Appendix 3

Correspondence

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
PARLIAMENT HOUSE
CANBERRA ACT 2600

Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017

Dear Chair

I refer to your letter dated 29 November 2017 in relation to the Parliamentary Joint Committee on Human Rights' (the Committee's) assessment of the Australian Broadcasting Corporation Amendment (Fair and Balanced) Bill 2017.

I welcome the opportunity to respond to the Committee's comments and provide the following advice under each comment:

Committee's comments:

1.27 The preceding analysis raises questions as to whether the measure constitutes a permissible limitation on the freedom of expression.

1.28 The committee therefore seeks the advice of the minister as to:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**

While the Australian Broadcasting Corporation's (ABC) Editorial Policies cover 'fair treatment' and 'a balance that follows the weight of evidence', these are only internal policies that can be amended at any time. The legitimate object of the Bill is to give certainty that it is a duty of the Board to ensure that the ABC's gathering and presentation of news and information is 'fair' and 'balanced' according to the recognised standards of objective journalism.

- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**

The purpose of the Bill is to provide certainty that the ABC continues to present its news and information in a 'fair' and 'balanced' manner. There is no other way to achieve this obligation in respect of the Board's duty, other than through legislation. The ABC's Editorial Policies, while a robust document, could be amended at any time to disregard such an important part of providing professional and steadfast journalistic news and information services. The Bill will ensure that 'fair' and 'balanced' reporting will be a duty of the Board as the obligation will be embedded in legislation.

- **whether the limitation is proportionate, including information as to the meaning of the words 'fair' and 'balanced', and whether those words are intended to have the same meaning in the bill as those words used in the ABC's editorial policy on impartiality.**

The ABC's own Editorial Policies require the ABC to adhere to fair treatment in the gathering and presentation of news and information, and a balance in its news reporting that follows the weight of evidence. The measure contained in this Bill aims to create unity between the ABC Act and the ABC Editorial Policies; it merely protects this obligation in legislation.

Thank you for your consideration on this issue.

Yours sincerely

MITCH FIFIELD

14/12/17

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MC17-111842

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letter of 6 December 2017, seeking a response to the Parliamentary Joint Committee on Human Rights *Report 13 of 2017*, concerning the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 [F2017L01311] (the CATSI Regulations).

In response to the Committee's request, I have enclosed advice regarding the nature of the documents and information that the Registrar of Indigenous Corporations (the Registrar) may make available to the public under the CATSI Regulations, and relevant safeguards in place for the protection of individuals' privacy.

The Committee can be assured that the Registrar is aware of, and takes seriously, the protection of the personal privacy of individuals, and this applies equally to any documents covered under section 55 of the CATSI Regulations that are currently held by the Registrar.

I acknowledge that this aspect of the CATSI Regulations may engage the right to privacy. However, the Registrar has established safeguards to ensure the protection of individuals' privacy whilst ensuring the important objective of supporting and regulating Aboriginal and Torres Strait Islander corporations. These safeguards ensure that the application of section 55 of the CATSI Regulations is effective and proportionate in relation to the right to privacy.

I trust this advice addresses the Committee's concerns and I look forward to working with you to assist in responding to future queries.

Yours sincerely

NIGEL SCULLION

12 / 12 / 2017

Advice in response to request from the Parliamentary Joint Committee on Human Rights

Advice in relation to the nature of the documents and information that the Registrar may make available to the public under the Corporations (Aboriginal and Torres Strait Islander) Regulations 2017 (the CATSI Regulations):

Section 55 of the CATSI Regulations deals with information and documents that were created in the context of the predecessor to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act), namely the *Aboriginal Councils and Associations Act 1976* (ACA Act). Chapter 9 of the Registrar's policy statement *PS-12: Registers and the use and disclosure of information held by the Registrar* specifically provides for this issue:

> **9 Information under the *Aboriginal Councils and Associations Act 1976* (ACA Act)**
> 9.1 Another function of the Registrar is to make documents and information relating to the registration of a corporation under the ACA Act available to the public, if the Registrar considers it appropriate. This includes documents and information that before the CATSI Act began were:
>
> - filed or lodged with the Registrar or served on the Registrar under the ACA Act
> - kept by the Registrar under the ACA Act or
> - given to or served on a person by the Registrar under the ACA Act.
>
> 9.2 In determining whether it is appropriate to release information or documents relating to the registration of an Aboriginal and Torres Strait Islander corporation under the ACA Act, the Registrar will consider:
>
> - whether the information or document would be exempt under the CATSI Act
> - whether a third party gave the information to the Registrar and the information related to a particular corporation – for example, information provided by a liquidator or administrator
> - whether there is a public interest or benefit in releasing the information.
>
> 9.3 The Registrar will not release information or documents which relate to a corporation under the ACA Act if they would be exempt information under the CATSI Act.
>
> 9.4 Any personal information contained in a document may be removed before its release.

The Registrar's policy statement, *PS-01: Providing information and advice,* outlines the nature of the information that the Registrar may make public as follows:

> 4.2 Information [that] is by its nature uncontroversial. Often information given will be 'public information'. It includes the following:
>
> - the name or Indigenous Corporation Number of a corporation
> - publicly available details about a corporation appearing on the Registrar's website
> - publicly available information or documents on the Register of Aboriginal and Torres Strait Islander Corporations
> - providing copies of a corporation's rule book to its members
> - the address and contact details of the Registrar or staff
> - general information about what functions the Registrar performs
> - information about the Registrar's public education programs
> - official publications produced by the Registrar
> - standard responses covered by the Registrar's publications.
>
> 4.3 Information may include telling people what forms to complete or procedures to follow.

4.4 Telling a person which part of the CATSI Act, the regulations, a corporation's rule book or a publication is relevant to their concern or query would also be information.

4.5 In some straightforward cases, providing an explanation of part of the CATSI Act, the Regulations or a corporation's rule book may be classified as information—for example, where the information:

- is a plain English explanation of a straightforward and uncontroversial clause which is well understood
- relates to provisions of the CATSI Act, the Regulations or model rule book for which the Registrar is responsible; and
- is information which is included in a Registrar's publication.

Relevant safeguards in place for the protection of individuals' privacy:

Paragraph 4.15 of *PS-01: Providing information and advice* states that: 'The Registrar is also bound by the Australian Privacy Principles in the *Privacy Act 1988* (Privacy Act), which regulate the collection, use, and storage and collection of personal information. Information received from individuals will be dealt with in accordance with these statutory requirements...'.

Paragraphs 7.1 to 7.8 of the Registrar's policy statement *PS-15: Privacy*, outlines the privacy obligations of the Registrar with respect to the use and disclosure of protected information. This applies to any equivalent material contained in documents created under the ACA Act that are held by the Registrar.

The Office of the Registrar of Indigenous Corporations (ORIC) has also published a privacy statement on its website to demonstrate its commitment to protect the privacy of officers of Aboriginal and Torres Strait Islander corporations. This statement can be found at http://www.oric.gov.au/privacy-statement. As ORIC is part of the Department of the Prime Minister and Cabinet (PM&C), it is also bound by PM&C's Privacy Policy.

Through the matters outlined in the relevant policy statements and the published privacy statements of ORIC and PM&C (published for the purposes of Australian Privacy Principles 1.3-1.5) as outlined above, the Registrar and ORIC are committed to the protection of the privacy of individuals in accordance with the Privacy Act. This includes any documents or information falling within the scope of section 55 of the CATSI Regulations.

Senator the Hon Marise Payne
Minister for Defence

Parliament House
CANBERRA ACT 2600

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MC17-000649

Chair
Parliamentary Joint Committee on Human Rights
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Dear Chair Tom.

Thank you for your letter of 29 November 2017 about the human rights compatibility of the Defence Legislation Amendment (Instrument Making) Bill 2017.

I understand that the Parliamentary Joint Committee on Human Rights is seeking advice as to whether the provision relating to the use of force in executing warrants is compatible with the right to life and with the right to freedom from torture, cruel, inhuman and degrading treatment or punishment.

While in most cases Defence can reach agreement with landowners regarding aviation hazards, the powers referred to in the new provisions of the Bill are important because they provide guidance in the event that agreement is not possible. The provision relating to use of force is aimed at achieving a legitimate objective, being the removal or reduction of hazards to defence aviation to enhance the safety of defence aviation.

Under new subsection 117AF(3), use of force against a person is limited to defence aviation area inspectors. Before appointing a defence aviation area inspector, the Secretary or the Chief of the Defence Force must be satisfied that the person has the knowledge, training or experience necessary to properly exercise the powers of a defence aviation area inspector. Since those powers include the power to use necessary and reasonable force, this will require the person to have sufficient knowledge, training or experience necessary to properly exercise the power to use force.

Importantly, the use of force is limited to what is necessary and reasonable. Factors that may be relevant in determining what is reasonable include the urgency of the aviation situation, other avenues that may be available to remove or reduce the hazard, the effect not removing or reducing the hazard will have on safety or operational requirements, and the particular circumstances of the person in question. Apart from a situation involving self-defence, it is difficult to imagine a scenario which would justify the deliberate use of lethal force or force that would cause serious injury to a person.

