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

MC21-007801

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

06 JUL 2021

scrutiny.sen@aph.gov.au

Dear Senator Polley Helen

I refer to correspondence of 17 June 2021 from Mr Glenn Ryall, Committee Secretary, regarding the Senate Scrutiny of Bills Committee's (the Committee) request for additional information on the Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (the Bill) in the Committee's *Scrutiny Digest 8 of 2021*.

Exemption from disallowance

The Committee requested that the Bill be amended to provide certainty in relation to the first standard made under proposed section 65C by either requiring the positive approval of each House of the Parliament before the first standards come into effect or by providing that the first standards do not come into effect until a disallowance period of five sitting days has expired. Alternatively, the Committee requested, at a minimum, that the Bill be amended to provide for the automatic repeal of the first standards following the review of a standard undertaken in accordance with proposed subsection 65G(2).

On 23 June 2021, I moved amendments to the Bill in the House of Representatives which provide for the automatic repeal (sunsetting) of the first national environmental standard made in relation to a particular matter (a first made standard). Unless revoked earlier, a first made standard will automatically sunset on the earlier of the following days:

(a) the day after the period of 30 months beginning on the day on which the standard commences. Under this scenario, a national environmental standard which commences on 1 January 2022 will sunset at the end of 1 July 2024.

(b) the day after the end of the period of 6 months beginning on the day after the report of the first review of a standard is published on the Department of Agriculture, Water and the Environment's website. Under this scenario, if the report is published on 30 May 2024, the standard will sunset at the end of 1 December 2024.

Incorporation of external materials existing from time to time

The Committee has requested that an addendum to the explanatory memorandum be provided containing the information I have previously provided to the Committee regarding why it is necessary and appropriate for national environmental standards to incorporate documents as in force or existing from time to time.

I am required to provide a revised explanatory memorandum to the Senate which takes account of the amendments to the Bill made by the House of Representatives. I will include this information in the revised explanatory memorandum.

Yours sincerely

SUSSAN LEY

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-001394

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Dear Senator Polley

I refer to *Scrutiny Digest 8 of 2021* from the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Financial Regulator Assessment Bill 2021 (the Bill) and Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021.

The Committee has sought my advice as to:

- the reason why certain reports provided by the Financial Regulator Assessment Authority (the Authority) are not required to be tabled in the Parliament;
- why the period for reports to be tabled in each House of the Parliament is 20 sitting days;
- why the Bill abrogates legal professional privilege in certain circumstances;
- the reasons that specified matters are included as offence-specific defences, and whether the defences could instead be included as elements of the offence;
- why the Bill confers immunity from liability on members and staff members of the Authority, and on consultants and contractors, and members and staff members of cooperating agencies;
- why the Bill allows for the delegation of certain powers to Executive Level 2 staff, rather than only to members Senior Executive Service or nominated office-holders; and
- the reasons why certain matters in the Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021 are included as offence-specific defences.

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Tabling of documents in Parliament

Background

Clause 12 of the Bill sets out the Authority's functions, which include assessing and reporting on the effectiveness and capability of both the Australian Prudential Regulatory Authority (APRA) and the Australian Securities and Investments Commission (ASIC). The Authority must provide each of these reports to the Minister biennially (clause 13).

Clause 17 of the Bill provides that the Minister must cause a copy of a biennial report to be tabled in each House of the Parliament within 20 sitting days of receiving the report.

Clause 12 also allows the Authority to make a report to the Minister on any matter relating to APRA or ASIC's effectiveness or capability where they are requested to do so by the Minister. There is no requirement for these ad hoc reports to be tabled in the Parliament.

Ad hoc reports

The power for the Minister to request ad hoc reports from the Authority is a broad one, and allows the Minister to request a report on any matter relating to the effectiveness or capability of APRA or ASIC. Such a report may relate to sensitive matters concerning the operation of APRA or ASIC.

I do not consider it necessary to amend the Bill to require ad hoc reports to be tabled. These reports may identify potential systematic issues with APRA or ASIC identified by the Authority, or make recommendations to Government about APRA or ASIC. While the Minister may choose to table an ad hoc report, it is not appropriate for this to be compulsory.

I note that biennial reports provided by the Authority will always be required to be tabled. These reports are expected to provide a comprehensive review of the function of each regulator, and will provide opportunity for public debate about how APRA and ASIC are undertaking their respective roles.

Biennial reports

The Bill requires that biennial reports must be tabled in each House of the Parliament within 20 sitting days, rather than 15 sitting days. Tabling within 20 sitting days was recommended by Commissioner Hayne in the Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.

Legal professional privilege

Clause 20 of the Bill requires APRA and ASIC, as well as their members and staff, to cooperate with the Authority, including by providing the Authority with information or documents. Clause 21(1) provides that the information or documents must be provided to the Authority regardless of whether legal professional privilege applies to the documents. Clause 21(2) confirms that the giving of information to the Authority under clause 21(1) does not affect a claim of legal professional privilege.

