The Hon. David Littleproud MP

Minister for Agriculture, Drought and Emergency Management
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MS20-000176

25 FEB 2020

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
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Dear Senator Polley

I write in relation to the commentary made by the Senate Standing Committee on the Scrutiny of Bills (the Committee) regarding the Agriculture Legislation Amendment (Streamlining Administration) Bill 2019 (the Bill), in its Scrutiny Digest 1 of 2020. The Committee requested my advice on the following matters:

- why it is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under each of the provisions listed in proposed paragraphs 541A(9)(a), (e) and (f);
- why it is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under most provisions of Chapters 3, 4 and 5 of the *Biosecurity Act 2015* (Biosecurity Act) (see proposed paragraphs 541A(9)(b), (c) and (d));
- whether the inclusion of subsections 541A(3) or (4) will limit or exclude administrative law requirements which condition the formation of a state of mind, for example the flexibility rule regarding policy or the requirements of legal reasonableness; and
- the appropriateness of amending the bill to limit the use of computerised decision-making to decisions made under specific provisions listed in the primary legislation, rather than by legislative instrument.

My response to the Committee is attached. I thank the Committee for its commentary on the Bill.

Yours sincerely

DAVID LITTLEPROUD MP

Agriculture Legislation (Streamlining Administration) Amendment Bill 2019
Response to the Senate Standing Committee for the Scrutiny of Bills – Scrutiny Digest 1 of 2020

1) why it is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under each of the provisions listed in proposed paragraphs 541A(9)(a), (e) and (f)

It is considered necessary and appropriate to permit the Director of Biosecurity (DoB) to arrange for the use of computer programs for decisions made under each of the provisions listed in proposed paragraphs 541A(9)(a), (e) and (f) of the Bill to enable the use of current technologies to effectively and efficiently enforce biosecurity controls over vast cargo volumes that may pose a high biosecurity risk to Australia.

Biosecurity incursions of high risk pests and diseases would have a devastating impact on Australia. The Department of Agriculture, Water and the Environment (department) processes an average of 45,000 commercial cargo referrals each month. It is critical that the department be innovative in identifying efficiencies that can be made in the operation of Australia's biosecurity framework.

There are a large and growing number of pests and diseases that pose a high risk to Australia's biosecurity. This Bill is particularly critical as we are in peak season for one of Australia's high risk pests – Brown Marmorated Stink Bug (BMSB). Intensive resources are also being devoted to stopping African Swine Fever Virus (ASFV) from entering Australia. Other high risk pests and diseases include the Khapra beetle, as well as the continued threat posed by foot and mouth disease.

The volume of work associated with preventing biosecurity incursions of these high risk pests and diseases has increased very rapidly and continues to require considerable amounts of manual effort. Automated decision making will lessen the operational burden in these high risk times, allowing the department to refocus efforts to high priority areas.

The Bill intends to ensure that Australia's biosecurity system remains flexible and adaptable, to effectively respond to evolving biosecurity risks threatening Australia in the current climate of high volumes and high risks. For example, from the 2017-18 BMSB season to the 2018-19 season, BMSB established itself in 24 additional countries around the world. Keeping this high risk pest from entering and establishing in Australia has necessitated flexible and rapid responses to the changing risk profile.

This Bill supports implementation of computerised decisions with appropriate safeguards to provide the department with the flexibility to streamline services, reduce the length of time for decision making in relation to biosecurity matters, reduce costs, and free up resources. There is no intention to make determinations in relation to all 'relevant provisions'. The intention is to develop determinations for decisions under provisions where there is a pressing need or are compelling benefits for using automated decision-making, and importantly where the nature of the decision is suitable for automated decision making.

Specifically, proposed paragraph 514(9)(a) would specify subsections 49(4) and (5) as relevant provisions, which means that the determination made under subsection 541A(2) may enable a computer program to grant pratique to vessels and aircraft entering Australia based on pre-arrival information presented by a vessel master and/or shipping agent. Proposed subsection 541A(3) provides that the Director of Biosecurity must take reasonable steps to ensure that the decisions made by the operation of a computer program consistent with the objects of the Biosecurity Act. A computer will follow objective specified business rules prior to granting a vessel 'pratique' under section 49(4) of the Biosecurity Act.

Proposed paragraph 541A(9)(e) would specify section 557 as a relevant provision, which means that the determination made under subsection 541A(2) may enable a computer program to provide permission for a person to engage in certain conduct specified in the table at section 557 of the Biosecurity Act. Permission may be given to enable a person to interact with goods, vessels, and other things without being liable to the civil penalty provision that would ordinarily have been applicable. Conduct includes interfering with notices affixed to goods (section 139(3)(b)) or moving goods with notices affixed (section 141(1)(b)) under Chapter 3.

Automated decisions would be suitable for providing permission for such conduct as outlined by section 557, if the conduct relates to provisions that are already subject to automated decision-making themselves, covered by 'relevant provisions' under proposed subsection 514(9). For example, in certain circumstances the department may authorise a person who is not a biosecurity industry participant (such as a transport company) to move goods subject to biosecurity control under section 130 to an approved arrangement of a particular class.

