THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS

Ref No: IS19-000010

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
PO Box 6022
Parliament House
CANBERRA ACT 2600

Dear Chair

I write regarding the Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019, in relation to which I understand the Senate Standing Committee for the Scrutiny of Bills (the Committee) is seeking further information.

I note that the Bill has passed both Houses of Parliament, and that the resulting Act received Royal Assent on 10 December 2019. The Act contains provisions to confirm the validity of current and former special operation and special investigation determinations made by the Australian Criminal Intelligence Commission Board, and streamline the process for the Board to make future special operation and special investigation determinations.

The provisions in the Bill were technical in nature and did not expand or otherwise alter the powers available to the Australian Criminal Intelligence Commission in the course of undertaking a special operation or special investigation. The Bill ensured that the Australian Criminal Intelligence Commission can continue to effectively fulfil its statutory functions and actively contribute to a safer and more secure Australia.

I also note that the Government has committed to undertake a review of the operation of the provisions within 12 months of passage. This will provide an opportunity to assess whether the provisions are working as intended, and will be a valuable exercise in transparency of law for all Australians.

Please find further information in response to the Committee's requests below.

Public interest requirement

Prior to passage of the Bill, the Australian Criminal Intelligence Commission Board could determine that an operation or investigation was a special operation or investigation, where traditional law enforcement methods were unlikely to be or had not been effective. The Bill strengthened this threshold by replacing the existing tests with a public interest test. The new test requires that the Board must consider, on the basis of their collective experience, that it is in the public interest that the special operation or special investigation occur.

The public interest test enables the Australian Criminal Intelligence Commission Board to consider all relevant matters in authorising a determination, rather than solely the utility of traditional law enforcement or criminal information/intelligence collection methods in the circumstances. The Australian Criminal Intelligence Commission Board is comprised of the heads of law enforcement agencies nationally, including all state and territory Police Commissioners, the Australian Federal Police Commissioner, the Commonwealth Director-General of Security, and others. As such, the Board is highly experienced in understanding the law enforcement and intelligence environment, and well-placed to make a public interest assessment.

Further, the use of a 'public interest' test is well-established in the exercise of decision-making authority under Commonwealth and state and territory legislation (for example, under the *Public Interest Disclosure Act 2013* (Cth), *Freedom of Information Act 1982* (Cth) and the *Government Information (Public Access) Act 2009* (NSW)).

Validity of special operation and special investigation determinations

The ability of the Australian Criminal Intelligence Commission to undertake special operations and special investigations is a key part of its critical role to detect, prevent and disrupt the most serious criminal offending, including emerging organised crime threats, high risk and emerging drug markets, firearms trafficking, and outlaw motorcycle gangs. The Australian Criminal Intelligence Commission Board has been making special operation and special investigation determinations in the same way for at least 10 years, which have been challenged and upheld by intermediate appellate courts on a number of occasions.

While the legality of previous determinations have been upheld, given the critical role of the Australian Criminal Intelligence Commission in combatting serious and organised crime, the Government has a responsibility to provide certainty regarding the status of special operation and special investigation determinations. As such, the Bill contained technical provisions to validate current and former special operation and special investigation determinations, and to provide clarity regarding the validity of future special operation and special investigation determinations.

The validation provisions in the Bill ensure that the Australian public has certainty regarding the status of the activities of the Australian Criminal Intelligence Commission. They also support the Australian Criminal Intelligence Commission to continue to fulfil its important statutory role working towards a safer Australia, and engage with law enforcement and intelligence partners without interruption.

I trust the above information is of assistance to the Committee. The relevant advisor in my office is , who can be contacted on

Yours sincerely

PETER DUTTON

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

Ref: MS19-003093

Senator Helen Polley
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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 10 of 2019* regarding the Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Bill 2019 (the Bill).

The Committee sought advice as to:

- why it is considered necessary and appropriate to leave the circumstances in which a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned, to regulations; and

- whether it is appropriate for the Bill to be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.

