The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MC19-013166

01 OCT 2019

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~ Helen

Thank you for your correspondence of 12 September 2019 regarding the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 (the Bill). I appreciate the time the Senate Scrutiny of Bills Committee has taken to review the Bill, and thank you for the opportunity to address the Committee's concerns.

The Committee has requested that I provide detailed justification as to:

- the necessity and appropriateness of expanding the presumption against bail and parole, noting that it may apply in circumstances where a person has not been charged with, or ever previously convicted of, a terrorism offence
- the appropriateness of expanding the continuing detention scheme for high risk terrorist offenders (HRTO scheme) after their sentences for imprisonment have been served, and
- the necessity and appropriateness of removing an offender's right to receive a complete copy of any application made against them.

Each of these amendments in the Bill are necessary and appropriate for the reasons outlined below.

Presumption against bail and parole

In June 2017, the Council of Australian Governments (COAG) agreed to ensure there will be a presumption that neither bail nor parole will be granted to those persons who have demonstrated support for, or have links to, terrorist activity. In line with the COAG agreement, this Bill expands the existing presumption against bail to include those offenders who are the subject of a control order, or have links with, or have shown support for, terrorist activities. The new presumption against parole similarly covers all of these terrorism-related offenders.

As noted at the special meeting of the COAG on Counter Terrorism on 5 October 2017:

> *A nationally consistent approach to preventing and responding to terrorist threats underpins Australia's national security in a complex and evolving threat environment. Close cooperation and interoperability between Commonwealth and state agencies is critical to Australia's ability to counter terrorism. It is the bedrock of our national counter-terrorism effort. And by strengthening legal frameworks, implementing new practices and programs and improving information sharing, we are better equipping our security and law enforcement agencies, strengthening protections for public places, and preventing radicalisation and violent extremism.*

The presumptions against bail and parole mirror those arrangements now in place in most Australian states and territories. The presumptions are necessary legislative tools in support of the prevention and disruption of terrorism, a core element of Australia's national security strategy. It is essential that our laws continue to enable intervention and disruption at the early stages of preparations for a terrorist act. Decision makers at the key steps in the criminal justice process of bail and parole must be able to take into account a person's prior actions, where those actions indicate a terrorism-related risk to the community. The terrorism-related risk posed by these offenders needs to be taken into account regardless of the federal offence for which they are currently being prosecuted or imprisoned.

The presumptions against bail and parole are intended to operate broadly to ensure the community is protected from terrorism and terrorist threats. The presumptions against bail and parole are critical mechanisms to mitigate risks posed by terrorist offenders and other people who have expressed support for terrorism, or those individuals who have been identified by law enforcement as posing a risk to the community who are the subject of a control order. These strong measures will ensure that public safety is paramount when applications for bail and parole are being considered.

A person who is convicted of a terrorism offence has been proven, to the satisfaction of the law, to be a danger to the Australian community. A person who is subject to a control order has been identified by law enforcement and the courts as posing a risk to society. In relation to such persons, as well as those who have shown support or advocated support for terrorist acts, restricting their freedom of movement through the rebuttable presumptions against bail and parole is a legitimate response to the need to protect the community and Australia's national security from the evolving nature of the threat posed by terrorism.

The Government is of the view that it is also appropriate that the presumption also apply to persons accused of offences against section 102.8 of the *Criminal Code Act 1995* (associating with terrorist organisations). This measure reflects the serious threat posed to the Australian community by those individuals who adhere to extremist ideology, and ensures that these individuals can be appropriately managed and controlled within the criminal justice system. This measure, along with the other measures in the Bill, is necessary to fully implement the COAG Agreement of 9 June 2017.

The presumptions provide safeguards and facilitate the exercise of judicial discretion as bail may still be granted where there are 'exceptional circumstances'. The presumptions against bail and parole are not blanket bans on bail and parole for persons who have demonstrated support for, or have links to, terrorism. The presumptions preserve an appropriate degree of discretion as decision makers may grant bail or parole where there are exceptional circumstances to justify release.

Exceptional circumstances are not defined in the *Crimes Act 1914* (Cth) (Crimes Act). This means that the courts (in relation to bail) and the Attorney-General (in relation to parole) have discretion to take into account all relevant information when determining whether exceptional circumstances exist to justify a terrorism-related offender's release into the community.

The defendant (and the Commonwealth Director of Public Prosecutions) also has the option to appeal the decision of the bail authority. This already exists under the current legislation and will continue to be available to the expanded class of offenders under the amended legislation.

In relation to parole, release on parole is already at the discretion of the Attorney-General for all federal offenders serving a non-parole period – the amendments merely set a higher threshold for these offenders who present the highest risk to the community. Further, the existing procedural fairness arrangements under Part IB of the Crimes Act will apply to this expanded class of offenders.

The presumptions are not insurmountable, but they do set an appropriately high threshold in order to protect the community from the threat posed by terrorism-related offenders.

Continuing Detention Orders

Concurrent and cumulative sentences

The proposed amendments in Part 1 of Schedule 2 are appropriate to ensure that the community can be protected from dangerous terrorist offenders who continue to pose an unacceptable risk of committing a serious terrorism offence upon release.

Currently, the HRTO scheme does not apply to terrorist offenders who are in prison for multiple offences where their sentence for the terrorism offence ends before that of any other offence. In such circumstances, the Minister for Home Affairs (Minister) cannot consider whether a continuing detention order (CDO) is appropriate, even if the sentence for any other offence expires only a short period after the sentence for the eligible terrorism offence. This undermines the policy intention of the original HRTO scheme, which is to continue the detention of high-risk terrorist offenders serving a custodial sentence who pose an unacceptable risk to the community. The fact that a terrorist offender has also been imprisoned for other offences, in addition to an eligible terrorism offence, does not mean that the offender is any less likely to pose a threat to the community of committing a serious Part 5.3 offence.

This gap in the current legislation could also lead to perverse outcomes which have the potential to diminish the effectiveness of the HRTO scheme. For example, offenders currently serving a sentence for a terrorism offence may be rendered ineligible for consideration under the HRTO scheme if they commit a further offence whilst in prison (e.g. assaulting another inmate or corrections staff), and subsequently serve a sentence for that offence which ends after the sentence for their terrorism offence.