The proposed paragraph 541A(9)(f) would specify subsections sections 600 and 602 as relevant provisions, which means that the determination made under subsection 541A(2) may enable a computer program to withhold goods that are subject to a charge as a result of a cost-recovery charge not being paid under section 598 of the Biosecurity Act. Automated decisions would be appropriate in these circumstances as suitable, objective business rules would enable a computer program to identify whether a debt is owed for failure to pay a cost-recovery charge and provide a written notice under subsection 600(2) of the Biosecurity Act.

2) why it is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under most provisions of Chapters 3, 4 and 5 of the Biosecurity Act (see proposed paragraphs 541A(9)(b), (c) and (d))

It is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under provisions of Chapters 3, 4 and 5 of the Biosecurity Act (see proposed paragraphs 541A(9)(b), (c) and (d)) to enable the use of current technologies to effectively and efficiently enforce biosecurity controls over vast cargo volumes that may pose a high biosecurity risk to Australia.

Provisions in Chapter 3 (managing biosecurity risks: goods), Chapter 4 (managing biosecurity risks: conveyances) and Chapter 5 (ballast water and sediment) have been included in the Bill as 'relevant provisions' set out by proposed subsection 541(9) because those chapters are vital to the management of biosecurity risks.

Chapter 3 provides powers for the management of biosecurity risks related to goods, including:

- powers to enable assessment of biosecurity risks associated with goods subject to biosecurity control, such as providing that a biosecurity officer may issue directions to secure goods (section 124), inspect goods (section 125), require documents to be produced (section 127), and require that goods be moved or not moved (section 128)
- powers to enable management of an unacceptable level of biosecurity risk with goods subject to biosecurity control, such as providing that a biosecurity officer may issue directions to require the goods be moved or left at a specified place (section 132), or for goods to be treated (section 134)
- releasing goods from biosecurity control (section 163), although the Biosecurity Act already provides for this to be automated (subsection 163(1)).

Chapter 4 provides powers for the management of biosecurity risks in relation to conveyances, including:

- power to enable assessment of biosecurity risks associated with a conveyance subject to biosecurity control, such as providing that a biosecurity officer may issue directions to secure a conveyance (section 198), require documents to be produced (section 201), and require that a conveyance be moved (section 202)
- powers to enable management of an unacceptable level of biosecurity risk with conveyances subject to biosecurity control such as providing that a biosecurity officer may require a conveyance be moved or not moved (sections 206 and 207), or issue a direction for treatment (section 208).

Chapter 5 provides for the management of biosecurity risks related to the discharge of ballast water and disposal of sediment from international and domestic ships, including powers for the purpose of monitoring compliance with requirements under this chapter, such as securing vessels (section 300B), inspecting and taking samples of ballast water from vessels (section 300C), asking questions about vessels (section 300D), and requiring ballast water records to be produced (section 301).These powers ultimately ensure that biosecurity risks associated with ballast water and sediments are managed appropriately, and that Australia fulfils its international obligations in relation to the management of ballast water and sediments.

The types of decision that would be made under those provisions are based on objective information, making it appropriate to provide for automated decision-making for those decisions. The efficient and effective use of those decision-making powers is vital to protecting Australia's borders from incursion of pests and diseases. With the high volumes of cargo and people entering Australia, and the high biosecurity risks associated with pests and diseases such as BMSB and ASFV, automated decision-making for provisions under Chapters 3, 4 and 5 aimed at assessing and managing biosecurity risk are necessary to ensure that Australia's borders are protected.

It is not intended that decisions that require interpretation or evaluation of evidence, such as where fact finding or weighing of evidence is required, or that require a high level of discretion, be automated.

3) whether the inclusion of subsections 541A(3) or (4) will limit or exclude administrative law requirements which condition the formation of a state of mind, for example the flexibility rule regarding policy or the requirements of legal reasonableness

The inclusion of subsections 541A(3) or 541A(4) will not unduly limit or exclude administrative law requirements which condition the formation of a state of mind.

Implementation of automated decision-making under the Biosecurity Act will be guided by the best practice principles developed by the Administrative Review Council outlined in its report Automated Assistance in Administrative Decision Making: Report to the Attorney-General (Report No. 46, 2004) (ARC's 2004 Principles).

This will ensure that automated decision making is consistent with the administrative law values of lawfulness, fairness, rationality, transparency and efficiency. These best practice principles in relation to expert systems (automated systems that make or support decisions) include (but are not limited to) the following:

- expert systems that make a decision, as opposed to helping a decision maker make a decision, would generally be suitable only for decisions involving non-discretionary elements
- expert system should not automate the exercise of discretion
- if expert systems are used as an administrative tool to assist in exercising discretion, they should not fetter the decision maker
- the construction of an expert system, and the decision made by or with the assistance of expert systems, must comply with administrative law standards
- expert systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy.