The provisions are necessary to ensure the ability of the Authority to conduct its core functions. Due to the nature of the work undertaken by the regulators, a large proportion of information handled by them that would be relevant to assessing their performance (particularly under their enforcement remit), may be covered by legal professional privilege. If the information or documents could not be disclosed to the Authority it would severely impede the ability of the Authority to conduct an objective assessment of the effectiveness of the regulators, as the Authority would either be unable to access many documents relevant to their assessment, or encounter great difficulty in accessing them.

Further, as the Committee has noted, the Bill also includes protections for information or documents that are covered by legal professional privilege. Such information or documents will be "protected information", and protected from disclosure by the Authority.

Reversal of the evidential burden of proof in the Bill

Clause 40 of the Bill prohibits a person who is or was an "entrusted person" from disclosing "protected information" in certain circumstances. Broadly, entrusted persons will be the staff and members of the Authority, the Secretary of the Treasury, APS employees, and consultants or others engaged to provide services to the Authority (including officers or employees of consultants or other service providers) (clause 5).

The prohibition on the unauthorised disclosure of protected information is important because of the range of sensitive information that will be provided to the Authority by APRA and ASIC. For example, this includes information that is otherwise prohibited from being disclosed by legislation, information subject to legal professional privilege, and documents that would reveal Cabinet deliberations.

The Bill also allows for the disclosure of information in a limited number of circumstances (see Subdivision B, Division 3 of Part 4 to the Bill), and it is not anticipated that a disclosure would take place outside of those circumstances. In this way, the prohibition serves as a general deterrent against the unauthorised disclosure of information.

It is appropriate to reverse the evidential burden of proof in the offence-specific defence in relation to the prohibition, because the matter 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.

Immunity from liability

Clause 47 of the Bill protects members, staff members, consultants and contractors of the Authority, and members and staff of cooperating agencies from liability in specified circumstances related to the Authority.

This protection from civil liability is required for the Authority to be able to conduct its functions. The Authority's functions involve providing reports to the Minister relating to the functioning and performance of APRA and ASIC. These functions rely on the Authority being able to provide frank advice and may involve the provision of advice that is critical of agencies in question. As a result, it is necessary that protected persons are able to perform their functions and exercise their powers without being obstructed by challenges to the performance of those functions or the exercise of those powers through civil proceedings for loss, damage or injury. The lack of a liability protection could limit the Authority's ability to undertake its functions and discourage the Authority from providing comprehensive advice to Government.

Delegation of administrative powers

As the Committee has noted, the Authority is permitted to delegate its information-gathering powers to certain of its staff members, including to an Executive Level 2 staff member.

The staff members of the Authority will be made available by the Secretary of the Treasury. It is expected that there will be a relatively small number of employees of the Authority, and that the most senior full-time staff member of the Authority will be an Executive Level 2 employee of the

Treasury. As such, the Authority must be able to delegate certain of its functions to an Executive Level 2 staff member.

I note that this delegation only applies to the information-gathering powers of the Authority. All other powers set out in the Bill that may be delegated may only be delegated to the Secretary of the Treasury or a SES employee (or acting SES employee) of the Treasury.

Reversal of the evidential burden of proof in the Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021

Section 56 of the *Australian Prudential Regulation Authority Act 1998* prohibits the disclosure of information by individuals in certain circumstances. Section 56 includes a range of defences that apply in relation to the prohibition. Item 3 of Schedule 1 to the Financial Regulator Assessment Authority (Consequential Amendments and Transitional Provisions) Bill 2021 adds additional defences that apply to APRA officials who make disclosures to the Authority (proposed section 56(6AA), and officials of the Authority (proposed section 56(6AB)).

A defendant bears an evidential burden in relation to these defences. This is appropriate as it will be peculiarly within the knowledge of the defendant how and whether the conduct was disclosed to the Authority for the performance of its functions or powers (proposed section 56(6AA)) or the circumstances of the disclosure where the person was an official of the Authority and acquired the information in the course of their duties in relation to the Authority (proposed section 56(6AB)).

I hope the information provided above is of assistance to the Committee.

Yours sincerely

THE HON JOSH FRYDENBERG MP

23/6 /2021

SENATOR THE HON RICHARD COLBECK
Minister for Senior Australians and Aged Care Services
Minister for Sport

Ref No: MC21-020042

Senator Helen Polley
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06 JUL 2021

Dear Ms Polley Helen,

Thank you for your correspondence of 24 June 2021 concerning the Major Sporting Events (Indicia and Images) Protection and Other Legislation Bill 2021 (Bill).

The *Major Sporting Events (Indicia and Images) Protection Act 2014* (Act) provides protections against ambush marketing by association for major international sporting events hosted in Australia. Typically, these protections are provided for event owners (international federations) and organisers (domestic bodies). The Bill proposes these protections for both the International Cricket Council (ICC) T20 World Cup 2022 and the FIFA Women's World Cup 2023.

