The Hon Michael McCormack MP

Deputy Prime Minister
Minister for Infrastructure, Transport and Regional Development
Leader of The Nationals
Federal Member for Riverina

Ref: MS20-000669

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

01 MAY 2020

Dear Senator

Thank you for the Committee Secretary's email of 20 April 2020 concerning the Senate Standing Committee for the Scrutiny of Bills' (the Committee) consideration of the *Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020* (the Bill). I appreciate the time taken to review the Bill and thank you for the opportunity to address the issues raised by the Committee.

Scrutiny of Payments under the Bill
In paragraph 1.28 of the *Scrutiny Digest 5 of 2020*, the Committee requests the minister's advice as to:

- how senators and others will be able to scrutinise the payments that are made, or have been made, under the Bill and the terms and conditions attached to those payments.
- whether the department could establish a website to list all payments made under the bill, including links to the relevant agreements setting out the terms and conditions attaching to each payment.

In response, I advise that measures that are being funded under the *Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Act 2020 (*the Act), announced by the Australian Government, are published on my Department's website at www.regional.gov.au/regional/programs/covid-19-relief-and-recovery-fund.aspx. Additionally, information on the COVID-19 Relief and Recovery Fund, established under the Act, can be found at treasury.gov.au/coronavirus/resources.

To ensure good governance and compliance with the Act, a Ministerial Advisory Group chaired by myself was established to provide advice to Cabinet, through the Expenditure Review Committee, on the selection of measures to be funded under the Act. This ensures funding is targeted to communities, regions and industry sectors severely affected by the impacts of COVID-19.

Financial assistance under the Act is being delivered through existing or newly established Government programs or initiatives. Information about these funding decisions will be published in accordance with existing arrangements for each mechanism. For example:

- where grants programs are used, grant agreements will be established and relevant information will be published on GrantConnect at www.grants.gov.au;
- where payments are made to States and Territories under the Intergovernmental Agreement on Federal Financial Relations, written agreements will be amended or established to outline the agreement between the Commonwealth and relevant State and/or Territory and published on at www.federalfinancialrelations.gov.au; and
- where payments are made through contracts, a contract notice will be reported where appropriate on AusTender at www.tenders.gov.au.

Public reporting on funding decisions or the implementation of specific measures will be managed by the Government agency responsible for the initiative, in consultation with the Department of Finance, and I have established a Secretariat function within my Department to oversee the administration of the Act. Agencies will continue to comply with all legislative obligations for the expenditure of public funding, including the *Public Governance, Performance and Accountability Act 2013*.

I note the Committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

Thank you for bringing your concerns to my attention and I trust this information will be of assistance to the Committee.

Yours sincerely

Michael McCormack

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-000818

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

Dear Senator Polley,

I refer to correspondence from the Senate Standing Committee for the Scrutiny of Bills (the Committee) requesting my advice in respect of the Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020 (the Bill).

The Committee has sought my advice as to:

- how it is intended that the Australian Business Growth Fund (the Fund) will operate;
- the governance arrangements for the Fund; and
- the types of matters likely to be included in rules made under clause 16 of the Bill.

As this Bill received Royal Assent on 24 March 2020, I provide this advice in relation to the *Australian Business Growth Fund (Coronavirus Economic Response Package) Act 2020* (the Act).

How the Fund will operate

The Fund will be set up as a corporation formed under the *Corporations Act 2001*. In addition to the Commonwealth, entities who will participate in the formation of the Fund and will constitute the founding shareholders include the National Australia Bank, the Commonwealth Bank of Australia, Westpac, ANZ, HSBC and Macquarie. The Fund will have an initial investment capacity of $540 million and will operate independently to make equity investments in eligible businesses.

The Act provides the authority for the Commonwealth to invest in the Fund and for the governance of that investment. The Act is not designed to define the operating characteristics of the Fund, such as the governance around how the Fund itself will operate, the investments that it will make, or the rights and obligations of its shareholders. Rather, these aspects will be settled as part of commercial negotiations between the Commonwealth and the other shareholders as the Fund will be a commercial enterprise separate from the Commonwealth.