The proposed amendments are a minor adjustment to the eligibility criteria of the HRTO scheme. They address this gap by ensuring that terrorist offenders are not rendered ineligible simply because they are serving a sentence of imprisonment for an additional offence that ends after their sentence of imprisonment for an eligible terrorism offence. Under the proposed amendments, the Minister will be able to seek a CDO irrespective of whether the terrorist offender's final day in prison is for the eligible terrorism offence or another offence,

provided that they have been detained continuously since being convicted of the eligible terrorism offence.

There will be no impact on the safeguards already guaranteed under Division 105A, which include:

- the court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious terrorism offence if released into the community
- the court must be satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk before making a CDO
- a CDO is appealable as of right within 28 days of the decision, and by leave, within such further time as the court of appeal allows
- the making of a CDO is a judicial process subject to civil rules of evidence and procedure, and
- a CDO is subject to annual review, and the terrorist offender can seek review of a CDO sooner where new facts or circumstances justify reviewing the order, or where it is in the interests of justice to review the order.

In assessing whether an offender continues to pose an unacceptable risk to the community of committing a further terrorism offence, the court may also consider any matter it considers relevant, including the time between the completion of the offender's terrorism sentence and their potential release from prison.

Information protections

When making a CDO application under the existing legislation, the 'complete copy' requirement requires the Minister to include all inculpatory information that the Minister seeks to rely upon to support the application, as well as *all* exculpatory information that the Minister is aware of which would support a finding that the CDO should not be made, regardless of the sensitivity or probative value of that exculpatory information.

The current requirement to provide all exculpatory material to the terrorist offender, without the ability to protect that material where it contains sensitive national security information, is problematic, as it may prejudice national security or ongoing law enforcement or intelligence operations. For example, it may require the Minister to provide the terrorist offender with material in the CDO application that discloses sensitive sources and capabilities, with severe consequences for the safety of human sources, the integrity of law enforcement and security operations, and ultimately, public safety. In deciding whether to make a CDO application, this could also put the Minister in a difficult position where the consequences of revealing sensitive national security information are significant and the terrorist offender poses an unacceptable risk of committing a serious terrorism offence when released into the community. In some circumstances, the consequences of compromising sensitive national security information may be so great that this risk outweighs the Minister making a CDO application. This ultimately undermines the preventative purpose of the CDO scheme.

The proposed amendments will overcome this problem by bringing the options for protecting sensitive national security information contained in an application for a CDO into line with the protections available in other proceedings, whether criminal or civil. The Bill will achieve this by providing that the information that must be given to a terrorist offender in a CDO application is subject to any protective orders made by a court. Under the proposed amendments, the Commonwealth can seek protective orders over sensitive inculpatory and exculpatory material to allow it not to be provided to the terrorist offender, or provided in a redacted or summarised form. This will enhance the ability of the Minister to properly

consider offenders for CDO applications in circumstances where sensitive national security information is involved.

Further, the amendments in the Bill will provide a mechanism through which public interest immunity (PII) may operate to prevent the disclosure of highly sensitive information to the terrorist offender. In so doing, the amendments do not purport to modify or qualify the ordinary application of the doctrine of PII. Rather, they provide a mechanism whereby that doctrine may be engaged to enable a court to consider whether to make protective orders in relation to the disclosure of information to a terrorist offender. Where the Commonwealth withholds sensitive exculpatory material on the basis of PII, the terrorist offender must be notified and may choose to contest the claim. If contested, it will be a matter for a court to determine a PII claim taking into account the right to a fair hearing and ensuring appropriate protections for highly sensitive national security information.

The Bill qualifies the 'complete copy' requirement where the Minister is likely to seek an order of the court preventing or limiting disclosure of the information (either through protective orders or PII). It will ultimately be a matter for the court to determine any protective orders, balancing the competing interests of providing the terrorist offender with material relevant to the proceedings, with the prejudice to national security that may result from the disclosure of that material.

The proposed amendments will not affect the existing requirement that all information that the Minister relies on for the making of a CDO must be provided to the terrorist offender to ensure their right to a fair hearing. Neither the Minister nor the court may rely on information that is not provided to the terrorist offender. If the court orders that information be withheld from a terrorist offender in its entirety, it will not form part of the proceedings. If the court orders that a summary or statement of facts will stand in place of the source document, the court will only be able to consider the summary or statement of facts for the purposes of the CDO proceeding.

Further, the terrorist offender will always be able to contest the withholding of sensitive exculpatory information. Where the Minister withholds any exculpatory material from an application on the basis of a planned PII claim, the Minister would be required to notify the terrorist offender of that fact in writing. The terrorist offender would then be able to seek disclosure of that information. The Minister, or a relevant operational agency, would then be required to formally resist disclosure of the sensitive material by making a PII claim to the court. There would be no onus on the terrorist offender to disprove the PII claim. The Commonwealth would have to demonstrate to the court the public interest arguments in favour of withholding the sensitive material outweigh the public interest in disclosure to the terrorist offender. It will be up to the court to determine whether the balance of the public interest lies in favour of protecting that information (in full or in part), or in ensuring the terrorist has complete access to the material. This is consistent with the operation of information protections in other contexts, whether criminal or civil.

The court always retains ultimate discretion as to whether to grant a PII claim, or grant any orders sought under the *National Security Information (Criminal and Civil Proceedings) Act 2004*, balancing competing public interests to determine the appropriate orders. Importantly, the proposed amendments in the Bill do not preclude the court from exercising its inherent powers to stay proceedings if it considers that the terrorist offender cannot receive a fair hearing. For example, the court may uphold a PII claim to withhold sensitive exculpatory material on the basis that the public interest in not prejudicing national security outweighs the public interest in disclosing that material to the terrorist offender for the purposes of ensuring a fair hearing. However, the court may decide to stay the CDO proceeding on the basis that it

would not be in the interests of justice to proceed with a hearing in which the terrorist offender had been denied relevant and important exculpatory material.

Thank you again for bringing the Committee's concerns to my attention. I trust this information is of assistance to the Committee.

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

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

REF: MC19-003004

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Dear Senator Polley

I am writing in response to a request from Mr Glenn Ryall, Secretary of the Senate Scrutiny of Bills Committee (Committee) on 19 September 2019, seeking further information on the Emergency Response Fund Bill 2019.

My response to the questions outlined in the Committee's *Scrutiny Digest 6 of 2019* is attached. I trust this additional information is sufficient to address the Committee's concerns.