To support the delivery of the FIFA Women's World Cup 2023, FIFA has established a wholly owned entity in Australia and New Zealand (FWWC2023 PTY LTD with ACN 650 853 302). This entity was not yet established at the time the Bill was introduced. It was therefore considered necessary and appropriate to allow the definition of 'event bodies' to be amended to allow additional event bodies to be prescribed in the Rules to ensure the FIFA entity (the event organiser) would be able to use the FIFA Women's World Cup 2023 indicia and images for commercial purposes.

The passage of the Bill through Parliament in the Spring sitting is required to allow the Australian Border Force approximately 12 months' lead-time to ensure appropriate enforcement arrangements at the Australian border ahead of the ICC T20 World Cup 2022. Given the two-year lead-time to the FIFA Women's World Cup 2023, it is prudent to retain the option to prescribe additional event bodies through the Rules to accommodate any unforeseen new bodies FIFA may wish to add.

Thank you for raising this matter.

Yours sincerely

Richard Colbeck

SENATOR THE HON LINDA REYNOLDS CSC
MINISTER FOR THE NATIONAL DISABILITY INSURANCE SCHEME
MINISTER FOR GOVERNMENT SERVICES
SENATOR FOR WESTERN AUSTRALIA

MB21-000549

Senator Helen Polley
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Dear Senator Helen Polley

I refer to an email from Mr Glenn Ryall, Committee Secretary for the Senate Standing Committee for Scrutiny of Bills, on 17 June 2021, seeking further information relating to the National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021.

I am pleased to provide the following information in response to the Committee's specific questions.

Why it is considered necessary and appropriate to provide the Commissioner with a broad discretion to impose specified conditions on a banning order?

The purpose of making a banning order is to remove a provider or worker entirely from the NDIS market or to restrict their involvement in that market. Orders are made because the continued involvement of that provider or person would pose a risk to NDIS participants that cannot be averted in any other way. Making a banning order is one of the most serious compliance actions the Commissioner can take in response to conduct by a provider or worker. A banning order is only contemplated after other possible compliance responses such as education, warning letters or infringement notices are considered but found to be inappropriate in the circumstances.

The current banning order provisions empower the Commissioner to prevent or restrict a provider or person who is, was or may be employed or engaged by a provider (worker) from engaging in specified activities either permanently or for a specified period.

The current provisions are a 'blunt instrument' and do not allow the Commissioner to refine the banning order to address specific concerns in particular cases. The ability to impose conditions allows a more fine-tuned regulatory response to enhance participant safeguarding. A broad discretion to impose conditions on a banning order enables the Commissioner to be flexible and tailor banning orders to the specific circumstances of each case. It supports the Commissioner, when exercising his or her functions, to use best endeavours to conduct compliance and enforcement activities in a risk responsive and proportionate manner as required by paragraph 181D(4)(b) of the NDIS Act.

In some cases, it would be beneficial if the Commissioner could require the subject of the banning order to undertake action to remedy identified deficits in the way they have provided supports or services to people with a disability. This could be skill development or training in a particular area, such as medication management.

The Commissioner routinely reviews banning orders which are near the end of their term and can decide to extend them for a further period. Where a banning order is for a specified time, the Commissioner can consider the person's compliance with a condition (e.g. if a person was banned until such time that they had successfully completed particular training) in deciding whether to vary the banning order to extend it. Compliance with the condition could demonstrate to the Commissioner that the banning order subject has addressed the concerns which led to the order being made.

The imposition of conditions can also provide greater safeguards where a banning order restricts a person only from providing particular types of services. For example from providing direct disability support services but not from providing indirect disability support services, such as working in an administrative or clerical role which involves no direct contact with people with disability. The condition might be that the worker provides a copy of the banning order with this restriction to each prospective employer. This ensures the employer knows not to employ the person in a direct service role. Without the power to impose this condition on the banned worker, the Commission relies on the honesty of the worker to inform the new employer of the restrictions in the banning order and to comply with it themselves, although the worker screening system provides some protections in this regard.

In this context, it is important to note that the Commissioner's practice is to notify worker screening units of banning orders which may then affect the worker's NDIS worker screening check. Registered providers must only engage or employ workers who have an NDIS clearance in a risk assessed role. However an unregistered provider is not subject to this requirement and may choose to employ workers without an NDIS worker screening check. It may therefore be appropriate in some cases to impose a condition that the banned worker gives a copy of the banning order to any employer who is an NDIS provider to ensure the employer has knowledge of any restriction on their work duties.

Can the bill be amended to provide, at a minimum, that the Commissioner must consider any matters set out in the NDIS Rules when imposing a specified condition on a banning order?