In respect of the investments of the Fund and the investment criteria, it is anticipated that the Fund will provide eligible businesses with long-term capital investments of between $5 million and $15 million, representing a minority equity interest in those businesses of between 10 and 40 per cent. The Fund will be set up with an investment mandate agreed by the Fund's shareholders that will define the characteristics of the types of businesses in which the Fund can invest. Those

characteristics include businesses that have revenue of between $2 million and $100 million per year, that want funding of minority stakes between 10 and 40 per cent and that have a three year track record in revenue growth and profitability (appropriately adjusted to take account of the economic effects of the COVID-19 pandemic). Eligible businesses can be from a range of industries, be at different stages in their development and come from around the country. The Fund will also provide other services, such as advice and mentoring.

Investments of the Fund will be based on criteria specified in the investment mandate. The responsibility of investment decisions by the Fund rests with the Fund, and its investment decisions will be made in line with the Fund's investment mandate.

The governance arrangements for the Fund

Governance arrangements will be in place to protect the Commonwealth's and other participants' interests in the Fund, and will ensure that the Fund is, and its investments are, appropriately managed.

The Fund will employ an executive team to independently manage the corporation, with oversight from a Board of Directors (the Board). A Chief Executive Officer (CEO) will be appointed and will be responsible for the day to day management of the Fund.

The Board will generally comprise nominees from the Fund's shareholders, and three independent directors. The Commonwealth, being a founding shareholder and providing an initial commitment of $100 million, will be entitled to appoint one nominee director.

The role of the Board will be to oversee the management of the Fund to make sure that the capital and investments of the Fund are being managed in a way that is consistent with the investment mandate and with the legislative requirements for the Fund.

It is intended that the Fund operate independently of its shareholders. The Commonwealth will not have a role in the day-to-day operations of the Fund or in individual investments made by the Fund. On this basis, it was appropriate that the Act only provide for the authority for the Commonwealth to make an investment in the Fund, and leave the further operational aspects and governance arrangements to be determined by all the Fund's shareholders by commercial arrangement.

The Commonwealth continues to have reporting requirements on its investment in the Fund in accordance with section 20 of the Act. Further, the Minister is required, under section 72 of the *Public Governance, Performance and Accountability Act 2013*, to inform the Parliament of certain events, such as the Commonwealth's participation in the formation of a company, or its acquisition of shares in a company. Arrangements will be in place with other shareholders of the Fund to ensure the Commonwealth will have the necessary information to properly provide these reports.

The types of matters likely to be included in the rules

Section 16 of the Act provides that rules may make provision for, or in relation to, the exercise of rights, responsibilities, duties and powers by the Minister under the Act. The powers the Minister has under the Act include the power to participate in the forming of the Fund, acquiring shares in, or debentures of, the Fund, the power to make arrangements relating to the operation of the Fund, and the powers that come with these actions (for example, the power of the Minister as a shareholder in the Fund).

It is anticipated that the rules could be used to make further provisions in relation to the governance, integrity and clarity of the use of the Minister's powers under the Act, where necessary. For example, the rules could be used to govern the use of the Minister's powers, set the Minister's

expectations on the use of those powers, or put in place limitations, if such powers are delegated in accordance with the Act.

The scope of the rule making power has been limited and ensures that the rules cannot create an offence or civil penalty, provide coercive enforcement powers, impose a tax, appropriate an amount from the Consolidated Revenue Fund or directly amend the text of the Act.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

11/05/2020

Senator the Hon Anne Ruston

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

Ref: MB20-000448

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

Thank you for the email of 20 April 2020, from the Senate Standing Committee for Scrutiny of Bills (the Committee) Secretary, regarding *the Coronavirus Economic Response Package Omnibus Act 2020* (the Act).

I note the issues the Committee has outlined in *Scrutiny Digest 5 of 2020,* particularly in relation to item 40A of Schedule 11 to the Act, which provides me the power to modify social security law by legislative instrument to vary provisions on a temporary basis relating to the qualifications of persons for social security payments and the rate of social security payments.

I appreciate the need for scrutiny around a provision such as item 40A of Schedule 11 and I note the Committee's concerns in relation to the Explanatory Memorandum. This power will allow the Government to act rapidly to ensure appropriate support is provided to those in need during the unprecedented and rapidly changing circumstances we are experiencing in respect of the Coronavirus outbreak. It also allows the Government to address any unintended consequences in the application of legislation as changes to social security payments are implemented. I have provided some additional information below in relation to its inclusion, for the Committee's consideration.