I have copied this letter to the Treasurer, as a responsible Minister, and the Minister for Water Resources, Drought, Rural Finance, Natural Disaster and Emergency Management.

Mathias Cormann
Minister for Finance

October 2019

Response to issues raised by the Senate Scrutiny of Bills Committee in relation to the Emergency Response Fund Bill 2019

1.20 The committee requests the minister's advice as to why it is considered necessary and appropriate to confer on the Emergency Management Minister a broad power to make grants of financial assistance, in the absence of any guidance on the face of the bill as to how this power is to be exercised.

1.21 The committee also requests the minister's advice as to the appropriateness of amending the bill to include (at least high-level) guidance as to the terms and conditions on which financial assistance may be granted.

The Emergency Response Fund Bill 2019 (Bill) ensures that any financial assistance provided under the Emergency Response Fund (ERF) will be subject to appropriately transparent decision-making processes.

Spending from the ERF will only be accessed as an additional source of funding for emergency response and recovery from natural disasters that have a significant or catastrophic impact on Australian communities and where the Government determines that existing programs are insufficient to meet the scale of the response required. The Bill does not provide for regular disbursements from the ERF which is consistent with the arrangements for other natural disaster recovery programs. This is due to the uncertainty of when funding will be required. Funding will only be accessed following a decision of the Government after a large scale natural disaster of national significance.

Funding from the ERF will complement existing sources of funding for emergency response and natural disaster recovery, such as the Disaster Recovery Funding Arrangements, the Australian Government Disaster Recovery Payment and the Disaster Recovery Allowance[1]. The ERF will also complement strategic work being undertaken to reduce disaster risk, in line with the National Disaster Risk Reduction Framework.

In developing a proposal to access the ERF, the Emergency Management Minister will be informed by advice from the Director General of Emergency Management Australia. The Director General is highly qualified for this role, as the senior official responsible for coordinating Australia's responses to crises, including providing both physical and financial support to those impacted by natural disasters. The Director General will provide advice to the Emergency Management Minister on when the ERF should be accessed and the design of funding arrangements for recovery from natural disasters.

In preparing advice for the Emergency Management Minister, the Director General will rely on the Australian Government's well-established crisis management arrangements, which include whole-of-government recovery consultative committees that bring together relevant government agencies at the Commonwealth and State and Territory levels. The Director General will also consult with local governments and communities affected by the disaster or any other expert, to determine the needs of the community and identify any additional recovery assistance that would be beneficial.

All decisions of the Government to access the ERF will be published as a Budget or Mid-Year Economic and Fiscal Outlook (MYEFO) measure that outlines the purpose and amount of funding to be provided. Following a Government decision of this nature, the Emergency Management Minister may make grants or arrangements as permitted by the legislation.

The Bill provides that the Emergency Management Minister can only make arrangements or grants for specified purposes - the carrying out of a project, the provision of a service, the adoption of technology or for a matter incidental or ancillary to one of those purposes. Any grants or arrangements made must be directed towards achieving the goal of recovery from a natural disaster and/or post-disaster resilience.

[1] https://www.disasterassist.gov.au/Pages/disaster-arrangements.aspx

These requirements in the Bill ensure that the Minister can only provide funding for purposes that are directed towards achieving the intent of the legislation.

Where appropriate, ERF funding programs will have guidelines published on the Department of Home Affairs' website to ensure that applicants are treated equitably, and that funding recipients are selected based on merit addressing the program's objectives. Grant programs under the ERF will be developed in accordance with the Commonwealth Grant Rules and Guidelines 2017 (CGRG) and the requirements of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act). Grant guidelines will be developed for all new grant opportunities and approved grants will be reported on the GrantConnect website no later than 21 days after the grant agreement takes effect. ERF grant administration will be conducted in a manner consistent with the CGRG's principles of:

- robust planning and design;
- collaboration and partnership;
- proportionality;
- an outcomes orientation;
- achieving value with relevant money;
- governance and accountability; and
- probity and transparency.

Procurements under the ERF will be undertaken in accordance with the Commonwealth Procurement Rules 2019 and the procurement policy framework. ERF procurements will be accountable and transparent, while meeting the core procurement principle of achieving value for money.

The terms and conditions of grants or arrangements will be set out in a written agreement between the Commonwealth and the relevant funding recipient. This approach is consistent with the CGRGs, which state that grant agreements should provide for:

- a clear understanding between the parties on required outcomes, prior to commencing payment of the grant;
- appropriate accountability for relevant money, which is informed by risk analysis;
- agreed terms and conditions in regards to the use of the grant, including any access requirements; and
- the performance information and other data that the grantee may be required to collect as well as the criteria that will be used to evaluate the grant, the grantee's compliance and performance.

The Bill also requires the Emergency Management Minister to publish detailed and up-to-date information about grants and arrangements made under the ERF on the Department of Home Affairs' website. This information, which may include amounts paid and payable to recipients as well as the names of recipients, is in addition to the reporting obligations under the CGRGs and Commonwealth Procurement Rules 2019. This information will not need to be reported for recipients that are individuals, to protect personal privacy.

I do not consider an amendment is necessary or that it would add to the effective administration of the ERF. The design of the funding arrangements will be informed by the Commonwealth's expert on natural disaster management, who will consult with appropriate stakeholders to determine the needs of the community and identify any additional recovery assistance that would be beneficial. Due to the unpredictability of the timing and scale of natural disasters, the ERF has been designed to be accessed only when the Government determines that that existing recovery programs are insufficient to meet the scale of the response required. There are sufficient reporting obligations in the Bill that, when combined with the existing requirements in existing Commonwealth legislation and frameworks, ensure that detailed information on grants and arrangements is transparently available to the general public.

I consider the Bill includes sufficient high-level guidance on the terms and conditions for financial assistance to be granted. As outlined above, financial assistance will be granted through a well-informed

decision-making process. The process includes expert advice from the Director General of Emergency Management Australia, consideration through the Government's Budget process and a consistent approach for making arrangements or grants for emergency response and recovery from natural disasters.

Where appropriate, terms and conditions will be included in grant guidelines and funding agreements with recipients, rather than placing it within the primary legislation.