The Commissioner must always be guided by paragraph 181D(4)(b) of the NDIS Act in deciding what conditions should be imposed. Paragraph 181D(4)(b) provides that the Commissioner must use best endeavours to conduct compliance and enforcement activities in a risk responsive and proportionate manner. In practice this means when determining conditions on a banning order, the Commissioner may consider matters such as the risk to participants, the nature of the conduct which led to banning order being made, previous work, conduct history of the banned person, expressions or actions of remorse/ commitment to rehabilitation/ co-operation of the banned person, support for the banned person from NDIS participants or their families based on past experience of service provision by that person. Further specification in NDIS Rules is considered unnecessary as it would not add to the current approach taken by the Commissioner, in line with requirements in the Act, when issuing banning orders.

Why it is considered necessary and appropriate to apply a significant civil penalty to breaches of specified conditions on banning orders?

A banning order is the most serious compliance action the Commission can take in response to conduct by a worker or provider, and is only contemplated after other possible compliance responses such as education, warning letters or infringement notices have been considered. Additionally, as outlined in the responses above, there is a wide variety of conditions that could be imposed on banning orders.

The intention is that any civil penalty applied for the breach of condition would be commensurate with the overall impact of the breach in question, with due regard to circumstances around the breach. Where a breach involves a low level risk to NDIS participants, particularly if there are extenuating circumstances, it is expected that the amount of the civil penalty imposed would be low. For more serious breaches with more significant ramifications or unacceptable risk of harm to NDIS participants, a higher civil penalty, particularly if the breach of the condition was materially akin to breaching the banning order, would be appropriate.

The application of a civil penalty is necessary as a further deterrent for a provider or worker who has a banning order in place to meet any conditions and to re-enforce that there is no tolerance for behaviour or actions that pose an unacceptable risk of harm to NDIS participants. Protecting and safeguarding NDIS participants from the risk of harm is the highest priority.

Why it is considered necessary and appropriate to allow delegated legislation to expand the permitted disclosures of information to any person or body prescribed by the rules for any purpose prescribed by the rules?

Currently if the Commission wishes to disclose personal information to a State/Territory body/authority and that disclosure is not for the purposes of the NDIS Act (or other grounds in section 67A) then the disclosure must be made under section 67E. This requires compliance with the Information Disclosure Rules including consideration of de-identification and consultation which delays the release of information to protect NDIS participants.

While the Commission appreciates the importance of these privacy protections, it is also important to be able to disclose information quickly to key public sector bodies to safeguard participants. This was a specific concern identified in the Robertson Review. Disclosures need to be made to law enforcement bodies, child protection authorities, disability commissioners or worker screening bodies so they can have relevant information to respond swiftly and exercise their own functions and powers.

The Commissioner's core functions include an information sharing function (to engage in, promote and coordinate the sharing of information to achieve the objects of the NDIS Act paragraph 181E(h)). The proposed amendment under the Bill allows the making of Rules to support this function and is therefore appropriate.

The amendment will allow flexibility in specifying bodies to which information can be disclosed under section 67A. *The NDIS (Protection and Disclosure of Information-Commissioner) Rules* 2018 are Category D Rules which require mandatory consultation with States and Territories before they are made or amended. There will therefore be consultation about the proposed prescribed bodies and purposes before the Rules are amended, with the amended Rules subject to a disallowance period before the Parliament in which further parliamentary scrutiny can occur.

As the Commission's regulatory role evolves, it is likely that the Commissioner will identify the specific bodies and purposes which are appropriate to be prescribed under this section. It is more appropriate to prescribe these bodies and purposes through the Rules rather than through amendments to the Act to allow the deletion or addition of prescribed bodies that become defunct, change their name or assume a different role in a timely way. This approach balances the need to ensure appropriate information to protect and safeguard NDIS participants is able to be shared to the right bodies at the right time, with the need for appropriate consultation and parliamentary scrutiny.

Whether the bill could be amended to include at least high-level guidance as to the types of entities information can be disclosed to and the purposes for which it can be disclosed.

It would be a matter for the Rules to prescribe the bodies and purposes following consultation with states and territories and other key stakeholders. Providing more high level guidance in the Act could create limitations on the entity type/disclosure purposes and prove counterproductive. For example, if the legislation was to limit the reason for disclosure to protecting people with disability from receiving poor quality services; the Commissioner may not be able to disclose compelling information it had uncovered relating to a parent's treatment of an NDIS participant to child protection authorities because it is not related to the receipt of services. Therefore it is better to leave such guidance to the Rules to enable the Commissioner to make adjustment to ensure relevant bodies have the information they need to protect NDIS participants. As noted above, the Rules are subject to consultation requirements and a disallowance period before the Parliament.

I trust this information clarifies the matters raised and will assist with your deliberations on the Bill.

I will consider making adjustments to the Explanatory Memorandum accompanying the Bill to address any clarification required, once you have finalised your deliberations.