Automation will enhance the government's ability to maintain biosecurity and food safety while giving faster clearances for large numbers of movements of goods, people, ships and aircraft. While a power to direct a person to take 'specified action' can involve the exercise of discretion to decide what action to 'specify', the discretionary aspects of this decision will be exercised in the development of business rules that will inform automated systems. Such rules are critical regardless of whether a direction is issued by a biosecurity officer or by application of a computer program, in order to enable responses across thousands of cargo referrals and ensure biosecurity risk is managed.

Discretion is exercised by human control of the business rules and the adaptation of the business rules to respond to new threats or to improve rules for existing threats. In this and similar contexts, it is appropriate to give the sector the predictability and speed of response which can be provided by operation of computer programs and to free up human resources for non-routine issues.

Under the Biosecurity Act, administrative law requirements will also help guide consideration of what decisions are suitable for automation in-line with administrative law requirements. They will ordinarily be decisions where particular facts are reliably established without the need for subjective assessment of complex information so as to come to a particular position.

The types of decisions that are proposed to be implemented by automated decision-making include decisions that require assessment of information provided by applicants and assessments as to whether specified statutory criteria are met. Complex decisions involving consideration of conflicting information from many sources are not proposed to be subject to automated decision-making, to ensure that discretion is fully exercised by a human decision-maker.

The Bill has several safeguards in place to ensure that the correct and most suitable decision is made in accordance with the objectives of the Biosecurity Act. An example of this is proposed subsection 541A(7), which enables a more appropriate decision to be substituted by a biosecurity officer. This allows for a state of mind to be formed and ensures the most appropriate decision can be made.

Computer programs issuing electronic decisions under the Biosecurity Act will be restricted to those contained in a determination made by the Director of Biosecurity, and will be for decisions that involve the identification and, if necessary, the management of biosecurity risk.

This is a technical and scientific process based on objective data and information, for example, what the relevant goods are, what are the associated diseases or pests of concern, whether there are current outbreaks or prevalence of the disease and their locations.

As the Committee identified, this issue also relates to proposed subsections 20A(3) and 20A(4) of the *Imported Food Control Act 1992* (Imported Food Control Act). Similarly, the inclusion of subsections 20A(3) and 20A(4) will not unduly limit or exclude administrative law requirements which condition the formation of a state of mind.

Subsection 20A(1) enables automated decision-making under section 12, subsection 14(1) or subsection 20(2), (3) or (4) of the Imported Food Control Act. Item 11 of the Explanatory Memorandum to the Bill outlines in detail what those provisions set out. Similar to the policy reasoning for amendments to the Biosecurity Act, decisions proposed to be automated do not involve complex facts or exercising higher levels of discretion. For example, section 12 provides for the issue of a food control certificate for examinable food. Examinable food receives a food control certificate whether or not it is required for inspection. Enabling the decision to issue a food control certificate to be made by a computer program allows for greater administrative efficiencies. This will be achieved by issuing automated food control certificates for all food not required to be inspected under the Scheme. Foods that are required to be inspected will continue to receive a food control certificate from an authorised officer, including the flexibility rule regarding policy or the requirements of legal reasonableness.

4) the appropriateness of amending the bill to limit the use of computerised decision-making to decisions made under specific provisions listed in the primary legislation, rather than by legislative instrument.

The Bill will enable the Director of Biosecurity to determine, by a legislative instrument, which biosecurity officer decisions under the Biosecurity Act may be made by automated systems.

The Department does not intend to automate decisions that require interpretation or evaluation of evidence, such as where fact finding or weighing evidence is required. These would include, for example, directions to order goods for destruction or for a conveyance to be ordered not to enter Australia.

The Committee has noted that any determination of the Director of Biosecurity that seeks to provide for automated decisions will be subject to Parliamentary scrutiny as a disallowable legislative instrument. A determination specifying the decisions subject to automated decision-making will provide a level of flexibility to take into account rapid changes in technology, while striking a balance by ensuring that Parliament retains scrutiny of the determination.

While administrative flexibility is not generally considered by the Committee to be sufficient justification for including significant matters in delegated legislation, the flexibility of Australia's biosecurity system is one of its most important aspects. It must be adaptable, to effectively respond to and manage evolving biosecurity risks threatening Australia. The legislative framework supporting the biosecurity system therefore also needs to be flexible and adaptable. The proposed Bill enables this flexibility and is necessary to ensure that Australia's biosecurity system remains effective in the current climate of high volumes and high risks.

THE HON MICHAEL SUKKAR MP

Minister for Housing and Assistant Treasurer

Ref: MC20-001970

Senator Helen Polley
Chair
Senate Standing Committee for the Scrutiny of Bills
PARLIAMENT HOUSE
CANBERRA ACT 2600

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 3 of 2020* regarding the Commonwealth Registers Bill 2019 and the Treasury Laws Amendments (Registries Modernisation and other Measures) Bill 2019 (the Bills).

The Committee sought further advice regarding the use of assisted decision making and on the appropriateness of the use of offence-specific defences in relation to breaches of the protections of confidential information by officials.

