Appendix 3

Correspondence

ASSISTANT MINISTER TO THE TREASURER

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

Dear Mr Goodenough Ian

Thank you for your correspondence of 29 November 2017 addressed to the Treasurer regarding the Parliamentary Joint Committee on Human Rights' legislation report 12 of 2017 request for advice on whether the civil penalty provisions in the *ASIC Credit (Flexible Credit Cost Arrangements) Instrument 2017/780* (the instrument) may be considered 'criminal' under international human rights law. The Treasurer has asked me to respond. I apologise for the delay in responding to you.

As you are aware, the instrument was made by the Australian Securities and Investments Commission (ASIC) on 7 September 2017 and prohibits flex commissions – a type of commission payable to lenders to car deals – from 1 November 2018. The Committee commented in its report that the size of the maximum civil penalty for breaches of the instrument's provisions raises the concern that it may be considered 'criminal' for the purposes of international human rights law.

The Explanatory Statement to the instrument explains that the use of flex commissions contributes to consumer harm due to distortions in the pricing of car finance. In particular, ASIC has identified that consumer harm from flex commissions disproportionately affects vulnerable customers. Due to the detrimental effect that these commissions have on vulnerable consumers, it is important that penalties in this area have a genuine deterrent effect. The Government considers that the maximum civil penalty of $420,000 is appropriate given the potential consumer detriment that may result from contravention.

In relation to the Committee's concerns, and taking into account the Committee's Guidance Note 2 on offence provisions, civil penalties and human rights, the following factors support the view that the civil penalties included in the flex commissions instrument are not criminal in nature:

- the $420,000 penalty is not a criminal penalty under Australian law;
- the maximum penalty applies exclusively to Australian credit licensees and exempt special purpose funding entities, and not to the general public; and
- the proportionate size of the maximum penalty, given the corporate nature of the financial services industry. Further, the maximum penalty is consistent with penalties imposed by other provisions in Chapter 2 of the *National Consumer Credit Protection Act 2009* (the Credit Act), for example, sections 69 and 70 of the Credit Act.

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Given these factors, the Government considers that the instrument does not engage any of the applicable human rights or freedoms.

The Committee has also commented on the risk that if the penalty were considered 'criminal' in nature for the purposes of international human rights law, the instrument may engage the right not to be tried and punished twice for an offence due to the operation of section 173 of the Credit Act, which allows criminal proceedings to be started against a person for conduct that has already resulted in a civil penalty being imposed.

The operation of section 173 applies to the operation of the Credit Act more generally, and is not restricted to, or an effect of the legislative instrument itself. The issue was addressed in the drafting of the Credit Act by including substantial protections for individuals. For example, section 174 prevents evidence that has been used in civil proceedings against a natural person being used in subsequent criminal proceedings against the person. This makes it clear that these provisions only allow criminal proceedings to be brought where new evidence comes to light following civil proceedings being started or completed.

I also note that similar provisions are relatively common and can be found in other Commonwealth legislation, as stated in Chapter 11 of the Australian Law Reform Commission's *Principled Regulation: Federal Civil and Administrative Penalties in Australia* (ALRC Report 95).

I trust this information will be of assistance to you.

Yours sincerely

The Hon Michael Sukkar MP

Senator the Hon Michaelia Cash
Minister for Jobs and Innovation

Reference: MC18-000206

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

Dear Mr Goodenough

Code for the Tendering and Performance of Building Work 2016* and *Code for the Tendering and Performance of Building Work Amendment Instrument 2017

This letter is in response to your letter of 30 November 2017 on behalf of the Parliamentary Joint Committee on Human Rights (the Committee), concerning the *Code for the Tendering and Performance of Building Work 2016* (the 2016 Code) and the *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (the Amendment Instrument).

As noted in my previous responses of 3 July 2017 and 5 October 2017 the 2016 Code was issued in December 2016 and was the subject of an Opposition disallowance motion that was defeated in the Senate in August 2017. The 2016 Code sets out the Australian Government's expected standards of conduct for all building contractors and building industry participants that seek to be, or are, involved in Commonwealth funded building work.

The Amendment Instrument amended the 2016 Code to reflect amendments made to subsection 34(2E) of the *Building and Construction Industry (Improving Productivity) Act 2016* and to provide additional transitional exemptions to assist building contractors and building industry participants with the transition to compliance with the 2016 Code.