1.25 The committee requests the minister's advice as to:

- **the processes by which grants would be provided, and arrangements would be entered into, in accordance with clause 20 of the bill;**
- **whether decisions in relation to the provision of grants and entering into arrangements would be subject to the independent merits review; and**
- **if not, the characteristics of those decisions that would justify excluding merits review (the committees consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, What decisions should be subject to merit review?).**

As outlined above, financial assistance will be granted through well-informed decision-making processes. The process includes:

- the requirement that the Emergency Management Minister can only make grants or arrangements that are directed towards recovery from a natural disaster and/or post-disaster resilience;
- the provision of advice on the design of ERF funding programs from the Commonwealth's expert on natural disaster management in consultation with appropriate stakeholders;
- the publication of program guidelines that outline the administration of the ERF and set out high-level principles to assist the Emergency Management Minister in considering when to bring forward proposals to access the Fund;
- the publication of all decisions of the Government to access the ERF, as a Budget or MYEFO measure that outlines the purpose and amount of funding to be provided; and
- a requirement that grants or arrangements made by the Emergency Management Minister be consistent with the program of grants or arrangements agreed by the Government.

This provides a transparent and merit-based decision-making process for providing financial assistance from the ERF, to assist with emergency response and recovery from natural disasters.

Priorities may be delivered by activities supported by, but not exclusive to, a competitive merit-based grants program, discretionary grants or a procurement process, consistent with the rules relating to the Commonwealth in the PGPA Act.

Guidelines will be developed for ERF granting activities and will include detailed criteria and merit review processes where appropriate. Scope also exists to provide grants to state and territory governments to support recovery from natural disasters and post-disaster resilience. In these scenarios, grants would be channelled through the COAG Reform Fund. Financial assistance will be paid in accordance with the terms and conditions set out in Schedule D of the Intergovernmental Agreement on Federal Financial Relations and through a written agreement between the Commonwealth and the State or Territory, which will be made publicly available on the Federal Financial Relations website.

The details of financial assistance provided from the ERF will be published on the Department of Home Affairs' website and provided in the department's annual report, providing transparency of the outcomes.

The general exclusion of an independent merits review process in the legislation can be justified on the basis of decisions relating to the allocation of a finite resource where not all claims can be met. Allocating resources to a merits process would be disproportionate to the significance of the decisions under review –

for example, small grants programs. However, where appropriate, merits review processes will be included in grant guidelines. If funding is provided to a State or Territory to distribute, any independent merits review would be subject to the conditions and processes they impose on recipients.

I do not consider that an amendment is necessary or would contribute to the effective administration of the ERF.

1.30 The committee requests the minister's more detailed advice as to:

- **why it is considered appropriate to leave significant elements of the disaster relief and post-disaster resilience scheme proposed by the bill to delegated legislation, and**
- **why the directions making up the Emergency Response Fund's investment mandate would not be subject to disallowance or to sunsetting.**

The Bill provides for certain functions to be carried out through delegated legislation, including:

- declarations made by the Prime Minister nominating the Emergency Management Minister for the purposes of the Act (clause 4 of the Bill);
- crediting determinations by the responsible Ministers regarding amounts to be credited into the Emergency Response Fund Special Account (clause 13 of the Bill);
- transfers by the Emergency Management Minister of excess amounts in the Home Affairs Emergency Response Fund Special Account back to the Emergency Response Fund Special Account (clause 31 of the Bill); and
- any rules made by the Finance Minister as permitted under the Bill (clause 64 of the Bill).

These functions are administrative in nature and do not represent significant elements of the legislative framework for the ERF. Consistent with the arrangements for other Commonwealth Investment Funds, providing for these functions to be carried out through delegated legislation allows for a simpler, more practical and more efficient administration of the ERF.

Investment Mandate

The investment mandate is a direction by the Treasurer and the Minister for Finance, as the responsible Ministers under the Bill, to the Future Fund Board of Guardians (Future Fund Board).

The ERF is intended to be a long-term investment that will provide an additional source of sustainable funding for recovery and post-disaster resilience following a natural disaster that has a significant or catastrophic impact in Australia. Similar to the other long-term Commonwealth Investment Funds (including the Future Fund, the Medical Research Future Fund and the Future Drought Fund), it is expected that the investment mandate will set a long-term target rate of return. In these cases it is envisaged that investment mandates would only be reissued if there was a significant change in Government policy or a structural change in the investment landscape.

In setting the investment mandates for the different investment funds, responsible Ministers need to ensure that:

- targeted returns are consistent with the policy intent (including consideration of the intended cash flows from the fund and growth of the underlying capital);
- resultant risks are aligned with the targeted returns, are reasonable and within tolerances; and
- the mandate is informed by appropriate and expert advice and set with regard to current and expected economic and financial market conditions.

Exemption from disallowance

As a direction from the Treasurer and the Minister for Finance to a body (the Future Fund Board), investment mandates are exempt from disallowance under item 2 of the table at section 9 of the

Legislation (Exemption and other Matters) Regulation 2015, which provides that a class of instruments not subject to disallowance is 'an instrument that is a direction by a Minister to any person or body'.

This is consistent with the long-standing and established operational arrangements for other funds currently managed by the Future Fund Board, and is appropriate in the case of the investment mandate. The investment mandate provides direction to the Future Fund Board in relation to the performance of its investment functions, and will include the setting of a benchmark rate of return and an acceptable level of risk that is aligned with the purpose of the ERF.

This process for setting investment mandates provides the Board with an appropriate level of operational certainty in managing their investments on behalf of the Government over the long term. It also allows the Government to issue updated directions to the Future Fund Board through new investment mandates when appropriate.

Although investment mandates are exempt from disallowance, the Bill provides for appropriate parliamentary and public scrutiny. The Bill requires that, prior to issuing the investment mandate, the responsible Ministers must consult the Future Fund Board (section 42(1) refers). If the Future Fund Board chooses to make a submission regarding the draft investment mandate, this submission must be tabled in both houses of Parliament (s 42(2) refers). This requirement ensures that Parliament is informed of any matters raised by the Future Fund Board with respect to proposed investment mandates.

Additionally, the Future Fund Management Agency provides annual and quarterly performance reports, including comparisons against the benchmark rates specified in the Fund investment mandates.

Exemption from sunsetting

It is not appropriate that the ERF investment mandate be subject to sunsetting due to the long-term nature of the fund's investments (refer to above comments). The investment mandates for Commonwealth Investment Funds are rarely reissued. For example, previous investment mandates for the Building Australia Fund and the Future Fund were in place for around 10 years. The investment mandate for the Education Investment Fund has been in place since 2009 and the investment mandates for the DisabilityCare Australia Fund and the Medical Research Future Fund have been in place since inception (2013 and 2015 respectively).