Delegation of registrar's function to be assisted or authorised by computer

I consider that the functions and powers of the registrar are appropriate for assisted decision-making. The Bills allocate 'registry' functions to the new Registrar, whereas 'regulatory' functions remain with existing regulators. Registry provisions tend to relate to the establishment, maintenance and use of registers. The functions of the registrar do not generally rely on complex or discretionary matters and so are well-suited to assisted decision making.

By contrast, 'regulatory' provisions that require more considered decision making or assessment, based on merit remain with existing regulators and are not allocated to the new Registrar under the Bills. These decisions therefore remain outside the scope of the provisions in the Bills for assisted decision-making. They generally relate to monitoring and enforcing the law and licencing and registering market operators and financial service providers.

On this basis, I do not consider amendments to the Bills to place further limits on the provisions that provide for assisted decision making are necessary in this situation.

Use of offence-specific defences for breaches of protections of confidential information

The offences in clause 17 of the Commonwealth Registers Bill 2019, and the equivalent provisions in proposed section 62M of the *Business Names Act 2011*, proposed section 1370L of the *Corporations Act 2001* and proposed section 212M of the *National Consumer Credit Protection Act 2009* are offences related to the protection of confidential information. The misuse of information obtained in the course of a person's employment is sufficiently serious to place an evidential burden of proof on the defendant in relation to the

matters listed in subclause 17(3) and equivalent provisions, while the scope of the defences provide appropriate protection for officers undertaking their work in compliance with the law.

For each of these offences, it is readily and specifically within the knowledge of the defendant who discloses or records information in the course of their official employment to adduce or point to evidence that suggests a reasonable possibility that the record or disclosure of information was authorised in accordance with a matter in subclause 17(3). For example, if there was evidence suggesting that a disclosure occurred with the consent of each person to whom the information relates, a defendant would be more readily able to point to this. Likewise, if there was evidence suggesting that a disclosure was made to another person for use in the course of the performance of the duties of the other person's official employment, in relation to the performance or exercise of the functions or powers of a government entity, this would be more readily accessible to the defendant. It would be much more difficult and costly for a prosecution to disprove that the making of a particular record or disclosure was authorised under subclause 17(3) and its equivalent provisions.

The offence provisions have been drafted to be consistent with existing provisions in Commonwealth law relating to the recording and disclosure of confidential information. This recognises the importance of protecting confidential information and ensuring that people whose work requires them to record and disclose protected information comply with their legal obligations and uphold the protections that are in place for that information.

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

Yours sincerely

The Hon Michael Sukkar MP

The Hon Keith Pitt MP

Minister for Resources, Water and Northern Australia

MC20-002475

20 MAR 2020

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

Dear Senator

Thank you for the Scrutiny of Bills Committee's consideration of the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020 (the bill).

Please find enclosed responses to the Committee's comments raised in Scrutiny Digest 3 of 2020 regarding the bill.

I trust this information is of assistance to the Committee.

Yours sincerely

Keith Pitt

Response to the Senate Standing Committee for the Scrutiny of Bills on the National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020

Scrutiny Digest 3 of 2020

OVERVIEW

The *National Radioactive Waste Management Act 2012* (the Act) currently allows for the Minister to acquire land for the purposes of establishing a site for the National Radioactive Waste Management Facility (the Facility), and providing all-weather road access to the Facility. The Act in its current form allows for these acquisitions to be made at the Minister's absolute discretion, by way of a written declaration, and without any Parliamentary oversight.

The National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020 (the Bill) carries over the ability for the land to be acquired, and provides for Parliamentary scrutiny of the site acquisition. The specification of the site in the Bill allows for the Parliament to consider and scrutinise the proposed acquisition of the site for the Facility. The Bill also provides for certain additional land to be acquired to expand the Facility, by way of a disallowable instrument with Parliamentary oversight.

The power under the Act for the Minister to acquire additional land for the purposes of providing all-weather road access is also substantially retained in proposed section 19B. The ability for governments to acquire land without Parliamentary oversight is not a new concept. For instance, the Commonwealth *Lands Acquisition Act 1989* and the South Australian *Land Acquisition Act 1969* both allow for land to be compulsorily acquired by way of gazetted declaration, without parliamentary oversight.

The Bill specifies a natural justice process for acquisitions of additional land under proposed sections 19A and 19B. Proposed section 19C ensures that those with a right or interest in the land proposed to be acquired have a right to be heard. They can put forward their comments on the acquisition and these comments must be taken into account by the Minister before the relevant acquisition is finalised. Furthermore, the compensation provisions in the Act would apply to ensure that, where rights or interests are acquired, extinguished or otherwise affected by an acquisition, the Commonwealth would be liable to pay reasonable compensation.

The size of the parcel of land specified in the Bill for the establishment of the Facility is approximately 160 hectares. This is sufficient to allow for the footprint of the Facility and associated security requirements, enabling infrastructure, such as power and water, and community agricultural research and development activities. The parcel of land specified in the Bill is located at Napandee, near Kimba in South Australia, which was voluntarily nominated as a site for the Facility by its landholders under section 7 of the Act.