If a defence aviation area inspector used force beyond what was necessary or reasonable, they would be subject to the ordinary criminal law, and could be investigated and prosecuted the same as any other person. A person subjected to the use of force would be able to report to the police or complain to Defence.

In this context, Defence considers that the chances of this provision limiting the right to life or the right to freedom from torture, cruel, inhuman and degrading treatment or punishment, extremely remote.

If you would like further information about this matter, please contact Ms Lynne Ross, Director, Defence Legal, on , or by email tc

I trust this information assists.

Yours sincerely

MARISE PAYNE

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB17-003722

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Fair Work Laws Amendment (Proper use of Worker Benefits) Bill 2017

This letter is in response to your letter of 29 November 2017 concerning issues raised in the Parliamentary Joint Committee on Human Rights' *Human Rights Scrutiny Report No.12 of 2017* in relation to the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the Bill).

The Australian Government made an election commitment to implement the majority of the recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption. The Bill responds to 10 recommendations of the Royal Commission. These relate to financial management and accountability (recommendations 9, 10, 17 and 39), the regulation of worker entitlement funds (recommendations 45, 46 and 49), election payments (recommendation 43), prohibiting coerced payments to employee benefit funds (recommendation 50) and disclosable arrangements (recommendation 47).

The Bill addresses Government and community concerns, highlighted by the Royal Commission, that the current regulation of registered organisations and their related entities is not satisfactory. Consistent with the Royal Commission recommendations, the Bill will provide for increased transparency of the financial affairs of registered organisations and worker entitlement funds to ensure greater accountability to the members of registered organisations.

I strongly reject any suggestion that the Bill limits rights to freedom of association or collective bargaining. In fact, the Bill significantly enhances the rights of workers for whom large sums of money are managed on their behalf, by ensuring that this money is properly accounted for and only used for legitimate purposes.

My detailed response to each of the issues raised in your correspondence is attached. I trust the Committee will find the information useful.

Yours sincerely

Senator the Hon Michaelia Cash
13 / 12 / 2017

Encl.

Attachment A

Detailed response to issues raised in *Human Rights Scrutiny Report No.12 of 2017*

FAIR WORK LAWS AMENDMENT (PROPER USE OF WORKER BENEFITS) BILL 2017

Compatibility with the right to freedom of association, the right to just and favourable conditions at work and the right to freedom of assembly and expression

Prohibiting terms of industrial agreements requiring or permitting payments to unregistered worker entitlement funds

The Committee asks:

- **whether the limitation is a reasonable and proportionate measure to achieve its stated objective (addressing findings by relevant international supervisory mechanisms about whether the limitation is permissible); and**
- **whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.**

Current provisions

Subdivision D of Part 2-3 of the *Fair Work Act 2009* (FW Act) provides for terms that must not be included in modern awards.

Section 194 of the FW Act defines 'unlawful term' in relation to terms of enterprise agreements.

Part 2-9 of the FW Act regulates other terms and conditions of employment.

Changes proposed through the Bill

Schedule 2 of the Bill would amend section 194 and add new sections 151A and 333B to the FW Act to prohibit any term of a modern award, enterprise agreement or contract of employment requiring or permitting contributions for the benefit of an employee to be made to any worker entitlement fund that is not a registered worker entitlement fund.

Discussion

As noted by the Committee:

> ... the measure does not prohibit contributions to worker entitlement funds but requires any contributions 'to be made to registered worker entitlement funds that are subject to basic governance and disclosure requirements designed to address potential conflicts of interest, breaches of fiduciary duty and the potential for coercion'. As such the measure would appear to be rationally connected to its stated objective.[1]

Reasonableness and proportionality

The Committee considers that the prohibition of terms of industrial agreements requiring or permitting payments to unregistered worker entitlement funds engages and limits the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work; and raises questions as to its compatibility with these rights.

Any worker entitlement fund, including those controlled by any industrial association, can be registered provided it meets basic governance and disclosure requirements. These requirements are designed to address potential conflicts of interest, breaches of fiduciary duty and coercive conduct. There is no restriction on who can be a member of a fund. The provisions enhance the right to just and favourable conditions of work by ensuring that money held by worker entitlement funds is used to benefit workers. The amendments will provide employees with a guarantee that any contributions they voluntarily make to a worker entitlement fund is subject to appropriate scrutiny and oversight.

To the extent that the prohibition may engage any of these rights, the measure is reasonable and proportionate and enhances workers' rights by ensuring that money held on their behalf is protected. The amendments are the least rights restrictive possible in that they do not represent an unqualified

[1] *Human Rights Scrutiny Report No.12 of 2017*, p 19, para 1.61.

prohibition on terms of industrial agreements that provide for contributions to worker entitlement funds. Rather, they require such contributions to be made to registered worker entitlement funds that are subject to basic governance and disclosure obligations.

The International Labour Organization (ILO) has stated that 'Restrictions on [the] principle [of leaving the greatest possible autonomy to organizations in their functioning and administration] should have the sole objective of protecting the interests of members'.[2]

To the extent the proposed provisions may engage with these rights they do so only to protect the rights of workers by ensuring that their money is properly managed and their interests protected.

The provisions support the basic governance and disclosure requirements of the Bill that are designed to address potential conflicts of interest, breaches of fiduciary duty and potential for coercive conduct that were found by the Royal Commission into Trade Union Governance and Corruption (Royal Commission) in examining the operation in Australia of worker entitlement funds. As such, the amendment protects the interests of workers.

Consultation

The Bill, including these provisions, was the subject of consultation with worker entitlement funds and employee and employer organisations prior to introduction. All worker entitlement funds registered for the purpose of fringe benefits tax laws were invited to consultation. Employee and employer organisations and their peak councils were consulted through the Committee on Industrial Legislation.

In addition, the recommendations of the Royal Commission implanted by this Bill were the subject of extensive consultation and discussion by the Royal Commission, which invited submissions from any interested parties.

Regulation of worker entitlement funds

The Committee asks:

- **whether the measure is aimed at pursuing a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is the least rights restrictive way of achieving its stated objective).**

Current provisions

An ASIC class order currently exempts worker entitlement funds from regulation under the *Corporations Act 2001*.

Contributions to 'approved worker entitlement funds' under the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act 1986) are exempt from fringe benefits tax. Funds can be approved if they meet certain minimum criteria, largely concerned with how fund money can be spent. This imposes a degree of indirect regulation on these funds.

Changes proposed through the Bill

The Bill will amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to insert new Part 3C of Chapter 11 to apply governance, financial reporting and financial disclosure requirements to worker entitlement funds. As noted by the Committee, Schedule 2 of the Bill would require worker entitlement funds to meet requirements for registration and meet certain conditions relating to financial management, board composition, disclosure and how money is spent. These conditions include that a worker entitlement fund will only be able to be operated by a corporation and cannot be operated by a registered organisation (proposed new section 329LA condition 2).[3]

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[2] ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO Geneva* Fifth (revised) Edition, 2006, para 369.

[3] *Human Rights Scrutiny Report No.12 of 2017*, p 20, para 1.64–1.65.

Discussion

The Committee is concerned that the prohibition on registered organisations administering worker entitlement funds and limiting the purposes for which money may be used appears to engage and limit the right to freedom of association and the right to just and favourable conditions of work.[4]

The objective of the Bill in relation to the administration of worker entitlement funds and limiting the purposes for which worker entitlement fund income and contributions can be used is to ensure that workers' entitlements are managed responsibly and transparently and in their interests. Funds will have to be run by trained professionals of good fame and character and fund money will be restricted from being re-characterised and spent for unauthorised purposes. These measures are intended to prohibit what the Royal Commission found were substantial payments flowing out of worker entitlement funds to other parties for purposes other than paying members.[5]

Requiring the registration of worker entitlement funds and placing conditions on that registration are measures that are rationally connected to the objective of ensuring that workers' entitlements are managed responsibly and transparently in their interests.

Requiring a fund operator to be a constitutional corporation is necessary to ensure that the provisions regulating such funds are valid. A similar requirement applies to superannuation funds under the *Superannuation Industry (Supervision) Act 1993*.

Requiring that a fund operator cannot be an organisation is designed to prevent conflicts of interest for worker entitlement funds that also make substantial payments to those organisations for purposes other than paying members worker entitlements.

In this respect, the Royal Commission stated that:

> The very substantial revenue flows to unions generate significant conflicts of interest and potential breaches of fiduciary duty on the part of unions and union officials negotiating enterprise agreements … In short, the union and union officials owe a duty to act in the interests of union member employees when negotiating enterprise agreements. At the same time, there is a significant potential and incentive for the union to act in its own interests to generate revenue.[6]

The worker entitlement fund, Incolink, provides an example of the substantial revenue that flows to unions and employer groups. Between 2011 and 2015, the Construction, Forestry, Mining and Energy Union (CFMEU), the Master Builders Association of Victoria and the Plumbing Joint Training Fund together received over $85 million from Incolink.[7] These organisations are all represented on the board of Incolink.