On this basis, and consistent with all of the Commonwealth Investment Fund investment mandates, I do not believe that it would be appropriate to make the ERF investment mandate subject to disallowance or sunsetting.

1.31 The committee also requests the minister's advice as to the appropriateness of amending the bill to provide that the Emergency Response Fund's investment mandate is subject to disallowance but only come into force once the disallowance period has expired, unless the minister certifies that there is an urgent need to make changes and it is in the national interest that a specified direction not be subject to disallowance.

See response above.

1.36 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to permit the Emergency Management Minister to delegate their powers to any official of a Commonwealth entity.

The Bill needs to be read in conjunction with the primary legislation governing the operation of all Commonwealth entities: the PGPA Act.

The PGPA Act imposes general duties on all accountable authorities of Commonwealth entities (at sections 15 to 19) including, inter alia, a duty to govern their entity in a way that promotes the proper use (efficient, effective, economical and ethical use) of public resources. Integral to that is the duty to establish

and maintain systems relating to risk and control (section 16), including measures directed at ensuring that the officials of the entity comply with the finance law.

To give effect to their duties, accountable authorities are generally expected to implement:

- delegation and decision-making processes for the proper use of public resources, including robust decision-making and control processes for the expenditure of relevant money. For example,
  - decision-making processes could be supported by requirements on the type of information that officials need to consider before making a spending decision; and
  - delegation processes could be limited to particular persons or positions with particular skills and roles (financial transaction limits could be part of those system of delegation).
- appropriate oversight and reporting arrangements for activities and projects, and to address the inappropriate use of resources by officials, or the failure by officials to comply with applicable laws or Commonwealth policies.

These processes are designed to provide an appropriate level of assurance in accordance with the accountable authorities' duty to establish and maintain systems in relation to risk and control in section 16 of the PGPA Act.

The PGPA Act provides an express power of delegation to accountable authorities for reasons of practical necessity, administrative efficiency and operational efficacy. The PGPA Act requirement that the delegation is in writing ensures clarity and accountability for decision-making. Management of delegated power by delegators is crucial to the legitimacy and appropriateness of the exercise of delegated power. The accountable authority of an entity may also, by written instrument, give instructions to officials of other entities where these officials are approving the commitment of relevant money or dealing with public resources for which the accountable authority is responsible (section 22 of the PGPA Act).

When delegating PGPA Act powers accountable authorities must bear in mind their duties under the PGPA Act at sections 15 to 19, including their duty to govern their entity in a way that promotes the proper use of public resources. To give effect to this, an accountable authority may accompany their delegations of power with directions to delegates. Directions enable the accountable authority to instruct the delegate to exercise the delegated power within specified parameters. This not only allows the accountable authority to control how the delegated power is exercised consistent with the statutory requirement to promote the proper use of resources, but also allows the accountable authority to set limits on the power the delegate may exercise.

Delegates, who are officials under the PGPA Act, should understand the nature and scope of the power they have been delegated. This is reinforced through the application of the duties of officials at sections 25 to 29 of the PGPA Act, which, inter alia, requires them to exercise powers with care and diligence, honestly, in good faith and for a proper purpose.

Emergency Management Australia within the Department of Home Affairs may utilise a Commonwealth Grants Hub, through a contract arrangement, to make payments to grant recipients. Grants Hub staff will also be officials under the PGPA Act and subject to the responsibilities outlined above.

1.37 The committee also requests the minister's advice as to the appropriateness of amending the bill to restrict the delegation of the Emergency Management Minister's powers to members of the Senior Executive Service, consistent with other powers of delegation in the Bill.

The provisions of the PGPA Act endure and there is no need or intention to introduce duplicative statutory requirements. The governance outcomes sought by the Committee are already factors implemented under the PGPA Act – see response above.

Senator the Hon Bridget McKenzie
Deputy Leader of The Nationals
Minister for Agriculture
Senator for Victoria

Ref: MC19-007840

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator Polley Helen,

Thank you for your email correspondence of 12 September 2019 regarding scrutiny of the Inspector-General of Live Animal Exports Bill 2019.

In response to The Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 5 of 2019 (item 1.31, 1.40 and 1.42), please refer to the enclosure at Attachment A.

Thank you for reviewing the above Bill.

Yours sincerely

Bridget McKenzie

Encl
Attachment A: Response to scrutiny of the Inspector-General of Live Animal Exports Bill 2019

Parliament House, Canberra ACT 2600 Telephone (02) 6277 7190 Email: Minister.McKenzie@agriculture.gov.au

Item 1.31 The committee requests the minister's more detailed justification as to why it is considered necessary and appropriate to leave significant elements of the review process and the content of reports to delegated legislation.

Section 10(4) provides that the rules may make provision for the conduct of reviews and the content of reports. The rule making power is set out in clause 41 of the Bill. This enables the Minister to prescribe any additional requirements relating to the conduct of reviews and the content of reports.

It is intended that the rules will include requirements regarding the Inspector-General's review program; when reviews are to be conducted; the process for inviting submissions and their publication; requesting of assistance from the department; the handling of documents; the consideration of all evidence provided; the reporting on reviews; the exclusion of certain material from reports and the inclusion of criticism in reports.

Matters relating to these issues have been dealt with under delegated legislation for many years in similar circumstances. The rules will mirror the delegated legislation for the Inspector-General of Biosecurity under the Biosecurity Regulation 2016.

In this case delegated legislation is necessary and justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently and its adaptability for other matters such as those of technical detail. Delegated legislation is the appropriate method through which to work out the application of the law in greater detail.

1.40 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.
(Refer footnote 25: Attorney-General's Department, A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers, September 2011, pp 50-52.)

The Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide) notes that placing the burden of proof on the defendant should be limited to where the matter is peculiarly within the knowledge of the defendant and where it is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. The Guide also notes that a reverse burden provision is more readily justified if:

- the matter in question is not central to the question of culpability for the offence
- the penalties are at the lower end of the scale and
- the conduct proscribed by the offence poses a grave danger to public health or safety.

An additional factor to consider is whether the offences only impose an evidential burden (as the prosecution must still disprove the matters beyond reasonable doubt if the defendant discharges the evidential burden).