A response to the Committee's request for further advice is enclosed and I trust that this response satisfies the Committee's remaining concerns. I note that both the Code and the Amendment Instrument are no longer open to disallowance.

Yours sincerely

Senator the Hon Michaelia Cash
31 / 01 / 2018

Encl.

Code for the Tendering and Performance of Building Work 2016
Code for the Tendering and Performance of Building Work Amendment Instrument 2017

Please find below responses to each of the requests of the Parliamentary Joint Committee on Human Rights (the Committee) for further advice contained in Report 12 of 2017.

Content of agreements and prohibited conduct – Right to collectively bargain and right to just and favourable conditions of work

The Committee has invited me to provide further advice in relation to the compatibility of sections 11 and 11A of the *Code for the Tendering and Performance of Building Work* (the 2016 Code) with the right to collectively bargain in light of recent concerns raised by the UN Committee on Economic, Social and Cultural Rights and the ILO Committee of Experts on the Application of Conventions and Recommendations.

My previous response of 3 July 2017 explains in detail as to why the requirements in sections 11 and 11A are a reasonable and proportionate measure to achieve the legitimate objective of seeking to ensure that enterprise agreements are not used to limit the ability of code covered entities to manage their business efficiently or restrict productivity improvements in the building and construction industry more generally. I continue to stand by that response.

Prohibiting the display of particular signs and union logos, mottos or indicia – Right to freedom of expression, right to freedom of association and right to form and join trade unions

The Committee has sought my advice as to whether there are 'less rights restrictive approaches' than those in paragraphs 13(2)(b), (c) and (j) of the 2016 Code to achieve the stated objective of protecting the ability of individuals to choose not to join a union.

In my responses to the Committee on 3 July 2017 and 5 October 2017 I outlined extensive material regarding the coercive culture that exists within the building and construction industry in which it is understood that there is such a thing as a 'union site' and on those sites all workers are expected to be members of a building association, whether voluntary or not. This included (but was not limited to) a number of findings by courts. Further decisions have been handed down since my last response of 5 October 2017 in which the Construction, Forestry, Mining and Energy Union (CFMEU) has repeatedly engaged in conduct that reinforces the coercive culture that an individual must be a union member:

- In October 2017 the Federal Court found the CFMEU in 2015 through its delegate, engaged in adverse action when that delegate prevented a subcontractor's employee from working on site because he was not a union member and prevented the same employee from performing work on site with intent to coerce him to become a union member. The CFMEU also engaged in coercion when the delegate insisted a second employee of the subcontractor pay fees to join the CFMEU. In imposing fines of $90,000 on the CFMEU and $8,000 on the delegate, Justice Tracey stated that *...the Commissioner has identified 15 cases, since 2000, in which the CFMEU and its officials have been found to have contravened the Act and its predecessors by engaging in misconduct with a view to maintaining "no ticket no start" regimes'* ... and that the delegate '*arrogated to himself the right to determine who would and would not work on the site in order to advance the 'no ticket no start' regime ...'*. Justice Tracey also observed that the CFMEU did not provide any assurance that '*it will direct its shop stewards not to seek to enforce "no ticket, no start" regimes and to respect the freedom of association provisions ....' (Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union (Werribee Shopping Centre Case)* [2017] FCA 1235).

- In November 2017, the Federal Court found a CFMEU shop steward in 2014 knowingly made false representations when, upon learning two employees of a subcontractor were non-paying CFMEU members, told the first employee *'You need to fix it. I can't let you work if you're not paid up'* and the second '*...you can't work in here...This job is a union site'*. The court also

found that in making the false representation and refusing the first employee to work on site a few days later, the shop steward engaged in coercion and adverse action against that employee. His Honour also found the CFMEU to be vicariously liable for the actions of the shop steward. The Court is yet to consider the matter of penalties against the shop steward and the CFMEU (*Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union (The Quest Apartments Case)* [2017] FCA 1398).

The Committee has asserted the provisions are an overbroad limitation on freedoms of expression and association in protecting an individual's right to choose not to join a union. The Committee must however consider the context in which these provisions were introduced and operate. As can be seen from the many decisions of the courts, the CFMEU had promoted, and continues to persistently promote, a coercive culture in which a person cannot engage in a day's work if they are not a union member.