In addition, none of the existing worker entitlement funds that are approved under the FBTA Act 1986 are operated by registered organisations; most worker entitlement funds are run by corporations with a mix of representatives from employer and employee associations on their boards. The Bill does not alter this position. Officers of registered organisations can still sit on the board of worker entitlement funds.

The Bill also retains the existing legal limits on how contributions and income of a fund can be spent under the FBTA Act 1986.

To the extent that these measures may limit human rights, any limitation is reasonable and proportionate in achieving the objectives of the Bill. Commensurate with this, the measures are the least rights restrictive as they do not prevent contributions to worker entitlement funds but provide appropriate governance and transparency to ensure that workers' entitlements are managed responsibly and transparently in their interests. They also take into account the feedback provided by funds during consultation, including to allow funds to use income to pay for training and welfare

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[4] *Human Rights Scrutiny Report No.12 of 2017*, p 20, para 1.66.
[5] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 5, p 304.
[6] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 5, p 305.
[7] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 4, pp 980–986.

services, subject to appropriate criteria, and the provision of a separate regulatory scheme for single employer worker entitlement funds.

Prohibiting terms of industrial instruments requiring payments to election funds

The Committee asks:

- **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is the least restrictive way of achieving its stated objective).**

Current provisions

There are currently no provisions in the FW Act or RO Act that deal with terms of industrial instruments requiring or permitting employees to pay into election funds. This is despite the fact that section 190 of the RO Act prohibits an organisation from using its resources for the purposes of the election of a particular candidate. Because election funds are structurally separate from the organisation, they are not captured by this provision.

Changes proposed through the Bill

Schedule 3 of the Bill would amend section 194 of the FW Act to prohibit any term of an enterprise agreement or contract of employment requiring or permitting employee contributions for a regulated election purpose.

Schedule 3 would also amend Part 2-9 of the FW Act to provide that any term of a contract of employment requiring or permitting payments for a regulated election purpose will have no effect.

A 'regulated election purpose' is one that includes the purpose of funding, supporting or promoting the election of candidates for election to office in an industrial association.

Discussion

The Committee considered that prohibiting the inclusion of particular terms in an enterprise agreement interferes with outcomes of the bargaining process and, accordingly, engages and limits the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association.

Election funds are established to fund election campaigns for office within registered organisations and are regularly sourced from contributions from employees of such organisations. These funds are usually managed by one or more individuals who hold elected office within the organisation. They are not established in the interests of workers who are subject to the collective agreement but rather the interests of officials of the bargaining representative. The Royal Commission found that such arrangements unfairly disadvantage candidates who are not already in office and have been misused by officials controlling the funds where there are no contested elections. The Royal Commission also found a lack of oversight of election funds, with information about revenue and expenditure sometimes hidden, or not kept at all.[8]

The amendments remove any legal or practical compulsion on employees to contribute to a particular election fund. They ensure employees have a choice about whether to contribute to the particular fund.

In the case that the amendments may limit human rights, they are reasonable and proportionate. The amendments are the least rights restrictive possible in that they do not provide for an absolute prohibition on contributions to election funds. Employees will still be able to make genuine contributions, voluntarily and independently of an industrial instrument.

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[8] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 5, pp.280-281.

By seeking to remove any legal or practical compulsion on employees to contribute to election funds, the amendments also engage and enhance the right to freedom of association by allowing choice in respect of contributions to election funds.

Prohibiting any action with the intent to coerce a person to pay amounts to a particular fund

The committee asks:

- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).**

The committee also asks in respect of the same measure:

- **the scope of any restriction on the right to freedom of expression and assembly;**
- **whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) its stated objective; and**
- **whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is sufficiently circumscribed, any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).**

Current provisions

Part 3-1 of the FW Act provides for general workplace protections. It contains specific prohibitions against coercive behaviour in relation to workplace rights (section 343) and industrial activities (348). However, the Part does not specifically prohibit coercive action in relation to the making payments to certain funds, particularly where such action occurs outside of the enterprise bargaining process. These funds include superannuation funds, training and welfare funds, worker entitlement funds and insurance arrangements and are collectively referred to by the Royal Commission as 'worker benefit funds'.

Changes proposed through the Bill

Schedule 4 of the Bill would amend Part 3-1 of the FW Act to insert a new section 355A to prohibit a person from taking coercive action in relation to the making of payments to a particular worker benefit fund. This would fix an existing gap in the Act, which prohibits coercion in relation to a wide range of other conduct, but not in relation to contributions to funds.

Discussion

The Committee is concerned that this measure circumscribes the right to strike as protected by the right to freedom of association.

On the contrary, compelling contributions to a particular worker benefit fund infringes basic principles of freedom of association and, by prohibiting mandatory contributions, the amendment is in fact promoting human rights. The amendment addresses the problems identified by the Royal Commission in a reasonable, necessary and proportionate manner.

The Bill does not alter the circumstances in which industrial action will be considered protected industrial action, or the consequences provided for failures to comply with Part 3-3 of the FW Act, dealing with industrial action. The Royal Commission recommended that coercion to pay into a worker entitlement fund be prohibited in response to a number of examples of inappropriate pressure being applied to secure payments into worker entitlement funds. For example, the Royal Commission found that the CFMEU engaged in 'a protracted campaign of industrial blackmail and extortion'

against Universal Cranes to secure payments to specific worker entitlement funds. Those funds provided substantial financial benefits to the CFMEU illustrating a clear conflict of interest. The union undertook this campaign in spite of employees choosing to adopt in-house schemes for redundancy and sick leave that offered them better value for money.[9]

In response to this evidence, the measure in Schedule 4 of the Bill addresses a gap in the current coercion protections in the FW Act. In its Final Report the Royal Commission noted:

> Accordingly, action done to coerce an employer to agree to a particular term of an enterprise agreement requiring contributions to a particular employee benefit fund is prohibited. However, it is doubtful whether action taken outside the enterprise bargaining process, for example, as part of seeking to come to a 'side deal' between employer and union, would be caught.[10]

The current FW Act provisions are not specifically designed to address this behaviour—they may do so, but not in all circumstances. This amendment will put the issue beyond doubt and pursues the legitimate objective of reducing the potential for coercive behaviour outside the enterprise bargaining process, for example in side deals.

The Committee is also concerned that the measure circumscribes the right to freedom of expression as set out in Article 19 of the International Covenant on Civil and Political Rights (ICCPR) and the right of peaceful assembly set out in Article 21 of the ICCPR. It is not clear how the relevant rights are engaged as the measure does not interfere with an individual's right to hold opinions without interference, the right to freedom of expression or the freedom to seek, receive and impart information and ideas of any kind or the right of peaceful assembly. In any event, the amendment pursues the legitimate objective of ensuring that a person cannot coerce another person to make payments into certain worker benefit funds and is reasonable and proportionate.

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[9] Royal Commission into Trade Union Governance and Corruption, *Interim Report*, 2014, Volume 2, p 1400.
[10] Royal Commission into Trade Union Governance and Corruption, *Final Report*, 2015, Volume 5, p 338.

TREASURER

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letters of 29 November 2017 on behalf of the Parliamentary Joint Committee on Human Rights (the committee) in relation to issues raised in the committee's *Report 12 of 2017* concerning the following Bills:

- Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017; and
- Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017.

I would like to thank you for the opportunity to provide further information on the issues identified by the committee. I have addressed each of the issues in **Attachment A** to this letter.

I trust that this information will be of assistance to the committee.

Yours sincerely

The Hon Scott Morrison MP

12 / 12 / 2017

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ATTACHMENT A

RESPONSE TO QUESTIONS FROM THE COMMITTEE

Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017

Issue: Compatibility of the measure with the right not to incriminate oneself

Noting the preceding analysis, the committee seeks the advice of the Treasurer as to:

1. **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;**

2. **how the measure is effective to achieve (that is, rationally connected to) that objective;**

3. **whether the limitation is proportionate to achieve the stated objective;**

4. **whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure;**

5. **whether a derivative use immunity is reasonably available as a less rights restrictive alternative in sections 62ZOD of the Insurance Act 1973 and 179AD of the Life Insurance Act 1995 to ensure information or evidence indirectly obtained from a person compelled to give information or documents cannot be used in evidence against that person.**

Explanation:

1. Objectives

The information gathering powers in proposed sections 62ZOD of the *Insurance Act 1973* (Insurance Act) and 179AD of the *Life Insurance Act 1995* (Life Insurance Act) form part of proposed statutory management regimes to be inserted by the Bill into the Insurance Act and Life Insurance Act. These regimes are based on existing provisions in the *Banking Act 1959* (Banking Act) and will enable APRA to appoint a statutory manager to an insurer or, in certain circumstances, a related body corporate. Appointment of a statutory manager will generally only occur in situations of urgency, for example where the failing insurer poses a threat to financial system stability.

