the WHS Act because of the risk of misalignment and different operation between jurisdictions.

I trust this information is of assistance.

Yours sincerely

THE HON TONY BURKE MP

1 / 3 / 2023