As was set out in my previous responses alternative approaches to address and challenge the custom and practice ingrained in the industry such as education and better mentoring and enforcement have been employed by the Australian Building and Construction Commission and its predecessors. It would be preferable if such approaches on their own were capable of making a difference to the ingrained practice. However, as I concluded in my response of 5 October 2017, it is clear that these approaches alone have not been sufficient (and in my view will continue not be sufficient in the immediate future) to bring about the culture change required to protect the right of individuals to choose whether or not to join a union.

It is in the context of a persistent coercive culture that has not responded to more traditional approaches to protecting freedom of association that the provisions in section 13 are necessary and proportionate. As I have stated in the previous responses, these provisions do not seek to eliminate all forms of expression in relation to union membership. Posters merely encouraging or conveying the benefits of union membership are not prohibited and an individual can display logos on their own personal clothing. The provisions are intended to eliminate visual cues that serve to reinforce the idea of 'union sites'; that is, signs that are directed at harassing or vilifying an individual on the basis of their participation or non-participation in industrial activities; 'no ticket, no start' signs; and union logos, mottos or indicia on employer clothing, property or equipment.

An individual can still seek to express their genuinely held views about industrial action without necessarily making an individual feel coerced into joining or not joining an association. As such it cannot in my view be asserted, as the Committee has done, that the 'limitation on freedom of expression is extensive'. With respect, the Committee's characterisation of the issue, that prohibiting 'insulting language or communication' for the purpose of achieving the stated objective still constitutes a limitation on the right to freedom of expression, trivialises a very real issue for those actually in the building and construction workforce.

The provisions are in my view absolutely essential in addressing the persuasive culture in the building and construction industry and achieving the objective of protecting the ability of individuals to choose to join or not to join a union.

The Hon Christian Porter MP
Minister for Social Services

MC17-012784

19 DEC 2017

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 letter of 6 December 2017 regarding the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the Commonwealth Bill) and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017. I appreciate the time you have taken to bring this matter to my attention. My response in relation to the human rights compatibility of the legislation is enclosed.

On balance, the Australian 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 establishing a best practice, supportive redress scheme for survivors.

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) released its *Redress and Civil Litigation* Report in 2015 and recommended the establishment of a national redress scheme for survivors. The Royal Commission has highlighted that many survivors of institutional child sexual abuse have not had the opportunity to seek compensation for their injuries that many Australians generally take for granted because of the nature and impact of the abuse they suffered. There is a clear need to provide avenues for survivors to obtain effective redress for this past abuse, but for many, it is no longer feasible to seek common law damages.

The Commonwealth Bill is a significant first step to encourage jurisdictions to opt in to the Scheme, and will ensure survivors who were sexually abused as children in Commonwealth institutions will receive redress. Given the Commonwealth's constitutional limitations, the Commonwealth Bill, which I introduced to Parliament on 26 October 2017, does not facilitate states, or non-government institutions in states, to opt in to the Scheme.

Therefore, if a state agrees to provide a referral of power to participate in the Scheme from its commencement, I will replace the Commonwealth Bill with a National Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the National Bill), prior to the former's enactment.

The Royal Commission has shed light on the issue of institutional child sexual abuse on a national level, but the scale of this Scheme is quite different from other state-based schemes or overseas experiences (for example, the Irish Redress Scheme only included one institution). For this reason, this Scheme will need to be flexible to account for unforeseen numbers of survivors, institutional contexts and other circumstances. Further, my experience of the Western Australian Redress Scheme has shown that it will be necessary to adjust policy settings to mitigate against unintended outcomes.

Thank you again for raising these matters with me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Response to the Parliamentary Joint Committee on Human Rights on:

- **the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017; and**
- **the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017**

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) *Redress and Civil Litigation Report* has formed the basis for the development of the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Commonwealth Bill). Further, an Independent Advisory Council on Redress, appointed by the Prime Minister, the Hon Malcolm Turnbull MP, provided expert advice and insight into the policy and implementation considerations for the Commonwealth Bill. The Independent Advisory Council includes survivors of institutional child sexual abuse and representatives from support organisations, as well as legal and psychological experts, Indigenous and disability experts, institutional interest groups and those with a background in government. The Council is chaired by the Hon Cheryl Edwardes AM, a former solicitor and Western Australian Attorney-General.