There is a pressing need for such a measure because of the lack of a statutory management regime for insurers as compared with the Banking Act and consequently, a substantial gap in APRA's resolution regime for insurers to effectively and efficiently manage and resolve a distressed or failing insurer. Statutory management powers will be exercised with the broad objectives of protecting the interests of policyholders of insurers and ensuring the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the limitation upon the right to claim privilege against self-incrimination in the measure is warranted and justified.

2. Effectiveness in achieving objectives

The proposed information gathering powers (proposed sections 62ZOD of the Insurance Act and 179AD of the Life Insurance Act) are based on the existing section 14A of the Banking Act. It is critical that a statutory manager, having taken over what will often be an insolvent or near insolvent financial institution or related entity, be in a position to obtain all relevant information relating to the business of the body corporate from officers (and former officers) in order for the statutory manager to control, stabilise, investigate and (to the extent possible) resolve the body corporate or resolve a related entity.

Overriding the privilege against self-incrimination is justified in this context because only the key personnel of an insurer will have access to information and documents relating to the insurer's business, including its financial condition. It is essential for a statutory manager to be able to obtain this information quickly to assist with the management and crisis resolution of an insurer that is financially distressed. In circumstances where an insurer is distressed or failing, especially where its failure may have an adverse effect on financial stability, time is of the essence in ensuring the orderly resolution of the insurer. By compelling relevant officers or ex-officers promptly to provide required information and documents relating to the business of the body corporate, statutory managers will be able to maximise their ability to rehabilitate a distressed insurer, or to ensure an orderly resolution and exit of a failing insurer. This will ultimately benefit the insurer's customers, creditors and other suppliers. In the event of a significant crisis, APRA would also be able to use the information gathered to support decision making and prevent contagion in the financial system, ensuring that financial system stability is maintained.

3. Proportionality of measures

The limitation to the privilege against self-incrimination is proportionate to achieve the stated objective due to the limited circumstances in which the proposed powers may be exercised. The information gathering powers in question can only be used where a statutory manager has been appointed, and there is a high threshold for triggering the appointment of a statutory manager to an insurer or related body corporate.

In order to appoint a statutory manager to an insurer, APRA must be satisfied that a condition for the appointment of a judicial manager exists (e.g. insolvency) and that at least one of a number of further conditions is satisfied (e.g. the failure of the insurer poses a threat to the stability of the financial system). Similarly, if the appointment of the statutory manager is to a related body corporate of an insurer, APRA must be satisfied that a relevant threshold test has been met (e.g. that a statutory manager has been or can be appointed to the insurer and the related body corporate supplies essential services to the insurer).

4. Sufficiency of circumscription

As noted above, the information gathering powers in question can only be used where a statutory manager has been appointed. This means that the proposed information gathering powers are not likely to be exercised except in circumstances warranting their use. The powers only relate to information relating to the business of the body corporate under statutory management.

The powers are further circumscribed in that they apply only in relation to an 'officer' as defined in section 9 of the *Corporations Act 2001* (the Corporations Act) (e.g. a director or other senior person with significant strategic responsibilities in relation to the failing entity), and a person who has been such an officer. Circumstances may exist where the failure of the insurer can be attributed to a failure by one or more officers to comply with their statutory responsibilities, including where there has been a breach of Corporations Act provisions carrying an offence. This raises the real possibility of the statutory manager's ability to fulfil his

or her duties being hampered by a refusal to provide information on self-incrimination grounds, making the override of the privilege against self-incrimination necessary in this instance.

5. Derivative use immunity

As the committee has noted, direct use immunity is conferred by these provisions, but not derivative use immunity. The reason for this is that if derivative use immunity is applied, it would often be very difficult for the prosecution to show that the evidence they rely on to prove a criminal case against an officer relating to the failure of the financial institution was uncovered through an absolutely independent and separate investigation process. This may in turn lead to hesitation on the part of a statutory manager to exercise the information gathering power, undermining the purpose for which the power was conferred.

If derivative use immunity applied, then further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information-obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.

These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the *Superannuation Industry (Supervision) Act 1993* (the SIS Act) and *Private Health Insurance (Prudential Supervision) Act 2015* (PHI Act).

The committee has also noted the difference between APRA's proposed information gathering powers (in proposed sections 62ZOI of the Insurance Act and 179AI of the Life Insurance Act), which includes derivative use immunity, and the proposed statutory manager's powers to require officers to provide information (in proposed sections 62ZOD and 179AD), which do not. This difference currently exists in the context of the Banking Act between existing provisions (namely sections 14A and 14AD) that correspond to those proposed for the Insurance and Life Insurance Acts.

APRA's information gathering power applies in respect of any person while the statutory manager's information gathering power is more circumscribed in scope and applies only in respect of officers (and ex-officers) of an insurer. This is a crucial distinction. Officers are in a different situation to ordinary persons in that they are the key personnel of the insurer with greater access to the relevant information and documents relating to the insurer. Also, an officer may well have breached directors' duties in connection with the failure of the insurer. Therefore, while use immunity is appropriate in this context, derivative use immunity may impede any prosecution or penalty proceedings against these officers for breach of their duties, especially given the issues identified above relating to the application of derivative use immunity. By contrast, APRA's information gathering power extends to any person, including an ordinary citizen, and the greater protection afforded by derivative use immunity is justified in this particular context because of the wider scope of the power.

Issue: Compatibility of the measure with the right to privacy

The preceding analysis raises questions about whether the amendment to section 42 of the Transfer Act is compatible with the right to privacy.

The committee therefore seeks the advice of the Treasurer as to:

1. **whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are**

otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;

2. **how the measure is effective to achieve (that is, rationally connected to) that objective; and**

3. **whether the limitation is proportionate to achieve the stated objective.**

Explanation:

1. Objectives

APRA's current powers under the *Financial Sector (Business Transfer and Group Restructure) Act 1999* (Transfer Act) enable it to compulsorily transfer all of the assets and liabilities of a failing regulated entity to another regulated entity. Compulsory business transfer is an important power among the resolution options available to APRA when managing the distress or failure of a regulated entity. Accordingly, the Transfer Act enables some or all of the business of a regulated entity (including assets, liabilities, legal rights and obligations, data and systems) to be transferred to another regulated entity to facilitate the resolution of the entity.

Existing section 42 of the Transfer Act provides that APRA may, in connection with a compulsory transfer, or a proposed or possible compulsory transfer, provide information (including personal information or confidential commercial information) to the receiving body, or to the possible or proposed receiving body, about the business that is to be, or that may be, transferred.

This provision is necessary under the current framework (i.e. where APRA may require a transfer of business) because the receiving body's board of directors must consent to the transfer and be in a position to undertake due diligence on the business being transferred. The business being transferred will usually include employment contracts (that is, staff will usually be transferred) and include records of insurance contracts which may cover customers who are individuals.

However, there is no current power under the Transfer Act to transfer a failing regulated entity's shares to another body corporate as a means of achieving the same outcome. The Bill supplements the Transfer Act by providing that, as an alternative to requiring a transfer of business, APRA may transfer the shares (ownership) of the failing entity to a new owner. The ability to transfer the shares of a failing regulated entity could, in some circumstances, provide a more efficient and simpler means of achieving an orderly resolution, than affecting a full transfer of all of the assets and liabilities of the entity. This is an enhancement of the Transfer Act to provide APRA with greater flexibility and certainty when considering the resolution options available to address and resolve a failing entity. The enhancement will enable APRA to more quickly achieve an orderly resolution of a distressed entity which is in the interests of most Australians as it helps prevent contagion in the financial system, ensuring that financial system stability is maintained.

As with other resolution powers to be exercised by APRA, compulsory transfer powers are exercised with the broad objectives of protecting the interests of depositors and policyholders and maintaining the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the limitation to privacy in the measure is warranted and justified.

2. Effectiveness in achieving objectives

As explained in the statement of compatibility referred to by the committee, the proposed information sharing provisions (in particular, the amended section 42, applicable to both transfer

of shares and transfer of business) are a necessary component of the framework for transfers under the Transfer Act.

In order for APRA to require a compulsory transfer, a receiving body's board must consent to the transfer from the transferring body (as is currently the case with a transfer of business). As with a transfer of business, in order for the receiving body's board to consent, it must be apprised of relevant knowledge of what is to be transferred to it, including all relevant information and documentation pertaining to the transferring body which may contain personal information relating to staff or individuals who have insurance or other arrangements with the failed entity. Without being so informed, it is impossible for the board to reach a decision as to whether to consent to the transfer. Therefore the information sharing provisions ensure that the receiving body can be provided relevant information about the staff, management and insurance arrangements as part of their due diligence when they are deciding whether or not to consent to the transfer.

3. Proportionality of measures

The limitation to privacy is proportionate to the stated objective as it is subject to appropriate safeguards. In terms of the safeguards referred to in the committee's comments, it is important to recognise that section 56 of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) imposes confidentiality upon APRA officers in respect of 'protected information' and 'protected documents'. Broadly, documents and information become 'protected' by virtue of both having been received by APRA and relating to the affairs of entities that APRA regulates, or customers of those entities, or entities that APRA registers or collects data from under the *Financial Sector (Collection of Data) Act 2001* (FSCODA).