Yours sincerely

Linda Reynolds

The Hon Keith Pitt MP

Minister for Resources, Water and Northern Australia

MB21-001058

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Dear Senator Polley Helen.

I refer to the Committee Secretary's letter, dated 17 June 2021, seeking information in relation to the Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 (the Bill).

In *Scrutiny Digest 8 of 2021*, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) requested my advice as to whether the Bill can be amended to provide at least high-level guidance regarding how the fees under proposed section 566ZD and proposed subsections 566ZE(1) and (3) will be calculated, including, at a minimum, a provision stating that the fees must not be such as to amount to taxation.

A response to the Scrutiny Committee's request for advice is attached.

In light of the matters set out in the response, I do not consider it necessary to amend the Bill to provide guidance regarding how fees under proposed section 566ZD and proposed subsections 566ZE(1) and (3) will be calculated.

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

Yours sincerely

Keith Pitt 24/6/2021

Encl. (1)

Attachment

Response to the Committee's question as to whether the Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 can be amended to provide guidance as to how fees under proposed section 566ZD and proposed subsections 566ZE(1) and (3) will be calculated.

Background to proposed sections 566ZD and 566ZE

The Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021 (the Bill) seeks to amend the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPGGS Act) to provide for increased Government oversight and scrutiny of entities over the life of an offshore project, from exploration to eventual decommissioning. This is to ensure that entities are suitable (including being capable, competent and well-governed) to carry out petroleum and greenhouse gas (GHG) activities and are able to discharge their duties under the OPGGS Act.

Item 1, Schedule 1 of the Bill seeks to insert a new Chapter 5A into the OPGGS Act, to provide for the regulation of changes in control of registered holders of petroleum and GHG titles (titleholders). As outlined on page 13 of the Explanatory Memorandum, changes in control typically involve transfers of shares in the company that is the titleholder. The measures in Chapter 5A complement measures in existing Chapters 4 and 5 of the OPGGS Act, which regulate transfers of and dealings in petroleum and GHG titles. In providing for increased Government oversight of changes in control of titleholders, the measures in Chapter 5A aim to ensure that a titleholder remains suitable to hold a title following a transaction involving a change of control.

New Chapter 5A proposes to make the National Offshore Petroleum Titles Administrator (NOPTA) responsible for oversight of changes in control of a titleholder. NOPTA would be responsible for approving changes in control of a titleholder, and would be able to obtain information, documents or evidence relating to a change in control, or possible change in control, in certain circumstances. The measures largely mirror those in existing Chapters 4 and 5 of the OPGGS Act, which require that transfers of and dealings in petroleum and GHG titles be approved by NOPTA, and require NOPTA to keep a Register of petroleum and GHG titles, including documentary information relating to transfers and dealings.

Proposed section 566ZD would provide for access to instruments, or copies of instruments, that are subject to inspection under new Chapter 5A. The section would require NOPTA to ensure that all such instruments are open for inspection at all convenient times on payment of a fee calculated under the regulations.

Proposed section 566ZE would facilitate proof of certain types of matters in relation to changes in control of titleholders (including possible changes in control), by enabling parties to proceedings to provide the relevant court with specified documents as evidence in relation to those matters. Proposed subsection 566ZE(1) would enable NOPTA to supply a certified true copy or extract of an instrument on payment of a fee calculated under the regulations. Proposed subsection 566ZE(3) would enable NOPTA, on payment of a fee calculated under the regulations, to supply a written certificate (evidentiary certificate) which is to be received in all courts and proceedings as prima facie evidence of specified matters.

NOPTA's cost recovery arrangements

NOPTA operates on a fully cost recovered basis, and is funded via an Annual Titles Administration (ATA) Levy and through application and other fees authorised by the OPGGS Act. The majority of the fees applicable to NOPTA's activities are set out in the *Offshore Petroleum and Greenhouse Gas Storage (Resource Management and Administration) Regulations 2011* (RMA Regulations). NOPTA's cost recovery arrangements aim to ensure that NOPTA has adequate funding for the performance of its functions.

NOPTA's cost recovery arrangements operate in accordance with the Australian Government Cost Recovery Guidelines (CR Guidelines). The CR Guidelines provide that a government entity may recover its costs through fees, levies, charges and other means, subject to the entity:

- having policy approval from the Australian Government to cost recover;
- having statutory authority to charge;
- ensuring alignment between expenses and revenue; and
- maintaining up-to-date, publicly available documentation and reporting.

Of relevance to the fees that may be imposed under proposed sections 566ZD and 566ZE, the CR Guidelines state at page 51 that amounts recovered through the payment of fees should be aligned with the expenses incurred in providing the relevant activity to an individual or a non-government organisation. As outlined below, fees that were formerly payable to NOPTA in relation to access to information and documents, the provision and certification of copies, and the issue of evidentiary certificates, have not exceeded the costs to NOPTA of performing the relevant activity.

NOPTA's cost recovery arrangements are outlined in its Cost Recovery Implementation Statement (CRIS). Among other matters, the CRIS sets out the policy and statutory authority for NOPTA to cost recover, as well as the staffing and other costs that NOPTA seeks to recover through the imposition of fees and levies. At present, NOPTA's costs are recovered through the ATA Levy and via fees payable on an application by a titleholder to undertake certain regulated activities. NOPTA's current CRIS may be accessed at www.nopta.gov.au/ documents/nopta-cris-2016-17-nov20.pdf.

NOPTA reviews its resourcing requirements on an ongoing basis, and updates its cost recovery arrangements as necessary to reflect changes to the nature and extent of its regulatory activities. NOPTA also consults with its key stakeholders on a regular basis, including to seek feedback on the quality and effectiveness of its activities and on industry expectations regarding fees and charges.

Fees payable under proposed sections 566ZD and 566ZE

As outlined at pages 43 and 45 of the Explanatory Memorandum, fees payable under proposed sections 566ZD and 566ZE will only serve to enable NOPTA—as a fully cost recovered agency—to recover the costs it will incur in relation to enabling public access to an instrument, supplying and certifying a copy or extract, or preparing and issuing an evidentiary certificate.

Proposed sections 566ZD and 566ZE substantially mirror existing provisions of the OPGGS Act relating to the administration of transfers of and dealings in petroleum and GHG titles. Proposed section 566ZD substantially mirrors current sections 515 and 564 of the OPGGS Act, which provide for inspections of the Register and of certain instruments on payment of a fee calculated under the regulations. Proposed section 566E substantially mirrors current sections 516 and 565, which enable NOPTA to provide certified copies of documents and to issue evidentiary certificates on payment of a fee calculated under the regulations.

No fee is currently prescribed in relation to section 515, 516, 564 or 565 of the OPGGS Act. However, fees were previously set out in the RMA Regulations in relation to those sections as follows:

> **11.03 Register inspection fee**
>
> (1) For subsections 515 (1) and (2) of the Act, the fee is $20.
>
> (2) For subsections 564 (1) and (2) of the Act, the fee is $19.
>
> **11.04 Document and certification fees**
>
> (1) For subsection 516 (2) of the Act, the fee is $4.00 per page.
>
> (2) For subsection 516 (4) of the Act, the fee is $50.
>
> (3) For subsection 565 (2) of the Act, the fee is $3.50 per page.
>
> (4) For subsection 565 (4) of the Act, the fee is $45.

NOPTA has advised that the fees set out above were nominal fees for administrative cost purposes. Moreover, in accordance with the CR Guidelines, fees did not amount to more than cost recovery of the time and resources needed to action a request to inspect the Register or an instrument, provide a certified document, or issue an evidentiary certificate.

The fees outlined above give an indication of fees that may be charged under proposed section 566ZD and 566ZE. NOPTA has also confirmed that, should fees be prescribed in relation to those sections, fee amounts would not exceed the costs to NOPTA of enabling access to instruments or copies of instruments, providing certified copies of instruments, or issuing evidentiary certificates. This accords with the CR Guidelines. Moreover, any fees prescribed in relation to proposed sections 566ZD and 566ZE would be reflected in updates to NOPTA's CRIS.

There is also a body of case law that would be applied in prescribing fees under the regulations. The application of this case law would limit the fees that could be charged under proposed sections 566ZD and 566ZE, and ensure that the relevant fees would not amount to a tax.

Finally, any amendments to regulations to prescribe fees payable in relation to proposed sections 566ZD and 566ZE would be subject to parliamentary scrutiny and disallowance. This would provide the opportunity for the Standing Committee for the Scrutiny of Delegated Legislation to assess whether any prescribed fees amount only to cost recovery.

The Hon Stuart Robert MP

Minister for Employment, Workforce, Skills, Small and Family Business

Reference: MC21-004063

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

Dear Chair

Thank you for your correspondence of 17 June 2021 regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021 (the Bill).

The Committee has asked for additional information on a range of issues related to the Bill, and employment services more broadly, which I have enclosed at Attachment A.

I trust this information is of assistance.

Yours sincerely

Stuart Robert

Encl.

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Attachment A: Additional Information

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

- **why it is considered necessary and appropriate that all determinations made under proposed section 40T 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.**

  Section 40T relates to exceptional circumstances in which classes of people will not be required to satisfy the employment pathway plan requirements if a determination to that effect is made. As stated in the explanatory memorandum, where there are circumstances such as bushfires or pandemics "there is a need for job seekers to receive timely information in advance as to whether they will need to meet mutual obligation requirements". This is not merely a matter of administrative flexibility – job seekers need timely information in advance so they do not expose themselves to danger, for example due to bushfires, due to uncertainty about whether they need to meet requirements.

  The usual tabling and disallowance processes are inconsistent with this, due to the potential for emergency situations to evolve rapidly and unpredictably in many areas simultaneously, as noted in the explanatory memorandum. While not all exceptional circumstances which might fall within the scope of section 40T will constitute health or safety emergencies, they may nonetheless evolve rapidly. Classes of job seekers who are affected by the exceptional circumstances need timely information in advance about their obligations so they are not exposed to unnecessary stress or anxiety in connection with whether they need to meet requirements.

  Accordingly, it is appropriate that the Bill provides that determinations under section 40T are not legislative instruments.

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

- **why it is considered necessary and appropriate to confer on the Employment Secretary a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised;**

  Schedule 2 relates to legislative authority for spending on the same sort of employment programs for which various *Financial Framework (Supplementary Powers) Regulations 1997* items currently authorise spending.

  Section 32B of the *Financial Framework (Supplementary Powers) Act 1997* means that the Commonwealth has the power to make, vary or administer an arrangement or grant for the purpose of programs specified in the FFSP Regulations. Subsection 32B(2) means that this power can be exercised on behalf of the Commonwealth by an accountable authority of a non-corporate Commonwealth entity, for example the Employment Secretary. The power to make arrangements and grants in Schedule 2 reproduces the power which already exists in section 32B.

As noted in the explanatory memorandum, all the usual processes for the establishment and oversight of such programs, such as the need to comply with the Commonwealth procurement and grants frameworks, will remain unchanged.

It is therefore necessary and appropriate for Schedule 2 to include this power.

whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which arrangements or grants can be made; and

The Department of Education, Skills and Employment (the department) ensures that relevant arrangements or grants are made consistently with the *Public Governance, Performance and Accountability Act 2013* and with value for money and other requirements in the Commonwealth procurement and grants frameworks.

The department also ensures that arrangements or grants are subject to robust conditions proportionate to the amounts and issues involved. The longstanding practice of the department in relation to jobactive and other sizable employment programs has been that employment service providers must enter deeds with the department which contain extensive terms and conditions. For example, the jobactive deed is 258 pages and also requires providers to comply with around a dozen guideline documents under the deed.

Such an amendment is therefore not necessary, and would not add to the effective administration of the arrangements or grants.

- **whether the bill can be amended to include a requirement that written agreements with the states and territories about arrangements or grants made under proposed section 1062A are:**
    - **tabled in the Parliament within 15 sitting days after being made; and**
    - **published on the internet within 30 sitting days after being made.**

The department's practice is to widely publicise employment programs for which it administers funds and this will continue, in addition to the requirement in new section 1062D to include information about the number and total amounts paid under arrangements and grants made, whether to state or territories or otherwise, in its annual report. In addition, it may be that some agreements will contain confidential or sensitive information which it would not be appropriate to publish. The current provisions of the Bill are therefore appropriate.

1.149 The committee therefore requests the minister's advice regarding:

- **why it is considered appropriate that instruments made under proposed subsection 8(8AC) and proposed subsection 40(3) are not legislative instruments; and**
- **whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.**

Subsection 8(8AC) authorises the Employment Secretary to determine, by notifiable instrument, payments and benefits from Commonwealth and State and Territory employment programs to not be considered income for social security law purposes. Subsection 40(3) authorises the Employment Secretary to determine, by notifiable

instrument, employment programs which do not give rise to employment for the purposes of certain industrial relations legislation.

The proposed instruments reflect the need to be able to rapidly vary administrative arrangements in response to changing programs - including in response to emergencies or rapid creation of new programs. This could include new programs needed rapidly in response to sudden industry downturns, or mass lay-offs. I therefore consider that the provisions of the Bill in relation to these instruments are appropriate.

The instrument under 8(8AC) will allow job seekers to keep any assistance from these programs, without needing to declare it as income to Services Australia. The instrument under subsection 40(3) will allow job seekers to participate in these programs without needing to have the participation directly entered into their Job Plan.

The Hon Keith Pitt MP

Minister for Resources, Water and Northern Australia

MS21-001611

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

Dear Chair

Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021

Thank you for your email of 18 June 2021 concerning the Senate Standing Committee for the Scrutiny of Bills questions on the Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021 (the Bill).

Please find enclosed my response to the Committee's questions on the Bill (Attachment A).

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

Yours sincerely

Keith Pitt 23 / 6 / 2021

Enc.

Attachment A

Response to Senate Standing Committee for the Scrutiny of Bills
Scrutiny Digest 8 of 2021

Water Legislation Amendment (Inspector-General of Water Compliance and Other Measures) Bill 2021

Reverse evidential burden

1.179 The committee therefore requests the minister's detailed advice 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 proposed sections 73A and 73B are peculiarly within the knowledge of the defendant; and**
- **why it is appropriate to use a defence of reasonable excuse in proposed subsections 73F(2), 73G(2), 222D(6), 238(6), 239AC(6), and 239AD(7), including why it is not possible to rely upon more specific defences.**

How the matters in proposed sections 73A and 73B are peculiarly within the knowledge of the defendant.

