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

MC20-030214

Senator Helen Polley
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Dear ~~Senator~~

Thank you for your letter of 18 September 2020 requesting additional information about the National Commissioner for Defence and Veteran Suicide Prevention Bill 2020, as set out in the Senate Scrutiny of Bills Committee's *Scrutiny Digest 12/20*.

The Committee sought advice regarding:

- why it is considered necessary and appropriate to set the level of criminal penalties for a standing body of inquiry at the same level as that set for Royal Commissions
- the rationale for including the offence of contempt
- the appropriateness of including specified matters as offence-specific defences, and
- the approach to legal professional privilege and the privilege against self-incrimination in the Bill.

I have enclosed additional information in response to the matters raised by the Committee, which I hope will be of assistance.

Yours sincerely

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

Encl. Response to the Senate Standing Committee for the Scrutiny of Bills – Digest 12/20

Enclosure

Response to the Senate Standing Committee for the Scrutiny of Bills – Digest 12/20
National Commissioner for Defence and Veteran Suicide Prevention Bill 2020

The Committee has requested advice as to the justification for the maximum penalties imposed by the offences in Part 4 of the Bill, including why it is considered necessary and appropriate to set the level of criminal penalties for a standing body of inquiry at the same level as that set for offences against the *Royal Commissions Act 1902*.

The Bill implements the Australian Government's commitment that the National Commissioner for Defence and Veteran Suicide Prevention (the Commissioner) will have inquiry powers broadly equivalent to a Royal Commission. Generally aligning the maximum criminal penalties in Part 4 of the Bill with the *Royal Commissions Act 1902* (Cth) (Royal Commissions Act) is considered a necessary and appropriate part of ensuring the Commissioner's inquiries can closely resemble those of a Royal Commission, including by penalising non-adherence to compulsory requests and similar actions that may undermine the Commissioner's inquiries.

The fact that the Commissioner is an ongoing function means it will have an important role in monitoring the implementation of its recommendations over time, which will ensure accountability, and enable it to build on suicide prevention and defence and veteran wellbeing strategies into the future. The enduring nature of the function does not inherently point to the need to depart from a Royal Commission-based approach to offences and penalties, given the Commissioner's inquiry and suicide prevention work will continue to be of significant public importance into the future. The proposed maximum penalties are intended to deter the more egregious conduct foreseen, for example, key information that is central to an inquiry being deliberately and dishonestly withheld from the Commissioner, which has the potential to undermine the functions of the Commissioner and the public benefit flowing from longer term policy reforms.

The approach to the penalties for offences in Part 4 of the Bill should also be understood within the context of the features in the Bill promoting the Commissioner obtaining information in a non-adversarial way, including providing opportunities for information to be shared outside of responses to formal notices and hearings. For example:

- It is a guiding principle for the Commissioner's functions that they take a restorative and trauma-informed approach (clause 12), and should recognise that families and people personally affected by a relevant death by suicide will have a unique contribution to make to the Commissioner's work. Applying a restorative and trauma-informed approach will involve the Commissioner considering ways to ensure that families and other people are assisted and supported in providing information and evidence, and that compulsory powers will be exercised in a considered way.

- The Bill includes a mechanism enabling Commonwealth, state and territory officials to volunteer information to the Commissioner to assist its functions (clauses 40 and 41). This will encourage government entities to proactively disclose information they may hold about a particular member or veteran suicide, or any other matter the Commissioner is considering. The proposed pathway for voluntary and proactive information sharing in the Bill is intended to reduce the need for recourse to compulsory powers.

The following table provides additional information about the basis for the penalties in Part 4 of the Bill, including where the Bill aligns with not only the Royal Commissions Act, but other Commonwealth legislation.

Further information about the offences in Part 4 of the Bill

Clause	Maximum penalty	Justification
45	**Failure to attend hearings** Imprisonment for 2 years **Failure to give information, or produce a document or thing** Imprisonment for 2 years	The inclusion of a penalty for failing to comply with a notice or summons achieves the objective of ensuring the Commissioner can fully inquire into and report on the circumstances relevant to defence member and veteran deaths by suicide. It is acknowledged that the *Guide to Framing Commonwealth Offences* (the Guide) states that 'if non-compliance with a notice to produce or attend is to be an offence, the maximum penalty for non-compliance should *generally* be six months' imprisonment and/or a fine of 30 penalty units' (9.4.1). The Guide also includes a principle that a penalty should be consistent with penalties for existing offences of a similar kind or of a similar seriousness (3.1.2). The maximum penalty of 2 years imprisonment for these offences is consistent with the relevant penalties available in the Royal Commissions Act. They are also consistent with the penalties for a failure to comply with notices in contexts such as notices issued by the Australian Securities and Investments Commission (section 63 of the *Australian Securities and Investments Commission Act 2001*) or the Law Enforcement Integrity Commissioner (section 78 of the *Law Enforcement Integrity Commissioner Act 2006*). It is appropriate that these penalties are consistent, given the seriousness of the consequences that could flow from non-adherence to the offences in the Bill compared to these other Acts.
46	**Refusal to swear an oath, make an affirmation or answer a question** Imprisonment for 2 years	A penalty of up to 2 years imprisonment is consistent with other penalties applicable to a refusal to swear an oath, make an affirmation or answer a question, such as subsection 93(2) of the *Law Enforcement Integrity Commissioner Act 2006* (imprisonment for 2 years). It is appropriate that these penalties are consistent, given the seriousness of the consequences that could flow from non-adherence to the offence in the Bill comparable to the consequences of non-adherence under the *Law Enforcement Integrity Commissioner Act 2006*.

47	**Failure to give written notice to the Commissioner of operationally sensitive material** Imprisonment for 3 years **Failure to give written notice to the Commissioner of intelligence information** Imprisonment for 3 years	The Guide notes that a higher maximum penalty will be justified where 'the consequences of the commission of the offence are particularly dangerous or damaging' (3.1.1). The Commissioner will have strong powers to require the production of information necessary to undertake its work, including operationally sensitive and intelligence information. It is important that the Commissioner is given notice of any security sensitive information of this kind, to ensure the relevant security sensitive information is appropriately handled and the risk of inadvertent public disclosure, or mishandling of the information due to not appreciating its sensitivity, is strongly mitigated. The offences for failure to give written notice are limited to a person who has held or holds an Australian Government Security clearance that allows or allowed access to operationally sensitive or intelligence information. This is appropriate as it ensures family members, or a member of the general public, does not commit an offence in circumstances where they would not be aware the information they held was operationally sensitive or intelligence related.
49	**Offences relating to claims for legal professional privilege** Imprisonment for 2 years	The offence relating to claims for legal professional privilege and the associated maximum penalty of 2 years imprisonment is modelled on section 6AB of the Royal Commissions Act. It is appropriate that there be an offence relating to claims for legal professional privilege aligned with the Royal Commission context, to ensure the Commissioner can conduct full inquiries on matters of public importance, with access to all relevant information.
51	**Dismissal etc. of witness** 10 penalty units or imprisonment for 1 year	The Bill provides strong protections for witnesses giving evidence to the Commissioner, modelled on the protections applying to a witness before a Royal Commission. This is appropriate to ensure the Commissioner can conduct full inquiries, with witnesses engaging with the Commissioner without fear of reprisal or disadvantage. The penalty applied for dismissal of witnesses is consistent with penalties available in the *Crimes Act 1914*. As explained in the Explanatory Memorandum of the Bill, offences set out under Part III of the *Crimes Act 1914* are also applicable to the Bill (see the notes to subclause 31(1) regarding a 'judicial proceeding'). Part III offences include intimidation of witnesses (section 36A) and corruption of witnesses (section 37) which carry a penalty of 5 years imprisonment, and

		preventing a witness from attending Court (section 40), which carries a penalty of imprisonment for 1 year.
52	**Contempt of Commissioner** 2 penalty units or imprisonment for 3 months	The penalty applied for the offence of contempt in this Bill is lower than other certain other similar penalties. Section 63 of the *Administrative Appeals Tribunal 1975* carries a penalty of imprisonment for 12 months or 60 penalty units for contempt of the Tribunal, and section 66 of the *Australian Securities and Investments Commission Act 2001* carries a penalty of 2 years imprisonment for contempt of ASIC. Further information about the inclusion of the offence of contempt is provided below.
54	**Publication in contravention of non-publication direction** Imprisonment for 3 years	The Guide notes that a higher maximum penalty will be justified where 'the consequences of the commission of the offence are particularly dangerous or damaging' (3.1.1). The penalty for contravening a non-publication direction is higher than comparable penalties available in section 62C of the *Administrative Appeals Tribunal 1975* (imprisonment for 12 months or 60 penalty units). A higher maximum penalty is considered appropriate in this Bill to account for the potential that the Commissioner will issue non-publication directions in relation to operationally sensitive and intelligence information. There is significant importance in deterring the publication of national security related information of this kind in contravention of a non-publication order.
55	**Unauthorised use or disclosure of protected information** Imprisonment for 2 years	The Commissioner and staff assisting the Commissioner will have access to operationally sensitive and intelligence information, as well as sensitive personal information. There is significant importance in deterring the public disclosure of information of this kind. The proposed maximum penalty of 2 years imprisonment is consistent with other penalties applicable for the unauthorised use or disclosure of protected information which may be highly sensitive, for example, section 34 of the *Inspector-General of Intelligence and Security Act 1986.*

The Committee requested more detailed advice as to the rationale for including the contempt offence in subclause 52(2) of the Bill, noting the highly emotive subject matter of the Commission's inquiry function.