Issue 1: Use of Regulations

The Committee raised concerns about the potential for significant matters to be included in regulations.

The regulation-making power, which provides for regulations about when a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned is justified in recognition of the need to account for the variety of and complexity of benefits that may be given to mortgage brokers and mortgage aggregators in relation to credit assistance, and the variety of situations in which such payments may be given. Under these circumstances, the ability that the regulation-making power provides for the regime to respond to changes in industry practice and to ensure that the new regime operates for the benefit of consumers is important.

Further, regulations in relation to the circumstances in which a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned, will only have applicability in relation to a limited class of persons. Specifically, they will only have effect in relation to the giving of benefits to, or the acceptance of benefits by, mortgage brokers and mortgage intermediaries and their representatives.

Given the limited class of persons in relation to which the ban on conflicted remuneration in the Bill would apply, it is appropriate that the detail of these matters is dealt with in regulations, rather than in the primary law. If these matters were to be inserted into the *National Consumer Credit Protection Act 2009* (the Act), they would insert, into an already complex statutory framework, a set of technical and 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.

While I note the Committee's concerns about the penalties that may be applicable as a consequence of matters described in part in the regulations, only civil penalties are applicable for breaches of the provisions concerned and that the penalties prescribed represent maximum penalties. These penalties would be set in the primary law, and would be consistent with other civil penalty provisions in the Act. A person liable to these penalties would be either a credit licensee or credit representative. This is consistent with the scheme of the Act, which holds these persons to high standards of accountability, in recognition of the responsibilities that accrue to holding a credit licence or to being authorised as a credit representative.

Issue 2: Amendments to the Bill

The existing provisions in the Bill provide an appropriate level of direction in the exercise of the regulation-making powers. In particular, the Bill contains limitations on the circumstances in which conflicted remuneration may be banned under the regulations. Specifically, the regulations may only prescribe the giving or accepting of conflicted remuneration when a benefit is given to a mortgage broker or mortgage intermediary, or the benefit is accepted by a mortgage broker or mortgage intermediary. As noted above, this is a limited class of persons. The penalties themselves, and the framework of the civil penalty provisions, would be set out in the primary law.

Further, any regulations made under the provisions in the Bill would be subject to parliamentary scrutiny, including the potential for disallowance by either House of Parliament, and would be subject to the consultation requirements set out in the *Legislation Act 2003* before any regulation is made.

Thank you for bringing your concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

18 / 12 / 2019

Senator the Hon Anne Ruston

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

Ref: MB19-001823

20 DEC 2019

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

Dear Helen Senator

I write in response to the Senate Standing Committee for the Scrutiny of Bills' (Committee) request for advice on a range of matters in relation to the Interactive Gambling Amendment (National Self-exclusion Register) Bill 2019 (Bill), as contained in its Scrutiny Digest 10 of 2019.

While I note that the Bill and accompanying National Self-Exclusion Register (Cost Recovery Levy) Bill 2019 were passed by the Parliament on 5 December 2019, I have addressed the Committee's queries in the enclosed response.

I have provided a copy of this letter to the Minister for Cyber Safety, Communications and the Arts, the Hon Paul Fletcher MP.

I thank the Committee for its interest and time in reviewing the Bill. I trust this additional information will be of assistance.

Yours sincerely

Anne Ruston

Encl.

Suite MG.60, Parliament House, Canberra ACT 2600 Tel: 02 6277 7560 Email: minister@dss.gov.au

Response to scrutiny of the Interactive Gambling Amendment (National Self-exclusion Register) Bill 2019

Reversal of evidential burden of proof

The Committee has raised concerns regarding the reversal of evidential burden of proof for the offence-specific defences set out in the Interactive Gambling Amendment (National Self-exclusion Register) Bill 2019 (Bill).

As noted by the Committee, the *Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states 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.