The Committee requested advice on the circumstances in which the power in item 40A of Schedule 11 would be used.

By way of example, the item 40A of Schedule 11 power has been used to:

- provide additional financial support to students
- extend the period that applicants for social security payments have to lodge a claim after submitting an intent to claim, to address the unprecedented number of applications for social security made to Services Australia
- reduce the partner income test taper rate for JobSeeker Payment from 60 cents in the dollar to 25 cents in the dollar.

As the Committee notes, item 40A of Schedule 11 will be repealed on 31 December 2020 and all instruments made under the item will cease having effect on that date. In addition, before making temporary modifications to social security law under item 40A of Schedule 11, I must be satisfied that the modifications are in response to circumstances relating to COVID-19.

The Committee has also raised concerns regarding my ability to alter or extend the operation of supplement payments, including allowing the amount of the Supplement to be set below the amount provided for by the Parliament in the primary legislation.

The Government has announced the Supplement will be paid at the rate of $550 per fortnight, and will be paid from 27 April 2020. As the situation develops, the Government will review the settings associated with income support to ensure we are responding to circumstances as they arise. Flexibility around the timing and scope of payments is required given the uncertainty over the length and severity of the economic impacts of the Coronavirus, and how we emerge from the crisis.

Providing additional financial support through social security is just one of the ways we are helping support individuals, communities and the economy during these testing times.

Thank you for raising these matters with me. I trust the information provided will be of assistance to the Committee.

Yours sincerely

Anne Ruston

5 May 2020

Response to Scrutiny Digest 4 of 2020 – Family Assistance Legislation Amendment (Improving Assistance for Vulnerable and Disadvantaged Families) Bill 2020

Item 7 of Schedule 1 – subparagraph 197G(1)(b)(ii) and (iii)

Background to the measure in item 7 of Schedule 1

Section 197G of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) allows the Secretary to vary the approval of an approved provider to remove an approved child care service from the provider's approval if that service has failed to provide care for 3 continuous months. The effect of a service being removed from a provider's approval is that families can no longer receive the Child Care Subsidy for care provided by the provider at that service and the provider will need to reapply for approval in respect of that service for that service to be able to provide care that is eligible for Child Care Subsidy.

Paragraph 197G(1)(b) sets out circumstances, where although a service may not have been providing care for 3 continuous months, it is not appropriate for the service to be removed from the provider's approval; in other words where there is an appropriate reason for the service to not be providing care over the 3 month period and removal of approval in respect of the service is therefore not warranted. This is a protection for the provider. It also protects the interests of families that are enrolled with the service.

Prior to amendments to paragraph 197G(1)(b) made under the *Family Assistance Legislation Amendment (Building on the Child Care Package) Bill 2019* (Building on the Child Care Package Bill), these circumstances, where non-operation for 3 months was appropriate, were:

i. **the service is subject to a determination under section 195C** that the service need not operate for the period;
ii. the Secretary is satisfied that, because of special circumstances affecting the service, the provider's approval should not be varied to remove the child care service from the approval.. [Emphasis added]

The Building on the Child Care Package Bill amended the Family Assistance Administration Act to insert a new section 197AA, which gave the Secretary the power to suspend the approval of an approved provider, or the approval of the approved provider in respect of one or more of its services, at the provider's request (i.e. voluntary suspension) (item 17 of Schedule 2 to the Building on the Child Care Package Bill).

Consequently, in order to address this new circumstance, where it would be appropriate for a service to not be operating for 3 months, a consequential amendment was made to paragraph 197(1)(b) to repeal that paragraph and substitute it with a new paragraph that included voluntary suspension under section 197AA ((item 20 of Schedule 2 to the Building on the Child Care Package Bill). The circumstances in the new paragraph 197G(1)(b) were:

i. the provider's approval with respect to the service is suspended under section 197AA for any part of the 3 month period;
ii. **all approved child care services** of the provider are subject to a determination under section 195C that the service need not operate for the period;
iii. the Secretary is satisfied that, because of special circumstances affecting the provider, the provider's approval should not be cancelled. [Emphasis added]

Unfortunately, an error was made in the drafting of the new subparagraph 197G(1)(b)(ii), which instead of referring to *the service* (which was not operating for 3 months) being subject to a determination under section 195C, referred to *all approved child care services* as needing to be subject to a determination under section 195C.