Subsection 56(2) of the APRA Act makes it an offence for a person who is, or has been, an APRA officer to disclose protected information or a protected document to any person or to a court, subject to certain exceptions. Information relating to a transferring body subject to the proposed information sharing provisions under the measure would be protected information under section 56 of the APRA Act as having been received by APRA and relating to the affairs of entities regulated by APRA.

The secrecy regime under section 56 extends to the receiving body's officers because they fall within paragraph (c) of the definition of 'officer' in subsection 56(1) of the APRA Act (received in course of their employment). As such, onward disclosure of the information by the receiving body to other persons is restricted under section 56.

Also, as noted in section 42 of the Transfer Act, subsection 56(9) of the APRA Act allows for conditions to be imposed on disclosure of protected information to restrict the use to which the receiving body may put the information to. Failure to comply with any condition so imposed is an offence. For example, if APRA were to disclose information about staff or insurance contracts of a failed insurer to a body corporate that was considering taking on ownership of the failed insurer via a transfer of shares, APRA could impose conditions under subsection 56(9) on the body corporate and its officers at the time of disclosing the information. Such conditions might require the recipients to only use the information for the purposes of deciding whether or not to accept the transfer, and not to further disclose the information.

As such, the secrecy regime under section 56 of the APRA Act affords an effective and appropriate degree of protection to any personal information that may be included within protected information. Where the information is provided to a statutory manager, it is important to note that a statutory manager is, in any case, subject to the secrecy regime under section 56 of the APRA Act, as signposted under subsection 14C(5) of the Banking Act, and proposed subsections 62ZOK(4) and 179AK(4) of the Insurance Act and Life Insurance Act respectively.

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-020470

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

8 DEC 2017

Dear Chair Ian

I refer to your letter of 29 November 2017 on behalf of the Parliamentary Joint Committee on Human Rights. In your letter, you requested additional information on the requirements of the Medicare obstetrics items which were amended on 1 November 2017 by the *Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017.*

On 10 November 2017, I wrote to the Standing Committee on Senate Regulations and Ordinances on the nature of the mental health assessment required to be conducted for antenatal items 16590 and 16591 and new postnatal item 16407. In the response, I noted the following:

- The mental health assessment can be met if the medical practitioner enquires about the mental wellbeing of the patient. This is a mandatory requirement.
- If the patient consents to a comprehensive assessment, the medical practitioner can discuss significant risk factors to the patient's wellbeing (such as drug and alcohol use and domestic violence).
- If the patient does not consent to a comprehensive assessment, a Medicare benefit is still payable for the service. This ensures that all patients will continue to have access to Medicare-subsidised obstetrics services.

I have enclosed a copy of my response for your information.

The provision of a comprehensive mental health assessment, subject to the patient's consent, is intended to enable the prevention or early detection of mental health disorders. These disorders, which affect one in 10 women during pregnancy and one in seven women after birth, have the potential to have a negative impact on the physical and mental wellbeing of mothers and their children.

The obstetrics changes are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Women will continue to have access to subsidised obstetrics services under Medicare, which is consistent with Articles 9 and 12 of the International Covenant on Economic Social and Cultural Rights (ICESCR). Women who elect to have a comprehensive mental health assessment will enjoy an improved standard of treatment for obstetrics care. The assessment will also contribute to the healthy development of the child.

You asked for clarification on the meaning of the word 'screening' in items 16590 and 16591 and new postnatal item 16407. In the context of these items, screening does not involve the use of any diagnostic techniques such as diagnostic imaging or pathology tests. Screening is simply asking patients a series of questions on certain risks factors. In other words, it is part of the comprehensive mental health assessment which the patient may or may not consent to. This terminology would be understood by medical practitioners and is consistent with the relevant clinical guidelines, *Mental Health Care in the Perinatal Period: Australian Clinical Practice Guideline*.

As noted above, if the patient does not consent to a comprehensive assessment, a Medicare benefit is still payable for the service.

The mental health assessment is minimally invasive and does not limit the patient's right to privacy under Article 17 of the International Covenant on Civil and Political Rights.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl (1)

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

Ref No: MC17-018079

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

10 NOV 2017

Dear Chair

Healthcare Identifiers Amendment (Healthcare Identifiers of Healthcare Providers) Regulations 2017

Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017

Sections 20 and 25D of the *Healthcare Identifiers Act 2010* (HI Act) enable regulations to authorise the collection, use, disclosure or adoption of healthcare identifiers for health-related purposes, and were included in the HI Act in 2015 as a result of a recommendation made by the *Healthcare Identifiers Act and Service Review, Final Report – June 2013* (the HI Review). The HI Review recognised a number of uses of healthcare identifiers that were not anticipated by the HI Act but would have the potential to deliver significant improvements in healthcare, and recommended that the Australian Health Ministers' Advisory Council (AHMAC) consider amending the HI Act to provide a regulation-making power to prescribe additional organisations that could handle healthcare identifiers.

AHMAC, and subsequently Council of Australian Governments (COAG) Health Council in August 2015, agreed to amend the HI Act to establish this mechanism. At that time Health Ministers also agreed that AHMAC agreement would be sought on all legislative instruments under the HI Act, with escalation to Health Ministers as appropriate. This office and my Department continue to honour this commitment.

The mechanism to make these regulations enables the Government to provide new authorisations more quickly than would be possible if amendments to the Act were needed each time a new entity is identified, providing more responsiveness for supporting entities that provide health-related support to consumers.

The *Healthcare Identifiers Amendment (Healthcare Identifiers of Healthcare Providers) Regulations 2017* (the Amendment Regulations) reinstate, in part, authorisations that were inadvertently removed as part of the 2015 changes. The absence of these authorisations began having adverse effects on the effectiveness of healthcare identifiers – for example, primary health networks could not collect healthcare providers' healthcare identifiers as part of managing healthcare delivery in their region, which is important in enabling primary health networks to work together to facilitate and evaluate the delivery of healthcare. It also created a barrier to the delivery of certain types of mobile apps that could connect to the My Health Record system – apps that would otherwise help individuals to manage their health information.

The Amendment Regulations were made as an interim measure to provide these much needed authorisations until they could be reinstated in their entirety through amendments to the HI Act. A review of the HI Act is scheduled to begin in coming months for delivery by November 2018 and it is likely to recommend amendments to the HI Act. It is intended that the removed authorisations be reinstated as part of those amendments as soon as practicable after the review is delivered.

The *Health Insurance (General Medical Services Table) Amendment (Obstetrics) Regulations 2017* implements the Government's response to the recommendations of the Medicare Benefits Schedule (MBS) Review Taskforce (the Taskforce) in relation to obstetrics services. These recommendations were subject to consultation and public feedback prior to the finalisation of the Taskforce's recommendations, with most respondents supporting the recommendations.

I note the Committee's request for information around the nature of the mental health assessment required to be conducted for amended antenatal items 16590 and 16591 and new postnatal item 16407. The Government does not intend to prescribe the method by which practitioners undertake mental health assessments of their patients, as this should be a matter of clinical judgement based on the individual needs of the patient. However, it is recommended that when conducting mental health assessment screening practitioners have regard to the appropriate and current Australian Clinical Practice guidelines.

Alcohol or drug misuse are significant risk factors that can negatively affect both the mental health of the patient and the wellbeing of infants. As part of an antenatal (16590 and 16591) or postnatal (16407) service, it is expected that a medical practitioner be required to enquire about the mental wellbeing of the patient and undertake a more comprehensive assessment where agreed to by the patient. This would include a discussion about factors that pose a significant risk to mental health, such as drug and alcohol use and domestic violence. This would then enable monitoring or referral for appropriate assessment, support and treatment, and facilitate education about the inherent risks of drug and alcohol misuse in pregnancy.

It is not intended that the screening for drug and alcohol use would require diagnostic testing of the patient. It is also not intended that a patient would be ineligible for Medicare benefit if the patient declines to receive a comprehensive mental health assessment. In that scenario, a Medicare benefit would still be payable providing the medical practitioner had enquired about the patient's mental wellbeing. This is outlined in the explanatory notes that are available on www.mbsonline.gov.au to assist practitioners when seeking information and guidance around the billing of items under Medicare. A copy of this note is attached.

I acknowledge that the explanatory statement for this instrument is not clear with regards to consent. My Department will look to correct this in the explanatory statement when the *Health Insurance (General Medical Services Table) Regulations* are remade in mid-2018.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

Encl 1 – MBS explanatory note

Technical requirements

In order to fulfill the item descriptor there must be a visual and audio link between the patient and the remote practitioner. If the remote practitioner is unable to establish both a video and audio link with the patient, a MBS rebate for a telehealth attendance is not payable.

Individual clinicians must be confident that the technology used is able to satisfy the item descriptor and that software and hardware used to deliver a videoconference meets the applicable laws for security and privacy.