It is appropriate in the context of the National Self-Exclusion Register scheme (Register) that the defendant, that is, a licensed interactive wagering service provider (IWSP), bears the evidential burden for these defences.

In regards to these offences, it remains the responsibility of the prosecution to discharge the evidential and legal burden of proof in respect of each of the elements of an offence, including the required fault element. The offence-specific defences would only require that the defendant discharge the evidential burden in regards to that defence. The legal burden of proving the defence would remain on the prosecution.

The offence-specific defences in the Bill fall into three classes:

- that the IWSP took reasonable precautions, and exercised due diligence, to avoid the contravention (found in subsections 61KA(5), 61LA(6), 61LB(3), 61LC(3), 61LD(3), 61MA(3), 61MB(3) and 61MC(4));
- that the IWSP's disclosure was authorised under specified laws (subsection 61NB(3)); and
- that the contravention occurred in circumstances prescribed by the register rules (subsection 61JP(7)).

Defences of reasonable precautions and due diligence

The form of reasonable precautions and due diligence that need to be taken in relation to an offence is not set out in the statute, and will vary with each IWSP. The Australian Communications and Media Authority (the ACMA), or the Register operator themselves, would not be privy to the business practices of the IWSP, or have access to their internal systems or databases. As such, the nature of those precautions and due diligence taken by an IWSP is knowledge that is peculiarly within the knowledge of the IWSP.

Evidence relevant to this defence would be held by the IWSP in question, and it would be complex for the prosecution to provide evidence that the IWSP does not have a defence. As such it would be significantly more difficult and costly for the ACMA to disprove that an IWSP had exercised due diligence and had taken reasonable precautions to avoid a contravention than it would be for the IWSP to prove.

Defence of authorised under specified laws
The exception under subsection 61NB(3) provides a defence where a disclosure is authorised under a law listed in the paragraphs to that subsection. This is a limited restatement of the general defence of lawful authority found in section 10.5 of the Criminal Code.
Under subsection 13.3(2) of the Criminal Code, a defendant who wishes to deny criminal responsibility by way of the defence in section 10.5 bears the evidential burden in relation to that defence.

As the defence in subsection 61NB(3) is simply a limited restatement of the existing general defence in subsection 13.3(2) of the Criminal Code, and is not intended to provide additional protections beyond the general defence, it is appropriate that the same evidential burden apply.

Defence that prescribed circumstances apply
The exception under subsection 61JP(7) provides a defence where the contravention occurred in certain prescribed circumstances. Under the prosecution policy of the Commonwealth, the Commonwealth Director of Public Prosecutions (the CDPP) would consider any defences available to the alleged offender in determining whether to commence a prosecution, and so if the CDPP is aware a prescribed circumstance exists, they would be unlikely to commence a prosecution. It would only be when the details of the mitigating circumstance are peculiarly within the knowledge of the defendant that the matter would go to trial.

Computerised decision-making
The Committee has raised concerns regarding computerised decision-making, and requested further justification as to why it is appropriate to permit the Register operator to arrange for the use of computer programs.

As mentioned in the Explanatory Memorandum of the Bill, the reasoning for applying section 61QA broadly across the proposed part 7B of the *Interactive Gambling Act 2001* (IGA) is to ensure that aspects of the Register scheme are able to be automated where suitable (for example registration). This is particularly relevant, given the Register is an online scheme. Allowing for computerised decision-making will also support future developments in technology, preventing the need for legislation to be continuously amended.

This is expected to streamline the exclusion process for individuals wishing to ban themselves from interactive wagering services, reduce the administrative work for the Register operator, and critically, assist in achieving privacy outcomes for consumers (as personal information would mostly be handled by automated processes). This is also consistent with the intent of the National Policy Statement (Statement) for the National Consumer Protection Framework (National Framework), as agreed by all Australian Governments. Specifically, the Statement sets out that the Register must be quick and simple for a consumer to apply to, and take immediate effect upon registration.

