THE HON ANGUS TAYLOR MP
MINISTER FOR ENERGY AND EMISSIONS REDUCTION

MS20-003625

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

By email: scrutiny.sen@aph.gov.au

Dear Mr Ryall

In relation to your request for advice in Scrutiny Digest 11/20, the Australian Government considers the reference to the Investment Mandate direction to be necessary and appropriate.

The non-disallowable Investment Mandate has been a feature of the *Clean Energy Finance Corporation Act 2012* (the Act) since it was introduced by the former Labor government. As set out in section 63 of the Act, a direction may set out the policies to be pursued by the Corporation in relation to technologies, projects and businesses that are eligible for investment and the allocation of investments between the various classes of clean energy technologies. The use of the Investment Mandate for the proposed GRF replicates the existing role of the Investment Mandate in relation to the CEFC's original $10 billion allocation. The legislative concept of a 'grid reliability fund investment' is also bounded by the definition of 'clean energy technologies' and the Investment Mandate cannot be used to expand that statutory limitation.

It is long-standing practice that Ministerial directions to Government bodies are not disallowable. This is the basis for section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015* and the previous inclusion of this exemption in section 44 of the then *Legislative Instruments Act 2003*.

Investment Mandate directions provided under a wide range of similar Commonwealth legislation are not disallowable. These include the:

- *Future Fund Act 2006;*
- *Future Drought Fund Act 2019;*
- *Medical Research Future Fund Act 2015;*
- *DisabilityCare Australia Fund Act 2013;*
- *Aboriginal and Torres Strait Islander Land and Sea Future Fund Act 2018;*
- *Northern Australia Infrastructure Facility Act 2016; and*
- *Nation-building Funds Act 2008.*

It is important that the GRF is targeted to current and emerging challenges to grid reliability and security. These challenges necessarily evolve over time with the emergence of new technologies, changes in energy demand, network investments and locational considerations (for example, the challenges and needs differ across Australia, such that the characteristics of Western Australia's South West Interconnected System differ from those in the South Australian region of the National Electricity Market).

The use of the Investment Mandate ensures that these issues can be considered and updated as required, without returning to Parliament to amend the Act. It allows for a targeted approach to be taken to maximise the public benefits of deploying the GRF.

Importantly, the Investment Mandate cannot override the operational independence of the CEFC as set out in the Act. An Investment Mandate direction cannot direct the CEFC to make, or not make, a particular investment.

The ability for the executive government to direct statutory agencies is an important element of the principle of responsible government in Australia. The Investment Mandate is an essential tool for the Government to give important direction to the CEFC in the performance of its legislative functions.

Yours sincerely

ANGUS TAYLOR

The Hon Michael McCormack MP

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

Ref: MS20-001451

Senator Hellen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
Canberra ACT 2600

Dear Senator Polley,

I write in relation to issues raised in the Senate Standing Committee for the Scrutiny of Bills (the Committee) *Scrutiny Digest 1 of 2020* regarding the Civil Aviation Amendment (Unmanned Aircraft Levy Collection and Payment) Bill 2020

The Committee sought advice regarding:

- why it is necessary and appropriate to leave the circumstances in which the proposed unmanned aircraft levy is payable, and the collection of the levy payments, to delegated legislation; and
- whether the bill can be amended to prescribe at least broad guidance in relation to these matters on the face of the primary legislation.

Response to the Committee's comments

The Bill intends to ensure that Australia's unmanned aircraft (also known as drones) management systems remains flexible and adaptable to effectively respond to this relatively new and rapidly developing sector of aviation. The Bill will enable the Governor-General to determine, by a legislative instrument (regulations), the circumstances in which unmanned aircraft levy is payable and the collection of the unmanned aircraft levy.

In 2018, the Government agreed to support a mandatory scheme of registration for unmanned aircraft, as recommended by the Senate Standing Committee on Rural and Regional Affairs and Transport in its report - *Current and future regulatory requirements that impact on the safe use of remotely piloted aircraft systems, unmanned aerial systems and associated systems,* (31 July 2018). The Civil Aviation Safety Authority has, therefore developed an unmanned aircraft registration scheme, which provide for the registration of commercial, utility and similar remotely piloted aircraft (RPA) – voluntarily from 30 September 2020 but compulsorily from

28 January 2021. Government policy requires that the costs of this registration scheme is recovered from its users.

At this stage, the potential number of unmanned aircraft registrants is volatile and very difficult to predict over anything other than the very short term. The nature of RPAs is highly varied and changing rapidly, with different weight and size classes, each operated for a wide range of purposes — this highlights the difficulty with developing an appropriate and targeted cost recovery scheme for such a diverse industry. The registration scheme will provide further information on the scope and size of the industry, inform the development of the cost recovery scheme, and the circumstances in which unmanned aircraft levy is payable and the collection of the levy.