The Bill enables a further parcel of land (up to 50 hectares of the original voluntary land nomination) to be acquired to expand the specified site. This may be necessary to allow for the establishment or operation of the Facility should further site-specific technical and cultural heritage investigations determine that more land is required. This ability does not exist in the current Act. The boundaries of the additional land that may be acquired is set out in proposed section 19A, and is entirely within the land parcel initially nominated for consideration as the site for the Facility.

The process to develop the Facility is lengthy and complex, involving multiple phases of investigation and approvals. As part of the site selection process, the Commonwealth has undertaken two years of preliminary assessments and has developed a concept design of the site. Once the land is acquired for the site of the Facility, the next phase of the development will involve detailed site investigations to support site-specific design development and obtaining regulatory approvals. It is only once these are complete, that the need for additional land for all-weather road access or expansion of the Facility would be known.

SIGNIFICANT MATTERS IN DELEGATED LEGISLATION—ACQUISITION OF LAND BY THE COMMONWEALTH

Why it is considered necessary and appropriate to allow the minister to specify additional land that is required to provide all-weather access to the site via a notifiable instrument, which is not subject to parliamentary tabling or disallowance; and

Whether the bill can be amended to specify that:

- **any regulations prescribing additional land for expansion of the site made under proposed subsection 19A(1) do not commence until after the Parliament has had the opportunity to scrutinise the regulations; and**

- **any instruments specifying additional land for all-weather access to the site under proposed subsection 19B(1) are disallowable legislative instruments or regulations that do not commence until after the Parliament has had the opportunity to scrutinise the instruments or regulations.**

In this regard, the committee notes that sections 45-20 and 50-20 of the *Australian Charities and Not-for-profits Commission Act 2012* provide a model for provisions which ensure that the Parliament has an opportunity to scrutinise particular legislative instruments before they commence.

All-weather road access

While investigations to date have not identified the need for additional all-weather road access, there remains the potential for such access to be required as a condition of the Australian Radiation Protection and Nuclear Safety Agency siting, construction and/or operational licenses. The Bill provides for this additional land to be acquired under proposed section 19B by notifiable instrument.

It is necessary to carry over a provision which allows for additional land to be acquired for all-weather road access, in order to retain the ability to respond to regulatory requirements for access to the site. It is appropriate that this land be acquired by way of notifiable instrument rather than by disallowable instrument. This is because an inability to construct all-weather road access may jeopardise the ability for the Facility to obtain its operational licence. An inability to acquire this land at this point in the development process would adversely impact on the ability for the government to safely deliver the Facility, which is necessary to support the nuclear medicine industry.

The current Act specifically allows for the Minister to acquire land for the purposes of providing all-weather road access to the Facility, without parliamentary oversight. This power was also conferred on the Minister under the Act's predecessor, the *Commonwealth Radioactive Waste Management Act 2005*.

The proposed specification of the site in the Bill provides oversight beyond the current provisions in the Act that enable a single minister to apply their absolute discretion to the land acquisition. In addition, the requirement to make a notifiable instrument to prescribe land for all-weather road access improves public accessibility to the instrument. While the current Act requires declarations to be published in the Gazette, the Bill requires acquisitions be made by notifiable instrument, which must be published on the centrally managed Federal Register of

Legislation. This will allow members of the public to view any such instruments alongside the regulations acquiring additional land for the facility and the Act.

Site expansion

Proposed subsection 19A(1) allows for the regulations to prescribe additional land required for the purposes of expanding the site for the establishment and operation of the Facility. Where this occurs, the regulations are also required to state a 'prescribed acquisition time' from which the additional land will be acquired for these purposes. This provides flexibility in the date the acquisition may take effect. Subject to any regulatory requirements or lengthy delays in the Parliamentary calendar, the government expects to specify an acquisition time that sits outside of the relevant disallowance period.

The Bill makes clear that no other land may be acquired to expand the site of the Facility by specifying the boundaries and location of the land for this purpose (proposed subsection 19A(2)). This provides Parliament with the opportunity to consider this land alongside the land proposed for the site of the Facility, allowing both defined pieces of land to be subject to Parliamentary scrutiny. This land specified in proposed subsection 19A(2) is entirely within the parcel of land originally nominated by the land owners as part of the site selection process. The proposed site for the Facility, specified in proposed section 5, comprises only one part of the parcel of land nominated by the same land owners. Extensive consultation has taken place with the land owners as part of the nomination and approval process relating to this land.

PROCEDURAL FAIRNESS

In light of the lack of information provided, the committee requests the minister's advice regarding why it is necessary and appropriate to limit the operation of the natural justice hearing rule in relation to consultation conducted under proposed section 19C.

The Bill has been introduced to give effect to the Government's commitment to establish a single, purpose built Facility at Napandee, near Kimba in South Australia, and to provide certainty to impacted communities and other stakeholders regarding the location of the Facility.