It should be noted that the Bill does not prescribe a particular set of activities for which computerised-decision making would be allowed. Once the Register operator is engaged and during the design of the system, consideration will be given to what decisions are suitable for automation, in line with administrative law requirements. The ACMA, and the body corporate that it procures to be the Register operator, would be the most appropriately placed to determine which of its decisions could be automated, guided by best practice administrative principles and relevant legislation. Only decisions which are by their nature suitable for automation, will be automated.

In general, it is recognised that these will be decisions where particular facts are reliable, and do not require complex assessment. For example, this may include assessment of the information a consumer provides, and whether the required criteria has been met for the purpose of adequate verification. It is expected that complex administrative decisions would not be covered by automated decision making.

How these processes will work in-practice will be further informed through the ACMA's processes to implement the Register. Ensuring the Register operator has integrity, and has the capability to meet both the legislative framework and consumer protection outcomes, will be a key consideration when implementing the Register. The Register scheme will also be extensively trialled and tested, prior to it becoming operational for consumers.

Significant matters in delegated legislation - Adequacy of review rights

The Committee has raised concerns regarding the appropriateness of leaving the details of the complaints process to delegated legislation, and whether judicial review and independent merits review of decisions made by the Register operator will be available.

Section 61QB of the Bill specifically deals with making complaints to the Register operator about the administration or operation of the Register, rather than complaints more broadly. These processes have been delegated to the Register Rules, in order to allow the ACMA to prescribe requirements once the Register operator has been procured and the system has been designed, to provide flexibility regarding operational aspects of the scheme (including complaints made directly to the Register operator). If this was prescribed by legislation, there is a risk that the process would not prove sufficiently flexible as the scheme is developed.

On this basis, the use of delegated legislation is necessary. Further, the Register Rules are subject to scrutiny by Parliament, and may be disallowed.

An independent merit review process is not generally required for decisions created under the Bill, as decisions the Register operator may make are of the nature of automatic or mandatory decisions, where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances. This leaves nothing on which merits review can operate.

There will be a limited degree of discretion for the ACMA to make a decision to remit the whole or a part of an amount of late payment penalty in section 61PB, for which there is a right to seek review by the Administrative Appeals Tribunal.

Affected individuals will also be able to pursue further action through other mechanisms if necessary, including through the ACMA and Office of the Australian Information Commissioner (OAIC). Specifically, Part 3 of the IGA sets out procedures for making complaints to the ACMA regarding contravention of the IGA, whereas the OAIC has processes already in place for making complaints regarding how personal information has been handled. I also note that a judicial review would also be available to consumers if necessary due to operation of the *Administrative Decisions (Judicial Review) Act 1977*, section 75(v) of the Constitution or section 39B of the *Judiciary Act 1903*.

Parliamentary scrutiny

The Committee has raised concerns regarding the impact on parliamentary scrutiny of not providing for the evaluation report, which will be undertaken three years following the Register being operational, to be tabled in Parliament.

Regarding section 61QG, it was considered that the report being made publicly available through the Department of Social Services website would provide for sufficient transparency regarding the effectiveness of the Register scheme.

Further, it is anticipated that the evaluation forms part of broader evaluation of the National Framework, of which the Register comprises one of 10 measures. The National Framework as a whole aims to reduce the harm that can be caused by online wagering. This means that the evaluation report will not be limited to measures that are being implemented by the Commonwealth, such as the Register. Rather, the evaluation report will assess the effectiveness of all 10 measures under the National Framework in achieving outcomes for consumers as a package, while also assessing that the measures are effective. This includes to inform ongoing refinements, identify unintended consequences, and identify potential weaknesses in the regulatory framework.

Given the scope of this evaluation, and the fact that the National Framework is a joint initiative with state and territory governments, it is intended that the reports would be provided to all governments before being made publicly available.