TN.4.13 Mental Health Assessments for Obstetric Patients (Items 16590, 16591, 16407)

Items for the planning and management of pregnancy (16590 and 16591) and for a postnatal attendance between 4 and 8 weeks after birth (16407), include a mental health assessment of the patient, including screening for drug and alcohol use and domestic violence, to be performed by the clinician or another suitably qualified health professional on behalf of the clinician. A mental health assessment must be offered to each patient, however, if the patient chooses not to undertake the assessment, this does not preclude a rebate being payable for these items.

It is recommended that mental health assessments associated with items 16590, 16591, and 16407 be conducted in accordance with the National Health and Medical Research Council (NHMRC) endorsed guideline: *Mental Health Care in the Perinatal Period: Australian Clinical Practice Guideline* – October 2017, Centre for Perinatal Excellence.

Results of the mental health assessment must be recorded in the patient's medical record. A record of a patient's decision not to undergo a mental health assessment must be recorded in the patient's clinical notes.

TN.4.14 Extended Medicare Safety Net (EMSN) for Obstetric Services (Items 16531, 16533 and 16534)

The Extended Medicare Safety Net (EMSN) benefit is capped at 65% of the schedule fee for obstetric items 16531, 16533, and 16534. However, as these items are for in-hospital services only, the EMSN does not apply

TN.6.1 Pre-anaesthesia Consultations by an Anaesthetist - (Items 17610 to 17625)

Pre-anaesthesia consultations are covered by items in the range 17610 - 17625.

Pre-anaesthesia consultations comprise 4 time-based items utilising 15 minute increments up to and exceeding 45 minutes, in conjunction with content-based descriptors. A pre-anaesthesia consultation will attract benefits under the appropriate items based on **BOTH** the duration of the consultation **AND** the complexity of the consultation in accordance with the requirements outlined in the content-based item descriptions.

Whether or not the proposed procedure proceeds, the pre-anaesthetic attendance will attract benefits under the appropriate consultation item in the range 17610 - 17625, as determined by the duration and content of the consultation.

The following provides further guidance on utilisation of the appropriate items in common clinical situations:

(i) Item 17610 (15 mins or less) - a pre-anaesthesia consultation of a straightforward nature occurring prior to investigative procedures and other routine surgery. This item covers routine pre-anaesthesia consultation services including the taking of a brief history, a limited examination of the patient including the cardio-respiratory system and brief discussion of an anaesthesia plan with the patient.

(ii) Item 17615 (16-30 mins) - a pre-anaesthesia consultation of between 16 to 30 minutes duration AND of significantly greater complexity than that required under item 17610. To qualify for benefits patients will be undergoing advanced surgery or will have complex medical problems. The consultation will involve a more extensive examination of the patient, for example: the cardio-respiratory system, the upper airway, anatomy relevant to regional anaesthesia and invasive monitoring. An anaesthesia plan of management should be formulated, of which there should be a written record included in the patient notes.

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

Mr Ian Goodenough MP
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Dear Chair Ian

Proceeds of Crime Amendment (Proceeds and Other Matters) Bill 2017

Thank you for your letter of 29 November 2017 regarding the Parliamentary Joint Committee on Human Rights' consideration of the above Bill in its *Report 12 of 2017*.

I have included my response to this request below, which I trust will assist the Committee in its consideration of the Bill.

Right to a fair trial and the right to a fair hearing

At paragraphs 1.120 to 1.121 and paragraphs 1.133 to 1.134, the Committee has requested my advice as to whether the amendments in the Bill are compatible with the right to a fair trial and a fair hearing under Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) with reference to the following considerations:

- By reference to the Committee's Guidance Note 2, whether the freezing, restraint or forfeiture powers and the unexplained wealth regime that are affected by these amendments may be characterised as 'criminal' for the purposes of international human rights law having regard to the nature, purpose and severity of the measures; and;

- The extent to which the amendments are compatible with the criminal process guarantees set out in Articles 14 and 15, including any justification for any limitations of these rights where applicable.

Minister's response

The Proceeds of Crime Act 2002 is civil in character

The Committee's Guidance Note 2 states that the test for whether a penalty can be classified as 'criminal' relies on three criteria: the domestic classification of the penalty; the nature and purpose of the penalty, and the severity of the penalty.

On the first criterion, it is clear that asset recovery actions, including those under the unexplained wealth regime, are characterised as civil in nature under Australian domestic law.[1]

On the second criterion, the *Proceeds of Crime Act 2002* (POC Act) is not solely focused on deterring or punishing persons for breaching laws, but is primarily focused on remedying the unjust enrichment of criminals who profit at society's expense.[2] Actions under the POC Act also make no determination of a person's guilt or innocence and can be taken against assets without a finding of any form of culpability against a particular individual.[3]

On the third criterion, Guidance Note 2 provides that a penalty is likely to be considered criminal for the purposes of human rights law if the penalty is imprisonment or a substantial pecuniary sanction. Proceedings under the POC Act cannot in themselves create any criminal liability and do not expose people to any criminal sanction (or a subsequent criminal record). Further, penalties under the POC Act cannot be commuted into a period of imprisonment.

On whether the sanction is substantial, it also remains open to a court to decrease the quantum to be forfeited under the Act to accurately reflect the quantum that has been derived or realised from crime, ensuring that orders are aimed primarily at preventing the retention of ill-gotten gains, rather than the imposition of a punishment or sanction.[4]

Compatibility with criminal justice guarantees

As the unexplained wealth regime and general forfeiture regime under the POC Act are civil in nature, it would not be appropriate or necessary to assess the compatibility of the amendments in the Bill with the criminal justice guarantees set out in Articles 14 and 15 of the ICCPR.

Amendments to civil law can only engage the right to a fair hearing for civil hearings under Article 14(1). This right guarantees equality before courts and tribunals, and, in the determination of criminal charges, or any suit at law, the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

Proceedings under the POC Act are proceedings heard by Commonwealth, State and Territory courts in accordance with relevant procedures of those courts. This affords an affected person adequate opportunity to present his or her case, such that the right to a fair hearing is not limited.

Assessment of POC Act

The Committee has recommended (at paragraph 1.122) that I engage in a detailed assessment of the POC Act to determine its compatibility with the right to a fair trial and a fair hearing.

I note this recommendation and reiterate my previous comments as outlined at paragraph 1.115 of the Committee's report, namely that legislation established prior to the enactment of the *Human Rights (Parliamentary Scrutiny) Act 2011* is not required to be subject to a human rights compatibility assessment. The Government continually reviews the POC Act to ensure that it addresses emerging trends in criminal conduct and will continue to undertake a human rights compatibility assessment when developing Bills to amend the Act.

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[1] *Proceeds of Crime Act 2002* s 315.
[2] Ibid ss 5(a) – (ba).
[3] See asset-directed forfeiture under the *Proceeds of Crime Act 2002* ss 19 and 49.
[4] For example, see compensation orders under the *Proceeds of Crime Act 2002* ss 77 and 94A.

Right to privacy

At paragraph 1.129 the Committee has raised concerns about the right to privacy in the following terms:

The committee therefore seeks the advice of the minister as to whether the limitation on the right to privacy is proportionate to the objective of the measure (including whether there are adequate safeguards in place to protect persons' property from being forfeited where they have been acquitted of the offence, and whether there are other less-rights restrictive means of achieving the objective).

Minister's response

The Committee has questioned whether the measures in the Bill are proportionate in achieving their objectives, noting that a person can be required to forfeit property linked to an offence where they have been acquitted of this offence or their conviction has been subsequently quashed.

This concern, however, only arises in relation to non-conviction based forfeiture orders under the POC Act.[5] This method of forfeiture is specifically designed to allow proceeds authorities to seize and forfeit property where they can establish a link to criminal conduct on the balance of probabilities (the civil standard of proof). This system of forfeiture functions independently of any criminal finding of guilt, which is established on the higher standard of 'beyond reasonable doubt'.

The Australian Law Reform Commission previously recommended the adoption of a non-conviction based forfeiture regime in its review of the *Proceeds of Crime Act 1987*, which found that the previous system of conviction-based forfeiture was ineffective at confiscating criminal assets and undermining the profitability of criminal enterprises.[6]

As noted in the Explanatory Memorandum to the Bill, the Act already contains safeguards and protections that ensure the measures are no more onerous than necessary to achieve their objectives. I also note that the civil forfeiture orders under the Act make no determination of a person's guilt or innocence and impose no criminal penalties upon an individual. Allowing these orders to be revoked where it is found that a person did not commit an offence beyond reasonable doubt, as is the case with an acquittal, would therefore be inappropriate and counterproductive to the underlying aims of non-conviction based forfeiture.

Should your office require any further information, the responsible advisor for this matter in my office is Adrian Barrett, who can be contacted on

I trust this information has been of assistance.

Yours sincerely

Michael Keenan

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[5] See *Proceeds of Crime Act 2002* ss 51, 80, 120 and 157.

[6] *Confiscation that Counts: A Review of the Proceeds of Crime Act 1987* [1999] ALRC 87.

The Hon Christian Porter MP
Minister for Social Services

MC17-012667

11 DEC 2017

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Mr Goodenough~~ Ian

Thank you for your letter of 29 November 2017 requesting further information around the human rights compatibility of the Social Services Amendment (Housing Affordability) Bill 2017 (the Bill), on the Parliamentary Joint Committee on Human Rights' (the Committee) Report 12 of 2017. Please find my responses to the Committee's comments at Attachment A.