It is necessary, therefore, to have a regulatory mechanism for setting a cost recovery levy in a way that allows for greater responsiveness than would be the case if the cost recovery levy were set as a fixed amount in an Act of the Parliament that would require relatively frequent amendment. The need for such amendments would arise because the fixed amount of cost recovery levy is likely to be quickly superseded by expansion in the numbers of commercial unmanned aircraft, and changes in the regulations and services the levy is being collected to fund.

Due to the rapidly changing nature of the industry, it is likely that the manner in which the levy is collected will similarly need to be updated and adjusted over time to ensure the levy may continue to be collected in a fair an appropriate manner. The use of regulations avoids these logistical problems, and is appropriate because it will allow administrative and technical details of the schemes to be adjusted relatively quickly.

Further, the regulations are disallowable by a single House acting alone, placing the circumstances of oversight and control over what level the cost recovery levy should be set at within Parliament. Once the cost recovery levy is set in the levy regulations, it may be disallowed if a House of the Parliament thinks fit. If, through amending regulations, the cost recovery levy is raised, those amending regulations may be disallowed and the previous cost recovery levy automatically restored by virtue of relevant provisions in the *Legislation Act 2003*.

Given the complex and dynamic nature of this industry, and noting the oversight mechanisms available to Parliament, the use of delegated legislation remains appropriate. Accordingly, I do not consider it necessary to amend the legislation to place additional guidance in relation to these matters on the face of the primary legislation.

I thank the Committee for its thorough consideration of the Bill and trust the above information is of assistance to the Committee.

Yours sincerely

Michael McCormack

The Hon Dan Tehan MP
Minister for Education

Parliament House
CANBERRA ACT 2600

Telephone: 02 6277 7350

Our Ref: MC20-024562

21 SEP 2020

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
scrutiny.sen@aph.gov.au

Dear Senator Polley Helen,

Thank you for your email of 3 September 2020 regarding the Senate Standing Committee for the Scrutiny of Bills (the Committee) assessment of the Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020 and the Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020. I appreciate the time you have taken to bring these matters to my attention.

The Committee has requested my advice on a few matters within these Bills. I have addressed each of the Committee's queries in the enclosed response.

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

Yours sincerely

DAN TEHAN

Response to the Standing Committee for the Scrutiny of Bills

Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020

Significant matters in delegated legislation

Concerns:

- **1.25: The committee therefore requests the minister's more detailed advice regarding:**
    - **why it is necessary and appropriate to leave significant elements of the tuition protection scheme to delegated legislation; and**
    - **whether the bill could be amended to include at least high–level guidance regarding matters to be contained in the Payments Guidelines on the face of the primary legislation.**

Response:

1. The committee expresses valid concerns about whether the Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020 ('the TP Bill') should include high-level guidance in relation to matters to be contained in the Up-front Payments Guidelines ('the Guidelines'). In this instance however, it is not desirable, or necessary to include such explicit guidance. In developing the legislation, it was intended that the primary legislation would contain the key substance and shape of the scheme, and that subordinate legislation would only deal with procedural issues, administrative matters and other matters that may need to be prescribed from time to time to deal with necessarily unforeseen circumstances.

2. The reliance on the Guidelines for the purposes of proposed subsections 26A(5), 26A(6), and 26A(7) in the TP Bill is appropriate because it will allow administrative and technical details of the up-front payments tuition protection scheme (such as the issue of notices) to be adjusted relatively quickly in comparison to the provisions of primary legislation, in the event that changes in policy give rise to the need for changes in the administration of the scheme.

3. The use of delegated legislation also allows the Minister, with appropriate parliamentary scrutiny, to work out the application of the law as it applies to administrative details of the scheme. For instance, it is desirable that the Guidelines are able to be made relating to the refund, remission and waiver of the up-front tuition protection levy, in order to provide greater flexibility in responding beneficially to circumstances where this may be appropriate (such as during an emergency that was unforeseen at the time the Bill was drafted).

4. In addition, the administration of new tuition protection arrangements is dependent on current and accurate record keeping by higher education providers. It is important at the time of provider default that the Higher Education Tuition Protection Director has current and correct information from the provider for the

purposes of assisting affected students. Information collection and record keeping processes quickly change over time and thus setting out record keeping requirements in the Guidelines rather than primary legislation is appropriate and necessary to keep pace with record keeping changes in the sector, to ensure the requirements do not become outdated. Accurate and timely information collection is critical to support the effective administration of tuition protection to quickly and effectively assist students when a provider defaults, enabling students to continue their studies.

Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020

Charges in delegated legislation

Concerns:

- **1.36: The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of allowing the Higher Education Tuition Protection Director to determine core elements of the payments tuition protection levy in delegated legislation, with only limited guidance as to the amounts of levy that may be imposed.**
- **1.37: The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.**

Response:

1. I consider there are sufficient checks and balances and guidance provided in the Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020 ('the Levy Bill') to ensure the core elements of the levy are appropriately determined. I explain this below for each of the three components to the up-front payments tuition protection levy: administrative fee, risk rated premium component and the special tuition protection component.

2. The Levy Bill provides for the administrative fee to be calculated having regard to the amounts determined in a legislative instrument made by the Minister. However, the Bill specifically provides for an upper limit beyond which the administrative fee cannot exceed. Both the legislated upper limit and the methodology for calculating the proposed annual limit were determined in consultation with the Australian Government Actuary.

3. The risk rated premium component of the levy is calculated according to a detailed methodology provided for in the Bill (see proposed section 11 of the Levy Bill), which was developed by the Australian Government Actuary. This methodology takes into consideration the provider's level of exposure under the relevant scheme in terms of total student numbers and tuition fee amounts paid up-front, as well as the provider's risk of default based on certain risk factors such as course completion rates, financial strength and non-compliance history by way of example.

4. The Higher Education Tuition Protection Director ('the Director') is responsible for determining in a legislative instrument certain amounts necessary to calculate a provider's risk rated premium. In making this instrument, the Director is required to have regard to the advice of the Higher Education Tuition Protection Fund Advisory Board as well as the sustainability of the Higher Education Tuition Protection Fund. Notably, members of the Advisory Board are required to include, amongst others, representatives from the Department of Finance, the Australian Prudential Regulatory Authority and the Australian Government Actuary (see section 55C ESOS Act). The Treasurer is also required to approve the legislative instrument before the Director makes the instrument, providing an extra measure of scrutiny to the legislative instrument.

5. The Director is similarly responsible for determining in the same legislative instrument (and so with the same checks and guidance) the percentage to multiply the providers' total up-front tuition fee amounts by, in order to calculate the special tuition protection component. This component of the levy is intended to be imposed on providers to enable the Higher Education Tuition Protection Fund to reach a level of sustainability.

6. Similar levy components apply under the *Education Services for Overseas Students (TPS Levies) Act 2012*, the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*, and the *VET Student Loans (VSL Tuition Protection Levy) Act 2020* with the Minister and the TPS Director (who also holds the office of the existing HELP Tuition Protection Director, and the VET Student Loans Tuition Protection Director) making the relevant legislative instruments. This approach towards the handling of the levy in respect to providers with international students has been operating successfully since 2012.

7. Consistent with other delegated legislation, the Minister and the Higher Education Tuition Protection Director will consult with the higher education sector as part of the annual levy setting process and similarly both instruments will be subject to Parliamentary scrutiny through the disallowance process after tabling in both Houses of Parliament.

Broad discretionary powers

Concerns:

- **1.42: The committee therefore requests the minister's more detailed advice regarding:**
    - **why it is considered necessary and appropriate to provide the minister with a broad discretionary power to exempt providers from paying aspects of the up-front payments tuition protection levy in delegated legislation; and**

- **whether the bill could be amended to include at least high-level guidance as to the circumstances where it is appropriate to exempt providers from the requirement to pay the levy on the face of the primary legislation.**

Response:

1. The power for the Minister to prescribe classes of leviable providers to be exempt from paying one or more components of the up-front payments tuition protection levy ('the levy') in the Up-front Payments Guidelines ('the Guidelines'), enables the Minister to react to changes in the dynamic higher education sector, while retaining the discretion to consider the relevant and unique circumstances of classes of leviable providers. Similar powers to exempt also already apply under the *Education Services for Overseas Students (TPS Levies) Act 2012*, the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*, and *the VET Student Loans (VSL Tuition Protection Levy) Act 2020*, referred to above.

2. An exemption is beneficial to a provider by nature. Noting this, prescriptive statutory criteria, which might have been suited to a power to impose an obligation or liability, was not considered essential to limit the exercise of this beneficial power.