Although the Bill would prescribe the location for the Facility, the Facility could not be established without the necessary regulatory approvals, licences and permits. In the process of applying for these, it may become necessary for the Commonwealth to acquire additional

land to allow for further enabling works, cultural heritage protection, community research and development opportunities, and to accommodate site-specific designs for the Facility. Regulators may also require secondary or emergency all-weather road access to the site.

New sections 19A and 19B would allow for the Commonwealth to make additional land acquisitions that may be necessary for the Facility to be established at Napandee. They provide further certainty to impacted communities by ensuring the Commonwealth is equipped to deal with critical issues that could be raised by regulators, which have the potential to prevent the Facility from being established at Napandee. Consequently, the validity of acquisitions made under new section 19A or 19B could become critical to ensuring that the Facility is ultimately able to be established at Napandee.

New section 19C would provide an exhaustive statement of the requirements of the natural justice hearing rule in relation to additional land acquisitions made under new section 19A or 19B. At common law, the natural justice hearing rule broadly requires that a person 'be given a hearing before a decision is made that adversely affects a right, interest or expectation which they hold.'[1] The requirements in new section 19C embody this principle, insofar as they would require the Minister to:

- notify the community of any proposals to make acquisitions under section 19A or 19B;
- invite interested persons to comment on the proposed acquisition; and
- take into account any relevant comments received prior to making the acquisition.

This would operate in a similar manner to section 18 of the current Act, which also provides an exhaustive statement of the rules of natural justice with respect to site selection decisions under section 14 of the Act. Both these sections would be repealed as part of the broader repeal of the current framework for selecting a site.

New section 19C seeks to retain the key elements of the 'procedural fairness requirements' set out in section 18 of the current Act. However, the process set out new section 19C is less extensive. This is appropriate because, under the Act as amended, the Minister[2] would only

[1] R Creyke & J McMillan, *Control of Government Action: Text, Cases and Commentary*, 3rd ed, 2012, p 629.
[2] In the case of an acquisition made under section 19A, in the Minister's capacity as the rule maker for the regulations.

be making minor, ancillary acquisition decisions about land nearby the area specified in new section 5. Furthermore, certain acquisitions, such as those relating to all-weather road access for the Facility, would be (subject to licensing requirements) unlikely to significantly affect the rights or interests of any person other than the owner of the land to be acquired.

New section 19C would ensure fairness remains at the centre of any decision-making under section 19A or 19B, while also addressing the uncertainties that flow from continually-evolving common law conceptions of natural justice. The codification of the natural justice hearing rule in this respect serves the broader objects of the Bill – namely, to provide certainty to impacted communities and stakeholders. This is achieved by ensuring all parties are precisely aware of what is required to comply with the natural justice hearing rule, and to ensure additional land acquisitions are properly made.

New section 19C ensures an appropriate balance is struck between the rights of interested parties (to be heard before an additional land acquisition is made), and the need for communities and stakeholders to have certainty about the Commonwealth's ability to establish the Facility at Napandee.

SIGNIFICANT MATTERS IN DELEGATED LEGISLATION—EXCLUSION OF STATE, TERRITORY AND COMMONWEALTH LAWS

The committee requests the minister's advice as to:
Why it is considered necessary and appropriate to allow regulations to exclude the operation of prescribed State, Territory or Commonwealth laws; and

The appropriateness of amending the bill to remove proposed subsections 34GA(2)–(4) and 34GB(2) which provide that the regulations may exclude the operation of prescribed State, Territory or Commonwealth laws.

Detailed technical assessments were conducted at a number of shortlisted sites before Napandee was identified as the preferred site for the Facility. As part of this process, there may have been disruption to land caused by activities such as constructing or rehabilitating bores, operating drilling equipment, placing meteorological or hydrological monitoring equipment on the land, or collecting water or flora and fauna samples.

Section 11 of the Act currently provides authority for activities to be conducted at shortlisted sites for a wide range of purposes, including to ensure land is left, as nearly as practicable, in the condition it was in immediately before the site assessment process. Section 23 of the Act

ensures that activities to remediate the land can be conducted after the site is acquired, and sections 12 and 13 of the Act ensure these activities can be conducted irrespective of other Commonwealth, State or Territory laws. The Bill repeals these sections of Act.

Proposed sections 34G, 34GA and 34GB are transitional provisions that would confer a narrower authority for the Commonwealth to conduct activities at shortlisted sites, only insofar as 'necessary for or incidental to the purpose of leaving the land, as nearly as practicable, in the condition in which it was immediately before the [assessment process]'.. Proposed subsections 34GA(2) – (4) are based on subsections 12(2) – (4) in the Act and proposed section 34GB(2) is based on subsection 13(2). These provisions applied to activities conducted on the land throughout the site selection process.

These provisions are important as they ensure that the Government is able to continue to remediate land after the commencement of the Bill. It is appropriate to retain the ability to exclude State, Territory and other Commonwealth laws that would regulate, hinder or prevent the Commonwealth from conducting activities necessary to remediate land disrupted during the site assessment process.