This drafting error:

- disadvantages providers, and families wishing to receive care at the service, as it means that even if the *one* service which was not operating for 3 months, and there was a determination under section 195C in place allowing this, the Secretary could still remove the service from the provider's approval, because *all* approved services of the provider did not have such a determination under section 195C in place (even though technically they would not need such a determination); and
- undermines the proper operation of section 197G, as logically it does not make sense.

The measure in item 7 and reason for its retrospectivity

Item 7 of Schedule 1 to the Bill repeals subparagraphs 197G(1)(b)(ii) and (iii) and substitutes them with the following:

> *"(ii) **the service is** subject to a determination under section 195C that the service need not operate for the period;*
>
> *(iii) the Secretary is satisfied that, because of special circumstances affecting the service, the provider's approval should not be so varied."* [Emphasis added]

The amendment to subparagraph 197G(1)(b)(ii) under item 7 of Schedule 1 in practice merely repeals the reference to "*all approved child care services of the provider*" and replaces it with a reference to "*the service*" (which has not been operating for 3 months).

This amendment corrects the drafting error made to paragraph 197G(1)(b) in the Building the Child Care Package Bill and returns the particular circumstance, which justifies why a service need not have been operating for the 3 month period, to the form that it was in prior to amendments made in the Building the Child Care Package Bill.

This restores a necessary protection to providers and families receiving care at the service. It also enables the provision to operate effectively in a manner consistent with the long standing policy intention behind the provision.

Item 7 of Schedule 1 has the retrospective commencement date of 13 December 2019, being immediately after Schedule 2 to *the Family Assistance Legislation Amendment (Building on the Child Care Package) Act 2019* (Building on the Child Care Package Act) commenced. This retrospective commencement date means that as soon as the erroneous paragraph 197G(1)(b) took effect, the correction to it under item 7 of Schedule 1 would also take effect.

This retrospective commencement date would thus ensure that there was *no* period of time in which:

- providers and families at their affected services could be disadvantaged by an unintentional drafting error; and
- the proper, fair and effective operation of the Family Assistance Administration Act could be undermined through the unintentional error.

It is noted that the retrospective commencement of item 7 has had no detrimental effect for any providers. Indeed, it would be of beneficial effect.

Item 8 of Schedule 1 – subsection 204K(6)

Background to the measure in item 8 of Schedule 1

Section 204K of the Family Assistance Administration Act required an approved provider to give notice to an appropriate State/Territory body that the provider considered a child to be at risk of serious abuse or neglect:

- within 6 week after a certificate given to the Secretary under section 85CB of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) that a child is or was at risk of serious abuse or neglect takes effect (subsection 204K(1));
- before applying for a determination under section 85CE of the Family Assistance Act in respect of a child being at risk of serious abuse or neglect (subsection 204K(3).

The reason for the notification requirement is to ensure that the appropriate State/Territory bodies are made aware of the risk to the child and can work with the child's family to provide assistance to benefit the child's wellbeing, health and safety.

Failure by a provider to give the notification to the State/Territory body has been both an offence (60 penalty units) and civil penalty provision (50 penalty units) under subsection 204K(5) and (6) of the Family Assistance Administration Act respectively since section 204K was included in the Administration by the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* with effect from 2 July 2018. This recognises that failure by a provider to notify appropriate State/Territory bodies that a child is at risk of serious abuse or neglect could compromise the ability of the family to receive the appropriate help needed.

Item 81 of Schedule 1 of the Building on the Child Care Package Bill repealed section 204K and substituted a new section 204K. However, the only substantive, intentional change to section 204K was that the bodies formerly known as an 'appropriate State or Territory body' were renamed as 'appropriate State/Territory support agency'. This change in terminology was made to address confusion in the child care sector, where some child care providers had thought that the term referred only to a state or territory department or agency dealing with matters of child protection and did not realise that other support agencies were also included.

The drafting approach of repealing and substituting the whole of section 204K, despite the minimal substantive changes, was taken as the term 'appropriate State or Territory body' was used many times throughout the provision.

However, due to an unintentional drafting error, although subsection 204K(6) was still identified as a civil penalty provision, the civil penalty amount of 50 penalty units was inadvertently omitted.