With regard to the offences raised by the Committee, it is necessary that the defendant bears the evidential burden in these sections in order to achieve the legitimate objectives of ensuring the objects of the Act are met. These clauses are reasonable and proportionate to the legitimate objectives because the defendant will have the information or knowledge that is evidence of the exception (i.e. that they were authorised by law to undertake the conduct).

These sections provide an exception to the relevant offence where a defendant has:

- acted in good faith or in purported compliance with the Act or rules (s31(2))
- the information is not false or misleading in a material particular (s34(2) and s35(2))
- the information did not omit a matter or thing without which the information is misleading in a material particular (s34(3)) or
- the official receiving the information did not take reasonable steps to inform the person that they may be liable to a civil penalty (s34(4)).

The defendant bears the evidential burden with respect to these exceptions. Whether someone has acted in good faith, whether a document is misleading or whether or not a person has been informed that they may be liable to a civil penalty provision for contravening this clause is something peculiarly within the knowledge of that person.

It would be difficult for the prosecution to provide evidence that the person is not covered by an exemption when evidence relevant to whether an exemption applies can only be known by that person. It would also be significantly more difficult and costly for the prosecution to provide evidence that a document is false or misleading than for a defendant to provide evidence of the matter themselves.

1.42 The committee requests the minister's advice as to why there is no requirement for either review reports or annual reports to be tabled in Parliament and why there is no requirement for an annual report to be made publicly available, noting the potential detrimental impact on parliamentary scrutiny.

Section 10(3) states that the Inspector-General must publish a report on each review conducted. The rules to be made under the *Inspector-General of Live Animal Exports Act 2019* will require that, as soon as practicable, each finalised review report will be available online on the Inspector-General's website. This level of transparency is appropriate and consistent with the activities of the Inspector-General of Biosecurity.

Section 40(1) states that the Inspector-General must, as soon as practicable after the end of each financial year, prepare and give the Minister a report on the activities of the Inspector-General during that financial year (i.e. number of reviews under section 10 started and completed, and other information considered appropriate). It is anticipated that the Minister will report to Parliament and each annual report will be available online on the Inspector-General's website. This level of transparency is appropriate and consistent with the activities of the Inspector-General of Biosecurity.

THE HON MICHAEL SUKKAR MP

Minister for Housing and Assistant Treasurer

Ref: MS19-002285

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Dear Senator Polley

I am writing in response to a letter from the Senate Scrutiny of Bills Committee (the Committee) requesting information in relation to issues raised on the National Housing Finance and Investment Corporation Amendment Bill 2019 that are contained in the Committee's *Scrutiny Digest No. 6 of 2019*. The Committee sought advice in relation to:

- why it is considered necessary and appropriate to prescribe a majority of the elements of the proposed First Home Loan Deposit Scheme (the Scheme) in subordinate legislation, specifically the *National Housing Finance and Investment Corporation Investment Mandate Direction 2018* (the Investment Mandate); and

- the appropriateness of the proposed amendments to the Investment Mandate being subject to the Parliamentary disallowance process.

Issue 1: Delegation

The Bill amends the *National Housing Finance and Investment Corporation Act 2018* (the Act) to establish the framework for the Scheme to assist eligible first home buyers to access the housing market sooner. It does this by expanding the functions of the National Housing Finance and Investment Corporation (NHFIC) to enable it to provide guarantees to improve access to home ownership.

The Act, as amended, will specify the matters that will be covered by the Investment Mandate, including decision-making criteria, limits on the making of guarantees by the NHFIC, and strategies and policies the NHFIC is to follow. The Government is preparing amendments to the Investment Mandate to outline key Scheme criteria – for example, eligible lenders, first homebuyers, loan types and price caps – limits on the making of guarantees by the NHFIC, and Scheme principles the NHFIC is to follow in administering the Scheme.

It is appropriate to prescribe the Government's expectations for the proposed Scheme in the Investment Mandate to ensure the Scheme is, and remains, responsive to market conditions, to facilitate additional consultation and to promote consistency with the existing legislative framework.

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Responsiveness

Providing the Government's expectations for the Scheme in the Investment Mandate rather than in primary legislation allows the legislative framework to be flexible and responsive to the changing needs of lenders and first home buyers. It allows refinements to be made, within the scope permitted by the Bill, to reflect new information and changes in market conditions including changes to house prices, housing supply, wages and finance costs.

The Government's objectives for the Scheme would be hindered if central elements of the Scheme were to be included in primary legislation. For example, one of the central elements of the Scheme is that the value of purchased property be less than the price cap that applies in the area where the property is located. Price caps will be set in the Investment Mandate and will likely require periodic and timely amendment to ensure they continue to reflect prevailing market conditions and the Government's overall objectives for the Scheme.

Additional Consultation

Detailing the Government's expectations for the Scheme in the Investment Mandate will facilitate additional consultation on the proposed operation of the Scheme with scheme participants. On 12 May 2019, the Government announced that it would establish the Scheme to commence on 1 January 2020. To ensure the Scheme had legislative authority and the requisite funding arrangement in place by 1 January 2020, the Government prioritised the preparation and introduction of the Bill, which would give the NHFIC the appropriate powers and funding to operate the Scheme. Limited opportunities would have been available to consult on the details of the Scheme were they included in the primary legislation.

Under this approach, the Government also has the flexibility to finalise the Investment Mandate amendments at a later date which allows for further stakeholder consultation. To date, Treasury and NHFIC have conducted broad stakeholder consultation to inform the policy design and its implementation. The First Home Loan Deposit Scheme Reference Group was established to provide advice to the Government on the design and implementation of the Scheme. The Reference Group convened in July and August 2019 to discuss key design elements of the Scheme, and implementation and operational matters.

Consultation has informed design considerations including the setting of eligibility criteria, safeguarding the integrity of the Scheme, as well as operational details such as the first home buyer application process, and the relationship between the NHFIC and lenders participating under the Scheme. A public consultation process is planned for the proposed amendments to the Investment Mandate.

The Legislative Framework

Detailing the Government's expectations for the Scheme in the Investment Mandate is consistent with the legislative framework already approved by the Parliament and in place under the Act. The Act authorises broad functions that support three current programs outlined in the Investment Mandate: the Affordable Housing Bond Aggregator, the National Housing Infrastructure Facility and the NHFIC's capacity building function. I note this approach is consistent with other legislative frameworks, including the *Northern Australia Infrastructure Facility Act 2016*, the *Clean Energy Finance Corporation Act 2012, Regional Investment Corporation Act 2018*, and the *Future Fund Act 2006*.