On balance, the Commonwealth Government views this Bill as having appropriate safeguards in place so as to be compatible with human rights while at the same time achieving the objective of ensuring a stable rental income stream for social housing providers. This will lead to a more efficient social housing system and reduces the risk of homelessness due to tenant evictions for the non-payment of rent.

By way of background, the introduction of an Automatic Rent Deduction Scheme (ARDS), formerly known as the Compulsory Rent Deduction Scheme, has been a reform and policy direction since the inception of the National Affordable Housing Agreement in 2009.

Participating State and Territory Ministers have worked with the Commonwealth to pursue the development of a sustainable rental deduction scheme with the intention to reduce homelessness, ensure financial sustainability of the system and support greater investment in social housing.

Thank you again for bringing your concerns to my attention.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

1.152 The preceding analysis raises questions as to the compatibility of the bill with the right to social security, the right to an adequate standard of living, the right to privacy, the right to protection of the family and the rights of children that are not addressed in the statement of compatibility.

1.153 The committee (on page 48 of the report) therefore seeks the advice of the minister as to:

- *Whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective (including any evidence of the extent to which the existing scheme of voluntary rent deduction is ineffective).*

  The Government is committed to implementing a compulsory rent deduction scheme for social housing welfare recipients as announced in the 2016–17 Budget, following a request by the states and territories who identified an Automatic Rent Deduction Scheme (ARDS) as an effective means to improve the sustainability of social housing and improving outcomes. ARDS would reduce tenancy eviction rates, which could reduce the probability of evicted tenants becoming homeless.

  Rent arrears and a failure to pay other tenancy charges is the single most significant tenancy management issue facing social housing providers nationally. The impact of failed social housing tenancies due to rent arrears is significant—including the direct impact of exits into homelessness and the longer-term impacts of housing instability (particularly in terms of continuity of support arrangements; employment opportunities and school attendance for children).

  State and territory governments estimate that the social housing system is losing more than $30 million annually from unpaid rent and administrative costs. This places an additional and unnecessary burden on the already financially strained public housing system.

  The current Rent Deduction Scheme (RDS) is voluntary and easy to bypass. This is because arrangements can be cancelled by the tenant without the housing provider's knowledge, which can lead to increasing rental arrears and eventual eviction.

  For example in 2013-14, around 80,000 households in social housing stopped their voluntary deductions at some time during the year which put them at greater risk of falling behind in their rent.

  Social housing tenants not paying their rent can also put pressure on local support and homelessness services.

- *How the automatic rent deduction scheme is effective to achieve (that is, rationally connected to) that objective (including its potential application to those who are not and have not been in rental arrears).*

  The new scheme, expected to be available from March 2018, responds to concerns from all levels of government and the community about evictions and homelessness due to rental arrears.

Through this Bill, ARDS will improve the operational efficiency of social housing by ensuring social housing providers receive rent from tenants on time, including those tenants who consistently fail to pay.

States and social housing providers are responsible for tenancy management and they would continue to retain responsibility and flexibility for tenancy management and rent setting policies. They would decide to which of their occupants of properties covered by a current lease ARDS should apply.

- *Whether the automatic rent deduction scheme is a proportionate limitation on these rights, in particular whether applying the scheme described in paragraph [1.136] above to both ongoing and outstanding obligations to pay rent is the least rights-restrictive means of achieving the stated objective, and whether the scheme provides sufficient flexibility to treat different cases differently.*

In 2013-14, more than 8,900 social housing tenants, including families with children, were in serious rental arrears, with more than 2,300 people evicted due to rent defaults. In NSW, during the same period, over 80 per cent of those evicted due to serious rental arrears had previously participated in the current voluntary Rent Deduction Scheme (RDS) but had then cancelled. If an ARDS were in place, this group would have been unable to cancel their payment. This strongly suggests that ARDS would be effective in reducing tenancy eviction rates.

Tenants have a legal obligation to pay rent as part of their tenancy agreements with their relevant housing providers. The ARDS acts as both a facility to enable the payment of these rents in a cost effective manner for housing providers, and a seamless mechanism for the tenant to ensure that their legal obligations are met.

To the extent that the Bill may limit human rights, those limitations are reasonable, necessary and proportionate to achieving the legitimate objective of preventing evictions due to arrears and debt which may force a person, and their children, into homelessness.

ARDS recognises that social welfare payments should be used towards a person's and their family's basic needs and is intended to support security of tenure in housing. It also recognises that a person's home is an important precondition to their ability to exercise their human rights and their economic, social and cultural rights in particular.

The Government is committed to ensuring that adequate safeguards are in place to protect tenants and ensure their particular circumstances are taken into account.

If a tenant is not able to resolve their concerns regarding an Automatic Rent Deduction Scheme (ARDS) deduction with their housing provider or a State based Review Body, they could approach the Department of Human Services (DHS). If it is a matter where the Commonwealth has responsibility, DHS and the Department of Social Services would monitor such requests for review as part of their usual business operations.

The Secretary (or their delegate) also has the power to intervene and make a decision as to whether a deduction is made and the amount deducted. Policy guidelines will also be developed following the passing of the Bill, which will provide further clarity on the operation of ARDS.

In addition, deductions under the scheme will stop as soon as the person is no longer living in public or community housing covered by a current lease.

An ARDS is designed to work alongside government funded financial counselling and other available support services, to ensure that tenants continue to be housed safely and affordably while they get the help they need to sustain their tenancy.

1.159 (on page 50 of the report) In relation to the right to equality and non-discrimination, the committee notes that the automatic rent deduction scheme appears to have a disproportionate negative impact on women and persons with a disability.

1.160 The committee therefore seeks the advice of the minister as to:

- *The compatibility of the automatic rent deduction scheme with the right to equality and non-discrimination.*

An ARDS is not discriminatory; it is a mechanism available for social housing providers to use to ensure rent is paid when it is due. It is a matter for housing providers to determine to which tenants ARDS will apply.

An ARDS will assist tenants by ensuring that they are able to honour rent and other household costs associated with tenancy obligations they have entered into.

The intent of this measure is to improve longer-term housing stability and reduce the risk of homelessness. ARDS may therefore have a comparatively larger positive impact on women and persons with a disability as they are most likely to be overrepresented in social housing.

1.169 The amendments to the cashless welfare arrangements that would allow automatic rent deductions from the unrestricted portion of a person's welfare payment would appear to have a disproportionate negative effect on Indigenous people, raising questions about whether this disproportionate negative effect (which indicates prima facie indirect discrimination) amounts to unlawful discrimination.

1.170 Accordingly, the Committee (on page 52 of the report) seeks the advice of the minister as to:

- *Whether the amendments to the cashless welfare arrangements introduced by the bill are compatible with the right to equality and non-discrimination (including whether the measure pursues a legitimate objective, is rationally connected to that objective and is a proportionate limitation on the right.*

These amendments do not adversely affect CDC participants. They simply provide consistency for all welfare recipients subject to deductions such as the ARDS, regardless of whether they are also subject to the CDC.

The amendments to allow the automatic deduction of rent where a person is also subject to the cashless debit card (CDC) do not have a negative effect on any CDC participants, including those that identify as Aboriginal or Torres Strait Islander. The interaction between the ARDS and the CDC program was considered carefully during drafting to ensure that CDC participants were not disadvantaged by the introduction of the ARDS.

Generally, the amendments to cashless welfare provisions (contained in Part 3D of the *Social Security (Administration) Act 1999*) will allow for the automatic deduction of rent from the restricted portion of a CDC participant's payment.

TREASURER

Mr Ian Goodenough MP
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear Mr Goodenough

Thank you for your letters of 29 November 2017 on behalf of the Parliamentary Joint Committee on Human Rights (the committee) in relation to issues raised in the committee's *Report 12 of 2017* concerning the following Bills:

- Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017; and
- Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017.

I would like to thank you for the opportunity to provide further information on the issues identified by the committee. I have addressed each of the issues in **Attachment A** to this letter.

I trust that this information will be of assistance to the committee.

Yours sincerely

The Hon Scott Morrison MP

12 / 12 / 2017

Parliament House Canberra ACT 2600 Australia
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Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017

Issue: Compatibility of the measure with the right not to incriminate oneself

The preceding analysis raises questions about the compatibility of the coercive examination powers in the bill with the right not to incriminate oneself.