The Commonwealth Bill acknowledges that child sexual abuse suffered by children in institutional settings was wrong and should not have happened. The Royal Commission highlighted the complex needs and different life outcomes of survivors of institutional child sexual abuse. The Commonwealth Bill is designed to recognise the suffering survivors have experienced, accept these events occurred and ensure that each institution that is responsible for the abuse pays redress to survivors.

The Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse (the Scheme), which implements all aspects of the Commonwealth Bill, is designed to be responsive to survivors' and participating institutions' needs.

The Royal Commission recommended the establishment of a national redress scheme for survivors. In circumstances where the Commonwealth does not have comprehensive constitutional power to legislate for a national Scheme, a referral to the Commonwealth from the states under section 51(xxxvii) of the Constitution is the most legally sound way to implement a nationally consistent Scheme and maximise participation. It will enable redress to be provided to survivors of institutional child sexual abuse in non-government institutions that occurred in a state or where a state government is deemed responsible.

The Commonwealth Bill is a significant first step to encourage jurisdictions to opt-in to the Scheme, and has been designed in anticipation of their participation should a referral of powers be received.

Eligibility to receive redress under the Commonwealth Redress Scheme

1.18 The preceding analysis indicates that the right to equality and non-discrimination on the basis of nationality or national origin is engaged and limited by the bill. This is because a person will only be eligible for the scheme if they are an

Australian citizen or Australian permanent resident notwithstanding that the right to an effective remedy for a violation of human rights applies regardless of citizenship or residency status.

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

- **whether the restriction on non-citizens' and non-permanent residents' eligibility for redress under the scheme is aimed at achieving a legitimate objective for the purposes of human rights law (including any information or evidence to explain why the measure addresses a pressing and substantial concern);**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the restriction on non-citizens' and non-permanent residents' eligibility for the scheme is proportionate to achieve the stated objective (including whether there are less rights restrictive means available to achieve the stated objective).**

I note the committee seeks further information on the importance of the objective of ensuring the integrity of the Scheme, in the context of the measure to limit eligibility of non-citizens and non-permanent residents. As stated in the opening remarks of this response, participation in the Scheme is necessarily voluntary. To ensure maximum participation, and therefore maximise the opportunity for survivors to seek redress, it is vitally important that participating institutions and institutions considering participating (together, most importantly, with survivors) are confident the Scheme provides the appropriate architecture to support its integrity and legitimacy.

A core principle of the Scheme is to ensure redress is paid to those who are eligible. It is important that the Scheme can identify and verify the identity of those making a claim. The Scheme is also designed to be an alternative to civil litigation where many survivors cannot seek redress due to the period of time that has lapsed since the incident, or do not have enough evidence to pursue a claim via the courts.

Given the comparative size of the monetary payments under the Scheme and the relatively low evidentiary burden that will be required of survivors making applications, the risk of fraud is a key concern. Verification of proof of identity is one means by which the Scheme can limit attempted fraud. Opening eligibility to non-citizens and non-permanent residents would significantly increase the difficulty of proof of identity verification for those applicants and increase overall processing times of applications. Verification of identity of those who are non-citizens and non-permanent residents would require primary documentation and verification from foreign governments and Australian embassies.

As I outlined in the statement of compatibility with human rights for the Scheme's legislation, large volumes of false claims from organised overseas groups could overwhelm the Scheme's resources and delay the processing of legitimate applications. In this regard, the Commonwealth Government is continually undertaking fraud detection work to ensure the integrity of social security payments and there is evidence of organised crime attempting to defraud the Commonwealth. However, providing evidence of this nature to the committee may compromise fraud detection activities.

Further, I note the committee's view that reducing administrative burden is insufficient for the permissible limitation of human rights, however I would emphasise that the nature of the survivor cohort is such that timeliness in processing Scheme applications is critical. Over half of the survivors anticipated to apply to the Scheme are over the age of 50, and so significant delays to the processing of applications may result in survivors passing away before they have the opportunity to applhy for or accept redress. It is widely recognised that survivors of child sexual abuse also experience poorer health and social outcomes, amplifying the need for timely decision-making and for promoting the rights of survivors.