The Bill includes the offence of contempt to protect the integrity of the Commissioner's processes. In practice, the offence might arise where a person took serious and deliberate action to prevent the Commissioner from conducting their inquiry. This is consistent with similar contempt provisions in contexts such as:

- section 63 of the *Administrative Appeals Tribunal Act 1975*
- subsection 34A(d) of the *Australian Crime Commission Act 2002*
- sections 94 and 96A of the *Law Enforcement Integrity Commissioner Act 2006*, and
- sections 66, 200 and 220 of the *Australian Securities and Investments Commission Act 2001*.

A number of these contempt provisions carry more significant penalties than the offence in the Bill. For example, in section 66 of the Australian Securities and Investments Commission Act, the penalty is 2 years imprisonment.

The Committee notes subclause 52(2) was modelled on section 63 of the Administrative Appeals Tribunal Act and states that 'the highly emotive subject matter of the Commission's inquiry function distinguishes the Commission from the Administrative Appeals Tribunal'. It is noted that the Administrative Appeals Tribunal may engage with vulnerable people in relation to sensitive and highly emotive subject matters, for example, in reviewing veterans' entitlements, social security, migration and refugee status related decisions. Royal Commissions, such as the Royal Commission into Institutional Responses to Child Sexual Abuse and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, also effectively reconcile considering sensitive subject matters with a contempt offence being available. Noting these precedents and the flexibility the Commissioner will have to sensitively engage with families, there is not considered to be an inherent tension between the availability of a contempt offence and the subject matter into which the Commissioner may inquire.

The Committee requested detailed justification as to the appropriateness of including the specified matters as offence-specific defences rather than as elements of the offences, including:

- **how the matters in subclauses 45(4) and 49(5) and clause 58 are peculiarly within the knowledge of the defendant; and**
- **why it is appropriate to use an offence-specific defence of reasonable excuse in subclauses 45(3) and 49(3).**

The Committee requested the Minister's advice as to whether to amend the provisions identified above to provide that the specified matters are framed as elements of the relevant offences.

Knowledge of the defendant and subclauses 45(4), 49(5) and clause 58

The defences created by the Bill are consistent with subsection 13.3(3) of the *Criminal Code Act 1995* which provides that 'a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter'.

A defendant relying on the proposed defences in the Bill needs to adduce or point to evidence that suggests *a reasonable possibility* that the matter exists or does not exist (subsection 13.3(6) of the Criminal Code). Where that evidential burden is discharged by the defendant, the prosecution then has the legal burden of disproving that matter beyond reasonable doubt (subsection 13.1(2) of the Criminal Code).

The Guide provides that 'a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the offence, where: it is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter' (see 4.3.1).

Subclause 45(4) provides that the offence for failure to give information or produce a document or thing under subclause 45(2) does not apply if the information, statement, document or thing required to be provided 'is not relevant to the matters into which the Commissioner was inquiring'. This defence ensures that a person does not commit an offence if they fail to provide information which is not within the scope of a notice issued to them, for example.

The defendant would be best placed to adduce evidence as to why the information, statement, document or thing is not relevant to the matters into which the Commissioner was inquiring, as the defendant would be in possession of the document or thing the subject of the request. The defendant would, in a range of foreseeable circumstances, have exclusive access to the document or thing, or exclusive knowledge about its contents and origin, satisfying the standard in the Guide that the information is 'peculiarly within' the knowledge of the defendant. Situations where the defendant may have exclusive access to, or knowledge of, the document or thing include where:

- there is only one version of the document or one type of the thing sought by the Commissioner, and that document or thing is held by the defendant

- the defendant has unique knowledge of the context in which the document or thing was produced or came into existence, such that only the defendant is in the position of being able to outline why, based on its unique circumstances, it is not relevant to the Commissioner's request.

It would be significantly more difficult and costly for the prosecution to adduce evidence that suggests the document or thing is relevant to the matters the Commissioner was inquiring into, than for the defendant to adduce evidence demonstrating its irrelevance, given the defendant's expected access to and knowledge of the document or thing.

Clause 49 creates two offences related to claims for legal professional privilege (LPP):

- an offence for a person failing to comply with a notice to give information or a statement, or produce a document or thing for inspection by the Commissioner, for the purpose of deciding whether to accept or reject a claim of LPP (subclause 48(3)), and

- an offence for a person failing to give information or a statement, or produce a document or thing as required in a notice under clause 30 or 32, following the Commissioner's decision to rejected a claim for LPP (subclause 49(1)).

Subclause 49(5) provides that a person will not commit an offence if the information, statement, document or thing required to be produced is not relevant to the matters into which the Commissioner was inquiring. Like subclause 45(4), this defence ensures that a person does not

commit an offence if they fail to provide information which is not within the scope of a notice issued to them, for example.

Where a defendant has claimed LPP over a document or thing, which is the context of the offences under subclauses 48(3) and 49(1), it is likely the defendant would consider the material to be sensitive and confidential, and that access to the document would be carefully controlled (for example, limited to the scope of the lawyer-client relationship). Given the sensitivity of the material and the defendant's expected interest in maintaining confidentiality, the defendant (along with their legal representative) would in a range of situations maintain exclusive access to or knowledge of the contents of the document, satisfying the standard in the Guide that this information is 'peculiarly within' the knowledge of the defendant.

It would be significantly more difficult and costly for the prosecution to adduce evidence that suggests the information, statement, document or thing is relevant to the matters the Commissioner was inquiring into, than for the defendant to adduce evidence demonstrating its irrelevance, given the defendants expected access to, knowledge of, and interest in preserving the confidentiality of, the information or thing.

Subclause 58(1) provides circumstances where a person who is served with a notice under clause 30 or clause 32 does not commit an offence, and is not liable to a penalty, under a secrecy provision. These circumstances are where the person:

- answers a question at a hearing that the Commissioner requires the person to answer
- gives information or a statement that the person is required to give in accordance with the notice, or
- produces a document or thing that the person is required to produce in accordance with the notice.

Subclause 58(2) provides a person of a Commonwealth, state or territory body or entity, acting within their authority, who provides information to the Commissioner consistent with clause 40 or 41, does not commit an offence and is not liable to a penalty under a secrecy provision. 'Secrecy provision' is defined in clause 5 of the Bill.

The defendant would be best placed to raise or point to evidence that conduct, which may otherwise contravene a secrecy provision, was in accordance with a requirement imposed by the Commissioner (or the Commissioner's authorised delegate) under subclause 58(1). The factual circumstances to support the existence of the person having being compelled to answer a question or provide information will be known to the defendant (for example, when the request was issued, and what it addressed). The defendant could readily bring a copy of the notice or a hearing transcript to the attention of the prosecution. This is an appropriate burden to place on the defendant.

As the Committee notes, the Commissioner would also have knowledge that a defendant provided information or documents to the Commissioner. However, the approach in the provision also accounts for the significantly greater cost and difficulty for the prosecution to adduce evidence that suggests the information, statement, document or thing was *not* provided in response to a request issued by the Commissioner, than for the defendant to adduce evidence demonstrating it was. It is also noted that the Commissioner may have concerns with sharing information about the exercise of

their powers (which are subject to an immunity under subclause 64(1)), especially if they related to matters connected with a private hearing, for example.

The defendant would also be best placed to raise or point to evidence that they disclosed information on behalf of a Commonwealth, state or territory body to the Commissioner in accordance with the requirements imposed by clause 40 or 41, which may otherwise contravene a secrecy provision, under subclause 58(2).

The factual circumstances to support that a person had appropriate authority to provide information on behalf of a Commonwealth, state or territory body to the Commissioner, and that the information was for the purpose of assisting the Commissioner, will be known to the defendant. The defendant could readily bring to the attention of the prosecution evidence of their authority to act on behalf of the particular body. It would be significantly more difficult and costly for the prosecution to disprove that the person disclosing information to the Commissioner was doing without the appropriate authority, as they will be outside of the relevant body. This is an appropriate burden to place on the defendant.

Reasonable excuse in subclauses 45(3) and 49(3)

The Bill defines a 'reasonable excuse' to mean:

- in relation to any act or omission by a witness before the Commissioner—an excuse which would excuse an act or omission of a similar nature by a witness before a court of law
- in relation to any act or omission by a person summoned as a witness before the Commissioner—an excuse which would excuse an act or omission of a similar nature by a person summoned as a witness before a court of law, or
- in relation to any act or omission by a person given a notice under section 32 or subsection 48(3)—an excuse which would excuse an act or omission of a similar nature by a person served with a subpoena in connection with a proceeding before a court of law' (clause 5).