The absence of these provisions would disadvantage landholders of shortlisted sites, as remediation activities could be stymied by regulatory requirements that did not apply when the land was initially disrupted.

Any proposal to prescribe a State, Territory or Commonwealth law in the regulations for the purposes of sections 34GA and 34GB would be subject to appropriate consultation with relevant departments and ministers. Furthermore, the relevant regulations will be subject to disallowance by either house of Parliament.

SIGNIFICANT MATTERS IN DELEGATED LEGISLATION—ESTABLISHMENT OF COMMUNITY FUND

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

Why it is considered necessary and appropriate to leave the establishment of the NRWMF Community Fund entity, as well as any additional terms and conditions on which any payment is to be made, to either delegated legislation or the provisions of a written agreement of which the Parliament may have no oversight; and

Whether the bill can be amended to:

- include at least high level guidance in relation to these matters on the face of the primary legislation, or
- at a minimum, to provide that the regulations must, rather than may, prescribe other terms and conditions that are to be set out in the agreement under proposed subsection 34AC(7).

The National Radioactive Waste Management Facility (NRWMF) Community Fund entity will be community-controlled and representative of a broad range of views in the host community. The Bill requires the Minister to ensure that there is consultation with the Regional Consultative Committee (RCC), the local council, and the South Australian government regarding the type of entity to be established and associated governance arrangements, before regulations are made to prescribe the NRWMF Community Fund entity.

The RCC will be an important conduit to facilitate communication between the Commonwealth and the host community on the development of the NRWMF Community Fund entity. The RCC will be established under section 22 of the Act as soon as possible following passage of the legislation.

It is therefore appropriate for the NRWMF Community Fund entity to be prescribed in the regulations, to provide the required flexibility to ensure the appropriate consultation can be conducted, and that the needs of the host community are met.

Proposed subsection 34AC(5) sets out the core condition of what the fund can be used for. It states that the NRWMF Community Fund must be used for the purposes associated with the economic and social sustainability of the host community for the Facility, so as to support the establishment and operation of the Facility in safely and securely managing controlled material. Any additional conditions imposed by an agreement between the Commonwealth and the NRWMF Community Fund entity will be geared toward supplementing and supporting this core condition.

It would not be possible to prescribe high level guidance on the NRWMF Community Fund entity in legislation as its composition and structure is subject to future consultation with the host community.

In addition to the core condition, the Bill provides scope for the Commonwealth to structure its agreement with the NRWMF Community Fund entity in such a way that ensures the terms upon which the payment is made are consistent with the *Public Governance, Performance and Accountability Act 2013.*

Proposed subsection 34AC(7) provides flexibility, allowing for the regulations to prescribe other terms and conditions required in the written agreement between the Commonwealth and the NRWMF Community Fund entity. It is proposed these are prescribed by regulation rather than in the primary legislation, as the precise terms and conditions that will be needed are not known at this time. It is anticipated that appropriate contractual arrangements will become clear once the relevant entity has been established, consultation has completed, and any relevant negotiations have been conducted.

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

Reference: MS20-000209

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator

Thank you for the Committee Secretary's email of 27 February 2020 to my office, regarding the Senate Committee for the Scrutiny of Bills' (the Committee's) consideration of the National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020 (the Bill), outlined in Scrutiny Digest 3/20.

I appreciate the time taken to review the Bill and thank you for the opportunity to address the important issues raised by the Committee.

No invalidity clause
The Committee sought advice about the rationale for the proposed amendments to subsection 157(6) of the *National Vocational Education and Training Regulator Act 2011* (the Act), which would operate so that failure of the National VET Regulator to comply with the requirements in proposed subsection 157(5A) (about having regard to advice provided by the new Advisory Council) will not affect the validity of the performance of the Regulator's functions.

The Committee has noted the justification provided in the Explanatory Memorandum in relation to the no invalidity clause in the Bill. The Committee has commented:

> 'While noting this justification, the committee has generally not accepted a desire for administrative certainty, on its own, to be a sufficient justification for the inclusion of clauses.'

The amendment to subsection 157(6) was inserted as part of the policy settings for the creation of the new independent expert Advisory Council, which will have the function of providing advice to the CEO of ASQA in relation to the Regulator's functions. The Advisory Council is not proposed to be a decision-making body that affects rights of individuals or registered training organisations (RTOs) or otherwise impacts on the regulatory decisions made by the CEO of ASQA. This is made plain by proposed subsection 175(1) (in item 41 of the Bill) which proposes to provide the Advisory Council with a broad advisory role in relation to the Regulator, but expressly provides that the Advisory Council's functions do not include giving advice about or in relation to the registration of a person or body as an NVR RTO. Rather, the Advisory Council's role is to provide a valuable source of strategic advice to the CEO of ASQA and to provide a strong foundation for stakeholder confidence in the Regulator.