It is important that our policy settings support the integrity and appropriate targeting of payments. Should the Scheme not safeguard against potential fraud, institutions may choose not to participate, or may seek to leave the Scheme.

When determining the proportionality of the measure, the committee has noted that the Explanatory Memorandum details three initial classes of people that will be eligible for redress, despite the citizenship requirements contained in the Bill. It is necessary for these classes of eligibility to be contained in a separate legislative instrument as further investigation and consultation is continuing across Government and with states and territories to determine if there are other classes of survivors that do not fit the above citizenship requirements that should be deemed eligible for the Scheme. While examples have been provided in the Explanatory Memorandum, these are still being investigated.

There may also be classes of survivors that will apply for redress that the Scheme has not, or could not, envisage including in the legislation. The Scheme may not have accounted for categories of survivors that it needs to deal with promptly, to ensure the timely processing of applications and the best outcomes for survivors so subclause 16(2) of the Commonwealth Bill is necessary to allow the Scheme to respond to situations as they arise. Additionally, subclause 16(3) will be used to respond to exceptional cases, such as to specify people ineligible where they have a criminal conviction and their eligibility would affect the integrity and public confidence in the Scheme.

Restricting the eligibility of non-citizens and non-permanent residents is necessary to achieve the legitimate aims of ensuring that survivors are provided the redress to which they are entitled in a timely manner, and that redress is provided only to those who submit genuine claims. Subsection 16(2) of the Commonwealth Bill will allow discretion to deem categories of survivors eligible despite these restrictions, such as child migrants. This ensures that the limitation of survivors' rights is proportionate.

I am considering the committee's suggestion to include these predetermined cases in primary legislation in the context of any future legislation developed to reflect a national redress Scheme.

1.26 The preceding analysis indicates that the right to an effective remedy may be engaged by the powers under the bill to determine eligibility and ineligibility for the scheme for the scheme by way of the proposed Commonwealth Redress Scheme Rules. This is because the broad rule-making power to determine eligibility or ineligibility may be exercised in a way that is compatible with this right.

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

- **Whether the power to determine eligibility or ineligibility in the proposed rules is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **How the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **Whether the limitation is proportionate to achieve the stated objective (including whether there are less rights restrictive means available to achieve the stated objective).**

The Scheme is designed to be responsive to survivors' and participating institutions' needs. Flexibility is needed to allow adjustments for the differing needs of survivors, participating institutions, and to enable the Scheme to quickly implement changes required to ensure positive outcomes for survivors. This is why it is necessary for elements of the Scheme to be in delegated legislation.

Using rules, rather than regulations or incorporating all elements of the Scheme in the Commonwealth Bill, provides appropriate flexibility and enables the Scheme to respond to factual matters as they arise. It is uncertain how many applications for redress the Scheme will receive at its commencement, and whether there will be unforeseen issues requiring prompt responses. It is therefore appropriate that aspects of the Scheme be covered by rules that can be adapted and modified in a timely manner. The need to respond quickly to survivor needs is also a key feature of the Scheme as many survivors have waited decades for recognition and justice.

The committee has noted foreshadowed exclusions of certain persons from being eligible to the Scheme if they have been convicted of sex offences, or sentenced to prison terms of five years or more for crimes such as serious drug, homicide or fraud offences.

As the committee rightly highlights, this significant matter should not be delegated to subordinate legislation. The limitation on eligibility for persons with criminal convictions will therefore be included in the primary legislation of the proposed National Bill.
There could be a perception that the Commonwealth Bill limits the rights to effective remedy for survivors with criminal convictions. However, the decision was made that in order to give integrity and public confidence to the Scheme, there had to be some limitations for applications from people who themselves had committed serious offences, but particularly sexual offences.

The eligibility policy has been developed in consultation with State and Territory Attorneys-General, who were almost unanimous in their view that reasonable limitations on applications is necessary to have public faith and confidence in the Scheme. Excluding some people based on serious criminal offences is necessary to ensure taxpayer money is not used to pay redress to those who may not meet prevailing community standards.