The accompanying part of the Explanatory Memorandum to the Bill outlines that:

> 'Reasonable excuse' is defined by reference to whether the excuse is one which would excuse a person before a court. The definition applies this test to the appropriateness or quality of an excuse in the case of a witness before the Commissioner, a person summoned as a witness, and a person given a notice to produce information, a document or thing. 'Reasonable excuse' is defined consistently with the Royal Commissions Act, recognising that the Commissioner's powers are closely aligned to those of a Royal Commission.
>
> The defence of reasonable excuse ensures a person is not penalised where they may be unable legitimately to produce a document or attend a hearing due to circumstances beyond their control, or where there is some other good and acceptable reason. It also allows for claims such as public interest immunity to be made in defence of material not being produced, for example, and for the quality of that claim to be examined on a case by case basis'.

Subclause 45(3) provides that the offences for failure to attend a hearing, or to give information or produce a document or thing under subclauses 45(1) and (2) respectively, do not apply if the person has a reasonable excuse.

Subclause 49(3) provides that the following offences in subsections 49(1) and (2) related to claims for LPP do not apply if the person has a reasonable excuse:

- an offence for a person failing to comply with a notice to give information or a statement, or produce a document or thing for inspection by the Commissioner, for the purpose of deciding whether to accept or reject a claim of LPP (subclause 48(3)), and

- an offence for a person failing to give information or a statement, or produce a document or thing as required in a notice under clause 30 or 32, following the Commissioner's decision to rejected a claim for LPP (subclause 49(1)).

The offence-specific defences of reasonable excuse in subclauses 45(3) and 49(3) are appropriate, recognising that the Bill defines 'reasonable excuse' in clause 5, which both narrows the scope of the defence and provides greater clarity as to the matters that would need to be adduced to establish it (4.3.3 of the Guide refers).

The defences of 'reasonable excuse' also appropriately recognise the breadth of circumstances which may affect a defendant's ability to meet a requirement of the Commissioner under the relevant offences. For example, a defendant is best placed to assert claims of privilege, such as public interest immunity, as well as to assert evidence about practical matters which affected a defendant's ability to meet a request from the Commissioner in the circumstances of each case. It would be significantly more difficult and costly for the prosecution to disprove these matters, such as the non-existence of a privilege claim, as well as circumstantial matters known only to the defendant, than for the defendant to establish these matters.

The Committee requests more detailed advice as to the rationale for, and the appropriateness of, abrogating legal professional privilege in the Bill. In particular, the Committee requests advice as to whether the Bill can be amended to:

- **set out criteria the Commissioner must consider in deciding a claim of legal professional privilege**

- **provide that a person must not be appointed as the Commissioner unless the person possesses qualifications, training or experience that would enable him or her to effectively assess claims of legal professional privilege under clause 48 of the bill; and**

- **provide that a decision by the Commissioner to reject a claim of legal professional privilege does not affect a later claim of legal professional privilege that anyone may make in relation to the information, document or record.**

General rationale for and appropriateness of abrogating LPP

The approach in the Bill is closely modelled on section 6AA of the Royal Commissions Act and is intended to ensure the Commissioner can conduct full inquiries with access to all relevant information, whilst allowing affected parties to make a claim. As acknowledged in the Explanatory Memorandum, the approach taken in the Bill gives weight to the public benefit in equipping the Commissioner with appropriate powers of inquiry.

Qualifications of the Commissioner

It is not proposed that there be a formal qualification standard for a person to be eligible for appointment as the Commissioner. However, the person must, in the Governor General's opinion, be suitable for appointment because of their qualifications, training or experience (see clause 16(2)). This will enable a broad range of potential candidates to be considered by Government for appointment, which is appropriate given the unique and sensitive nature of this role. It will provide scope for the Governor-General to consider, among a range of other relevant factors, whether the person's qualifications, training or experience would enable them to effectively assess claims of LPP.

Further, the Commissioner will be supported by legal and other specialist staff in the Office of the National Commissioner as required. As such, the Commissioner will be able to draw on expert assistance and advice when assessing claims of LPP.

Considerations in deciding a claim of LPP

In deciding a claim of LPP under subclause 48(2), it is intended that the Commissioner would apply the established common law principles relevant to determining a claim of LPP. This clause substantially replicates subsection 6AA(2) of the Royal Commissions Act, which sets out the process for the production of documents and the making of a claim, but does not expressly set out the test to be applied.

In applying the common law principles, the Commissioner will have regard to the information presented by the party making the claim (noting that the Commissioner would need to afford procedural fairness to the affected parties in deciding that claim). The Commissioner could also seek additional information, as required

Further, it is intended that a decision to reject a claim of LPP would be an administrative decision subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), as well as under section 39B of the *Judiciary Act 1903* (Cth). As such, even leaving aside the ability of an affected party to seek a declaration from a court that the relevant information is subject to LPP, there will be appropriate judicial oversight where there are concerns as to whether the Commissioner has applied the relevant common law principles correctly.

Consequences for later claims of LPP

The Committee has commented that the Bill could provide that a decision by the Commissioner to reject a claim of LPP does not affect a later claim of LPP that anyone may make in relation to the information, document or record. We note that there is nothing in the Bill that seeks to exclude a later claim of LPP in relation to any material. The Bill expressly abrogates LPP only to the extent that it might provide a basis on which to resist a summons or requirement to provide information under clauses 30 and 32, and only to the extent that it would not be possible for a person to establish a 'reasonable excuse' within the terms of clause 48.

The Committee cites various provisions of the *Ombudsman Act 1976* (Cth) which expressly state that disclosure to the Ombudsman of information subject to LPP does not otherwise affect a claim of LPP that anyone may make in relation to that information. It is important to note, however, that the Ombudsman's powers with respect to information subject to LPP are significantly greater than the powers that would be exercised by the Commissioner. Under paragraph 9(4)(ab) of the

Ombudsman Act, a person is required to furnish material when required to do so by that Act, even where this would involve disclosing certain advice or communications subject to LPP.

In contrast, the information disclosure regime under the Bill, like that under the Royal Commissions Act, allows a person to resist disclosure by making a claim to the Commissioner and, alongside other things, seeking a declaration from a court that the information sought by the Commissioner is subject to LPP. In particular, this means that the person has the option of seeking a conclusive judicial determination of whether the material is protected by LPP before any use or disclosure to the Commission. This diminishes the need to provide for the implications of such use or disclosure on future claims of LPP (because, in such cases, the court will already have determined whether or not the information is privileged).

The Committee also requests advice as to why it is proposed to abrogate the privilege against self-incrimination without also providing a derivative use immunity.

The Guide provides that 'the privilege against self-incrimination may be overridden by legislation where there is clear justification for doing so' and 'if the privilege against self-incrimination is overridden; the use of incriminating evidence should be constrained' (9.5.3-4 of the Guide refers).

As explained in the Explanatory Memorandum, the justification for a partial abrogation of the privilege against self-incrimination is to support the Commissioner's function to inquire into, and report on, a matter of public importance: the prevention of, defence member and veteran deaths by suicide. In doing so, the approach gives weight to the public benefit and expectation that the Commissioner will have appropriate inquiry powers. The abrogation of the privilege against self-incrimination is not absolute and there are limits and safeguards on the abrogation.

The partial abrogation of the privilege against self-incrimination operates alongside the protection that a natural person appearing as a witness, or giving or producing evidence or a statement in response to a notice, has the same protection as a witness in the High Court of Australia (clause 64). This will enable relevant persons to claim the defence of absolute privilege in respect of information disclosed when appearing as a witness or in response to a compulsory notice, for example, in separate criminal or civil proceedings. The Commissioner also has powers under clause 53 to issue a non-publication direction to limit the further disclosure or publication of evidence which may be self-incriminating.

It is acknowledged that the Commissioner may disclose information to listed entities, including the police or the Director of Public Prosecutions, where the Commissioner considers the information will assist the entity to perform its functions or exercise its powers (clause 56). During the course of their work, the Commissioner may uncover information indicating a crime may have been committed. Introducing a 'derivative use' immunity to prevent any incriminating evidence being used to gather other evidence against the person may unreasonably hinder the ability of law enforcement agencies to investigate and prosecute matters the Commissioner identifies. This consideration has been central in the design of the approach taken in the Bill.

The approach in the Bill to partially abrogate the privilege against self-incrimination, and not to provide a 'derivative use' immunity is consistent with the approach taken in other inquiry legislation, such as the Royal Commissions Act and subsection 9(4) of the Ombudsman Act.

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

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MC20-011362

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Dear Senator Helen

Thank you for the letter from your Committee Secretary dated 18 September 2020, requesting advice about issues identified by the Senate Standing Committee for the Scrutiny of Bills (the Committee) in relation to the Radiocommunications Legislation Amendment (Reform and Modernisation) Bill 2020 (the Bill).

The Bill will amend the *Radiocommunications Act 1992* (the Act) to implement recommendations of the 2015 Spectrum Review (the Spectrum Review) and fulfil the Australian Government's commitment to modernise the legislative framework for spectrum management.

The technological landscape has changed significantly since the original legislative framework was first introduced in 1992. Regulatory arrangements for spectrum management must not only respond to these changes, but also be flexible enough to adapt to future innovation and changing demand for spectrum. The Bill is designed to improve processes, add flexibility to the legislative framework, and remove unnecessary prescription and legislative barriers.

I have set out some advice in response to the issues raised by the Committee below. I welcome further debate on the provisions of the Bill, including discussion of these issues, as they are considered by the Parliament.