Issue 2: Disallowance

The Investment Mandate should provide certainty to both the NHFIC Board and the market about the way in which the NHFIC is to exercise its functions and powers. For example, it is expected that commercial lenders will make long-term commitments to participate in the Scheme. Consequently, lenders will expect a level of certainty about the operation of the Scheme and the manner in which changes to the Scheme are made. Certainty would be compromised, due to potential delays, and unpredictable market conditions and regulatory environment, if the Investment Mandate were disallowable. Further, possible disallowance would place the NHFIC in a very difficult situation leading to significant uncertainty and impracticality for

participants in the Scheme. The treatment of legislative instruments under the Act is consistent with the current treatment of all ministerial directions to corporate Commonwealth entities.

Like other legislative instruments, the Investment Mandate is required to be tabled in Parliament and registered on the Federal Register of Legislative Instruments. This enables the public and Parliament to hold the Government accountable for the directions it issues to the NHFIC.

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

The Hon Michael Sukkar MP

Senator the Hon Anne Ruston

Minister for Families and Social Services
Senator for South Australia
Manager of Government Business in the Senate

Ref: MB19-001422

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03 OCT 2019

Dear Senator Polley

I writing in response to issues raised by the Senate Scrutiny of Bills Committee in its Scrutiny Digest 6 of 2019 of 19 September 2019 about the Social Security (Administration) Amendment (Income Management to Cashless Debit Card Transition) Bill 2019 (the Bill). If enacted, the Bill will amend the *Social Security (Administration) Act 1999* (the Act).

The Bill establishes the Northern Territory and the Cape York area in Queensland as Cashless Debit Card trial areas, transitions Income Management participants in these sites onto the Cashless Debit Card trial in 2020 and extends the end date for existing Cashless Debit Card trial areas from 30 June 2020 to 30 June 2021 (with the exception of the end date for the Cashless Debit Card trial in the Cape York area, which will be 31 December 2021).

The Committee sought advice about measures to specify the portion of restrictable payments that are designated 'restricted' and 'unrestricted' for participants in the Northern Territory trial of the Cashless Debit Card and measures relating to the sharing and sourcing of information relating to current or prospective trial participants.

Proportion of payments placed on to the Cashless Debit Card

The ability to vary rates for participants under new subsections 124PJ(2A), 124PJ(2B) and 124PJ(2C) ensures the effective operation of the Cashless Debit Card and allows for response to the particular needs of individual communities and support for individual participants in the Northern Territory.

The Bill proposes that participants in the Northern Territory have between 50 per cent and 70 per cent of their welfare payment placed on to the Cashless Debit Card. This is less than the proportion in the existing Cashless Debit Card trial areas, which have 80 per cent of their welfare payment placed onto the Cashless Debit Card and was designed in response to feedback from communities and other stakeholders.

New subsections 124PJ(2A) and 124PJ(2B) each allow the Minister to make a determination, by notifiable instrument, that varies the restricted portion of welfare payments accessible through the Cashless Debit Card by trial participants who reside in the Northern Territory. The subsections operate with respect to different classes of trial participants. The restricted portions are established in subsections 124PGE(1), 124PGE(2) and 124PGE (3) and reflect the existing portions that are applied under the Income Management regime.

Subsection 124PJ(2A) relates to trial participants under subsection 124PGE(1) who are currently covered by the Income Management Long-Term Welfare Recipient and Disengaged youth measures and whose restricted portion is set at 50 per cent under subsection 124PJ(1B). As outlined in the Explanatory Memorandum, new subsection 124PJ(2A) will be used to reflect community requests relating to discretionary expenditure.

Subsection 124PJ(2B) relates to people who are trial participants under subsection 124PGE(2) (who are covered by the current Child Protection measure) and subsection 124PGE(3) (who are covered by the current Supporting People at Risk measure). The restricted portions for these participants are set, respectively, by subsection 124PJ((1C) at 70 per cent and subsection 124PJ(1D) at 50 per cent. The power in subsection 124PJ(2B) will allow employees or officers of relevant authorities, including Northern Territory child protection officers and the Northern Territory Banned Drinkers Registrar, to request an increase or decrease in the proportion of payments accessible through the Cashless Debit Card.

With respect to the Northern Territory, the Minister can respond to changing community conditions as reflected in requests from communities or referring employees and officers. However, it is intended that the Minister would only respond to requests made by a community or an employee or officer of a relevant authority in appropriate circumstances. For example, a child protection officer may seek to increase or decrease the restricted rate based on the individual circumstances of a specific participant.

As explained in the Explanatory Memorandum, the Act provides that the portion of a participant's welfare payment that is restricted can be varied by the Secretary under subsection 124PJ(3). The Bill extends that power to new trial participants. This safeguard allows the Secretary to revise a trial participant's restricted portion as appropriate to the individual's circumstances notwithstanding the Minister's general determination under subsection 124PJ(2A) or 124PJ(2B).

It is important for the Minister to respond to changes in community needs, and for the Secretary to respond to in a targeted way to changes in an individual's circumstances as and when they arise. The Minister's power to determine restricted portions is better exercised by notifiable instrument to ensure that trial participants have responsiveness, transparency and certainty about their financial arrangements.

Information sharing powers

Powers to obtain and share information about trial participants are necessary to facilitate the effective administration of the Cashless Debit Card trial and enable trial participants and their communities to be appropriately supported, including in times of crisis.

The Bill proposes new sections 124POB, 124POC and 124POD to authorise certain information disclosures to the Queensland Commission (currently the Family Responsibilities Commission (FRC)), a child protection officer of the Northern Territory or recognised State/Territory authority of the Northern Territory. These entities are responsible for referring participants to the Cashless Debit Card trial under section 124PGD (FRC) and 124PGE(2) (a child protection officer of the Northern Territory or recognised State/Territory authority of the Northern Territory).

The measures replicate existing provisions in Part 3B of the Act and are necessary to ensure that the personal circumstances of participants can be disclosed to ensure that participants are correctly placed onto the Cashless Debit Card trial and correctly authorised to cease to be trial participants. For example, information about a potential participant's address will be necessary to determine if the individual is a resident of a trial area.