This had the unintended consequence of creating uncertainty for providers, families, appropriate State/Territory support agencies and the Australia Government about the civil penalty consequences attached to a breach of subsections 204K(1) and (3). It also potentially undermined the safety and wellbeing of vulnerable children, who were at risk of serious abuse or neglect, as a failure by a provider to appropriately notify the appropriate State/Territory support agencies no longer attracted a clear civil penalty.

The measure in item 8 and reason for its retrospectivity

Item 8 of Schedule 1 to the Bill adds the civil penalty amount of 50 penalty units to the end of subsection 204K(6). The amendment merely reinstates the civil penalty amount that has been attached to breach of subsection 204K(1) and 204K(3) since these provisions took effect on 2 July 2018; and which were unintentionally repealed.

Item 8 of Schedule 1 has the retrospective commencement date of 16 December 2019, being immediately after Part 1 of Schedule 1 to the Building on the Child Care Package Act commenced. This retrospective commencement date means that as soon as the erroneous omission of the civil penalty amount in subsection 204K(1) took effect, the correction to reinsert in under item 8 of Schedule 1 would also take effect.

This retrospective commencement is appropriate as it:

- ensures that there is certainty for providers, families, appropriate State/Territory support agencies and the Australia Government about the civil penalty consequences attached to a breach of subsections 204K(1) and (3);
- promotes and facilitates the safety and wellbeing of vulnerable children at risk of serious abuse or neglect, by ensuring there is no uncertainty about, or gap in the application of an appropriate civil penalty amount, that applies where there has been a failure by a provider to appropriately notify the appropriate State/Territory support agencies;
- ensures that at all times the importance of a provider notifying appropriate State/Territory support agencies where a child is at risk of serious abuse or neglect is supported by the legislation through a clear and enforceable civil penalty provision;
- merely reinstates what was previously in the legislation, is the long standing policy intention behind the provision, and was unintentionally repealed.

It is noted that the retrospective commencement of item 8 has, to date, had no detrimental effect for any providers during the period 16 December 2019 to the present.

It is respectfully submitted to the committee that the retrospective commencement of items 7 and 8 of Schedule 1 of the Bill are necessary and appropriate in the above described circumstances.

Schedule 2 – Amendment to CCS reconciliation

The measures at Schedule 2 insert new subsections 105E(4) to (7) of the Family Assistance Administration Act. These new subsections modify how Child Care Subsidy (CCS) entitlements are reviewed and calculated when an individual, who is a member of a couple for some but not all of the CCS fortnights in an income year, meets the CCS reconciliation conditions.

Currently all CCS claimants' entitlement to CCS is calculated using the methodology in Schedules 2 and 3 of the Family Assistance Act. CCS reconciliation occurs after the income year, when the individual meets the CCS reconciliation conditions. At that point, the Secretary reviews all entitlement determinations made throughout the year in respect of that individual, using the person's actual Adjusted Taxable Income (ATI) (and other information relevant to the individual's entitlement) and remakes all entitlement determinations.

There are 3 possible outcomes from CCS reconciliation. The individual can owe a debt due to being paid more CCS during the year than they were entitled to, be paid an additional amount of CCS due to not being paid all the CCS they were entitled to during the year, or have no adjustment where the individual was paid the correct amount of CCS during the year.

Around 45,000 individuals receiving CCS partner, separate or die during the year. During the financial year, a claimant's CCS percentage rate is calculated and paid based on a claimant's (combined with their partner's if they have one) estimated ATI for that financial year.

If an individual had a partner during the financial year, but the partnership did not extend for the entire financial year (a 'part year partner'), instead of using the part year partner's entire actual ATI for that financial year, only a proportion of the partner's ATI (based on the number of CCS fortnights they were partnered) is used to re-calculate the CCS percentage rate the claimant was actually entitled to for that financial year. So, for example, if the partnership lasted for 3 months, only 3 months' worth of the part year partner's ATI will be added to the claimant's income at CCS reconciliation, in recognition that the partner only contributed to the partnership for 3 months.

If the difference between:

- the part year partner's total annual income used to pay CCS during the year; and
- the proportion of the partner's income used at CCS reconciliation was large enough,

it resulted in the claimant having a final CCS reconciliation outcome of being entitled to a higher CCS percentage rate than they were paid during the year, resulting in arrears being paid directly to the claimant as a 'top up'.