THE HON JASON WOOD MP
ASSISTANT MINISTER FOR CUSTOMS, COMMUNITY SAFETY AND MULTICULTURAL AFFAIRS

Ref No: MS19-004152

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Dear Senator Polley

Response to the Senate Scrutiny of Bills Committee - Migration Amendment (Regulation of Migration Agents) Bill 2019

Thank you for inviting me to respond to comments made in the Committee's *Scrutiny Digest No. 10 of 2019* concerning the Migration Amendment (Regulation of Migration Agents) Bill 2019 (the Bill).

I would like to provide the following advice to the Committee in response to comments in the Scrutiny Digest.

Strict liability offence: Schedule 1, Item 25

> *The committee requests the minister's more detailed justification as to why it is considered necessary and appropriate for the offence in proposed subsection 312(4) to be one of strict liability with a penalty of 100 penalty units. The committee notes that its assessment of this matter would be assisted if the minister's response addresses the principles set out in the Guide to Framing Commonwealth Offences.*

Under new subsection 312(4) of the *Migration Act 1958* (the Act), inserted by item 25 of Schedule 1 to the Bill, a migration agent is required to notify the Migration Agents Registration Authority (MARA) in writing within 28 days after the agent becomes a restricted legal practitioner or an unrestricted legal practitioner. It is further provided under new subsection 312(5) that failure to comply with subsection 312(4) is a strict liability offence with a maximum penalty of 100 penalty units.

This information is required for MARA to determine whether a registered migration agent is an eligible restricted legal practitioner or an unrestricted legal practitioner. If they are a restricted legal practitioner who is not eligible or an unrestricted legal practitioner, then their registration must be cancelled by the MARA in accordance with new section 302A.

The definition of strict liability is subject to the definition contained in the Criminal Code, which allows the defence of honest and reasonable mistake of fact. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that 'a defendant must turn his or her mind to the existence of the facts, and be under a mistaken but reasonable belief about those facts.' Therefore, although the offence is one of strict liability, a migration agent has a defence if he or she can demonstrate making a reasonable mistake of fact to notify the MARA of their change in circumstances as a legal practitioner.

The application of strict liability to this offence significantly enhances the ability of the MARA to effectively regulate the migration agent industry. Requiring the MARA to prove guilt to a higher standard would undermine deterrence by the MARA.

The 100 penalty units for failing to comply with new subsection 312(4) is consistent with other notification provisions within the Act. Other parts of subsection 312(1), which have not been repealed and replaced, provide that a registered migration agent must notify the MARA in writing within 14 days of the following events, failure of which to do so are offences of strict liability, incurring the penalty of 100 penalty units:

(a) he or she becomes bankrupt;
(b) he or she applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
(c) he or she compounds with his or her creditors;
(d) he or she makes an assignment of remuneration for the benefit of his or her creditors;
(e) he or she is convicted of an offence under a law of the Commonwealth or of a State or Territory;
(f) he or she becomes an employee, or becomes the employee of a new employer, and will give immigration assistance in that capacity;
(fa) he or she becomes a member of a partnership and will give immigration assistance in that capacity;
(g) if he or she is a member or an employee of a partnership and gives immigration assistance in that capacity — a member of the partnership becomes bankrupt;
(h) if he or she is an executive officer or an employee of a corporation and gives immigration assistance in that capacity:
- *a receiver of its property or part of its property is appointed; or*
- *it begins to be wound up.*

Delegation of Powers: Schedule 3, Item 16

The committee requests the minister's advice as to:

- *why it is considered necessary to allow for the minister to delegate any of the powers or functions given to the MARA to APS employees at any level; and*

- *whether the bill can be amended to provide legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated. For example, the committee notes that it may be possible to at least restrict the delegation of significant cancellation, suspension and information gathering powers (such as those referred to in paragraph 1.53 of Scrutiny Digest 10 or 2019) to SES or Executive level employees.*

The delegation of power at proposed subsection 320(1) is appropriate and consistent with the current framework of the Act.