However, the Scheme Operator will have discretion at subsections 16(2) and (3) of the Commonwealth Bill to determine the eligibility of survivors applying for redress on a case-by-case basis, including survivors who are currently, or have been, incarcerated. Importantly, the Scheme Operator can use this discretion to deem a person eligible for redress if they are otherwise ineligible due to the criminal convictions exclusions. In considering whether to exercise discretion, the Scheme Operator will consider the nature of the crime committed, the duration of the sentence and broader public interest issues. The Scheme Operator discretion is

also intended to mitigate the impact of jurisdictional differences in crimes legislation. For example, mandatory minimum sentences for certain offences may lead to some applicants receiving longer sentences than they would in other jurisdictions, and perhaps making them ineligible for the Scheme.

It is appropriate for such matters to be included in rules as the Scheme needs to be responsive to survivors, participating State and Territory institutions, and participating non-government institutions given that the Scheme will operate for a fixed period of time and needs to ensure the timely processing of survivors' applications.

All aspects of the Scheme have been subject to ongoing consultation with State and Territory Ministers responsible for redress, state and territory departmental officials, the Independent Advisory Council, survivors of institutional child sexual abuse and non-government institutions. The drafting of the legislation, including the rules, have been a part of this consultation with stakeholders.

A Board of Governance will be established to serve in an advisory capacity to provide advice to the Minister, Scheme Operator, the Department of Social Services and the Department of Human Services. The Board's membership will be made up of Ministerial representatives from each participating State and Territory and consultation and agreement from the Board will be undertaken prior to any legislative changes, including creating or amending legislative instruments.

Power to determine when a participating institution is not responsible for sexual or non-sexual abuse

1.32 The preceding analysis indicates that the right to an effective remedy may be engaged by the powers under the bill to determine by way of the proposed Commonwealth Redress Scheme Rules when a participating institution is not responsible for sexual abuse or non-sexual abuse.

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

- **whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;**
- **how the measure is effective to achieve (that is, rationally connected to) that objective; and**
- **whether the limitation is proportionate to achieve the stated objective (including whether there are less rights restrictive means available to achieve the stated objective).**

As the Committee has noted, subclause 21(7) of the Commonwealth Bill is intended to operate to ensure that participating institutions are not found responsible for abuse that occurred in circumstances where it would be unreasonable to hold the institution responsible.

The power in subclause 21(7) will also be used to clarify circumstances where a participating government institution should not be considered responsible. Such circumstances may include:

- where the government only had a regulatory role over a non-government institution;

- where the government only provided funding to a non-government institution; and
- where the only connection is that the non-government institution was established under law enacted by the government.

Until institutions opt in to the Scheme, it is not possible to envisage every possible circumstance to include in the legislation. These rulemaking provisions allow the Scheme to be responsive to the realities of implementation, which is necessary to achieve the legitimate aim of public and institutional support for the Scheme. Were the Scheme too fixed in its methodology, the Scheme may face criticism for reaching unreasonable decisions.

Bar on future civil liability of participating institutions

1.41 The preceding analysis raises questions as to whether requiring persons who are eligible for redress to release and discharge institutions participating in the scheme from future civil liability for abuse of the person is a proportionate limitation on the right to an effective remedy.

1.42 The committee therefore seeks the advice of the minister as to the proportionality of the measure, in particular the content of the proposed rules relating to the provision of legal services under the scheme.

As the Committee has noted, maximising the redress for survivors is a legitimate objective for the purposes of international human rights law. Therefore, releasing institutions from further liability following their involvement in the redress process under the Scheme is a proportionate measure to achieve the objective of ensuring institutions opt into the Scheme.

The measure is supported by proportionate and essential safeguards for survivors through the provision of a free community-based legal service to ensure survivors understand the legal implications of signing a release. The free community-based legal service will be available to survivors at the commencement of their engagement with the Scheme. The website, helpline and other engagement documents will make it clear to survivors that a release will be required in order to receive redress under the Scheme. The Scheme will make available legal advice during this process so that survivors understand the legal implications.

The Rules will include a provision which provides funding for legal services for the purposes of a person receiving trauma informed, culturally appropriate and expert legal advice as required throughout the Scheme.

Legal services will be available during the four key stages of the redress application process:

1. prior to application so survivors understand eligibility requirements and the application process of the Scheme;
2. during completion of a survivor's application;
3. after a survivor has received an offer of redress (including if they elect to seek an internal review); and

4. on the effect of signing a Deed of Release (DoR), including its impact on the prospect of future litigation.

Survivors will be able to obtain free legal assistance on an ongoing basis as required across each of the above four stages.