The committee therefore seeks the advice of the Treasurer as to:

1. **whether there is reasoning or evidence that establishes that one or more of the stated objectives addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective for the purposes of international human rights law;**

2. **how the measure is effective to achieve (that is, rationally connected to) that objective;**

3. **whether the limitation is a reasonable and proportionate measure to achieve the stated objective;**

4. **whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure;**

5. **whether a derivative use immunity is reasonably available as a less rights restrictive alternative in proposed schedule 2 to ensure information or evidence indirectly obtained from a person compelled by APRA to answer questions or provide information or documents cannot be used in evidence against that person.**

Explanation:

1. Objectives

The provisions in the Bill which the Committee notes engage and limit the right to a fair trial and right not to incriminate oneself are intended to address a substantial concern. The concern is that APRA must be able to acquire or access relevant information to ensure it can effectively investigate a prudential matter relating to an Authorised Deposit-Taking Institution (ADI) which, in turn, is likely to affect the ability of APRA to effectively perform its regulatory functions and meet its broad objectives of protecting depositors and ensuring the stability of Australia's financial system.

The evidence to support these provisions is that information relevant to the prudential matters of an ADI is not always within the possession, custody or control of the ADI. There are cases where information relevant to an investigation concerning the prudential affairs of an ADI is legitimately in the possession of others including, but not limited to, current or former officers, agents, contractors or employees of the ADI.

In cases where the person with the possession, custody or control of the relevant information forms the view that the provision of that information to APRA may potentially incriminate them or make them liable to a penalty, that person would, in the absence of any limitation on the right not to incriminate oneself, be entitled to refuse to disclose that information without any recourse in law.

The difficulty for APRA in this scenario is that the absence of that relevant information may stymie the progress of APRA's investigation into prudential matters of the ADI.

For example, if an accountable person (as defined by the proposed section 37BA of the Bill) had dishonestly used their position in order to obtain a personal benefit, and that same accountable person had made and retained personal notes recording that conduct, such evidence is likely to incriminate that accountable person and could be used to found a criminal prosecution against that person.

However, that same conduct by the accountable person could also be relevant evidence in an investigation into whether the ADI was meeting its accountability obligations under the proposed section 37C of the Bill and potentially other prudential obligations.

As the ADI is a corporate entity it must, by necessity, conduct its activities through natural persons. In many instances, like the example above, misconduct by a natural person employed by the ADI could also be used to substantiate a breach of obligations by both the natural person and the ADI.

Therefore, when investigating prudential matters relevant to the ADI it is critical that APRA have access not only to information held by the ADI, but that it also have access to information that is relevant to the ADI or its business that is held by others.

If a person were able to refuse to comply with an examination or information-gathering power and exercise the right against self-incrimination, there could be cases where it would impair APRA's ability to effectively investigate a prudential matter relating to an ADI which, in turn, is likely to adversely affect the ability of APRA to effectively perform its regulatory functions and meet its broad objectives of protecting depositors and ensuring the stability of Australia's financial system.

The right against self-incrimination would most likely be exercised in investigations concerning conduct at the more severe end of the spectrum (i.e. cases involving possible criminal conduct) and it will often be in these cases where the interests of the depositors, prudential matters relating to an ADI and financial stability will be most at risk.

2. Effectiveness in achieving objectives

It is crucial that APRA have access to information that may otherwise be unattainable by reason of the right against self-incrimination in order to help achieve its objectives.

The measures are effective in that they enable APRA, in the course of an investigation into prudential matters relating to an ADI, to have access to information relevant to those investigations, including information which relates to conduct that may expose the provider of that information to criminal proceedings or other penalties. If the conduct in question also relates to prudential matters of an ADI that APRA is, or may consider, investigating, then it is likely to be important for the protection of depositors in an ADI or to the stability of Australia's financial system

3. Proportionality of measures

The proposed measure is reasonable and proportionate to achieve the stated objectives of depositor protection and financial system stability. The limitation of the right against self-incrimination is a very serious measure and the Government would not seek to interfere with that right if APRA were able to readily acquire the relevant evidence through other means. However, in many cases, the best evidence is held by the person who carried out the conduct under scrutiny.

APRA investigations into prudential matters relating to an ADI are carried out with the broad objectives of protecting depositors of an ADI and ensuring the stability of Australia's financial system, both of which are such pressing or substantial concerns for most Australians that the

limitation upon the right to claim privilege against self-incrimination in the measures is warranted and justified.

I note that there are safeguards in place which ensure that APRA cannot use the measures lightly.

The proposed measures are not available for use until after APRA has appointed an investigator pursuant to subsections 13(4), 13A(1) or 61(1) of the Banking Act. The decision to appoint an investigator is subject to approval by formal internal delegations held by senior APRA officers.

Furthermore, if APRA wants to exercise any of the existing coercive information gathering powers in the course of an investigation under the Banking Act, such actions are also subject to approval by senior APRA officers under formal internal delegations and are subject to internal oversight governance structures.

It is also important to recognise that all information received by APRA pursuant to its exercise of the measures will be protected by Section 56 of the APRA Act. This provision concerns confidentiality of 'protected information' and 'protected documents'. Broadly, documents and information become 'protected' by virtue of both having been received by APRA and relating to the affairs of entities that APRA regulates, or customers of those entities, or entities that APRA registers or collects data from under the FSCODA.

Subsection 56(2) of the APRA Act makes it an offence for a person who is, or has been an APRA officer, to disclose protected information or a protected document to any person or to a court, subject to identified exceptions.

Subsection 52F(2) of the Banking Act also provides for 'use immunity', in that any information given to APRA in compliance with a requirement to give information under the Banking Act or the FSCODA is not admissible in evidence against the individual in criminal or civil penalty proceedings, other than in respect of the falsity of the information.

In light of the above safeguards, the limitation on the right not to incriminate oneself is a reasonable and proportionate measure to achieve the stated objective.

4. Sufficiency of circumscription

Persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measures.

The provisions are limited to the circumstances of an investigation having been commenced into certain matters concerning ADIs under the Banking Act and an investigator having been appointed. Further, the investigator needs to have a 'reasonable belief' on which to exercise the powers. The information-gathering powers are available for use against any person that the investigator 'reasonably believes' has custody or control of any books, accounts or documents relevant to the investigator's investigation.

The examination powers are available for use against any person that the investigator 'reasonably believes or suspects' can give information relevant to the investigator's investigation.

Additional circumscription of the persons upon whom the measures may be exercised would reduce the effectiveness of these powers and increase the likelihood that APRA will be unable to effectively perform its regulatory functions and meet its broad objectives of protecting depositors and ensuring the stability of Australia's financial system.

5. Derivative use immunity

As the committee has noted, direct use immunity is conferred by these provisions, but not derivative use immunity. The reason for this is that if derivative use immunity applied, it would impair APRA's ability to effectively perform its regulatory functions.

It is relatively straightforward to prove compliance with use immunity in that all of the evidence obtained under compulsion from the person concerned is easily identifiable and can be excluded from any subsequent criminal or civil penalty proceedings against that person.

In most cases, establishing compliance with derivative use immunity would be substantially more difficult. It would require persuading the court to the required standard that no part of the original information was taken into account, directly or indirectly, when obtaining the information upon which the prosecution is based.

If derivative use immunity applied, then further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information-obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.

APRA concurs with ASIC's view expressed in ASIC's submissions to the Australian law Reform Commission Inquiry into Traditional Rights and Freedoms: Issues Paper 46 (March 2015) at page 25: 'Any grant of derivative use immunity has the potential to render a person conviction-proof for an unforeseeable range of offences.'

These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the SIS Act and PHI Act.

Issue: Compatibility of the measure with the right to privacy

The statement of compatibility has not identified or addressed the limitation on the right to privacy that arises from the proposed coercive examination and information gathering powers introduced by Schedule 2 of the bill.

The committee therefore seeks the advice of the Treasurer as to:

1. **whether the proposed coercive examination and information gathering powers pursue a legitimate objective (including reasoning or evidence that establishes that the stated objectives address a pressing or substantial concern);**

2. **how the measure is effective to achieve (that is, rationally connected to) those objectives; and**

3. **whether the limitation is reasonable and proportionate to achieve the stated objectives (including whether there are less rights restrictive ways of achieving that objective, whether the persons who may be subject to examination and the scope of information that may be subject to compulsory disclosure is sufficiently circumscribed with respect to the stated objective of the measure; and whether there are adequate and effective safeguards in relation to the measure).**

Explanation:

1. Objectives

The measure addresses a pressing and substantial concern about a gap in APRA's ability to effectively investigate prudential matters relevant to an ADI on the same basis as explained in answer to the same question concerning the right not to incriminate oneself in section 1 above.

2. Effectiveness in achieving objectives

The measure is effective to achieve the objective on the same basis as explained in answer to the same question concerning the right not to incriminate oneself in section 2 above.

3. Proportionality of measures

The limitation is proportionate to achieve the stated objective, is sufficiently circumscribed with respect to the stated objective of the measure, and there are adequate and effective safeguards in relation to the measure on the same basis as explained in answer to the same questions concerning the right not to incriminate oneself in sections 3, 4 and 5 above. Additional safeguards to protect the right to privacy are set out below.

Further safeguards to protect the right to privacy are also provided within the proposed examination powers. In particular:

- the proposed subsection 61E(1) of the Bill provides that the examination must take place in private;
- the proposed subsection 61E(2) of the Bill specifies who may be present at the examination; and
- the proposed subsection 61E(3) of the Bill creates an offence for a person to be present at the examination if not permitted.