Analysis revealed, however, for example, if the individual earned a low income, and the part year partner earned a high income, the proportion of the partner's income added to the individual's income at CCS reconciliation could result in the individual being entitled to a lower CCCS percentage rate than they were paid during the year, creating a debt.

Consequently, this methodology was unfair, since their CCS reconciliation outcome was dependent on an unpredictable set of personal circumstances (i.e. the duration of the partnership and the income of the part year partner throughout the year).

The amendments made by the measures in Schedule 2 of this Bill to section 105E were intended to address this and to provide for a fairer entitlement calculation methodology to apply to individuals with part year partners, at CCS reconciliation. This fairer result was to be achieved as the new subsection 105E(4) to (7) of the Family Assistance Administration Act have the following effect:

- They adjusted whether or not the annual cap (which is a cap on the CCS payable based on whether the individual exceeded the annual cap income threshold) would apply to each CCS fortnight (as opposed to the entire income year) depending on whether the individual was single or partnered and their income was under or above the annual cap income threshold during that CCS fortnight;
- For the purpose of determining the individual's applicable percentage, the individual's ATI would also be considered across each CCS fortnight (as opposed to across the entire income year), depending on whether or not the individual was single or in a relationship with a part year partner and the impact of that on the individual's ATI for that CCS fortnight.

A fairer CCS reconciliation entitlement outcome would thus be achieved, as individuals with part year partner's would have their annual cap and ATI considered on a CCS fortnightly basis as opposed to on an income year basis, which better recognises the fluctuations to their ATI which might result from them being in relationship(s) for only part of the year.

Essentially, the new CCS reconciliation method means that if the individual follows the Government's instructions to keep their estimated annual income up to date, their CCS

reconciliation outcome will closely reflect the CCS entitlements paid to them during the year. The fairer calculation method to be used at CCS reconciliation imposes no additional requirements for CCS claimants to meet, or plan for and greatly increases the probability of a nil adjustment CCS reconciliation outcome where individuals have accurately reported their income throughout the year.

Additionally, the retrospective commencement of the provisions in Schedule 2 allow the new reconciliation methodology to be applied to CCS amounts payable to individuals for care provided to their children during the 2019-2020 financial year. This would not be possible without retrospective commencement of the provisions. This is to enable the fair reconciliation methodology to be applied to individuals sooner.

Notably, the Constitutional savings provision included at subitem 2(2) of Schedule 2 states that the amendment made by item 1 of Schedule 2 have no effect to the extent (if any) to which it would:

- result in an acquisition of property (within the meaning of paragraph 51 (xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph); or
- impose taxation (within the meaning of section 55 of the Constitution).

Thus to the extent that any individuals were disadvantaged by the retrospective commencement of these provisions, it would be open to them to challenge the application of the provision to them and seek compensation on just terms for an amount equal to the amount they were disadvantaged by.

Extensive analysis by the Department of Education, Skills and Employment has been unable to identify that any of the around 45,000 individuals who partner, separate or die during the year that make up the cohort would be disadvantaged by this new measure.

This measure allows for a more consistent and fair outcome at CSS reconciliation for this cohort.

It is respectfully submitted to the committee that the retrospective commencement of the measures in Schedule 2 of the Bill, while to be removed from the Bill as they are now dealt with in the Coronavirus Measures No. 2 Bill, are necessary and appropriate in the above described circumstances.

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC20-008180

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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CANBERRA ACT 2600

Dear Senator Helen

Thank you for the Committee Secretary's email of 3 April 2020 to my office concerning the Senate Standing Committee for the Scrutiny of Bills' (Committee) consideration of the Health Insurance Amendment (General Practitioners and Quality Assistance) Bill 2020 (Bill). I appreciate the time taken to review the Bill and thank you for the opportunity to address important issues raised by the Committee.

Retrospective validation

The Committee sought more detailed advice as to the necessity and appropriateness of retrospectively validating declarations made by the Minister under Section 124X of the *Health Insurance Act 1973* (HIA), including a more detailed explanation regarding whether there will, or may, be a detrimental effect to any involved parties. In particular the Committee noted:

- generally, where proposed legislation will have a retrospective effect the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected; and
- while the explanatory memorandum provided an explanation, it remains unclear whether the retrospective validation of declarations will, or may, have a detrimental effect on any persons.