The Rules will also include a provision that allows a person who cannot access the funded legal service because of a conflict of interest, to be referred to another legal firm and have their legal costs covered by the Scheme's legal services provider.

In relation to the release, legal support could include:

- providing an explanation of the factors which make up the offer survivors have received and the matters considered by the assessment team;
- identifying the potential rights that the survivor is releasing; and
- helping the survivor decide whether they wish to accept the offer or not.

Information Sharing Provisions

1.52 The preceding analysis raises questions as to whether the compatibility of the proposed disclosure powers of the Operator in proposed section 77 of the bill is a proportionate limitation on the right to privacy.

1.53 The committee seeks the advice of the minister as to whether the limitation on the right to privacy is proportionate to the stated objective of the measure (including whether there are adequate safeguards in place in relation to disclosure by the Operator of protected information).

Section 77 of the Commonwealth Bill has been drafted to reflect similar provisions in other legislation within the Social Services portfolio, which routinely deals with a person's sensitive information and provides a consistent approach to the way in which the Department deals with protected information. It was considered appropriate to provide a power to enable rules to be made by the Minister if it was considered necessary to assist with the exercise of the Scheme Operator's disclosure of protected information. This provides flexibility to address any circumstances that arise which are of sufficient public interest to warrant the exercise of that power. Incorporating high-level rules in the Commonwealth Bill would restrict the Scheme Operator's power to make a public interest disclosure to those circumstances set out in the Commonwealth Bill.

Careful consideration will be given to ensure that any personal information held by the Scheme Operator is given due and proper protection. It is envisaged the power to make public interest disclosures will only be used where it is necessary to prevent, or lessen, a threat to life, health or welfare, for the purpose of briefing the Minister or if the information is necessary to assist a court, coronial inquiry, Royal Commission, or similar, for specific purposes such as a reported missing person or a homeless person. These criteria are some of those that are already outlined in other legislation in the Social Services portfolio that govern public interest certificates, such as the *Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015* and the *Paid Parental Leave Rules 2010.*

Despite there not being a positive requirement in the Commonwealth Bill, the intention is to make rules to regulate the Scheme Operator's disclosure power to ensure that the limitation

on the right to privacy is proportionate to achieve the various legitimate aims of public interest disclosures. However, the Committee's concerns are noted and I will consider including a positive requirement for rules in the National Bill, including a requirement that the Scheme Operator must have regard to the impact the disclosure may have on a person to whom the information relates.

Absence of external merits review and removal of judicial review

1.62 The preceding analysis indicates that the right to a fair hearing may be engaged by the absence of external merits review of determinations made under the scheme, and the removal of judicial review.

1.63 The committee seeks the advice of the minister as to the compatibility of the measure with the right to a fair hearing, including:

- **whether the absence of external merits review and removal of judicial review pursues a legitimate objective;**
- **whether the measures are rationally connected to (that is, effective to achieve) that objective;**
- **whether the measures are a proportionate means of achieving the stated objective.**

The decision to exclude external merits review for applicants was made on the advice of the Independent Advisory Council on Redress and following the Royal Commission's recommendation on this matter. The Council recommended the Scheme provide survivors with access to an internal review process, but no access to external merits or judicial review as it considered that providing survivors with external review would be overly legalistic, time consuming, expensive and would risk further harm to survivors. If judicial review avenues were available, many survivors may have unrealistic expectations of what could be achieved given the low evidentiary barrier to entry to the Scheme compared to civil litigation, and that therefore the judicial review process is likely to re-traumatise a survivor.

The Department of Social Services will recruit appropriately qualified, independent assessors, known as Independent Decision Makers, who will make all decisions on applications made to the Scheme. Independent Decision Makers will not report or be answerable to Government. These Independent Decision Makers will be able to provide survivors with access to independent and impartial review without subjecting them to potential re-traumatisation.

Members of the Administrative Appeals Tribunal are appointed based on their judicial experience, not recruited for the skillset and understanding of the survivor cohort that will be required of Independent Decision Makers. The Administrative Appeals Tribunal must make a legally correct or preferable decision, while Independent Decision Makers will make decisions on applications with highly variable levels of detail and without strict legislative guidance on what weight should be applied to the information they do receive. Without an understanding of past decisions under the Scheme, the Tribunal may reach decisions that are inconsistent with past decisions made by Independent Decision Makers. Utilising the Administrative Appeals Tribunal for merits review under the Scheme risks inappropriately imposing a legalistic lens on a non-legalistic decision making process.