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Item 34 needs to be considered in the context of Item 33 and existing paragraph 157(5) as amended by Item 32

Item 33 of the Bill proposes to insert a new subsection 157(5A) into the Act. New subsection 157(5A) provides that the National VET Regulator must have regard to any advice provided by the Advisory Council in performing its functions. This provision makes it mandatory for the CEO of ASQA to consider the Advisory Council's advice, including reports. However, the amendment to subsection 157(6) (proposed by item 34 in the Bill) ensures that the decisions of ASQA, including regulatory decisions such as whether to cancel a RTO's registration, will not be invalid merely on the basis that the CEO did not have regard to a relevant Advisory Council report or advice.

Subsection 157(6) is not a new provision and already operates to ensure that a function of the National VET Regulator is not invalid merely because of certain procedural irregularities. It already operates to ensure that failure to apply the 'Risk Assessment Framework' and to have regard to certain reports or information does not affect the validity of the performance of one of the National VET Regulator's functions.[1]

If subsection 157(6) of the Act had not been extended to new subsection 157(5A) (about having regard to the advice of the Advisory Council), there would be uncertainty about the relationship between the general and strategic advice provided by the new Advisory Council and specific regulatory decisions of the National VET Regulator. The effect of the amendments is to ensure that a specific decision of the Regulator is not invalid (made as an error of law) merely by failure to have regard to the advice of the new Council. This amendment is intended to ensure that persons affected by regulatory decisions of the Regulator are provided with certainty as to the mandatory legal test that applies to a particular decision: for example, that a decision to register an RTO is to be made wholly on the basis of the test for registration outlined in Part 2 of the Act.

The policy intent for an Advisory Council is to provide general and strategic advice. It is important that the CEO of ASQA consider, although not necessarily follow, that advice and information in specific circumstances. The National VET Regulator was established as, and will remain, an independent regulator whose decisions are to be informed by advice, but not determined by advice. The amendments proposed by the Bill are intended to reinforce this long-standing status of the National VET Regulator.

Significant matters in delegated legislation - Privacy

The committee sought advice on why is it considered necessary and appropriate to leave the safeguards for the disclosure of information to delegated legislation and whether the Bill can be amended to:

1. include at least high-level guidance regarding the relevant safeguards on the face of the primary legislation; or
2. at a minimum, provide that the minister *must*, rather than may make information safeguard rules under proposed section 214A (and to remove references to '(if any)' in proposed paragraphs 210A(3)(a) and (b) and subsection 210B(3)).

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[1] The Explanatory Memorandum of the National Vocational Education and Training Regulator Bill 2010 provided:

> Subclauses 157(4) and (5) respectively provide that, in performing its functions, the NVR must apply the Risk Assessment Framework (see clause 190) and have regard to reports or information it receives about matters relating to this Bill. A failure to do so, however, does not affect the validity of the performance of the function by the NVR (subclause 157(6)).

Appropriate levels of safeguards and guidance have been included on the face of primary legislation. For example, subsection 210A(2) in item 2 of Schedule 2 of the Bill ensures that the National Centre for Vocational Education Research (NCVER) only discloses to a person that is engaged by NCVER so as to support NCVER to carry out its research functions. This person would likely be someone that is contracted to NCVER to perform those functions, and would undergo various scrutiny measures to ensure the person engaged has the ability to fulfil the role and meets all requirements under that contract such as suitability checks and privacy considerations. The provision also supports current use of information processes by NCVER, and similarly when an Australian Government department engages a person by contract to carry out duties for that department. NCVER is an APP entity under the *Privacy Act 1988* and must already meet those collection, use or disclosure requirements, in particular under APP 6 – use or disclosure of personal information.

The proposed arrangements under subsection 210A(2) do not increase the risk of inappropriate disclosure of personal information and support NCVER's use of personal information where additional persons are engaged to assist NCVER to perform its functions.

The information safeguard rules add an additional layer of protection to those already included on the face of primary legislation for the specified bodies to satisfy. As the protection of an individual's personal information is a serious matter and if unforeseen issues were to arise, over time and with changing technological capabilities, the information safeguard rules give the Commonwealth Minister the power to respond quickly to emerging issues in a manner appropriate to the new circumstances. I consider this additional protection mechanism to be an important step in continuing to protect personal information and responding to changing environments.

I plan to draft information safeguard rules for consideration by the Skills Ministerial Council. These rules will list the factors that should be considered before a decision is made by the NCVER or the Secretary to disclose identified personal information. These factors will include the purpose for the request, how the data will be used, and how privacy will be protected. They will also state that identified data should not be disclosed if de-identified or confidentialised data will achieve the relevant purpose.

The Committee also noted that 'a legislative instrument is not subject to the full range of Parliamentary scrutiny'. As outlined in the Explanatory Memorandum to the Bill, NCVER was established in 1981 by Commonwealth, state and territory Ministers responsible for VET. In the making of legislative instruments by the Commonwealth Minister under the *National Vocational Education and Training Regulator Act 2011*, the instruments must be agreed to by the Council of Australian Governments (COAG) Skills Council Ministers as well as undergoing Parliamentary scrutiny.

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

Yours sincerely

Senator the Hon Michaelia Cash
12 / 03 / 2020