THE HON MICHAEL SUKKAR MP
Assistant Treasurer
Minister for Housing
Minister for Homelessness, Social and Community Housing

Ref: MB21-000043

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

Thank you for your correspondence of 21 April 2021 on behalf of the Senate Standing Committee for the Scrutiny of Bills regarding the Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021, the Treasury Laws Amendment (2020 Measures No. 4) Bill 2020 and the Treasury Laws Amendment (2021 Measures No. 2) Bill 2021.

Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021

The *Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021* (the *Motor Vehicles Bill*) establishes a scheme that mandates that service and repair information provided to car dealership networks and manufacturer preferred repairers be made available for independent repairers and registered training organisations to purchase at a fair market price. The Committee has requested my advice as to why the annual and other reports prepared by the scheme adviser are not required to be tabled in Parliament and if that is appropriate.

The scheme adviser's role is expected to be undertaken by an industry-led organisation. The scheme advisor's annual report is a way to provide advice about the number and type of inquiries and disputes, the appointment of mediators, resolution rates for disputes and anything else relating to the operation of the scheme or requested by the Minister. I do not consider it necessary to amend the Bill to require these documents be tabled in Parliament. The Bill requires that the annual report be published on the scheme adviser's website. Publication of the annual report on the Scheme Adviser's website will mean that members of the industry, general public and parliamentarians are able to access the report.

The scheme adviser can also provide advice to the Minister or ACCC upon request or on its own initiative. Such advice may identify potential systematic issues with the scheme or make recommendations for amendments. It is not appropriate to publish such advice ahead of consideration by the Minister or the regulator.

The Committee has also asked for my advice as to why it is considered necessary and appropriate to leave requirements relating to when a person may be considered a fit and proper person, and circumstances in which personal information may be sought or given, to delegated legislation; and whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.

The bill sets out the framework for when a person must meet a fit and proper person test (that is, only when seeking access to safety or security information) and what information can be used to determine this, and provides that the Scheme Rules will provide the detail. The bill also provides for privacy settings designed to protect independent repairers from misuse or mishandling of personal information by data providers which could cause financial or reputational harm. The only sensitive personal information that can be obtained, a repairer's criminal record, is prescribed in the bill. Only non-sensitive personal information, such as qualifications, can be prescribed in rules. It is appropriate that the detailed requirements for the fit and proper person test and access criteria be set out in the scheme rules as it will be technical in nature and may need to be updated regularly and quickly to reflect changes in technology and deal promptly with attempts to frustrate the scheme. Consultation on these detailed requirements is currently underway. The rules will be a legislative instrument and subject to disallowance by either house of the Parliament. I consider that this provides the Parliament with sufficient and appropriate oversight of the detailed rules.

Finally, the committee has asked for justification for the significant penalties that may be imposed via infringement notice. The penalties in the Bill seek to deter data providers from undertaking anti-competitive conduct that deprives independent repairers of work opportunities and reduces consumers' ability to get their vehicle serviced by a repairer of their choice.

The penalty provisions have been carefully considered and are consistent with provisions for breaches relating to anti-competitive behaviour and failure to comply with consumer protection provisions under the *Competition and Consumer Act 2010*. Infringement notices provide the ACCC with flexibility in enforcement options and enable alleged contraventions to be handled quickly so they do not undermine the scheme's operation or ability of a repairer to access scheme information.

Most infringement notices under the scheme are consistent with the *Guide to Framing Commonwealth Offences*, that is, they do not exceed 12 penalty units for a natural person or 60 penalty units for a body corporate. However, a higher infringement notice penalty amount of 120 penalty units for a natural person or 600 penalty units for a body corporate has been provided where a data provider fails to supply scheme information within the required timeframe (which, in most cases, will be immediately). The *Guide to Framing Commonwealth Offences* notes that if the amount payable under an infringement notice is too low it will be an inadequate deterrent and may simply be paid by the guilty and innocent alike as a cost of doing business and that higher penalty amounts can be applied in exceptional circumstances. As most data providers are expected to be large multinational corporations, the penalties are considered to apply in exceptional circumstances and a higher amount is therefore considered to be appropriate and necessary. Also, contraventions of this requirement may significantly undermine the effectiveness of the scheme if independent repairers are not able to access information in a timely way. For example, if repairers cannot obtain information needed to complete a typical car service on the day the vehicle is in their workshop, this substantially hampers their ability to compete with a workshop that can deliver same-day service, and would frustrate the core objectives of the scheme. This higher amount is also consistent with the *Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021*.

Treasury Laws Amendment (2020 Measures No. 4) Bill 2020

Schedule 3 to the *Treasury Laws Amendment (2020 Measures No. 4) Bill 2020* amends the *Competition and Consumer Act 2010* to increase the maximum amount of penalty units that can be included in regulations that prescribe an industry code from 300 to 600 penalty units. The Committee has requested my advice as to why it is considered necessary and appropriate to allow provisions with civil penalties of up to $500,000 for a person who is not a body corporate to be included in delegated, rather than primary, legislation.

Section 51AE(2) of the *Competition and Consumer Act 2010* allows penalties to be prescribed by regulations. This penalty provision was inserted in 2014 in order to penalise contraventions of key provisions of an industry code (which are prescribed in regulations). *Treasury Laws Amendment (2020 Measures No. 4) Bill 2020* increases the maximum penalties that can be prescribed by regulations.

The industry code provisions are aimed at regulating the conduct of corporations and businesses engaged in trade and commerce. The new maximum penalty of $500,000 for persons other than corporations would only apply to persons engaging in trade and commerce within the franchising industry, as regulated by the Franchising Code of Conduct. For corporations, the new maximum penalty is the greater of: $10 million; three times the value of the benefit gained from the contravention; or 10 per cent of the annual turnover of the corporation. These maximum penalty amounts – for both corporations and non-incorporated persons – are in line with other penalty provisions in the *Competition and Consumer Act 2010*.

These increased maximum penalties have been included following the Parliamentary Joint Committee on Corporations and Financial Services inquiry into the operation and effectiveness of the Franchising Code of Conduct. The Committee's report recommended that the quantum of penalties available for a breach of the Franchising Code be significantly increased to align with penalties under the Australian Consumer Law and ensure the penalties are a meaningful deterrent for non-compliance. Poor conduct in the franchising industry has led to serious harm to franchisees. This amendment enables regulations to prescribe penalties that will deter persons from serious and egregious breaches of the franchising code. As the Franchising Code is the key piece of legislation regulating behaviour between franchisors and franchisees, the regulations are the most appropriate place for these increased penalties to be included.

Any regulations made under the new provision will be a legislative instrument and subject to disallowance by either house of the Parliament. I consider that this provides the Parliament with sufficient and appropriate oversight of the regulation making process.

Treasury Laws Amendment (2021 Measures No. 2) Bill 2021

Schedule 1 to the *Treasury Laws Amendment (2021 Measures No. 2) Bill 2021* inserts a new requirement for non-government deductible gift recipients to be a registered charity. The transitional arrangements in Schedule 1 to the Treasury Laws Amendment (2021 Measures No. 2) Bill 2021 generally provide that affected entities have 15 months after Royal Assent to comply with the new requirements about receiving endorsement as a deductible gift recipient (DGR). Entities that need a longer period to comply with the new requirements can apply to the Commissioner of Taxation for an extended application date. If an extended application date is granted, the entity has an additional three years after the 15 month period to comply with the new requirements.

Before granting an extended application date to an entity, the Commissioner of Taxation must consider whether the prescribed criteria in relation to the application are satisfied and have regard to the prescribed matters in relation to the application. Subitem 16(7) allows the Minister to prescribe the criteria and matters for this purpose by legislative instrument.

The entities that are likely to require an extended application date are generally those with complex structures and arrangements. However, it may not be immediately clear to some of these entities whether they need an extended application date, particularly given the relatively long transitional period of 15 months and the nature of the entities (which are not-for-profit organisations). Therefore, I consider it is necessary and appropriate to leave the criteria and matters to delegated legislation, to ensure they can remain flexible and quickly respond to the needs of affected entities.

I also note the instrument setting out the prescribed matters and criteria is a legislative instrument that is subject to disallowance. Therefore, Parliament will still have the opportunity to scrutinise any criteria and matters that the Commissioner must be satisfied of and have regard to when assessing a request for an extended application date. Additionally, the *Legislation Act 2003* requires the rule-maker 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.

For the above reasons, I consider it is necessary and appropriate to provide the relevant Minister with the power to determine the relevant criteria and matters. In my view, this power is not broad as it is necessarily limited by the fact that it relates to transitional arrangements. In other words, the scope of the power is confined such that it must relate to criteria and matters that are about giving entities more time to comply with the amendments, where reasonable.

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

Yours sincerely

The Hon Michael Sukkar MP

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7230

The Hon David Littleproud MP

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

Ref: MC21-003707

01 MAY 2021

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

Via email: Scrutiny.Sen@aph.gov.au

Dear Senator

Thank you for your request on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding a query in relation to the Biosecurity Amendment (Clarifying Conditionally Non-prohibited Goods) Bill 2021 (the Bill) in Scrutiny Digest 6 of 2021.

The Committee has sought advice as to whether any persons are likely to be adversely affected by the retrospective validation of determinations purportedly made under subsection 174(1) of the *Biosecurity Act 2015* (the Act), and the extent to which their interests are likely to be affected. The Bill clarifies the validity of determinations made under subsection 174(1) of the Act that specify that certain classes of goods are conditionally non-prohibited goods and specify conditions that apply to such goods before they can be brought or imported into Australia.

The Bill does not retrospectively change the intention of the law. The Bill simply reinstates the legal rights and obligations that arise from determinations made under subsection 174(1) of the Act to the position that was always understood to be the case when the original determinations were enacted. Any persons who were not affected by determinations made under subsection 174(1) of the Act at the time that the original determinations were made will continue to remain unaffected by such determinations after the commencement of the Bill. The Bill therefore does not create any new consequences or obligations for persons who had not previously been affected by such determinations.

Any persons who had been affected by determinations made under subsection 174(1) of the Act at the time that the original determinations were made will continue to be persons who are affected by such determinations after the commencement of the Bill. The Bill therefore confirms that the determinations will continue to operate as they have always been understood to operate.

I trust this information is of assistance to the Committee.

Yours sincerely

DAVID LITTLEPROUD MP

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PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Urban Infrastructure,
Cities & the Arts

MC21-003539

Senator Helen Polley
Chair, Senate Scrutiny of Bills Committee
Suite 1.111
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Canberra ACT 2600

Dear Senator Polley

Thank you for the letter of 21 April 2021 drawing attention to the Committee's comments on the *Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021* (the Bill). I have noted the comments of the Committee in its Scrutiny Digest 6 of 2021 (the Digest) and provide the explanations to respond to the two matters raised at pages 6-8 of the Digest.

Significant matters in delegated legislation

The core objectives of the proposed reforms to the captioning requirements for subscription television (STV) licensees are maximising flexibility, simplicity and transparency, while aiming to ensure that the most popular programming attracts the most captioning.

Reform in this area is necessary for the following reasons:

- the existing rules are highly complex to administer and comply with and are opaque to viewers that rely on captions;
- consultations have been conducted in relation to the existing captioning regime and the STV industry, consumer representatives and the regulator (the Australian Communications and Media Authority) all support a more simplified and transparent framework;
- The industry has changed significantly as a result of digital disruption since the current arrangements in the *Broadcasting Services Act 1992*, which were introduced in 2012. The introduction of subscription video on demand services (such as Netflix, Stan, Amazon Prime, Disney Plus, Binge and Optus Sport) has led to significantly reduced audiences and revenue for licensed subscription TV services. It is expected that the industry will continue to rapidly evolve; and
- The size and complexity of the existing framework is arguably excessive for an industry sector in decline.

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The power to make a legislative instrument for the STV captioning scheme allows flexibility to consult on and respond in a timely and efficient way to new and emerging issues associated with, or changes affecting, subscription TV and the needs and interests of viewers who rely on captions.

Prescription of the scheme though primary legislation could not provide the same level of flexibility and may result in captioning requirements no longer remaining fit for purpose or becoming out of date as time progresses. The delegated legislation approach adopted in the Bill is consistent with good regulatory practice as it will help ensure the scheme remains proportionate to the STV industry's role and remains adaptable to the needs of captioning users.

It is noted that the scheme would be a legislative instrument for the purposes of the *Legislation Act 2003*, and therefore subject to parliamentary scrutiny and the disallowance regime of that Act.

The Bill already sets out at proposed subsection 130ZV(1) a non-exhaustive list of the matters likely to be covered by an STV captioning scheme established by Ministerial determination. The list comprises matters which are familiar elements of the current regime:

- annual captioning targets for subscription television services, including methods for working out the targets;
- applications for partial or total exemptions from annual captioning targets, including who may make such applications, the information or documents that must accompany applications and the making of decisions in relation to applications;
- reporting and record-keeping obligations of subscription television licensees; and
- the publication of information relating to the scheme, including decisions made under the scheme.

Given the objectives for the reforms (which includes flexibility), proposed subsection 130ZV(1) and the scrutiny and disallowance safeguards under the Legislation Act, at this time, I do not consider it necessary to amend the Bill to include guidance regarding the scheme.

I intend to undertake consultation to determine whether the existing annual captioning targets for different categories of content remain appropriate or should be simplified, including whether captioning targets should be subject to annual increases or paused at current levels.

I also intend to consult on the introduction of more objective grounds for exemptions, based on audience share for channels and exemptions for racing channels.

Finally, I intend to consult in relation to appropriate measures to ensure customers are able to access information about captioning levels in a more timely way.

Incorporation of external materials existing from time to time

Proposed subsection 130XV(5), which would enable the incorporation of material as in force or existing from time-to-time, is necessary in my view. It will allow the scheme to include references to certain technical and industry specific matters that may change from time to time. For example, the proposed scheme could establish an exemption which had regard to a certain level of audience share as set out in particular written industry reports or data. An example of industry standard data for television audience share data is OzTAM data which is available both online and in bespoke reports which can be commissioned and purchased. However, industry arrangements for measuring audiences may change from time to time, and it would be important that these sources remain relevant if audience share becomes a criterion for captioning exemptions.

Should such information be incorporated into the scheme, I will explore mechanisms for making this material publicly and freely available (such as posted on a website). The mechanisms for making incorporated documents publically available and publically clarifying their legal status will be an area for consultation before the scheme is made.

I trust this information is of assistance to the Committee.

Yours sincerely

Paul Fletcher

5 / 5 / 2021

THE HON BEN MORTON MP
ASSISTANT MINISTER TO THE PRIME MINISTER AND CABINET
ASSISTANT MINISTER TO THE MINISTER FOR THE PUBLIC SERVICE
ASSISTANT MINISTER FOR ELECTORAL MATTERS

Reference: MC21-045176

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

Dear Senator

I refer to correspondence of 21 March 2021 from Mr Glenn Ryall, Committee Secretary, regarding the request from the Senate Standing Committee for the Scrutiny of Bills for information on matters identified in *Scrutiny Digest 6 of 2021*, concerning the Mutual Recognition Amendment Bill 2021 (the Bill).

The Bill seeks to amend the *Mutual Recognition Act 1992* to provide for the Automatic Mutual Recognition (AMR) of occupational registrations.

The Committee has requested more detailed advice as to why it is considered necessary and appropriate to leave each of the below matters to delegated legislation which is exempt from parliamentary disallowance and effective parliamentary accountability or oversight at either the Commonwealth or state level.

The Bill facilitates the operation of the Intergovernmental Agreement on Automatic Mutual Recognition of Occupational Registration (IGA), which was signed by all jurisdictions, with the exception of the Australian Capital Territory, in December 2020.

The proposed Part 3A provides for the making of determinations or declarations that impose notification requirements or exclude certain occupational registrations from AMR.
This would allow a state or territory Minister to determine or declare by legislative instrument:

- registrations in relation to which a person who intends to carry on the activity covered by the registered occupation must notify the relevant local registration authority before the person begins to carry on the activity;
- registrations that are excluded from automatic deemed registration, if the Minister is satisfied of a significant risk; and
- registrations that are excluded temporarily from automatic deemed registration (for a period ending six months after the commencement of the Bill, which can be extended to 30 June 2022).

These legislative instruments address a key aspect of the IGA which recognises the need for appropriate safeguards to be retained to protect consumers and the health and safety of workers and the public.

By facilitating the operation of an IGA scheme, and authorising a determination or declaration to be made for the purposes of that scheme, the Bill also attracts the operation of subsection 44(1) of the *Legislation Act 2003* so as to exempt from disallowance those determinations and declarations under section 42 of the *Legislation Act 2003*. This is in keeping with current arrangements under the *Mutual Recognition Act 1992* where declarations as to equivalent occupations are similarly not subject to disallowance.

If the instruments in the proposed Part 3A were open to being disallowed under section 42 of the Legislation Act, an essential aspect of the IGA, namely the retention of appropriate safeguards to be determined by jurisdictions, would be called into doubt and this in turn could undermine the effective operation of the scheme more generally.

The implementation of AMR, including exemptions of occupational registrations, will be evaluated as part of an independent review agreed by States and Territories and outlined in the IGA.

I trust this addresses the Committee's comments and thank you for writing on this matter.

Yours sincerely

BEN MORTON

/ / 2021

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield
Minister for Communications,
Urban Infrastructure,
Cities & the Arts

MS21-000320

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Chair

Thank you for the letter from the secretary of the Senate Scrutiny of Bills Committee of 21 April 2021 requesting further information in relation to the Online Safety Bill 2021 (the Bill) and that an addendum to the explanatory memorandum to the Bill be tabled in the Parliament.

I have noted the comments of the committee in its *Scrutiny Digest 6 of 2021* (the Digest) and I provide the attached addendum to the explanatory memorandum of the Bill that responds to 10 of the matters raised at pages 55 to 80.

I have given careful consideration to your request for further information in relation to delegated legislation in the Bill, and your request that the Bill be amended to provide guidance to the Commissioner in relation to a determination under the Bill. Having weighed up these issues, and balanced them up against the importance of the eSafety Commissioner being as effective as possible in protecting Australians against online harms, I have concluded that in my judgement the better course is not to amend the Bill.

I trust this information will be of assistance to the committee in its deliberations.

Yours sincerely

Paul Fletcher

4 / 5 / 2021

Enc.

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2019-2020-2021

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

ONLINE SAFETY BILL 2021

ADDENDUM TO THE EXPLANATORY MEMORANDUM

(Circulated by the authority of the

Minister for Communications, Urban Infrastructure, Cities and the Arts,

The Hon Paul Fletcher MP)

ONLINE SAFETY BILL 2021

This addendum responds to concerns raised by the Senate Standing Committee for the Scrutiny of Bills in its *Scrutiny Digest 6 of 2021* dated 21 April 2021 and the Parliamentary Joint Committee on Human Rights Report 5 of 2021, dated 29 April 2021.

NOTES ON CLAUSES

1. **Clause 183 – Annual report**

After the paragraph commencing **'Clause 183 – Annual report'** on page 150 add the following text:

The Commissioner is provided with a discretion as to the manner of investigating complaints. It is intended that this will support the development of intelligence gathering technologies and assist in administering the complaints scheme effectively. The Commissioner is expected to apply sound investigatory principles including procedural fairness in the conduct of investigations.

2. **Clause 220 – Review of decisions**

At the end of the section titled **'Clause 220 – Review of decisions'** on page 165 add the following text:

Decisions for not proceeding with an investigation fall into the category of preliminary or procedural decisions and are not suitable for review.

3. **Clause 160 – Commissioner may obtain advice from the Classification Board'**

At **'Clause 160 – Commissioner may obtain advice from the Classification Board'** and following the paragraph commencing **'the Classification Board may give the advice requested by the Commissioner'** on page 143 add the following text:

The Commissioner is to assess and act on content under the Online Content Scheme in a way that is intended to streamline the process for removing illegal or harmful content from the internet, and to reduce administrative costs associated with applications to the Classification Board. The nature of the material to be dealt with under the Bill differs to the material dealt with by the Classification Board, as it tends to be user generated rather than professionally produced, and necessitates a rapid response.

4. **Clause 235 – Liability of Australian hosting service providers and internet service providers under State and Territory laws etc.**

After the paragraph commencing **'Clause 235(1)'** on page 171 add the following text:

Clause 235 is intended to respond to a situation where a state or territory law has a direct or indirect effect of regulating service providers in a way that is inconsistent with the principle that these types of service providers are not generally aware of the content on their services and do not monitor the content on their services.

Clause 235 is intended to work in conjunction with clause 234 to give effect to the principle that the Commonwealth will provide a nationally consistent framework for the activities of hosting service providers and internet service providers, without encroaching on the power of the States in areas of defamation or criminal law.

5. Clause 95 – Blocking requests

After the paragraph commencing **'Subclause 95(3)'** on page 117 add the following text:

It is expected that the Commissioner would act impartially, and in a way that can be objectively assessed as not having prejudged a decision when exercising powers under clause 95.

6. **Clause 209 – Disclosure to Secretary, or APS employees , for advising the Minister**

After the paragraph commencing **'Clause 209'** on page 160 add the following text:

Disclosure under these provisions is a necessary aspect of the constitutional principle of responsible government and all parties are bound by the *Privacy Act 1988*.

7. **Clause 211 - Disclosure to Royal Commission**
   Clause 212 - Disclosure to certain authorities
   Clause 213 - Disclosure to teachers or school principals
   Clause 214 - Disclosure to parents or guardians

After the paragraph commencing **'This means that if the written conditions are in relation to a particular disclosure'** in **'Clause 211'** on page 162, **'Clause 212'** on page 163, **'Clause 213'** on page 164, **'Clause 214'** on page 164 add the following text:

The flexibility to impose conditions on the release of information under this clause is a necessity to deal with the variety of complaints received by the Commissioner. It is impractical to list the conditions for every circumstance.

8. Clause 188 – Minister may give directions to the Commissioner

After the paragraph commencing **'Subclause 188(2)** on page 153 add the following text:

The Commissioner cannot be directed to make a specific regulatory decision.

9. Clause 27 – Functions of the Commissioner

After the paragraph commencing **'Subclauses 27(2) to (4) relate to grants of financial assistance'** on page 81 add the text:

The Commissioner is to administer programs in accordance with the Commonwealth Government's grants guidelines. The Parliament is provided with the opportunity to scrutinise expenditure, including funding to the Commissioner for grants, and the administration of programs in accordance to the Commonwealth Government's grants guidelines.

10. Clause 205 – Non-compliance with the requirement to give evidence

After the paragraph commencing **'Subclause 205(1)'** on page 158 add the text:

Clause 205 relates to matters that are 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.

11. **Clause 230 - Instruments under this Act may provide for matters by reference to other instruments**

At the start of the section titled **'Clause 230 - Instruments under this Act may provide for matters by reference to other instruments'** on page 170 add the text:

The flexibility provided by clause 230 of the Bill is intended to reduce administrative burden, particularly with reference to technical or industry standards that may be updated frequently due to technological or industry changes.

12. **Clause 181 – Delegation by the Commissioner to a member of the staff of the ACMA'**

At the start of the section titled **'Clause 181 – Delegation by the Commissioner to a member of the staff of the ACMA'** on page 150 add the text:

Clause 181 allows the Commissioner to delegate functions and powers to members of staff of the ACMA. Delegation of functions and powers to appropriately qualified staff provides necessary flexibility while reducing the administrative burden on the Commissioner.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Human Rights Implications

On page 58, before the paragraph that begins **'In relation to the online content scheme**' insert the following paragraph:

A decision of the Commissioner to issue blocking notices would be subject to merits review by the Administrative Appeals Tribunal under subclause 220(13) and internal review under the internal review scheme that is required by clause 220A.

On page 58, after the paragraph that begins **'In relation to the online content scheme** 'insert the following paragraphs:

The Bill relies on the categories set out in the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act). To the extent possible, the principles and community standards that underpin the classification system also underpin the Bill. These principles include that adults should be able to read, hear, see and play what they want and children should be protected from material that may harm or disturb them. The Bill does not prohibit adults from viewing class 2 material online which includes material depicting consensual sex between adults. As described in more detail below, it limits the availability of class 2 material that would be classified 'X18+' material to sites hosted overseas and requires class 2 material provided from Australia, that would be classified 'R18+,' to be behind a system limiting access to those under 18 years of age.

Class 1 material is material that has been, or is likely to be, classified 'Refused Classification' under the Classification Act. It contains content that is very high in impact and falls outside generally-accepted community standards. It includes non-consensual sexual activity, for example descriptions or depictions of child sexual abuse or any other exploitative or offensive descriptions or depictions involving a person who is, or appears to be, a child under 18 years, promotion or provision of instruction in paedophile activity, sexual violence and bestiality. It also includes gratuitous, exploitative or offensive depictions of fetishes or practices which are offensive or abhorrent or incest fantasies or other fantasies which are offensive or abhorrent. Offline, films, computer games and publications that are classified 'Refused Classification' cannot be sold, hired, advertised or legally imported in Australia. To the extent possible, the approach taken to this type of material under the Bill is consistent with the offline approach. That is, it should not be accessible to Australian end-users and is subject to removal notices.

Class 2 material may be material that has been, or would likely be, classified 'X18+' or 'Category 2 Restricted' under the Classification Act. This content contains real depictions of actual sexual intercourse and other sexual activity between consenting adults. Any depictions of non-adult persons or adult persons who look like they are under 18 years or portrayed to be minors are not permitted. No violence, coercion or sexually assaultive language is permitted. Fetishes such as body piercing, application of substances such as candle wax, 'golden showers', bondage, spanking or fisting are also not permitted. Offline, X18+ material is restricted to adults and is only available for sale or hire in the Australian Capital Territory and some parts of the Northern Territory. Category 2 Restricted publications may not be publicly displayed and may only be displayed in premises that are restricted to adults such as adult shops. To the extent possible, the approach taken with respect to this type of material under the Bill is consistent with the approach taken offline. That is, in the offline world this type of material should not be displayed in public spaces where it can be accessed by children and online it would be subject to removal notices where available on a service provided from Australia. This approach also recognises the jurisdictional limitations in enforcing Australian community standards overseas.

Class 2 material may also be material that has been, or would likely be, classified ‘R18+’ or ‘Category 1 Restricted’ under the Classification Act. This material is considered to be unsuitable for minors and may offend some sections of the adult community. Both offline and online this type of material must be restricted to adults. This is consistent with the principles that adults should be able to read, hear, see and play what they want, minors should be protected from material likely to harm or disturb them and everyone should be protected from exposure to unsolicited material they find offensive.

The nature of the class 1 and class 2 material covered by the proposed online content scheme is such that unrestricted access it would be harmful to Australians, particularly children, and accordingly to the extent that the Bill lawfully restricts freedom of speech through these provisions, those restrictions are reasonable, proportionate and necessary to achieve the legitimate objective of protecting Australians online.

In practice, the Commissioner would consider the context or purpose for which the material was published during an investigation, including whether it is in the public interest. Under clause 42 the Commissioner may conduct any investigation as they think fit and may refuse to investigate a complaint under clause 43.

The approach taken under the Bill with respect to the removal of certain class 2 material provided from Australia is consistent with the approach taken to this type of material offline. Both online and offline systems seek to limit the provision of this type of material while recognising that adults have the right to read, see, hear and play what they want and minors should be protected from material that may harm or disturb them.

Clause 108 of the Bill allows the Commissioner to declare by written instrument that a specified access control system or a class of such system is a ‘restricted access system’ in relation to online material for the purposes of the Bill. The purpose of a restricted access system declaration is not to prevent access to age-restricted content, but to seek to ensure that access is limited to persons 18 years and over and that the methods used for limiting this access meet a minimum standard.

The Commissioner would consult with industry in the development of any restricted access system declaration made under the regime. Industry is best placed to consider the most appropriate system for restricting access to content on their services, including whether a particular system requires the provision of personal information to log in and what protections should be in place to secure that information.

The interests of service providers are protected under the scheme through the review of decisions procedures provided by clauses 220 and 220A of the Bill.

Clause 220 provides for the review, by the Administrative Appeals Tribunal (AAT), of certain decisions made by the Commissioner, and sets out who may make an application for such review.

Internal review of the Commissioner’s decisions is provided by clause 220A, under which the Commissioner must, by notifiable instrument, formulate a scheme for

internal review of decisions of a kind referred to in clause 220. These decisions include review of a decision by the Commissioner under clauses 109, 110, 114, 115, 119, 120, 124 and 128.

Under subclause 220A (2) the internal review scheme may empower the Commissioner to, on application, review such a decision and affirm, vary or revoke the decision concerned.

On page 64 under the heading '**Best interests of the child',** and after the existing paragraphs insert the following paragraphs:

The CROC also recognises the right of a child not to be subjected to unlawful attacks on their honour and reputation. By providing remedies for a child who is the target of such material, the Bill advances these rights.

Under subclause 213(1), the Commissioner may disclose information to a teacher or school principal if satisfied that the information will assist in the resolution of a complaint about cyber-bullying of a child made under clause 30 of the Bill. For example, where cyber-bullying involves a group of school students, enlisting the help of the school or schools attended by the students may be the quickest and most effective means of resolving the complaint. Subclause 213(2) allows the Commissioner to impose written conditions to be complied with in relation to information disclosed under subclause 213(1). For example, the Commissioner may impose a condition preventing secondary disclosures to third parties.

Similarly, subclause 214(1) enables the Commissioner to disclose information to a parent or guardian of an Australian child if the Commissioner is satisfied that the information will assist in the resolution of a complaint made under clause 30 of the Bill. Subclause 214(2) allows the Commissioner to impose written conditions to be complied with in relation to information disclosed under subclause 214(1). Such conditions may include a requirement preventing secondary disclosures to third parties.

Resolution of a complaint by teachers or principals, or parents or guardians, has advantages over the more formal regulatory channels available under the Bill. Disclosure under clauses 213 and 214 may help quickly resolve the cyber-bullying complaint and as such promote the rights of the child.

It would be expected that the Commissioner would consider the child's views, consistent with the child's age and maturity, in deciding whether or not to exercise the Commissioner's discretion to disclose information under clauses 213 and 214. Part 15 of the Bill provides that the Commissioner may disclose information in certain circumstances. It should be noted that Part 15 does not require disclosure.

On page 61 after the paragraph beginning '**Clause 212 of the Bill**' insert the following paragraphs:

Subclause 212(1) of the Bill provides the Commissioner may disclose information to any of a variety of authorities listed in that clause, if satisfied that the information will enable or assist the authority to perform or exercise any of its functions or powers.

Paragraph 212(1)(h) and paragraph 212(1)(i) allows the Commissioner to disclose information to an authority of a foreign country that is responsible for regulating matters or enforcing laws of that country relating to either or both the capacity of individuals to use social media services, relevant electronic services and designated internet services in a safe manner, or material that is accessible to, or delivered to, end-users of social media services, relevant electronic services and designated internet services.

Subclause 212(2) allows the Commissioner to impose written conditions to be complied with in relation to information disclosed under subclause 212(1). This provides a safeguard by which the Commissioner may limit further disclosure of the information, where it is appropriate to do so.

By authorising the disclosure of information obtained by the Commissioner, to the authorities of foreign countries for the purpose of assisting them to perform or exercise any of their functions or powers, clause 212 engages and limits the right to privacy. However, the provision is necessary to allow the authorities to protect the best interests of affected children and victims of cyber-abuse and image-based abuse.

Where information is provided to foreign law enforcement, it would be provided via Australian Federal Police and Interpol. The manner in which any information is provided would therefore be consistent with the protocol of not disclosing law enforcement information to foreign agencies in circumstances where it might lead to prosecution involving the death penalty.