Response

The changes proposed in the Bill address an outdated reference within the definition of 'quality assurance activity' provided in Section 124W(1) of the HIA. This will be corrected by updating the reference from the repealed *Health Care (Appropriation) Act 1998* (HCAA) to the *Federal Financial Relations Act 2009* (FFRA). From 1 July 2009 the FFRA became the main vehicle for Commonwealth payments to states and territories for public hospital and other public healthcare services. As a consequence of updating that reference within the definition of a 'quality assurance activity', the Bill provides for declarations made since the change in legislation to be taken to have been valid even though there was a delay in changing the reference to that legislation in s124W(1).

The amendment addresses the risk that these declarations might be considered to be technically invalid. If that were the case, people participating in the scheme might not receive the protections intended by those declarations.

It is therefore desirable to retrospectively validate declarations made since 1 July 2009 so that, notwithstanding the outdated legislative reference, people who have participated in declared quality assurance activities can remain confident that they are protected by the immunity conferred by s124ZB; and the prohibition of disclosure of information and production of documents at s124Y of the HIA.

The Bill will not result in a detrimental effect on anyone. The Bill does not expand or otherwise alter existing or future declarations of qualified privilege in any way. Any person participating in a declared activity will continue to be protected and will be taken to have always been participating in a validly declared activity, as intended from the date of each declaration. A quality assurance activity declaration ceases after 5 years, unless another is made, and this is not affected by the proposed amendment (s124X(4)).

In contrast, however, if the changes are not made to have retrospective effect, there is a risk that people who participated in good faith in those activities declared as a 'quality assurance activity' after 1 July 2009 might be taken to have participated in an activity not protected under the immunity relied on under s124ZB and not protected by the prohibition on disclosure relied on under s124Y.

One such practical implication of this could arise if a person had a material right to proceed against another person, for example in the event of a defamation case, if it were successfully claimed that immunity never applied due to an administrative delay in updating a reference to repealed legislation. If this was to occur it would cause unnecessary detriment to participants and organisations undertaking the quality assurance activities and undermine confidence in the operation of quality assurance confidentiality arrangements under the HIA.

The Commonwealth is not aware of any action where a person or organisation has any interest in challenging the immunity conferred under s124ZB for any declarations made past or current.

Thank you for the opportunity to respond to the Committee's concerns and I trust the information is helpful.

Yours sincerely

Greg Hunt

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 Helen

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.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-000808

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

Dear Senator Polley

I refer to correspondence from the Senate Standing Committee for the Scrutiny of Bills (the Committee) requesting my advice in respect of the Structured Finance Support (Coronavirus Economic Response Package) Bill 2020.

The Committee has sought advice as to:

- how it is intended that the Structured Finance Support (Coronavirus Economic Response) Fund (the Fund) will operate;
- why determinations to credit additional amounts to the Structured Finance Support (Coronavirus Economic Response) Fund Special Account (the Account) are not subject to parliamentary disallowance; and
- the types of matters that are likely to be included in the rules.

As this Bill recieved Royal Assent on the 24 March 2020, I provide this advice in relation to the *Structured Finance Support (Coronavirus Economic Response Package) Act 2020*.

How will the Fund operate?

Under the Act, I am responsible for operating the Fund. I have delegated my powers to make the investments of the Fund to the Chief Executive Officer (CEO) of the Australian Office of Financial Management (AOFM). The instrument of delegation is the *Structured Finance Support (Coronavirus Economic Response Package) Delegation 2020*, which is a notifiable instrument registered on the Federal Register of Legislation (FRL ID: F2020N00035).

The Account for the Fund has been credited with an initial balance of $15 billion for the AOFM to invest in wholesale funding markets used by small ADIs and non-ADI lenders. The assets being purchased by the AOFM will include residential mortgage backed securities as well as securities backed by a range of other assets. This will enable customers of smaller lenders to continue to access affordable credit despite the significant challenges presented by the COVID-19 pandemic.

I have given a direction under subsection 18(4) of the Act that applies to the CEO of the AOFM, as my delegate, concerning his exercise of the investment powers under the Act. This direction is the *Structured Finance Support (Coronavirus Economic Response Package) (Delegation) Direction*

2020, which is also a notifiable instrument registered on the Federal Register of Legislation (FRL ID: F2020N00034).

I have made this direction so that it is clear both to the delegate and more broadly what my expectations are concerning the operation of the Fund.