The Hon Craig Laundy MP
Minister for Small and Family Business, the Workplace and Deregulation

Reference: MC18-000299

08 FEB 2018

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

Dear Mr Goodenough Ian,

This letter is in response to an email of 5 February 2018 from the Committee Secretary, Ms Toni Dawes, to the Senior Adviser to Senator the Hon Michaelia Cash, Minister for Jobs and Innovation, concerning the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017. As the issues raised fall within my portfolio responsibilities as Minister for Small and Family Business, the Workplace and Deregulation, your email was referred to me for reply.

I understand that the Parliamentary Joint Committee on Human Rights seeks further information as to whether the proposed prohibition on terms of industrial instruments requiring or permitting payments to worker entitlement funds in the Bill is compatible with the right to collectively bargain, with particular reference to findings by relevant international supervisory mechanisms.

My detailed response to the Committee's enquiry is attached.

Yours sincerely

Craig Laundy

Encl.

Attachment A

Detailed response to issues raised by the Parliamentary Joint Committee on Human Rights

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

Compatibility with the right to collectively bargain

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

The Committee has sought further information, asking:

- **whether the proposed prohibition is compatible with the right to collectively bargain, with particular reference to findings by relevant international supervisory mechanisms.**

A detailed response to issues raised in Human Rights Scrutiny Report No.12 of 2017 in relation to the Bill was provided to the Committee by the office of Senator the Hon Michaelia Cash, then Minister for Employment, on 19 December 2017. That response addressed the proposed prohibition on industrial instruments requiring or permitting payments to unregistered worker entitlement funds, noting that while the prohibition engages the right to collectively bargain, it does so in a manner that is reasonable and proportionate and enhances workers' rights.

The Bill prohibits terms in industrial agreements that require or permit payments only to unregistered worker entitlement funds. Registered worker entitlement funds will be required to comply with basic governance and disclosure requirements. The prohibition on payments to unregistered worker entitlement funds is simply a mechanism to ensure that such funds are properly regulated, subject to appropriate minimum governance requirements and comply with laws similar to those that apply to other managed investment schemes.

Findings from two Royal Commissions have emphasised the importance of properly regulating worker entitlement funds, particularly given the significant sums of money held by these funds for the benefit of workers, and the consequences that would follow if a fund was to fail.

Most recently, the 2016 report of the Royal Commission into Trade Union Governance and Corruption (2016 Royal Commission) recommended that legislation be enacted dealing comprehensively with the minimum governance, financial reporting and financial disclosures for worker entitlement funds. This Bill implements that recommendation.

As noted in the previous response of 19 December 2017, the International Labour Organisation (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'.[1] It is considered that the 'functioning' of organisations includes their ability to collectively bargain, such that any restriction on collective bargaining should have the sole objective of protecting the interests of members.

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[1] Citing 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.

A prohibition on industrial instruments requiring or permitting payments to unregistered worker entitlement funds is intended to protect the interests of members of organisations by ensuring that such payments may only be made to worker entitlement funds that are registered. A worker entitlement fund 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. The provisions in the Bill ensure that money held by worker entitlement funds is used to benefit workers. The amendments will provide members with a guarantee that any contributions made to a worker entitlement fund is subject to appropriate scrutiny and oversight.

In addition, the ILO considers that there are some exceptions to the general rule that measures taken to restrict the scope of negotiable issues are generally considered to be incompatible with international labour standards. These include 'the prohibition of certain subjects for reasons of public order'.[2] Further, Article 4 of the ILO Right to Organize and Collective Bargaining Convention 1949 (No. 98) specifies that the machinery for voluntary negotiation of terms and conditions of employment should be 'appropriate to national conditions'.

Given that the prohibition supports the basic governance and disclosure requirements of the Bill that are intended to address potential conflicts of interest, breaches of fiduciary duty and potential for coercive conduct outlined in the 2016 Royal Commission, in addition to protecting the interests of workers and supporting public order, it is appropriate to Australian conditions and so is permissible.

[2] International Labour Office *Collective Bargaining: a policy guide*, 2015, p 37.