It is currently the case that powers and functions of the MARA under Part 3 of the Act are delegated to a person in the Department who is appointed or engaged under the *Public Service Act 1999*. The committee may note that the proposed amendment to subsection 320(1) does not extend the delegation of administrative powers; rather it provides that the Minister may delegate the MARA's powers and functions under Part 3 of the Act more specifically to an APS employee in the Department. The use of the term "APS employee" is consistent with the *Acts Interpretation Act 1901*.

Any attempt to restrict the level of delegation to SES or Executive level employees in the Act would create an unnecessary administrative and legislative burden, as it may require a change to the Act each time there was a restructure to the administrative arrangements of the MARA. Further, the Committee may not be aware that, while the MARA reports to a SES Band 1, there are currently no SES level positions within the MARA itself. Delegation to the SES level would therefore be impractical in this instance.

Further, the existing powers and functions under Part 3 of the Act have been delegated by the Minister and have been working effectively, with no findings of inappropriate use or abuse of powers having been made against the MARA under these arrangements.

Thank you for considering this advice. The contact officer in my Department is Heimura Ringi, Assistant Secretary, Legislation Branch, who can be contacted on .

Yours sincerely

JASON WOOD

20 / 12 / 2019

Senator the Hon Michaelia Cash
Minister for Employment, Skills, Small and Family Business

Reference: MS19-001805

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

Thank you for the Committee Secretary's email of 5 December 2019 to my office concerning the Senate Standing Committee for the Scrutiny of Bills' (the Committee) consideration of the Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019 (the Bill).
I appreciate the time taken to review the Bill and thank you for the opportunity to address the important issues raised by the Committee.

Significant matters in delegated legislation

The Committee sought advice on why matters that the Registrar is to have regard to when permitting a student an exemption from the requirement to hold a unique student identifier (USI) are to be prescribed in a legislative instrument, and why guidance could not be included on the face of the primary legislation.

The amendments proposed by the Bill in this respect do not significantly alter existing arrangements under section 53 of the *Student Identifiers Act 2014* (the Act). Rather, the amendments propose to clarify that there is an express power and process to seek an exemption and to clarify the Registrar's powers to grant an exemption. That is, the amendments to section 53 of the Act observed by the Committee primarily propose to clarify the procedural aspects of seeking and granting an exemption. As is the case for the current law, the amendments will require the Registrar, before granting an exemption, to have regard to any matters set out in a legislative instrument made by the Minister.

Prior to the amendments proposed by the Bill, section 53 of the Act relevantly provides that a registered training organisation (RTO) must not issue a vocational education and training (VET) qualification or VET statement of attainment to an individual if the individual has not been assigned a USI, unless an "issue" applies. Currently, I have the power to, with the agreement of the Ministerial Council, make a legislative instrument that specifies such "issues". The effect of the existing provision is to allow the legislative instrument to outline cases where an exemption to the requirement to hold a USI applies.

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Whether or not a student is actually issued their VET qualification or VET statement of attainment is not strictly determined by whether an exemption applies. An exemption decision simply dictates whether an RTO can issue a VET qualification or VET statement of attainment where the student does not have a USI. Under the current law, I have made the *Student Identifiers (Exemptions) Instrument 2018* (the Exemptions Instrument) setting out a number of circumstances in which an exemption currently applies.

The Committee's view is that 'significant matters, such as the matters to be considered when making a determination to exempt a student from the requirement to have a USI, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided.'

Including the matters in a legislative instrument that the Registrar is required to take into account when granting an exemption ensures the USI regime continues to be able to adapt to the changing circumstances of students. This is important, since new and genuine reasons may emerge, justifying a student's exemption from the requirement to be issued a USI. The legislative instrument making power is proposed to give the Commonwealth Minister the flexibility to be able to respond to those new circumstances in a manner that is beneficial for students, while ensuring the ongoing integrity of the USI regime. For example, the Exemptions Instrument was remade in 2018 to remove the short course exemption so that more students could receive the benefits of a USI and an authenticated VET transcript.