The direction provides for the ways in which investment strategies, policies, decision-making criteria, risk and return for the Fund may be implemented by my delegate. For example, the direction requires the prioritisation of investments that, among other things, provide support to smaller lenders that have lost access to reasonably priced funding due to the economic effects of the COVID-19 pandemic. As a further example, the direction requires the CEO of the AOFM to ensure that investments of the Fund have an acceptable level of risk (noting that credit losses may be higher in the short to medium term due to the economic effects of the COVID-19 pandemic).

I have also made rules under section 20 of the Act. The rules are in the *Structured Finance Support (Coronavirus Economic Response Package) Rules 2020*, which is a disallowable legislative instrument registered on the Federal Register of Legislation (FRL ID: F2020L00309). The purpose of the rules is to prescribe matters relating to the administration of the Fund. This includes prescribing limits on the investments of the Fund. In particular, the rules prescribe a restriction that a debt security must not be a first loss security if it is to be an authorised debt security for investment under the Act. This reduces risk for the Commonwealth, including by ensuring that smaller lenders continue to undertake an appropriate level of risk assessment before extending credit to households or small businesses.

The CEO of the AOFM, as the delegate, is responsible for approving all investment proposals for the Fund. An analysis of each proposal is undertaken by the internal investment team prior to delegate approval, which includes a review of compliance with the Act and the rules, an assessment against the priorities, criteria and other requirements set out in the direction, an investment analysis that includes an assessment of the structure of the transaction, a deal documentation review and a credit assessment. The AOFM also leverages existing elements of its governance framework, for example its enterprise risk management framework and conflicts of interest policy, to identify and manage the risks of the Fund.

Why are determinations to credit amounts to the Account not subject to disallowance?

A determination under subsection 13(2) of the Act is not a disallowable legislative instrument because that would frustrate the purpose of the provision. Subsection 13(2) is intended to allow me to credit additional amounts to the Account beyond the initial $15 billion that may be used to make investments of the Fund.

Due to the nature of the COVID-19 pandemic, investments made by the Fund are likely to be made on an urgent basis. If a determination under subsection 13(2) were made disallowable, waiting for the expiry of the disallowance period would mean the opportunity to make the investment had long passed, preventing the investment from being made and frustrating the achievement of the objects of the Act set out in section 3 of the Act. Alternatively, making an investment during the disallowance period would carry risk, and could undermine commercial certainty in the investment.

We also note that the approach taken to the drafting of this provision is similar to other special account crediting provisions in Commonwealth legislation, such as exist in the *Australian Business Securitisation Fund Act 2019* and the *Medicare Guarantee Act 2017*.

What are the types of matters likely to be included in the rules?

As noted above, I have made rules prescribing restrictions on the debt securities that are authorised debt securities in which investments may be made under the Act. In addition, the rules also prescribe the AOFM as a listed entity whose officials may be delegated powers under the Act.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

11/05/2020

The Hon Greg Hunt MP
Minister for Health
Minister Assisting the Prime Minister for the Public Service and Cabinet

Ref No: MC20-008225

Mr Glenn Ryall
Committee Secretary
Senate Standing Committee for the Scrutiny of Bills
Parliament House
PO Box 6100
CANBERRA ACT 2600

23 APR 2020

Dear Mr Ryall Glenn

I refer to your letter of 3 April 2020 concerning the Therapeutic Goods Amendment (2020 Measures No.1) Bill 2020 noting you have drawn 'incorporation by reference' matters to the attention of the Senate and the Senate Standing Committee for the Scrutiny of Delegated Legislation (Committee).

As you note, the explanatory memorandum to the Bill records the policy reasons for the proposed inclusion in the ministerial power to make a medical device standards order under section 41CB of the *Therapeutic Goods Act 1989* by (broadly) incorporating a matter in another instrument or writing as in force or existing from time to time. This is appropriate having regard to the fact that the vast majority of medical devices are imported, manufactured in accordance with standards operative in the exporting country. The power of incorporation, therefore, not only assists with clarity, it has the effect that imported medical devices complying with those standards will necessarily comply with domestically imposed standards.

In accordance with the guideline of the Committee, an explanatory statement for a ministerial order will include information as to where a relevant incorporated instrument or writing may be readily and freely accessed. I also note, however, the information in the explanatory memorandum to the Bill that persons affected by any ministerial order are, separately, likely to know this information.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt