THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002774

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

Dear Senator Polley

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Corporations Amendment (Corporate Insolvency Reforms) Bill 2020 (the Bill).

In that letter, you sought my advice as to:

- why it is proposed to use an offence-specific defence in subsection 453F(4);
- whether general defences in the Criminal Code apply to an offence under section 435F or regard was given to providing for a more specific defence than that of a reasonable excuse;
- the justification for providing that the offence in subsection 453F(3) is an offence of strict liability;
- whether subsections 453L(2) and (3) provide for offence-specific defences which reverse the evidential burden of proof, and if so, why this is necessary and appropriate;
- why it is proposed to use offence-specific defences in section 456B;
- how the fact that a person is a registered liquidator is peculiarly within the knowledge of the defendant in light of the fact that this information appears to be publicly available on the ASIC website; and
- why it is necessary and appropriate to leave various matters to delegated legislation.

Why an offence-specific defence in subsection 453F(4) is appropriate, application of general defences in the Criminal Code to an offence under section 435F, and consideration of a more specific defence than that of a reasonable excuse

Under section 453F of the Bill, a director of a company under restructuring must help the small business restructuring practitioner by attending to them, providing information on the company's business, property, affairs and financial circumstances and giving the practitioner access to inspect and make copies of company books. Failure by a director to do so is an offence of strict liability without reasonable excuse. The penalty for the offence is 120 penalty units.

The new debt restructuring process established in new Part 5.3B of the Corporations Act draws heavily on the established voluntary administration framework, as well as the debt agreements framework in Part IX of the Bankruptcy Act. This provides consistency in the obligations of a director across the external administrative regime. In this way, the defences available under section

453F of the Bill reflect those available under the existing section 530A of the *Corporations Act 2001* (Corporations Act), which requires officers to help liquidators under a winding up.

In addition to this, in accordance with the Attorney-General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (September 2011) (the Guide), it is appropriate that the defendant bears the evidential burden for providing a reasonable excuse defence as this information would be peculiarly within the knowledge of the defendant, and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. It is intended to rely on this justification.

This is because the defendant would be better positioned to readily adduce evidence that they had a reasonable excuse not to fulfil the practitioner's requests rather than the prosecution having to adduce evidence to the contrary. In addition to this, the defendant only has an evidential burden which is less onerous than the legal burden.

The defences in Part 5.3 of the Criminal Code do apply to the strict liability offence. While paragraph 4.3.3 of the Guide discourages the use of the reasonable excuse defence where these defences apply, in this instance, allowing for a broad range of defences is necessary to ensure that where there is a good reason that the requests were not fulfilled, that a director may rely on those reasons. Relying on the existing defences of the Criminal Code would not be enough to cover all of the unforeseen situations where the directors cannot fulfil their duties under section 453F.

The justification for providing that the offence in subsection 453F(3) is an offence of strict liability

As pointed out by the Committee, subsection 453F(3) of the Bill provides that where a director does not help the restructuring practitioner without reasonable excuse is an offence of strict liability.

In line with the Guide, the offence of strict liability is appropriate in this instance as non-compliance with a restructuring practitioner's request by a director would undermine the integrity of the restructuring regime. Avoiding a restructuring practitioner's request for information presents a serious detriment for creditors as the restructuring practitioner would not have the information readily available to make an accurate declaration in relation to the proposed restructuring plan. Therefore, the offence significantly enhances the effectiveness of the restructuring process regime in deterring this kind of conduct. In addition to this, in line with Guide, the offence is not punishable by imprisonment.

Whether subsections 453L(2) and (3) provide for offence-specific defences which reverses the evidential burden of proof, and if so, why this is necessary and appropriate

As the Committee has pointed out, section 453L of the Bill provides that a person who is a director of a company contravenes this section if the company is under restructuring and the company purports to enter into a transaction or dealing affecting the property of the company and the director approves that action is also a contravention for a director of a company under restructuring to purport to enter into a transaction or dealing affecting the property of the company on behalf of the company. Subsections 453L(2) and (3) provide for specific circumstances in which there will not be a contravention of section 453L.

In a proceeding against a director in relation to section 453L, the defendant will bear the evidential burden that these specific circumstances occurred. The reversal of the evidential burden in this instance is limited to reliance on the exceptions.

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.

Obtaining information about an organisation's detailed transactional information, and whether this is covered by the exception, or information about relevant consent or court orders where obtained may require the prosecution to undertake lengthy and difficult investigative exercises that would require obtaining large amount of potentially confidential information from the company. It would also be significantly more difficult and costly for the prosecution to have to disprove that these exceptions didn't exist than it would be for the defendant to provide or point to evidence that suggests a reasonable possibility that a matter exists.

In this way, it is considered appropriate and necessary for subsection 453L(2) and (3) to be offence-specific defences.

Why it is proposed to use offence-specific defences in section 456B

Section 456B of the Bill provides that only a registered liquidator can consent to be appointed, and act as, a small business restructuring practitioner. It is an offence of strict liability where a person is not a registered liquidator and they consent to an appointment. In proceedings brought against the person, the person bears an evidential burden in proving that they were a registered liquidator. The penalty for the offence is 50 penalty units. This is consistent with current requirements under existing voluntary administrative provisions under Part 5.3A of the Corporations Act.

In line with the Guide, it is appropriate for the defendant to bear the evidential burden as the registered liquidator can quickly adduce evidence proving that they are a registered liquidator. This is already within the knowledge of the defendant and therefore, if requested, the defendant would have the information available to quickly provide to the regulator to show that they possess the requisite qualifications, knowledge and experience necessary to support a distressed small business through the debt restructuring process and to develop a debt restructuring plan to put to creditors.

How the fact that a person is a registered liquidator is peculiarly within the knowledge of the defendant in light of the fact that this information appears to be publicly available on the ASIC website

As the Committee is aware, the Bill establishes a new formal debt restructuring process. In this process, a small business restructuring practitioner supports the company to develop a debt restructuring plan and review its financial affairs, certifies the plan to creditors, and manages disbursements once the plan is in place. A restructuring practitioners must be a registered liquidator.

This key information would reside with the person and evidence relating to this would be readily available by the person. While, it would not be expected that the prosecution would not begin proceedings without sufficient concerns that the person was not a registered liquidator. It would not be particularly onerous for the person to produce evidence to show their registration. In addition to this, it may not always be the case that the evidence would be readily available that a restructuring practitioner is a registered liquidator. With the establishment of the new formal debt restructuring process, there is an expected increase in the number of the applications for registered liquidators. This may cause delay in uploading relevant information onto the public register, thereby the information may not be so readily available. Where this occurs, it is quicker for the defendant to quickly adduce evidence that they are a registered liquidator rather than the prosecution proving information to the contrary.

Why it is necessary and appropriate to leave various matters to delegated legislation

As the Committee has pointed out, the Bill establishes a framework for the new formal debt restructuring process with amendments to be made to associated delegated legislation (including regulations amending the *Corporations Regulations 2001* and rules amending the *Insolvency Practice Rules (Corporations) 2016* made under the Corporations Act). The amendments to these instruments are necessary to fully implement the regime.

The primary legislation provides power for delegated legislation to specify further details of the reforms. These powers are appropriate and necessary to deal with situations where the operation of the Bill may produce unintended or unforeseen results that are not consistent with the policy intention for the new regime. As the Committee is aware, the reforms will assist to safeguard against the impacts of the COVID-19 pandemic which is expected to see an increase in the number of companies that move into external administration. Therefore, it remains appropriate and necessary to provide specificity in regulations as it allows the process to respond quickly to developments that occur from the expected increase in the number of insolvencies. This ensures that the regime remains fit-for-purpose and is adaptable to the changing economic environment to best reflect the needs of small businesses.

Therefore, although it may be desirable to place all of the details in primary legislation, I consider that it is necessary and appropriate to place specificity in delegated legislation as, given the nature of the reforms, this retains the ability to respond to unforeseen issues that could have constrained the ability for the industry to properly use the streamlined regimes.

Thank you for bringing your concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

16 / 12 / 2020

SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR DEFENCE
SENATOR FOR WESTERN AUSTRALIA

IS20-000007

17 DEC 2020

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
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Dear Senator Polley

I refer to your correspondence from 27 November 2020 concerning the *Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020*. The Senate Scrutiny of Bills Committee has sought my advice in relation to some aspects of this Bill, which I am pleased to provide below.

In particular, the Committee is seeking advice on aspects relating to Parliamentary scrutiny of Reserve call out orders and directions under proposed section 123AA(2) of the *Defence Act 1903*. The Committee is also seeking advice about the inclusion of immunity from criminal liability in proposed section 123AA.

Parliamentary scrutiny

The Committee has sought an addendum to the explanatory memorandum including the key information that has been provided by Defence about the Bill. Ahead of debate of this Bill in the Senate, I tabled a replacement explanatory memorandum which included:

- Clarification that the Bill does not alter, expand or otherwise change the Government's existing legal authorities to deploy the ADF
- Clarification that the operative provisions of the Bill, including the proposed immunity provision, relate to Defence Assistance to the Civil Community and do not authorise the use of force (beyond self-defence)
- Examples of 'other emergencies' referred to in the immunity provision

- Clarification that the requirement for a direction by the Minister under s 123AA(2) is intended to provide a check on the proposed immunity and does not grant a new authority to the Minister to direct the deployment of Defence personnel.

The Committee has sought advice about which parliamentary scrutiny mechanisms apply to a Reserve call out order made under subsection 28(1) and to a direction relating to the provision of Defence assistance made under subsection 123AA(2). There are a range of mechanisms available to the Parliament to scrutinise decisions of Government, including decisions to call out the Reserves or to deploy the ADF in response to a natural disaster or other emergency. This includes (but is not limited to):

- Notices of motion by Members of Parliament
- Inquiries by Parliamentary committees
- Senate estimates processes
- Question time.

The Committee has also sought advice on whether the Bill can be amended in several ways:

- To provide that Reserve call out orders must be tabled in both Houses of Parliament.

  Response: As outlined above, even without tabling a Reserve call out order in Parliament, there are numerous opportunities for members of Parliament to consider such an order and debate it.

- Provide that Defence's annual report include information about any directions made under subsection 123AA(2).

  Response: Defence's annual report will generally include information about any significant Defence Assistance to the Civil Community that has occurred (see for example page 5 of the 2019-2020 Defence Annual Report).

- Provide high level guidance on the scope of powers that may be exercised by Reserve members who are subject to a Reserve call out order, and protected persons subject to a direction relating to the provision of assistance under subsection 123AA(2), including clarifying that these orders and directions do not authorise the use of force or coercive powers beyond what is available to members of the community.

  Response: Reserve members who are subject to a Reserve call out order have exactly the same scope of powers as a Permanent member of the ADF or a Reserve member who has volunteered for service. If the Reserve call out is in relation to Defence Assistance to the Civil Community, this would not include use of force or coercive powers. A protected person subject to a direction relating to the provision of assistance under subsection 123AA(2) has exactly the same scope of powers as an ADF member providing assistance of that sort without the benefit of this provision. This would not include power to use force or coercive powers. The replacement explanatory memorandum makes this position explicit.

Immunity from civil and criminal liability

The Committee has sought advice as why it is considered necessary and appropriate to provide protected persons with both civil and criminal immunity.

The range of criminal offences to which this provision would be relevant is narrow. However, it is important to include criminal offences, so that ADF members and other protected persons who are providing assistance in good faith performance of their duties, including in high risk situations, are able to take appropriate action without fear of prosecution.
I also note that inclusion of immunity from criminal liability was recommended by the Royal Commission into National Natural Disaster Arrangements (recommendation 7.3).

The Committee has also sought advice as to whether the Bill can be amended to:

- Include an inclusive definition of the term 'other emergency'.

  Response: The term 'other emergency' takes its ordinary meaning. The replacement explanatory memorandum includes a further explanation of this term at paragraph 34.

- Clarify that the immunity in section 123AA does not extend to the Commonwealth as a whole.

  Response: The immunity provision only applies to 'protected persons', which are named as being ADF members, APS employees in the Department, and certain other persons authorised by the CDF or Secretary. It does not include the Commonwealth. This position is further emphasised in the explanatory memorandum.

I note that the Bill has passed the Senate on 8 December 2020. Defence advises that there seems to be an error with receipt of emails from the Scrutiny of Bills Committee Secretariat, which I am sure can be resolved through direct liaison with Defence's Parliamentary Business staff.

Thank you for your consideration of the Bill.

Yours sincerely

Linda Reynolds

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS20-002740

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

Dear Senator Polley

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Financial Sector Reform (Hayne Royal Commission Response) Bill 2020 (the Bill).

In that letter, the Committee sought my advice as to why matters have been placed in delegated legislation, including non-disallowable delegated legislation. In particular, the Committees request relates to Schedules 5, 9 & 11 of the Bill. I will address these issues individually below.

Issue 1: Exceptions to anti-hawking offences to be provided in delegated legislation

The Committee raised a concern about why it is considered necessary and appropriate to leave exceptions to anti-hawking offences to delegated legislation, especially in light of the fact that it appears the government has already formulated one additional exception and whether the bill can be amended to include this additional exception on the face of the primary legislation.

The use of delegated legislation provides a flexible, timely mechanism to change exemptions over primary legislation, and its use in the hawking prohibition reflects the broad scope of financial products in relation to which the hawking prohibition applies. Given the large number of financial products, the technical nature of many of those products and the dynamic nature of the industries effected by the prohibition, it is desirable that some exceptions are provided for in delegated legislation. Parliament will retain the ability to disallow the delegated legislation.

Additionally, I expect that the exceptions which will be provided for in delegated legislation will directly reference other provisions in the Corporations Regulations. It would not be appropriate for the primary law to directly reference concepts or provisions in delegated legislation. Where an exception references a provision in the Act, such as the exception for persons who are providing personal advice and are subject to the best interests duty, that exception has been included in the Bill.

Accordingly I consider it appropriate that the remaining exceptions to the anti-hawking offences be left to delegated legislation. I do not think that the primary law should be amended to include the exception for offers, requests and invitations in relation to the renewal of insurance products.

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Issue 2: Directions about the performance or exercise of APRA or ASIC's powers or functions to delegated legislation that is exempt from disallowance and sunsetting

The Committee has also raised a concern about why it is considered necessary and appropriate to leave directions about the performance or exercise of the Australian Prudential Regulation Authority's (APRA) or Australian Securities and Investments Commission's (ASIC) powers or functions to delegated legislation which is exempt from disallowance and sunsetting and whether the bill can be amended to provide that these directions are subject to disallowance and sunsetting and provide at least high-level guidance regarding what may be included in the directions on the face of the primary legislation.

Under the existing section 6(3) of the *Superannuation Industry (Supervision) Act 199* (SIS Act), the Minister may give APRA or ASIC directions about the performance or exercise of its functions or powers under the SIS Act. Item 1 of Schedule 9 to the Bill amends this direction rule so that the Minister must use a legislative instrument to direct APRA or ASIC.

As the Explanatory Memorandum to the Bill outlined, Item 1 of Schedule 9 to the Bill updates the existing requirement that the Minister publish such directions in the Gazette. This is consistent with other existing law in respect of directions provided to APRA and ASIC by the Minister. This allows for appropriate certainty to the regulator that they may begin to undertake the Minister's direction in a timely manner. Executive control is intended in these instances as the directions are intended to be remain in place until revoked by the relevant Minister.

In order for the directions power to be sufficiently broad, I do not consider that it is appropriate for guidance regarding what such directions may encompass to be provided in the primary law. However, I will note that the directions power only pertains to the Minister giving APRA or ASIC directions about the performance or exercise of their functions or powers under the SIS Act and it is expected that this will only occur in exceptional and limited circumstances.

Issue 3: Significant matters relating to the kinds of conduct which do not constitute the provision of a superannuation trustee service to be provided in delegated legislation

The Committee has raised a potential concern as to why it is considered necessary and appropriate to leave the kinds of conduct which do not constitute the provision of a superannuation trustee service to delegated legislation and whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.

The regulation-making power, which provides for regulations to prescribe conduct that does not constitute the provision of a superannuation trustee service, is justified in recognition of the breadth and complexity of conduct by a registrable superannuation entity. Under these circumstances, the regulation-making power provides for the regime to respond to changes in industry practice. The power is also consistent with existing flexibility in the *Corporations Act 2001*, for example under section 766E(3)(e), for what constitutes the provision of a custodial or depository service, which in turn is also a financial service.

Further, it is expected that the regulation-making power would only be used in limited and exceptional circumstances. Any regulations made under the provisions in the Bill would also be subject to appropriate parliamentary scrutiny, and would be subject to the consultation requirements set out in the *Legislation Act 2003* before any regulation is made.

Issue 4: Significant matters, such as what personal information can be published by ASIC online, to be provided in delegated legislation

The Committee has also requested my advice as to why it is considered necessary and appropriate to leave significant matters, such as what personal information can be published by ASIC online, to delegated legislation, noting the potential impact on a person's privacy and whether the bill can be amended to set out the information that can be published by ASIC online on the face of the primary legislation.

As the Committee is aware, the amendments in Schedule 11 to the Bill would require ASIC to publish breach reporting information about licensees. This has the legitimate purpose of enhancing accountability in the financial services and credit sector and would allow consumers to identify licensees that are involved in significant breaches of the law.

Under these amendments, the information published by ASIC must include any information prescribed by the regulations, including personal information within the meaning of the *Privacy Act 1988* (Privacy Act) in relation a financial services licensee or a credit licensee who is an individual.

The Explanatory Memorandum to the Bill outlines that the regulation-making power may be exercised to allow ASIC to publish the names of credit licensees where the licence is held in the name of an individual. Since many licensees hold licences in their own name, not allowing publication of this information would mean consumers may not be able to access breach reporting information about licensees that are individuals. To ensure that there is transparency in relation to all licensees, it would be necessary to publish the names of these licensees, which is personal information under the Privacy Act.

The amendments in Schedule 11 do not limit the personal information that may be published to the name of the licensee. This reflects that the information that will be collected is to be specified in a form approved by ASIC, and is still subject to consultation with industry. This information may change over time as industry practices and forms change.

I therefore consider that on balance it is necessary and appropriate that these matters are dealt with in delegated legislation because:

- The types of information ASIC collects may change over time, so the publishing of information by ASIC should be flexible and able to respond to these changes.
- Although ASIC collects the relevant information, I will be the rule-maker for the purposes of making regulations which would allow personal information to be published. This would ensure that there is an appropriate Government-led policy process before any regulations are made.
- Regulations are legislative instruments, which are subject to disallowance and Parliamentary scrutiny, so Parliament will still have the opportunity to scrutinise any requirement that personal information collected in breach reports is published.
- Before regulations can be made which would require personal information to be published, the *Legislation Act 2003* requires me to be satisfied that there has been appropriate consultation, and that a summary of that consultation is included in the explanatory statement to the instrument. This will enable effective Parliamentary scrutiny.

I also do not consider it necessary to amend the primary legislation to restrict the types of information that can be published, as that would limit the flexibility of the regime to adapt to changes in information ASIC collects, which may be necessary to publish for transparency and the public interest.

Thank you for bringing the Committee's concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

16 / 12 / 2020

Senator the Hon Anne Ruston

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

Ref: MC20-018274

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear ~~Senator Polley~~ Helen

Thank you for your request on behalf of the Senate Scrutiny of Bills Committee, dated 3 December 2020, concerning queries raised in relation to the Social Services and Other Legislation Amendment (Extension of Coronavirus Support) Bill 2020 in Scrutiny Digest 17.

The Committee has asked why it was considered necessary and appropriate for the proposed section 1262 to provide for the modification of primary legislation by instrument, in circumstances where regular parliamentary sittings have recommenced.

The instrument-making power specified in section 1262 is a much narrower power than item 40A of Schedule 11 to the *Coronavirus Economic Response Package Omnibus Act 2020* (item 40A), which is automatically repealed on 31 December 2020. Section 1262 only allows certain specified provisions of social security law to be modified, if it is appropriate to respond to future impacts of COVID-19. Item 40A provides a far wider power encompassing unspecified modifications to the social security law, in response to COVID-19 impacts. I intend to use the new power under section 1262 to continue those beneficial measures currently in place under instruments made under item 40A, by making a new disallowable legislative instrument commencing on 1 January 2021. This instrument would give effect to the temporary extensions of COVID-19 measures announced by the Prime Minister and myself on 10 November 2020.

The future impacts of COVID-19 are unpredictable and, while the Parliament has returned to a normal sitting pattern, the Government considers that it is prudent to retain a power such as section 1262 until the end of March 2021. The Parliament is not sitting in January 2021 and it is unlikely that any new primary legislation could be passed until mid-February 2021, at the earliest. Section 1262 will assist the Government to respond to any COVID-19 circumstances early in 2021. The Government accepts that the duration of this power should be strictly limited, which is why the Bill provides for the power to cease after 31 March 2021.

The Committee has also asked why it was considered necessary for proposed subsection 1262(5) to allow a determination under subsection 1262(1) to provide that a person is taken to have done a specified thing before the determination commences.

Subsection 1262(5) has been included in the Bill to ensure that there is flexibility available for a determination to be drafted in the way that is most appropriate to deliver beneficial measures.

It has been necessary for some 40A instruments to regulate events or actions that occurred before those instruments commenced, for the benefit of those affected. For example, the Social Security (Coronavirus Economic Response—2020 Measures No. 11) Determination 2020 applies from 22 June 2020 to ensure that people who cease to be payable due to employment income can continue to access certain ancillary benefits (such as concession cards). This determination deems eligible individuals to be receiving a social security payment for the period 22 June 2020 to 31 December 2020 (inclusive). As the instrument has been amended, the amendments have applied to nil rate periods that were in place on 22 June 2020 (and later) so that people who actually stopped receiving their payment can continue to be treated as 'receiving' their payment going forward, for the purposes of the social security law.

By way of further example, the Social Security (Coronavirus Economic Response—2020 Measures No. 10) Determination 2020 applies to people who arrive in Australia during the period 11 March 2020 to 31 December 2020 (inclusive). This instrument, among other things, ensures the Secretary can make determinations that treat certain Age Pension recipients and Disability Support Pension recipients as eligible for a higher rate of payment despite the recipient otherwise exceeding the standard overseas payment portability requirements for their payment. This instrument had a period of retrospective operation to benefit some people, as it was made after 11 March 2020 but applies to a person whose standard portability period ended on that date (or a later date).

Proposed subsection 1262(5) is intended to allow beneficial temporary modifications to be made to the social security law that may require a person to be deemed to have done something prior to commencement of a section 1262 determination to better adapt the temporary modification to the concepts and structure of social security law. However, the subsection is not intended to permit determinations to have any form of retrospective effect that disadvantages or imposes any liabilities as a result of a person being deemed to have done something prior to the commencement of the determination.

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

Yours sincerely

Anne Ruston

18 /12/ 2020

The Hon Nola Marino MP

Assistant Minister for Regional Development and Territories
Federal Member for Forrest

Ref: MC20-010037

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

Thank you for the email of 3 December 2020 from the Senate Standing Committee for the Scrutiny of Bills (the Committee). The Committee is seeking further advice in relation to the Territories Legislation Amendment Bill 2020 (the Bill).

The Bill will amend various Acts to improve the legal frameworks applying to the territories of Norfolk Island, Christmas Island, the Cocos (Keeling) Islands and the Jervis Bay Territory. I note that the Bill was passed by the Parliament during its recent Spring sittings and is currently waiting assent by the Governor-General. At the conclusion of the second reading debate in the House of Representatives, I tabled an addendum to the explanatory memorandum to the Bill in response to a request by the Committee in its *Scrutiny Digest 17 of 2020* (2 December 2020).

The Committee has also sought further advice as to whether an amendment could be made in the Bill to the Minister's power to exempt a small category of external territory public bodies from the operation of the *Privacy Act 1988* (the Privacy Act). In particular, the Committee suggests that an express requirement be included in the Bill for the Minister to be obliged to consult the Office of the Australian Information Commissioner before exercising this exemption power.

The Government has decided that an amendment to the Bill along these lines is not necessary. As explained in my previous correspondence to the Committee, any legislative instrument made by the Minister pursuant to new subsection 6(5A) of the Privacy Act is disallowable by a single House of Parliament acting alone, and subject to the usual parliamentary scrutiny, including by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

The Hon Nola Marino MP
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The Minister will also be obliged under the *Legislation Act 2003* to justify the making of the instrument in its explanatory statement, as well as recording any consultation undertaken. In making this assessment, the Minister would consult relevant stakeholders, including the Office of the Australian Information Commissioner. Accordingly, the proposed amendment would not have a substantive effect on the process that would be undertaken if this exemption power was to be used in the future.

However, acknowledging the views of the Committee, the Department of Infrastructure, Transport, Regional Development and Communications will continue to carefully monitor these arrangements in the future.

Thank you again for bringing the concerns of the Committee to my attention and I trust this is of assistance.

Yours sincerely

Nola Marino

17 DEC 2020

THE HON MICHAEL SUKKAR MP

Assistant Treasurer
Minister for Housing
Minister for Homelessness, Social and Community Housing

Ref: MS20-0002860

Senator the Hon Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator

I refer to the Scrutiny Digest 18 of 2020 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Treasury Laws Amendment (2020 Measures No. 6) Bill 2020 (the Bill). As the Bill has now been enacted, I provide this advice in relation to the *Treasury Laws Amendment (2020 Measures No. 6) Act 2020* (the Act).

The Committee sought my advice as to:

- the rationale for including no-invalidity clauses in subsection 56BS(2) and section 56BTA of the *Competition and Consumer Act 2010* in relation to requirements for making consumer data rules; and
- why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in subsection 355-67(1) of the *Taxation Administration Act 1953*.

Issue 1: No-invalidity clause- procedural requirements

The no –invalidity clauses for procedural requirements were included to provide certainty on the validity of the consumer data rules for the benefit of all consumer data right (CDR) participants and consumers.

The no-invalidity clauses reflect the general position set out in section 19 of the *Legislation Act 2003* that the validity or enforceability of a legislative instrument is not affected by a failure to consult. Recognising the importance of consultation given the broad rule-making power, the consumer data rules are subject to considerably stricter consultation requirements than those in the *Legislation Act 2003*. This sets significantly higher expectations in respect of the CDR than standard legislative processes.

However, the importance of thorough consultation was balanced against the need for certainty and consumer protection once the consumer data rules are made. The absence of a no-invalidity clause in relation to consumer data rules could risk their validity through challenge on the basis of, for example, the quality of consultation undertaken or adequacy of the consideration of submissions.

The lack of a no-validity clause would also create perceived and actual risk for the validity of the consumer data rules, even where all the procedural requirements have been followed. The rules create rights for consumers and explain how the privacy safeguards for consumers' data will be applied once data has been

shared under the rules. As a result it is not desirable from a consumer protection perspective for the rules to be subject to challenge on the basis of the quality of consultation undertaken.

Importantly, given that the consumer data rules are legislative instruments within the meaning of section 8 of the *Legislation Act 2003*, they will always be subject to the full Parliamentary scrutiny and disallowance processes applicable to such instruments.

Issue 2: Reverse evidential burden of proof

The Committee sought advice as to why it was proposed to use an offence specific defence in relation to the new provision being inserted into the *Taxation Administration Act 1953* that will allow officers of the Australian Taxation Office to disclose protected information to the new Commonwealth Registrar so as to assist the Registrar in the performance of the Registrar's new functions and powers.

Consistent with the Government's commitment to simplify its interactions with business to support growth, innovation and employment, the *Commonwealth Registers Act 2020* (and related Acts) facilitated a modern government registry regime that is flexible, technology neutral and governance neutral.

Item 143 of Schedule 4 of the *Treasury Laws Amendment (2020 Measures No. 6) Act 2020* supports those amendments by making a consequential amendment in section 355-67 of the *Taxation Administration Act 1953* to provide for the sharing of information by the Commissioner of Taxation to the Registrar where the disclosure relates to the performance of the Registrar's functions, or the exercise of the Registrar's powers. This amendment, which provides for a new authorised disclosure, is consistent with information previously shared under Commonwealth law by the Commissioner of Taxation to the Australian Business Register and Australian Securities and Investments Commission.

The *Taxation Administration Act 1953* prohibits the disclosure of information about the tax affairs of all taxpayers except in specified circumstances. Those exceptions are designed having appropriate regard to the principle that disclosure of taxpayer information should be permitted only if the public benefit derived from the disclosure outweighs the entity's right to privacy. It achieves this by creating offences in relation to the making of records, or the disclosing of information, about an entity's tax affairs.

The new authorised disclosure to the Registrar, like all other authorised disclosures under the *Taxation Administration Act 1953*, is an offence specific defence to the general prohibition (or offence) on disclosure. The authorised disclosures are set out as offence specific defences as the evidence needed to prove the defence is peculiarly within the knowledge of the defendant, that is, the taxation officer making the disclosure. It is only the taxation officer who knows the basis on which they made a decision to record or disclose protected taxpayer information and it would be significantly more difficult and costly for the prosecution to disprove than for the taxation officer to establish the matter.

The taxation confidentiality provisions have been developed in accordance with the relevant principles set out in the Guide to Framing Commonwealth Offences. *Treasury Laws Amendment (2020 Measures No. 6) Act 2020* does not alter the structure of the confidentiality framework or the offence provisions within it. The amendments introduced by the Act simply added a further ground for authorised disclosure which will assist the new Commonwealth Registrar to undertake their new functions in relation to the modernised and centralised Commonwealth Business Register.

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

Yours sincerely

The Hon Michael Sukkar MP