In addition, the Bill amends section 192 of the Act to include the operation of Part 3D in this section to facilitate collection of information relevant to trial participation. This replicates arrangements under Part 3B of the Act for the Income Management regime and will support the operation of the Cashless Debit Card trial, including with respect to exit and wellbeing exemptions. Information that may be obtained pursuant to this provision includes trial participant residential addresses, payment types and mental and social wellbeing. This information will support the administration of the trial including the identification of trial participants and the management of wellbeing exemption and exit processes.

As you have noted, the Bill addresses disclosure of information to community bodies and the Queensland Commission and officers and employees of certain state or territory authorities (including child protection officers). As explained in the Explanatory Memorandum, sections 124POA, 124POB 124POC and 124POD replicate the current information sharing provisions in Part 3B of Act.

The information to be shared under the proposed 124POA, 124POB 124POC and 124POD is protected information for the purposes of the Act and relates to participation in, and exit from, the Cashless Debit Card trial. The information that may be disclosed is limited in scope according to the body involved. For example, section 124POA specifies that the Secretary may only disclose to a relevant community body the fact that the person has ceased to be a trial participant or a voluntary participant, the day the person ceased to be a participant and the fact that participation ceased due to a determination under subsection 124PHA(1) or 124PHB(3). In other contexts, the information required will be material to whether a person is a trial participant and may relate, for example, to the person's place of residence.

The Department of Social Services (the department) is subject to a range of legal obligations relating to privacy, which are supplemented by policies and practices to ensure that individual's privacy is protected in relation to protected (personal) information obtained under the Act. Personal information collected by the department in connection with the Cashless Debit Card trial is held securely by the department and is not disclosed otherwise than for the administration of Part 3D of the Act or in connection with possible breaches of the law.

Importantly, the Act contains confidentiality provisions, including offence provisions, to ensure that trial participant information is stringently protected. Protected information can only be disclosed in specified circumstances. Division 3 of Part 5 of the Act creates a series of strict liability offences, which are punishable, upon conviction, by a term of imprisonment not exceeding two years.

In addition, the *Privacy Act 1988* applies to the collection, use, storage and disclosure of personal information by the department, Services Australia and certain other entities.

The department uses a secure Archiving, Record Keeping and Compliance (Arc) system. Access controls are placed on each person's individual record and group of individual records to ensure only authorised people have access to the protected information. For auditing and compliance purposes, Arc metadata records who has viewed, updated, modified, destroyed or contributed to a document. Assessment and quality assurance processes are performed regularly to ensure that staff manage protected information within the secure Arc environment.

People with access to protected data will:

- be engaged by the Department of Social Services and required to comply with, among other things, the Australian Public Service Code of Conduct and Conflict of Interest Disclosure policy
- hold a Australian Government Security Vetting Agency (AGSVA) Baseline Security Clearance as a minimum
- be trained in handling protected information before given access to protected information, and
- be appropriately supervised.

I thank the Committee for the consideration of this Bill.

Yours sincerely

Anne Ruston

THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY

Ref: MS19-002192

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Dear Senator Polley

I am writing in response to a letter from the Senate Scrutiny of Bills Committee (the Committee) requesting information in relation to issues raised in the Committee's Scrutiny *Digest 5 of 2019* regarding the Treasury Laws Amendment (Ending Grandfathered Conflicted Remuneration) Bill 2019 (the Bill).

The Committee sought advice as to:

- why it is considered necessary and appropriate to leave the scheme for the rebate of conflicted remuneration to regulations; and
- whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the regulations).

Issue 1: Use of Regulations

The regulation-making power, which provides the rules around how grandfathered benefits are to be passed through to retail clients is justified in recognition of the need to account for the variety of financial products and arrangements in relation to which rebates may need to be paid, and the variety of potential recipients of those rebates. It is designed to ensure the application of primary legislation remains flexible to adapt to market developments and applies in a way consistent with the intended policy and the enabling provisions in the Bill, specifically, to ensure that the benefits of ending grandfathered conflicted remuneration go to customers. Specifying these requirements in regulations is the most appropriate approach as it provides the flexibility to make more detailed rules on how benefits must be passed through and to respond to changing industry circumstances in a timely manner.

While the rebating scheme must be sufficiently adaptable to cover the wide variety of situations in which conflicted remuneration may be provided, it will only be applicable to a limited class of persons. The rebating scheme would only apply to those covered persons, within the meaning of proposed section 963M of the *Corporations Act 2001* (the Act) where the person would be legally obliged (disregarding the ban on conflicted remuneration in Subdivision C of Division 4 of Part 7.7A of the Act) to give conflicted remuneration to another person, on or after 1 January 2021.

That is, the obligations to make payments in accordance with the regulations would only apply to those covered persons who still had obligations to pay conflicted remuneration as at 1 January 2021 under an arrangement that had been in place prior to the application date of Division 4 of Part 7.7A of the Act (generally 1 July 2013).

Given the limited class of persons who would be required to pay rebates in accordance with the regulations, it is appropriate that these matters are dealt with in subordinate laws, rather than in the primary law. If matters in relation to rebating were to be inserted into the Act, they would insert, into an already complex statutory framework, a set of specific provisions that would apply only to a relatively small group of persons. This would result in additional cost and unnecessary complexity for other users of the Act.

Issue 2: Specific consultation obligations included in the legislation

The Committee's concerns about the lack of a specific consultation requirement before making regulations for the purposes of proposed section 963N of the Act are noted. Consistent with standard practice, consultation is expected to occur before making regulations for the purposes of this proposed section, especially where this would impact businesses and consumers, as required under section 17 of the *Legislation Act 2003*. In addition, if the Government were to proceed with regulations that were subject to less than four weeks public consultation, the Government is obligated under the *Corporations Agreement 2002* to provide a statement of reasons for the shorter consultation period to States and Territories.

In this case, on 28 March 2019, the Government released exposure draft regulations proposed to be made pursuant to proposed section 963N of the Act for four weeks of public consultation. The Government received feedback from consumer groups, industry and the Australian Securities and Investments Commission. Since then, Treasury has undertaken further targeted consultation on the draft regulations.

Given the already existing standard legislative consultation requirements and the other existing safeguards, making the validity of regulations made for the purposes of section 963N of the Act contingent on further legislated consultation obligations appears unnecessary and inconsistent with other regulation making powers within the Act.

Thank you for bringing your concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

27 / 9 /2019