The Act is a relatively new piece of legislation and its application to individuals' circumstances is evolving. There are also other amendments to the Act proposed by a Bill recently introduced by the Hon Dan Tehan MP, Minister for Education, seeking to expand the coverage of the USI regime into higher education.

Currently, the Exemptions Instrument provides that an exemption can apply to individuals. For example, in the case where an individual has completed, and provided to the Registrar, a statutory declaration stating that they have a genuine personal objection to being assigned a USI, and they understand the consequences of not being assigned a USI. It is important to keep the matters for the Registrar to have regard to when making a decision about an exemption application, together with the administrative processes for that decision, in one document. This supports understanding by all stakeholders, particularly students.

It is notable that in 2018, whilst more than four million individuals studied VET, only 24 students applied for a personal exemption. Even though the number is small, the USI regime has been drafted in such a way as to ensure the needs and unique circumstances of individual students and RTOs can continue to be met. The small instances of requests for exemptions to date also means there are generally no known cases where a theme has emerged for cohorts seeking an exemption. Therefore, it was not considered suitable or possible to include high-level guidance limiting the cases in which exemptions may apply in the primary legislation.

The making of legislative instruments by the Commonwealth Minister under the Act must be agreed to by the Council of Australian Governments (COAG) Skills Council Ministers as well as undergoing Parliamentary scrutiny.

Merits review

The Committee noted that generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided.

There are a number of reasons why it is considered that merits review ought not to be available to students seeking an exemption.

Firstly, as discussed above, section 53 of the Act operates primarily as a restriction imposed on RTOs in respect of when they can and cannot issue a VET qualification or VET statement of attainment. Importantly, the ultimate determinative issue from an RTO's or student's point of view is whether or not the qualification or statement of attainment can be issued. If a student seeking an exemption to the requirement to hold a USI is not granted an exemption, rather than seeking costly and potentially elongated review through the Administrative Appeals Tribunal (AAT) in relation to the exemption decision alone, the student will, as now, be able to achieve their objective of receiving their qualification or statement of attainment by progressing through the simple process of applying for a USI. In this context, an exemption from the requirement to hold a USI is simply a procedural step along the way to an ultimate outcome of receiving a qualification or statement of attainment. It is notable, in this context, that one of the factors accepted in the Administrative Review Council's guidance document helpfully referred to by the Committee (*What decisions should be subject to merit review?*) for when merits review may not be suitable, is where the decision involves a preliminary or procedural decision (as discussed at paragraph 4.3-4.7 of the guidance document). As a step along the way to receiving a qualification or statement of attainment, a USI exemption decision is in substance a preliminary or procedural step.

Secondly, it is important to ensure the limited resources of the AAT are reserved for matters where genuine issues that turn on merits are in dispute. It is anticipated the matters that will be included in the legislative instrument will be matters that will not lend themselves to factual dispute. For instance, if, as now, the legislative instrument specifies circumstances where a person has expressed a genuine personal objection as a case where an exemption would apply, the facts in respect of that objection are not likely to be meaningfully in dispute before a merits review tribunal. Of course, judicial review, including under the *Administrative Decisions (Judicial Review) Act 1977*, will remain available to students or affected RTOs where the exemption decision has been made involving an error of law.

A merits review process also appears disproportionate to the nature of the decision and the instances of exemption requests. The number of individuals seeking an exemption in the VET sector under the Act is negligible in comparison to the number of USIs issued by the Registrar. The number of USIs issued in 2018 was approximately 1.5 million whilst only 24 applications for exemptions were received in the same year. No applications for exemptions were denied. Making decisions of the Registrar subject to merits review would not be an efficient use of Commonwealth resources, as the cost of administering a merits review process would be greatly disproportionate to the number of individuals requesting an exemption.

Further, external merits review at AAT may delay the outcome of the request for an individual by a number of years, therefore delaying their award conferral and impacting their prospects of obtaining meaningful employment and greater career aspirations.

As the Registrar is obliged to make decisions based on fair and accountable reasoning, the decision to deny or allow an exemption would be carefully considered and denied only on appropriate grounds. As such, it would be time-consuming and costly to engage in *de novo* review of these decisions, and not highly beneficial or protective for the individual/s requesting an exemption.

The USI is a product and system designed with the benefits to students considered at every stage of the application process, to support their personal choices and help Australians maintain their lifelong learning in order to pursue a meaningful and purposeful career.

I thank the Committee for its interest and I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
/ / 2019

Senator the Hon Michaelia Cash
Minister for Employment, Skills, Small and Family Business

Reference: MS19-001809

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator

Thank you for your email of 5 December 2019 regarding the Trade Support Loans Amendment (Improving Administration) Bill 2019.

Noting the Committee's concerns about whether it is necessary and appropriate to leave significant matters, such as the circumstances in which the amounts of later Trade Support Loans (TSL) instalments may be reduced to delegated legislation, the following justification is provided.

The purpose of the amendments proposed by the Trade Support Loans Amendment (Improving Administration) Bill 2019 ('the Bill') is to simplify and improve the administration of the TSL program. The key measure involves an ability to effectively offset overpayments of TSL, allowing an overpaid amount to be recovered through the tax system, as if it was properly paid, and to allow for the Secretary to reduce a future TSL payment. The discretion to reduce future payments addresses the fact that the TSL recipient will have retained a TSL payment that would otherwise be an overpayment debt.

All of the circumstances, that are consistent with the scope and purpose of the TSL legislation, in which it may become appropriate to reduce the amounts of later TSL instalments are not certain and cannot necessarily be foreseen. For instance, it may be that certain cohorts of Australian Apprentices are specifically affected by the measure in the future and allowing scope for a legislative instrument to adapt to the impact of the measure ensures the TSL program will remain adaptive to the needs of Australian Apprentices. Specifying the detail of the only circumstances in which payments may be reduced in primary legislation could have the potential to either prevent the Secretary from reducing future payments of TSL where it would be appropriate to do so, or may have led to the Secretary being required to reduce a payment of TSL where it may not continue to be appropriate.

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TSL payments are made to assist Australian Apprentices with the cost of undertaking their training. Where a TSL payment is made in circumstances where a recipient is not eligible and the recipient benefits from the 'special case payability' introduced by this measure, in most circumstances where future TSL becomes payable, the usual expectation would be that the Australian Apprentice should use the overpaid amount for their future support needs, and that future TSL payments would be reduced accordingly.

However, when considering the relevant and unique circumstances of a particular Australian Apprentice or a group of Australian Apprentices in similar circumstances, the measure has been drafted to ensure that the Secretary has flexibility to determine which repayment method(s) are appropriate to be offered in particular situations, consistent with the purposes of TSL. This will ensure the possibility of debts being recovered in appropriate circumstances, while ensuring that no undue financial pressure is applied to Australian Apprentices which may have the potential to negatively impact their ability to successfully complete their apprenticeship.

The ability to determine, by legislative instrument, circumstances in which the amounts of later TSL instalments may be reduced, will allow the Minister to address identified emerging patterns in a timely manner, and as circumstances change, as the implementation of the measure is monitored. Importantly, any amendments to TSL rules, prescribing circumstances for the purposes of new subsection 11(4), would be subject to Parliamentary scrutiny and possible disallowance by either House of Parliament, should either House consider that the rules are unfair or otherwise inappropriate.

With regard to the question of the appropriateness of amending the Bill to provide guidance on circumstances in which the amounts of later TSL instalments may be reduced, for the reasons outlined above, it is impractical and restrictive to anticipate the factors that the Secretary may take into account when considering whether to make a determination, and therefore, it is not appropriate to amend the Bill.

I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
8 /7/ 2019