Ministerial policy statements not subject to disallowance

The Committee has requested further information regarding Ministerial Policy Statements (MPS) under proposed section 28B being notifiable instruments, including:

- why it is necessary and appropriate for guidance from the minister under proposed section 28B to be a notifiable instrument; and
- whether the bill can be amended to provide that any instrument made under proposed section 28B will be a legislative instrument.

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As noted by the Committee in the Scrutiny Digest, an MPS is designed to provide formalised policy guidance to the Australian Communications and Media Authority (ACMA) on the performance of its spectrum management functions and the exercise of its spectrum management powers.

As part of efforts to better delineate the role of the Minister and ACMA, in line with the recommendations of the 2015 Spectrum Review, these policy statements are intended to provide a new tool that enables the Minister to set strategic policy and to require ACMA to have regard to this policy guidance.

As such, they are designed to provide guidance, without compelling ACMA by legislative instrument or Ministerial direction. This means that MPSs are not legislative in nature, as they do not determine or alter the content of the law, nor do they create, vary or remove an obligation or right. MPSs are not intended as a prescriptive approach and instead serve to emphasise the Minister's role in setting strategic policy priorities.

As policy guidance from the Minister to the regulator, it is not appropriate that MPSs be subject to parliamentary disallowance, as would generally be the case for a legislative instrument. However, it is appropriate to provide a high level of transparency on the matters covered by MPSs.

In this context, making MPSs notifiable instruments will help provide the necessary and appropriate transparency, and allow for parliamentary and stakeholder visibility of the content of MPSs.

In comparison, where ACMA is required to exercise its powers in a manner consistent with a Ministerial direction (for example, under section 60 of the Act or under section 14 of the *Australian Communications and Media Authority Act 2005*), these directions will generally be made as legislative instruments.

As such, I do not consider it to be appropriate for MPSs to be made by legislative instrument. The transparency afforded by being a notifiable instrument will be complemented by any consultation the Minister undertakes on draft MPSs, as well as the consultation ACMA undertakes on its annual work program, which will provide an opportunity for stakeholders to comment on how ACMA will exercise its spectrum management functions.

Bans on equipment not subject to disallowance

The Committee has requested further information regarding ACMA's proposed power to make an interim equipment ban, an extension of an interim ban, and amnesty periods for permanent bans, specifically:

- why it is necessary and appropriate for interim bans on equipment, the extension and revocation of interim bans and the declaration of amnesty periods for permanent bans to be made by notifiable instrument; and
- whether the bill can be amended to provide that any instrument made under proposed sections 167, 168, 169 and 179 will be a legislative instrument.

Non-compliant equipment can pose significant risks of harmful interference to radiocommunications or to the health and safety of the community. The power to make an interim ban is focussed on managing the risk of immediate harm to persons posed by equipment in the short term, so that ACMA is given sufficient time to determine whether a permanent ban ought to be issued.

The power to make an interim ban is intended to be used as a temporary, short-term administrative measure to appropriately manage risks of immediate harm. For this reason an interim ban may be imposed if ACMA has a reasonable belief that the situation meets the requirements of proposed section 167 of the Bill. In addition, an affected person may seek a review of a decision to impose an interim ban (refer to item 29 of Schedule 4 to the Bill).

Under the proposed changes to the Act, an interim ban on equipment would only be valid for 60 days, in which time ACMA could, if necessary, develop a permanent ban. A permanent ban on equipment would require the making of a legislative instrument and, therefore, be subject to parliamentary scrutiny.

While performing a different function, an amnesty may be a tool that ACMA decides to draw on to reduce the risk of hazardous equipment, the subject of a permanent ban, continuing to circulate in the industry. To promote the effectiveness of the regulatory response, an amnesty may need to be declared when a permanent ban is imposed to support the risks proposed by the banned equipment are adequately addressed.
An amnesty is designed as an administrative tool to increase the effectiveness of a permanent ban by ameliorating the potential harshness of a permanent ban on persons who are in possession of prohibited equipment and the time the ban comes into force.

An amnesty will mitigate the risk of further use of harmful devices, which may be discarded while operable, rather than surrendered to ACMA as part of an amnesty. The possession of equipment would not have been prohibited by any preceding interim ban (which would only prohibit the supply or operation of such equipment). While not designed to be legislative in nature, transparency is critical for the effective administration of amnesties and as such, providing that an amnesty may be made by notifiable instrument is appropriate.

Given the factors outlined, notifiable instruments are considered to be a more appropriate tool for the management of interim bans (including the extension of such bans) and the declaration of amnesties.

Computerised decision making

The Committee has requested further advice regarding the computerised decision making provisions in the Bill, including:

- why it is considered necessary and appropriate to permit ACMA to arrange for the use of computer programs for any decisions, powers or obligations it has under the Act and any legislative instruments made pursuant to the Act;
- whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and

- whether consideration has been given to including a requirement on the face of the bill that certain administrative actions and powers (for example, complex or discretionary decisions) must be taken or exercised by a person rather than by a computer.

The area where automated decision making will have the greatest importance for ACMA is in the issuance and renewal of apparatus licences, the majority of which are short term licences, meaning a large number of decisions need to be made on an annual basis (there are currently over 40,000 licensees holding over 170,000 licences). Most of these licence applications and renewals are simple processes wherein the only requirements are compliance with administrative technical requirements and payments of fees. In this instance, a requirement that each application be manually assessed for renewal would involve additional processing time and increased application fees for licensees and introduce the potential for human error. For the vast majority of cases that ACMA manage, it is more appropriate to have an automated computerised system to facilitate the consideration of the application, having regard to the mandatory matters under the Act.

A number of controls have been factored into the design of the computerised decision making process to take into account administrative law requirements including ACMA being required to substitute a decision where it is satisfied that the computerised decision making system has made the wrong decision. In addition, ACMA would be able to facilitate the efficient consideration of matters relevant to the application, and adjust the system so that the use of a computerised system does not lead to inappropriate outcomes. For example, in the case of licence renewal, where ACMA must not renew a licence where it would be inconsistent with the Australian Radiofrequency Spectrum Plan (due to the operation of section 104 of the Act), ACMA would be able to identify licences falling into this category following a change in the ARSP and mark them so they are not able to be renewed by the system. In this way, human administrative judgment would oversee the system where it may make a decision that is contrary to the interests of an individual. In addition, formal decisions made by ACMA, including computerised decisions, are subject to a right of review.

Consideration has also been given to whether certain actions must be undertaken by a person rather than an automated system. However, it is difficult to predetermine which decisions should be appropriately made by a person or by an automated computer system. Taking again the example of licence renewals, the majority of short term licences are appropriate for renewal by computer decision. However, the renewal of a 20 year apparatus licence (also undertaken under section 130 of the Act) is more likely to be appropriate for consideration by an officer of ACMA. As such, the decision of when to use an automated computer system for decision making under the Act is best left to the judgment of ACMA.

Broad delegation of investigatory powers

The Committee raised concerns about:

- why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised person; and

- whether the bill can be amended to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out.

Subsections 284A(14) and 284B(13) of the Bill provide for an inspector to be assisted by other persons exercising powers or performing functions under Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act). A person assisting may exercise these powers or perform these functions for the purposes of assisting an inspector to monitor a provision or to investigate the contravention of a civil penalty or an offence provision.

It is unnecessary to specify in legislation that persons assisting inspectors have particular skills or attributes relating to their or experience, given the role performed by a person assisting an inspector will depend on the circumstances in which their assistance is necessary. Such circumstances will not always require that person to have particular skills and experience relating to the exercise of any coercive regulatory powers.

In most circumstances, a person assisting an inspector will already be an authorised person of ACMA. In other circumstances, a person may assist an inspector by providing relevant expertise and advice to inform an inspector in determining whether a person has complied with a monitored provision, or in gathering evidential materials relating to a contravention of a civil penalty or offence provision.

A person assisting is not expected to assist an inspector by independently determining compliance or gathering evidential material under Parts 2 and 3 of the Regulatory Powers Act. These matters would be the responsibility of the inspector. A person assisting would also be subject to any directions given by an inspector who will continue to have direct responsibility and oversight of the powers exercised and functions performed under Parts 2 and 3 of the Regulatory Powers Act.

Significant matters in delegated legislation

The Committee raised the following issues about the Bill:

- why it is considered necessary and appropriate to leave the details of the scheme to manage the operation, supply and possession of equipment to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance on the face of the primary legislation regarding the intended operation of the scheme.

Part 4 of Chapter 4 of the Act sets out a technical regulation framework that applies to equipment that uses or is affected by radio emissions, in order to contain interference, promote electromagnetic compatibility of equipment, establish standards and compliance monitoring, control the sale and supply of non-standard devices, and protect the health and safety of those using the equipment. This is currently achieved through setting technical standards and requirements for testing, labelling and record-keeping in the form of delegated legislation.

Currently, the regulation of equipment is governed by provisions in the Radiocommunications Regulations 1993, as well as 18 standards made by legislative

instrument under section 162 of the Act and four notices about labelling of devices made as legislative instruments under section 182 of the Act.