3. Provider funding and governance structures, historical arrangements, existing and emerging compliance risks, and other characteristics vary widely across the sector, and continue to evolve. In recognition of this, the Minister can provide in the Guidelines that the administrative fee component, the risk rated premium component, and/or the special tuition protection component of the levy (provided in proposed section 8, 11 and 12 respectively of the Levy Bill) do not apply to a class of providers based on that class of providers' circumstances. Requiring the Minister to anticipate, through legislation, factors that must be considered before determining a class of providers to be exempt from one or more of the levy's components in delegated legislation risks restricting the Minister's ability to consider current circumstances surrounding classes of providers.

4. Further, it is desirable to allow the delegated legislation maximum flexibility to exempt classes of providers. This is because the circumstances and classes of providers for which it may be appropriate to exempt are not certain and cannot necessarily be foreseen. Specifying this detail in the delegated legislation may avoid the need to amend the primary legislation in order to exempt a class of provider not currently contemplated for an exemption. For example, to make provision for reduced levies for providers who have significantly reduced their risk factor to minimal risk of default, and/or have the capability to protect students in the event of a default.

5. It is impractical and restrictive to anticipate the factors that the Minister may consider when determining whether to exempt a class of providers. Therefore, it is not appropriate to amend the Bill to provide guidance as to the circumstances where it is appropriate to exempt providers from the requirement to pay one or more of the levy's components under proposed section 14.

THE HON SUSSAN LEY MP
MINISTER FOR THE ENVIRONMENT
MEMBER FOR FARRER

MC20-013841

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

16 SEP 2020

Dear Chair Helen

I refer to the letter of 3 September 2020 from the Senate Standing Committee for the Scrutiny of Bills requesting additional information regarding the Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020.

The Committee sought advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed section 48AA and, in particular, whether these documents will be made freely available to all persons interested in the law (paragraph 1.31 of Scrutiny Digest 11 of 2020).

Under section 46AA of the *Acts Interpretation Act 1901* (the AI Act), instruments made under Commonwealth Acts (other than legislative instruments within the meaning of the *Legislation Act 2003* or rules of court):

- May apply, adopt or incorporate the provisions of a Commonwealth Act or legislative instrument as in force at a particular time, or as in force from time to time; and

- May only apply, adopt or incorporate the provisions of any other instrument or writing as in force at a particular time, unless the Commonwealth Act under which the instrument is made allows otherwise.

Section 46AA of the AI Act applies to bilateral agreements made under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). Due to the operation of section 46AA of the AI Act and the current provisions of the EPBC Act, bilateral agreements may only apply, adopt or incorporate a document or other instrument (other than Commonwealth Acts or legislative instruments) that is in force at a particular time (for example, at the time of, or before, the making of a bilateral agreement). Bilateral agreements may not apply, adopt or incorporate documents or other instruments as in force from time to time.

The intention of proposed section 48AA is to enable bilateral agreements to apply, adopt or incorporate instruments or other writings either as in force at a particular time, or as in force or existing from time to time. This may include, for example:

- Commonwealth legislative instruments such as recovery plans or threat abatement plans prepared for listed threatened species and ecological communities. As these documents are legislative instruments, they are freely available on the Federal Register of Legislation.

- Commonwealth instruments such as approved conservation advices prepared for listed threatened species or ecological communities. While conservation advices are not legislative instruments, they must be published on the internet (section 266B of the EPBC Act).

- Commonwealth policies such as the Significant Impact Guidelines or the EPBC Environmental Offsets Policy. Documents such as this are freely available on the Department's internet site.

- State or territory Acts and subordinate legislation. These documents are freely available through the repositories of legislation published on state or territory government internet sites.

  The incorporation of state or territory Acts or subordinate legislation into bilateral agreements as in force or existing from time to time will also be subject to the processes set out in proposed sections 46A and 47A. Proposed sections 46A and 47A facilitate minor amendments to a bilaterally accredited management arrangement or authorisation process for the purposes of an approval bilateral agreement, or the specified manner in which actions are assessed for an assessment bilateral agreement.

- State or territory policies and plans. Generally speaking, states and territories will have policies and/or plans that are specifically relevant to their assessment and approval processes. It is my expectation that these documents would be made freely available.

As stated in the Explanatory Memorandum, the ability to allow documents of this nature to be applied, adopted or incorporated into a bilateral agreement either as in force at a particular time, or as in force or existing from time to time, will ensure that environmental assessment and approval decisions are based on the best scientific information so that actions assessed and approved by the state or territory under the bilateral agreement will not have unacceptable or unsustainable impacts on matters of national environmental significance.

Yours sincerely

SUSSAN LEY