The Bill proposes to replace the existing framework, which involves many legislative instruments for regulating equipment, with a modern comprehensive regulatory framework that consists of a single set of equipment rules. These equipment rules, made as a legislative instrument under the Act, will prescribe standards for equipment, impose obligations or prohibitions on the operation, supply, offer to supply, possession and import of equipment, and create a power to grant permits to do an act or thing otherwise prohibited under the rules.

The Act would continue to provide for:

- offences for breaching the equipment rules or permit conditions;
- provisions prohibiting the use of a protected symbol otherwise in accordance with the Act and the effect of labelling equipment with protected symbol (being that the equipment complies with the relevant standards in the equipment rules);
- regulatory tools for ACMA including:
    - interim bans on equipment made by ACMA in the form of a notifiable instrument and offences for non-compliance with a ban;
    - permanent bans on equipment made by ACMA in the form of a legislative instrument and offences for non-compliance with a ban;
    - an amnesty on equipment subject to a permanent ban made by ACMA in the form of a notifiable instrument.

The proposed amendments address the significant elements of the scheme, specifically, important definitions, the scope of standards, prohibitions and obligations that can be made in delegated legislation, the nature of offences, penalties, presumptions and defences, the powers and functions of ACMA and accredited persons and independent review of specified administrative decision. None of the significant elements of the scheme have been left to be established in delegated legislation. Noting the complexity of the matters addressed by the Act, for example, there are currently 18 standards and four notices about labelling of devices made as delegated legislation, it would be impracticable to include this type of material in the Bill.

The amendments proposed in the Bill provide an opportunity to simplify the complexity of the Act, and the delegated legislation made under the Act. Reducing the complexity of the laws is likely to increase its readability for users, such as operators in the sector, and, as a consequence, increase the level of understanding about responsibilities and obligations and, ultimately, compliance with regulatory expectations.

In addition, allowing for the detailed rule-making to be developed under delegated legislation would allow those instruments to be amended in a timely manner, as appropriate, to ensure they can adapt to regulatory and policy issues being experienced in the industry. Further, providing this degree of flexibility, while ensuring that the significant elements of the scheme are set out in primary legislation, would enable Australia to meets its international obligations, such as changes in technical standards in a timely and considered manner.

Broad delegation of administrative powers - Adequacy of review rights - Parliamentary scrutiny

The Committee has requested further information about the purpose, powers, functions and accountability of accredited persons:

- why it is necessary and appropriate to allow both legislative and notifiable instruments to delegate the power to make decisions of an administrative character and the power to charge fees to persons who hold a specified accreditation; and
- the nature of decisions of an 'administrative character' that may be made by persons who hold a specified accreditation;
- whether the bill can be amended to provide that ACMA must be satisfied that the persons who hold a specified accreditation have the appropriate training, expertise or qualifications to make decisions of an administrative character;
- whether judicial review and independent merits review will be available for decisions of an administrative character made by accredited persons;
- how the amount of any fee charged will be calculated and how ACMA will ensure that the level of fee imposed by another person is appropriate;
- whether the bill can be amended to provide at least high-level guidance on the face of the bill regarding how fees will be calculated; and
- whether proposed section 298A can be amended so that an instrument made under that section by ACMA is a legislative instrument rather than a notifiable instrument to ensure that such instruments are subject to appropriate parliamentary scrutiny.

Accredited persons generally provide services to licensees and assist licensees in their application for a licence as part of a suite of commercial consulting services that they offer to the licensee. As accredited persons, the information that they provide to ACMA, such as a frequency assignment certificate to support an application for an apparatus licence, is used by ACMA to assist it in the decision it makes under the Act. Neither ACMA nor the Commonwealth will be a party to such contracts between licensees and accredited persons.

As a part of providing commercial services, while the Act permits the charging of fees for these services, it is not appropriate to govern how the amount of the fee will be charged (other than it must not amount to taxation)

The information and administrative functions performed by accredited persons are preliminary steps to final decisions that are made by ACMA. As such, the appropriate point of judicial or administrative review is the decision of ACMA, with relevant decisions subject to reconsideration and review under section 285 of the Act. ACMA will retain all formal decision-making powers under the Act, such as issuing a permit under the equipment rules. In this case, the Bill allows accredited persons to undertake work of an administrative character, such as reviewing a permit application and making a recommendation to ACMA as the formal decision-maker and for that person to charge the applicant for this work. The Bill allows for the review of formal decisions, with decisions of ACMA under the Equipment Rules capable of being reviewed under section 285 of the Act (subject to the provisions of the Equipment Rules).

Paragraph 266(2)(d) of the Act provides that, as part of the Accreditation Rules, ACMA is able to determine the qualifications and other requirements required before a person can be given a kind of accreditation. The Bill allows accredited persons to undertake work for licensees and applicants under the Act. ACMA's decisions under the Accreditation Rules will be capable of reconsideration and review under section 285 of the Act (subject to the provisions of the Accreditation Rules).

Accredited persons have become significant contributors to the management of radiocommunications licensing over the last 20 years. The expansion of accreditation arrangements in this Bill would provide more opportunities for spectrum users to participate in spectrum management, consistent with the recommendations of the Spectrum Review. ACMA will consult stakeholders on any expanded accreditation arrangements as it develops and implements arrangements under the Bill.

Broad delegation of legislative power

The Committee has requested further information about the delegation of legislative power in the Bill, specifically:

- why it is proposed to confer on ACMA the broad power to exempt acts and persons from the application of the law; and
- whether the Bill could be amended to include at least high-level guidance regarding the circumstances where it will be appropriate for ACMA to exempt an act or person from the compliance provisions

The Bill proposes to allow ACMA to exempt certain acts or persons from compliance provisions if it is satisfied that the exemption is in the public interest, or the exemption is of a kind specified in the legislative rules. In both instances, ACMA is able to make the exemptions subject to conditions. These exemptions are designed to help promote innovation and industry development opportunities within Australia.

The explanatory memorandum sets out the kind of matters that ACMA should consider in determining an exemption based on public interest. In determining the public interest, ACMA will need to weigh the broader benefits (as well as the individual benefits accrued to the recipient of an exemption) against any detriments that may flow from an exemption. ACMA will also consider the intrinsic principle of the compliance provision from which an act is being exempted. In many situations, such as the supply of prohibited devices, there must be a strong public interest case for an exemption to be granted.

The Act contains provisions that require the operation of radiocommunications devices to occur under licence and with the use of compliant equipment, consistent with the object of the Act, which is the promotion of the long-term public interest derived from the use of the spectrum is achieved, particularly through minimising interference between spectrum users. However, it would also be consistent with the object of the Act to empower ACMA to grant exemptions to support innovations and research and manufacturing in Australia, although the development of new equipment, by its nature, may not be licensable or capable of complying with standards.

Accordingly, it is appropriate that ACMA should be able to assess whether it is in the public interest for a person conducting a particular activity to be exempted from the relevant offence provisions, so that the offence provisions in the Act do not undermine the object of the Act.

As exemptions would be granted through a legislative instrument, section 17 of the *Legislation Act 2003* requires that the instrument-maker be satisfied that appropriate consultation has occurred. It is noted that section 197, which prohibits the causing of interference, is not included under proposed section 302 as a compliance provision from which ACMA can grant an exemption. As such, any research would need to be undertaken in frequencies that are not currently licensed, or in conditions that eliminate interference, like a Faraday cage. This will allow for protections to remain in place for existing licensees and services, for example in the case that ACMA grants an exemption for the operation of a banned device capable of operating on frequencies that are covered by a spectrum licence or an apparatus licence.

I would like to thank the Committee for its consideration of these reforms, which will improve and modernise the framework for spectrum management in Australia. I trust that the above information is of assistance to the Committee in its further consideration of the Bill.

Yours sincerely

Paul Fletcher

2 / 10 / 2020

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

MC20-015347

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

02 OCT 2020

Dear Senator Polley Helen

I refer to correspondence dated 18 September 2020 from Glenn Ryall, Committee Secretary, regarding the Senate Scrutiny of Bills Committee's (the Committee) request for information on matters identified in Scrutiny Digest No.12 of 2020 regarding the Recycling and Waste Reduction Bill 2020 (the Bill).

I have considered the Committee's requests and detailed my responses in the enclosed.

I thank the Committee for the opportunity to respond. I have copied this letter to the Assistant Minister for Waste Reduction and Environmental Management, the Hon Trevor Evans MP.

Yours sincerely

SUSSAN LEY

Enc Response to Senate Scrutiny of Bills Committee Scrutiny Digest 12 of 2020 Recycling and Waste Reduction Bill 2020

CC The Hon Trevor Evans MP, Assistant Minister for Waste Reduction and Environmental Management

RESPONSE TO SENATE SCRUTINY OF BILLS COMMITTEE
SCRUTINY DIGEST 12 of 2020
RECYCLING AND WASTE REDUCTION BILL 2020

1. Reversal of the evidential burden of proof

Committee comment:

1.81 The committee requests the minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee suggests that it may be appropriate if subclauses 21(5), 22(5), 23(5), 24(5), 106(9), 124(2), and 148(2) were amended to be elements of the relevant offences and requests the minister's advice in relation to this matter.

Response:

Offences for knowingly or recklessly making false or misleading representations

Subclauses 21(2), 22(2), 23(2) and 24(2) of the Bill will provide offences for knowingly or recklessly making false or misleading representations relating to the export of regulated waste material. Subclauses 21(5), 22(5), 23(5) and 24(5) provide an exception to the offence if the representation was not false or misleading in a material particular. They do not broaden the offence or remove any existing burden on the prosecution to establish the offence, and consequently, are beneficial for defendants.

In accordance with subsection 13.3(3) of the *Criminal Code Act 1995* (*Criminal Code*), it is the defendant who bears the evidential burden to show that the representation was not false or misleading in a material particular. In accordance with subsection 13.1. of the *Criminal Code*, if the defendant discharges the evidential burden, the prosecution must disprove those matters beyond a reasonable doubt.

As the Committee noted, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly in the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Whether a representation is false or misleading in a material particular is something that is peculiarly in the knowledge of the defendant, because only the defendant would know the nature of their representation and, importantly, the materiality of the false and misleading aspect of that representation. My Department does not have a presence within, for example, the administration of voluntary or co-regulatory product stewardship arrangements, or waste processing facilities, and would be reliant on the information provided by the person. The defendant would be in a better position to point to evidence indicating how material the false and misleading part of their representation is.

The matter would also be significantly more difficult and costly for the prosecution to disprove, rather than for the defendant to supply the evidence. In order for the prosecution to disprove the matter, the prosecution may need to obtain evidence from entities that are not regulated by the scheme (who may not be willing to cooperate and who may not have sufficient knowledge of the context to provide accurate evidence).

Offence for contravention of a direction by an authorised officer

Subclause 106(7) of the Bill provides that a person commits an offence if they are given a direction to take specified action within a specified period, and the person engages in conduct that contravenes that direction. Subclause 106(9) provides an exception to the offence if:

- the direction was in writing but did not include a statement that a failure to comply with the direction could result in a criminal or civil penalty; or
- the direction was given orally, and reasonable steps were not taken to inform the person that a failure to comply with the direction could result in a criminal or civil penalty.

Subclause 106(9) does not broaden the offence or remove any existing burden on the prosecution to establish the offence, and consequently, is beneficial for defendants.

Whether a written direction given to the defendant included a statement informing them of the consequences of failing to comply with a direction is a matter peculiarly in the knowledge of the defendant. The defendant will have received the notice and have access to it. It would be significantly more difficult and costly for the prosecution to prove that the written notice given to the defendant did not contain the required statement, rather than for the defendant to supply the written direction.

Similarly, whether an oral direction included reasonable steps to inform the defendant of the consequences of failing to comply with a direction is a matter peculiarly in the knowledge of the defendant. The defendant would be able to adduce evidence that the steps taken, or not taken, by the authorised officer did not go far enough to inform the defendant of the consequences of failing to comply with a direction.

In order for the prosecution to disprove the matter, the prosecution would need to be in possession of the written direction, or audio of the oral direction between the authorised officer and defendant, which would be difficult, or impossible, to obtain.

Offence for failure to return identity card

Subclause 124(1) of the Bill provides that it is an offence for a person that has been issued an identity card not to return the card within 14 days of ceasing to be an authorised officer, an approved auditor, or another person prescribed by the rules. Subclause 124(2) provides an exception to the offence if:

- an authorisation of an authorised officer has been suspended; or
- the identity card has been lost or destroyed.

Subclause 131(5) of the Bill will provide that, if a person's authorisation as an authorised officer is suspended, the person is taken not to be an authorised officer during the period of suspension. The intent of including paragraph 124(2)(a) was to clarify that an authorised officer who has been suspended does not commit an offence if they fail to return their identity card. This recognises that, in some instances, a suspension of a person's authorisation will be revoked, and the person will continue to be an authorised officer.

My Department will be able to establish whether a person's authorisation as an authorised officer was suspended, and therefore whether the person was required to return their identity card. This accords with subsection 13.3(4) of the *Criminal Code,* which provides that the defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court. In practice, my Department would not institute proceedings in circumstances where the authorisation was suspended. The exception is enlivened when the authorisation is suspended and not whether the defendant can establish they had been given or received a notice of suspension.

Whether an identity card has been lost or destroyed is a matter peculiarly in the knowledge of the defendant. The defendant would be able to adduce, or point to evidence, as to the loss or destruction of the identity card, for example, the date or location of the loss. My Department is reliant on the defendant to inform it of the loss or destruction, and would not have that information available to it.

The matter would be significantly more difficult and costly for the prosecution to disprove, rather than for the defendant to supply evidence of the loss or destruction of the identity card. In order to disprove the matter, the prosecution would need to obtain indirect circumstantial evidence, which would be difficult or impossible to obtain.

Offence for using or disclosing commercially sensitive information

Subclause 148(1) of the Bill provides that it is an offence for a person to use or disclose protected information obtained in the course of, or for the purposes of, performing functions or duties under the Bill, if there is a risk that the use or disclosure may substantially prejudice the commercial interests of another person. Subclause 148(2) provides an exception to the offence if the use or disclosure is authorised by clause 149.

Clause 149 provides a number of authorised uses and disclosures, including if a prejudiced person has provided consent, if the use or disclosure is required or authorised by another Australian law, or if the use or disclosure is necessary to prevent or lessen a serious and imminent threat to the life or health of a person.

For each of the exceptions in clause 149, it is readily and specifically within the knowledge of the defendant who uses or discloses the information in the course of performing functions or exercising powers under the Bill to adduce or point to evidence that suggests a reasonable possibility that the relevant exception applies. While some of the exceptions may be able to be established by adducing evidence from third parties (such as where a third party consent to the disclosure of the protected information), this will not always be the case and the information will generally (and in some cases only) be accessible to the defendant. For example, if the disclosure was due to the defendant's belief on reasonable grounds that disclosure was required in order to prevent or lessen a serious threat to life or health, the defendant is better placed to point to this. Likewise, if there was evidence suggesting that a disclosure was made to another person for use in that person's performance of duties, functions or exercise of a power under the Bill, it would be more readily accessible to the defendant.

In addition, it would be significantly more difficult and costly for the prosecution to disprove all exceptions in subclause 149(1), rather than for the defendant to supply evidence of their reliance on one of the authorised disclosures. This is particularly the case given the breadth in the nature and scope of the authorised disclosures listed in clause 149.

On this basis, I do not consider it appropriate for subclauses 21(5), 22(5), 23(5), 24(5), 106(9), 124(2), and 148(2) to be amended to be elements of the relevant offences.

2. Strict liability

Committee comment:

1.87 The committee suggests that it may be appropriate to amend subclause 81(2) to provide that the offence is not one of strict liability. The committee therefore requests the minister's advice as to whether the bill can be amended to provide that the offence in subclause 81(2) is a fault-based offence.

Response:

Subclause 81(2) of the Bill will create an offence of strict liability where an administrator of a co-regulatory arrangement fails to take all reasonable steps to ensure that the arrangement achieves the

outcomes prescribed under clause 79 in relation to a product, and comply with any requirements prescribed by rules made for achieving those outcomes.

As noted in the explanatory memorandum accompanying the Bill, the use of strict liability for this offence is consistent with the principles relating to strict liability in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and the *Senate Scrutiny of Bills Committee Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. Notably:

- the offence is not punishable by imprisonment;
- the offence is subject to a maximum penalty of 60 penalty units for an individual;
- the actions which trigger the offence are simple, readily understood and easily defended;
- offences relating to achieving the outcomes of co-regulatory schemes need to be dealt with efficiently to ensure the integrity of, and confidence in, the regulatory regime;
- the offence will be subject to an infringement notice;
- the absence of strict liability may adversely affect the capacity to prosecute offenders. Requiring administrators of approved co-regulatory arrangements to take all reasonable steps to ensure the specified outcomes for that arrangement is integral to the operation of the co-regulatory product stewardship scheme and the overarching product stewardship framework set out in the Bill. Whether or not a defendant intentionally or negligently did not take all reasonable steps is a matter that is peculiarly within the knowledge of the defendant alone. Proving the contrary beyond reasonable doubt will require significant and difficult to obtain indirect and circumstantial evidence.

I note the Committee's concern that strict liability should not be justified by reference to broad uncertain criteria, such as offences being intuitively against community interests or for the public good. However, this offence is triggered if the administrator of an approved co-regulatory arrangement does not take all reasonable steps to ensure the arrangement achieves the specified outcomes, or does not comply with requirements. These outcomes and requirements will be clearly set out in rules made for the purpose of clause 79 of the Bill.

For example, outcomes for co-regulatory arrangements may include:

- providing reasonable access to collection services in metropolitan areas, inner regional areas, outer regional areas and remote areas;
- the recycling target must be met; or
- the material recovery target must be met.

Therefore, the triggers for the offence will be simple, certain, and easily understood. Reasonable steps to ensure that an arrangement achieves the prescribed outcomes and complies with any requirements could include:

- assessing the approved co-regulatory arrangement on an ongoing basis to determine whether outcomes are being met and requirements complied with;
- having effective policies in place;
- seeking advice on whether outcomes or requirements are being met; or
- working with liable parties to eliminate risks and ensuring any issues are addressed.

Further, in setting the penalties in the Bill, specific regard was given to the principle articulated at Chapter 3.1.2 of the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that there should be consistent penalties for offences of a similar kind or of a similar seriousness.

Most offences that relate specifically to the co-regulatory product stewardship scheme under the Bill are strict liability offences of 60 penalty units for an individual. This approach was guided by existing penalty provisions in the *Product Stewardship Act 2011*. If this provision was made a fault-based offence, it would be appropriate to increase the penalty units in accordance with other fault-based offences, such as clause 92 of the Bill, which relates to the mandatory product stewardship scheme. However, failing to comply with requirements in rules in relation to the mandatory product stewardship scheme is a more serious breach in the context of the Bill. If subclause 81(2) were made a fault-based offence and the maximum penalty increased, it would not be comparable to the penalties that apply in respect of similar prohibited behaviours under co-regulatory product stewardship, such as those under clauses 72, 76, 82 and 83.

On this basis, I consider that it is not necessary to amend the Bill to provide that the strict liability offence in subclause 81(2) is a fault-based offence.

3. Broad delegation of investigatory powers

Committee comment:

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

- **why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised person; and**
- **whether the bill can be amended to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out.**

Response:

Subclauses 97(4) and 99(3) of the Bill will provide that an authorised person may be assisted by 'other persons' in exercising powers or performing functions or duties under Part 2 (monitoring) and Part 3 (investigation) of the *Regulatory Powers (Standard Provisions) Act 2014* (*Regulatory Powers Act*).

The Bill will trigger the *Regulatory Powers Act* as the accepted baseline of Commonwealth powers required for a monitoring and investigation regime. Sections 23 and 53 of the *Regulatory Powers Act*, as triggered by subclauses 97(4) and 99(3) of the Bill, will confer monitoring and investigation powers on the person assisting an authorised person, subject to specific safeguards.

It is necessary to confer monitoring or investigatory powers on person assisting an authorised person because there may be circumstances where:

- no other authorised person may be available to assist;
- the premises that are subject to monitoring or investigation may be large;
- there may be a large number of documents or material that needs to be reviewed;
- there may be a large number of things that need to be searched, inspected, examined or sampled;
- the person assisting may be more familiar with the premises, or have particular skills or knowledge that would enable the authorised person to effectively exercise their powers and perform their functions or duties; or
- things may be heavy or difficult to move without assistance.

It would not be appropriate to amend the Bill to specify the expertise or training that persons assisting are required to possess. A person assisting an authorised person will need to have different expertise and training depending on the circumstances and the purpose of the assistance required, such as the purpose of the entry to premises (such as for monitoring or investigation purposes), the nature of the premises or things, and the anticipated needs of the authorised officer in exercising their powers under the Bill. For example, a person assisting may need to be a specialist in operating electronic equipment, a person with scientific knowledge of the waste material that are the subject of the exercise of powers, a person with knowledge of the business operations of the premises, or a person who is trained to review financial records. In addition, the circumstances in which the assistance of another person will be necessary and reasonable will not always require that person to have particular skills and experience relating to the exercise of regulatory powers.

It is therefore more appropriate for operational requirements to determine who is appropriate to assist an authorised officer in the particular circumstances, based on the relevance of their training and experience to the situation for which assistance is required.

Further, paragraphs 23(1)(a) and 53(1)(a) of the *Regulatory Powers Act* provide that a person exercising monitoring or investigation powers may only be assisted by another person if the assistance is necessary and reasonable. It is not intended that a person assisting will assist an authorised officer to determine compliance or gather evidential material by separately determining compliance or gathering evidential material under Parts 2 and 3 of the *Regulatory Powers Act*. The intention is that a person assisting to exercise monitoring or investigatory powers will support the authorised officer in the exercise of their powers to monitor and investigate compliance with the Bill.

A person assisting would also be subject to any directions given by an authorised person in accordance with paragraphs 23(2)(d) and 53(2)(d) of the *Regulatory Powers Act* who will continue to have direct responsibility and oversight of the powers exercised and functions performed under Parts 2 and 3 of the *Regulatory Powers Act*.

In addition, subsections 23(3) and 53(3) of the *Regulatory Powers Act* make it clear that a power exercised by a person assisting an authorised person is taken to have been exercised by the authorised person him or herself. It will therefore be the authorised person who will ultimately be accountable for the activities performed by the person assisting them.

On this basis, I consider that it is not appropriate to amend the Bill to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out.

4. Delegated legislation not subject to parliamentary disallowance

Committee comments:

1.96 The committee requests the minister's more detailed advice regarding:

- **why it is necessary and appropriate to specify that determinations made under clauses 125, 129 and 166 are not legislative instruments; and**
- **whether the bill could be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

Response:

The determinations made by the Secretary of the Department of Agriculture, Water and the Environment under subclauses 125(7), 129(1) and 166(3) of the Bill will set out the training and qualification requirements for authorised officers, authorised government enforcement officers and analysts, respectively. Training and qualification requirements may relate to specific classes of

authorised officer, authorised government enforcement officer or analyst. Subclauses 125(8), 129(2) and 166(4) of the Bill will provide that determinations made under subclause 125(7), 129(1) and 166(3) are not legislative instruments.

I note that subsections 8(1) and (4) of the *Legislation Act 2003* have the combined effect that an instrument that is made under a power delegated by Parliament and has one or more provisions that have legislative character (rather than administrative character) will be a legislative instrument– unless the relevant Act expressly exempts the instrument from being a legislative instrument.

In *Visa International Services Association v Reserve Bank of Australia* (2003) 131 FCR 300 at 424 (Visa International), the Federal Court identified a number of factors that are likely to have bearing on whether a decision is to be characterised as being of administrative or legislative character. The list included (at paragraph 29):

- whether the decision determined rules of general application, or whether there was an application of rules to particular cases;
- whether there was Parliamentary control of the decision;
- whether there was public notification of the making of the decision;
- whether there was public consultation;
- whether there were broad policy considerations imposed;
- whether the regulations (or other instrument) could be varied;
- whether there was power of executive variation or control;
- whether there was provision for merits review; and
- whether there was binding effect.

The case law makes it clear that no one of these factors will determine whether the decision is of administrative or legislative character. Rather, it is necessary to consider the decision in light of all these factors.

Legislative and administrative decisions can also be distinguished because legislative decisions determine the content of the law as a 'rule of conduct' or 'declaration as to power, right or duty' whilst administrative decisions apply the law in particular cases (*Roche Products Pty Limited v National Drugs and Poisons Schedule Committee* [2007] FCA 1352per Branson J).

Applying these factors to the instruments made under subclauses 125(7), 129(1) and 166(3), I am satisfied that the none of these instruments determine a 'rule of conduct' or declare a 'power, right or duty'. Notably, the inclusion of training and qualification requirements does not determine the future lawfulness of conduct by or in relation to authorised officers, authorised government enforcement officers or analysts, and thus does not determine the content of rules of general application. Rather, the instruments will apply the law to particular cases, by setting training and qualification requirements for the different individuals or classes of individuals as appropriate for their position and their powers, functions and duties under the Bill.

In addition, the determination will not have binding effect on any of the individuals concerned; nor will it require them to do or not do any act or omission. Furthermore, there is no public consultation required for making the instrument, nor is there any requirement to notify the public when the instrument is made. The policy considerations imposed are narrow, being confined to Commonwealth regulatory and compliance policy, and do not generally affect the public.

In light of this, I consider that the determinations under subclauses 125(7), 129(1) and 166(3) will be instruments of administrative character, rather than legislative character. The statements in subclauses 125(7), 129(1) and 166(3) that the relevant instruments are not legislative instruments, are declarations of the law and do not provide an exemption from the *Legislation Act 2003*.

However, the legislative versus administrative character test is complex and likely to be beyond the knowledge of many persons who are reading the Bill. The declaratory statement will therefore assist readers of the Bill to understand that the instruments are not legislative instruments.

On this basis, I consider that it is not necessary or appropriate to specify that determinations made under subclauses 125(7), 129(1) and 166(3) are not legislative instruments and do not consider that Bill could be amended to provide that these determinations are legislative instruments.

5. Immunity from civil liability

Committee comments:

1.100 The committee requests the minister's advice as to why it is considered appropriate to provide the Commonwealth and a number of protected persons with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

1.101 The committee considers that it may be appropriate to amend the bill to remove the civil immunity for the Commonwealth as an entity and requests the minister's advice in relation to this.

Response:

Subclause 180(1) of the Bill will provide the Commonwealth and protected persons with immunity from civil proceedings in relation to any act or omission done in good faith in the performance or purported performance of a duty, function or power under the Bill, or in the assistance or purported assistance of a person performing a duty, function or power under the Bill. A protected person is defined in subclause 180(3) of the Bill as the Minister, Secretary, an authorised officer or a Departmental officer or employee.

Subclause 180(2) will provide equivalent protection to a person who is assisting a protected person as a result of a request, direction or other requirement imposed by the protected person in the performance (or purported performance) of a duty, function or power under the Bill, so long as the assistance was provided by the person in good faith.

These protections are considered necessary and appropriate to ensure efficient and effective administration of the Bill. Immunity from civil liability where good faith is shown is necessary to maintain the integrity of the regulatory framework. In the absence of immunity to protected persons (or those assisting them), it would be difficult to effectively administer the scheme. For example, protected persons may be unwilling to perform functions and powers under the Bill if there was a risk they could be held personally liable even if they acted honestly and in good faith.

Similarly, providing the Commonwealth as an entity with immunity from civil proceedings in respect of acts done in good faith is appropriate given the nature and scope of the powers and functions in the Bill.

Acts or omissions that are not performed in good faith (such as those performed with malice) will still be subject to potential civil proceedings, which is considered appropriate as powers, duties and functions under legislation must be exercised in good faith for a proper purpose. In addition, clause 180 does not protect the Commonwealth, protected persons, or persons assisting protected persons from criminal proceedings.

The granting of immunity to the Commonwealth is also relatively common across Commonwealth legislation. In this regard, clause 180 was modelled on, and is consistent with, similar immunities that

protect the Commonwealth and protected persons against liability for acts performed in good faith in the performance of legislative functions. These include:

- section 430 of the *Export Control Act 2020;*
- section 441 of the *Biosecurity Act 2015;* and
- section 74T of the *Broadcasting Services Act 1992*.

On this basis, it is not appropriate for the Bill to be amended to remove the civil immunity for the Commonwealth as an entity.

6. Computerised decision making—significant matters in delegated legislation

Committee comments:

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

- **why it is considered necessary and appropriate to permit the secretary to arrange for the use of computer programs for any decision made under the bill;**
- **whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); 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 leaving the determination of which decisions may be made by computer programs to delegated legislation.**

Response:

Whether the secretary should be permitted to arrange for the use of computer programs for any decision made under the Bill

Clause 182 of the Bill provides that the Secretary of the Department of Agriculture, Water and the Environment may arrange for the use of computer program for any purpose for which the Secretary or Minister may or must make a decision under the Bill, that is prescribed by the rules.

The purpose of permitting the Secretary to arrange for the automation of prescribed decisions is to allow high volume decisions that are suitable for automation because they have no discretionary elements to be made by a computer program. Automation of such decisions is consistent with the Administrative Review Council's report to the Attorney General on *Automated Assistance in Administrative Decision making* (the ARC Report). It will also lessen the operational burden and allow my Department to focus resources on high priority areas whilst potentially reducing administrative burden and fees for industry. This accords with recommendations supported by the Government to reduce fees and streamline and reduce administrative burden under the product stewardship framework, following the recent Review of the *Product Stewardship Act 2011*.

It is not intended that the Secretary will be able to arrange for the automation of any decision under the Bill. Rather, the Minister will decide which decisions can potentially be automated by prescribing those decisions in rules. Such rules will be subject to Parliamentary scrutiny processes such as disallowance. This is a necessary and appropriate limitation on the Secretary's power to arrange for the automation of decisions.

As mentioned above, it is also intended that the Minister will only prescribe decisions in the rules where there is a pressing need or where there are compelling benefits for using automated decision making,

and importantly where the nature of the decision is suitable for automated decision making, including where the decision does not contain any discretionary elements. For example, if an authorised officer wishes to suspend their authorisation under clause 135 of the Bill, this could be automated, as there is no discretion involved.

Decisions that require interpretation or evaluation of evidence, such as where fact finding or weighing of evidence is required, or that involve discretion on the part of the decision-maker, will be automated. Again, this is consistent with the principles set out in the ARC Report. For example, decisions to grant or refuse an export licence for regulated waste material or decisions to grant or refuse an application for an exemption involve discretion on the part of the decision-maker and are therefore not intended to be automated.

The Bill also has several safeguards in place to ensure that the correct and most suitable decision is made in accordance with the objectives of the Bill. For example:

- subclause 182(3) will impose an obligation on the Secretary to take all reasonable steps to ensure decisions made by the operation of a computer program are correct; and
- subclause 182(5) provides for the Secretary or the Minister to substitute a new decision for a decision made by a computer program is satisfied that the original decision is incorrect.

On this basis, I consider it is necessary and appropriate to permit the Secretary to arrange for the use of computer programs for decisions made under the Bill, within the parameters provided by clause 182.

Consideration to compliance with administrative law requirements

Consideration has been given to how automated decision-making processes will comply with administrative law requirements. The inclusion of an automated decision-making power will not unduly limit or exclude administrative law requirements such as the requirement to consider relevant matters and the rule against fettering of discretionary power.

As stated above, implementation of automated decision-making under the Bill will be guided by the best practice principles developed by the ARC Report.

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; and
- expert systems should be designed, used and maintained in such a way that they accurately and consistently reflect the relevant law and policy.

As also mentioned above, it is intended that only non-discretionary decisions will be automated. This will mean that a computer system will not be used to exercise discretion, and administrative law requirements, such as not fettering a decision-maker's discretion, will not be compromised.

In addition, administrative law requirements to take account of relevant considerations will still be complied with, as:

- a human will be responsible for ensuring all relevant considerations for a decision are entered into the computer program. Failure to do so would leave the decision open to challenge on judicial review grounds; and
- where the relevant considerations are subject to the decision-maker's discretion, or are required to be assessed and evaluated (as opposed to facts that are already established), the decision will not be considered appropriate for automation.

Decisions made by computer programs under arrangements made under subclause 182(1) will still be required to comply with general administrative law principles and will be subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*, the *Judiciary Act 1903* and the Constitution.

Whether decisions should be made under specific provisions listed in the primary legislation

As set out above, subclause 182(2) of the Bill will require the rules to prescribe the decisions that may be made by a computer program. Rules will be subject to Parliamentary scrutiny as disallowable legislative instruments.

Allowing the rules to specify decisions subject to automated decision-making will provide a level of flexibility to take into account changes in technology, while striking a balance by ensuring that Parliament retains scrutiny of what decisions can be automated. In addition, it is likely that automation will only be used for non-discretionary decisions of high volume, where automation will provide a clear operational benefit. Allowing such decisions to be prescribed in a legislative instrument, rather than being specified in the primary legislation itself will allow the Minister to consider which non-discretionary decisions are being made in sufficiently high volumes to justify automation.

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 waste export system into the future is one of its most important aspects. It must be adaptable, to effectively respond to and manage emerging and evolving environmental issues in Australia. Flexibility is also key for effective regulation of product stewardship scheme. The Bill enables this flexibility.

On this basis, it is not appropriate to amend the Bill to limit the use of computerised decision-making to decisions made under specific provisions listed in the primary legislation.

7. Incorporation of external materials existing from time to time

Committee comments:

1.112 Noting the above comments, the committee requests the minister's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subclause 188(3), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.

Response:

Section 188 of the Bill will provide for a general rule-making power. Rules will be subject to Parliamentary scrutiny as disallowable legislative instruments. Several rules are proposed to provide the basis for product stewardship schemes which will replace existing instruments under the *Product Stewardship Act 2011*. Other rules will impose requirements and conditions on the export of certain

kinds of waste material. This will implement the commitment of the Australian Governments (through the former Council of Australian Governments) to ban the export of waste glass, plastic, tyres and paper.

Subclause 188(3) of the Bill will provide that despite subsection 14(2) of the *Legislation Act 2003*, the rules may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument.

As stated in the explanatory memorandum, the kind of documents that are likely to be incorporated are reference materials that are regularly updated. Specifically, the rules may apply, adopt or incorporate documents that include:

- industry processing standards relating to waste material;
- Australian census data;
- Australian standards;
- standards published by the International Organisation for Standardisation (ISO); and
- an instrument or writing made by an authority or government body in an importing country, setting out requirements that must be met prior to waste material being imported into that country.

The majority of documents applied, adopted or incorporated into the rules will be publicly available either on my Department's website or through a link on that website to where the documents may be found on the website of the relevant authority or body. For example, Australian census data and most processing standards will be publicly available.

Processing standards for regulated waste materials will be an important concept in the waste export rules. Export licence holders will be required to ensure goods are processed to an acceptable standard prior to export. This will reduce the impact of waste material on the environment in accordance with the objects of the Bill. However, the intention is that an exporter will not be required to comply with a processing standard that is not publicly available free of charge. It is intended that the waste export rules will incorporate a variety of different processing standards. In some circumstances, a standard that sets out processing requirements for waste material, such as an ISO standard, will not be freely available. However, the rules will only incorporate such a standard in circumstances where compliance with that standard is optional.

An exporter will be able to choose from the different standards (including those that are publicly available) to demonstrate the requirements of the Bill have been met. An alternative mechanism for an exporter to meet the processing requirements will be to provide the Department with contracts of sale that detail the processing specifications. An exporter will also be able to propose new, individual standards that will be considered by my Department. This approach provides flexibility to regulated entities to choose a waste processing standard which meets their specific situation and circumstances.

It is necessary and appropriate that the proposed rules are able to apply, adopt or incorporate documents as in force or existing from time to time to ensure that exporters are required to comply with the most up to date processing techniques and requirements, without the need to amend the rules every time a processing standard is updated. This will, in turn, help to ensure that the export of waste material will have minimal environmental impact. Similarly, incorporating Australian census data as existing from time to time will ensure that the recycling targets for co-regulatory product stewardship will accurately reflect Australian demographics.

All explanatory statements for the rules will include information about the incorporated documents, and where they can be freely accessed in accordance with the Guideline on incorporation of documents published by the Senate Scrutiny of Delegated Legislation Committee.