Proposed sections 73A and 73B create fault-based offences for taking water when not permitted under State law. Subsection 73A(8) provides that the 'first person' may rely on an exception, exemption, excuse, qualification or justification provided by the law of a State, referred to in new subsections 73A(7) provided this does not involve determining the first person's state of mind. Similarly, subsection 73B(9) provides that the 'first person' may rely on an exception, exemption, excuse, qualification or justification referred to in new subsections 73B(8) provided this does not involve determining the first person's state of mind. Where the first person wishes to rely on such an exception, exemption, excuse, qualification or justification, the first person would bear the evidential burden in relation to that matter.

The drafting of the proposed offences is unusual and complex because it draws on underlying provisions in various State and ACT laws to create the offences The structure makes clear that in establishing a potential State contravention the prosecution does not need to prove no potential State exceptions etc. apply. Instead in line with s 13.3 of the *Criminal Code,* a defendant may rely on the State exceptions etc. but has an evidential burden.

The department considers that reliance on such an exception, exemption, excuse, qualification or justification provided by a law of the State by the defendant is necessary to provide consistency between the Commonwealth offences and an offence brought under State law.

The Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and-Enforcement Powers* (September 2011) (the Guide) provides that a matter should only be included in an offence-specific defence, 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.

In accordance with the Guide, it is appropriate that the defendant bears the evidential burden of establishing that there is a reasonable possibility that a matter exists where the matter is an exception, exemption, excuse, qualification or justification. This is because it would be peculiarly within the mind of the defendant, and the defendant would be better positioned to readily adduce evidence.

To discharge the evidential burden, the defendant would need to adduce evidence that an exception, exemption, excuse, qualification or justification applied. This evidence would be readily available to the defendant as a person who is operating within the relevant state. Where the evidential burden was discharged, the prosecution would then need to disprove beyond reasonable doubt that the relevant defence is available in order to establish the offence.

For example, section 60F of the Water Management Act 2000 (NSW) provides that:

> *"It is a defence to a prosecution under this Division in relation to a Tier 1 offence if the accused person establishes:*
> *(a) that the commission of the offence was due to causes over which the person had no control, and*
> *(b) that the person took reasonable precautions and exercised due diligence to prevent the commission of the offence."*

This would be a matter that would be peculiarly within the knowledge of the defendant. This is reflected in the structuring of this matter as a defence under NSW law.

Conversely, for the prosecution to prove the substance of an exception, exemption, excuse, qualification or justification relied on by the defendant without any reliance on any evidence from the defence would impose a disproportionate burden on the prosecution. This reversal is necessary to ensure that the prosecution is not required to devote significant resources to establishing certain background facts that may be peculiarly within the knowledge of the defendant.

Why it is appropriate to use a defence of reasonable excuse in proposed subsections 73F(2), 73G(2), 222D(6), 238(6), 239AC(6), and 239AD(7), including why it is not possible to rely upon more specific defences.

Proposed sections 73F and 73G provide that a person is liable to a civil penalty if they are required by the Basin Plan to give a notification with respect to the trading of water access rights and fails to do so. Proposed subsections 73F(2) and 73G(2) provide that it is a defence if the person has a reasonable excuse.

Proposed sections 238, 239AC, and 239AD provide that a person is liable for a civil penalty if the person is required to give information by the Inspector-General and fails to do so. Proposed section 222D provide that a person is liable for a civil penalty if the person is are required to give information to the Authority and fails to do so. For the respective offences, proposed subsections 222D(6), 238(6), 239AC(6), and 239AD(7) provide a defence if the person has a reasonable excuse.

The Committee seeks explanation about why it is appropriate to use a defence of reasonable excuse in proposed subsections 73F(2), 73G(2), 222D(6), 238(6), 239AC(6), and 239AD(7) and why it is not possible to rely upon more specific defences.

The department considers that a defence of reasonable excuse for these civil penalties rather than specific defences is appropriate to ensure consistency within the broader context of the *Water Act 2007* (the Act).

The defence of reasonable excuse is contained within the Act under subsection 126(6) in relation to giving water information to the Bureau, subsection 127(4) in relation to the Director of Meteorology requiring water information and subsection 133(3) in relation to complying with notice requiring a person to rectify a requirement of National Water Information Standards.

The department further notes that the current subsection 238(5) of the Act provides a reasonable excuse defence for where the person fails to comply with a requirement that the person give specified compellable information to the Authority. To be consistent with the current section that relates to the Authority, the reasonable excuse defence has been incorporated into the proposed section 238 that relates to the Inspector-General and the proposed section 222D that relates to the Authority. To deviate from the current legislative framework that contains a reasonable excuse defence would be inconsistent within the broader context of the Act.

Significant matters in delegated legislation

1.183 In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave the conferral of functions and powers on the Inspector-General for the purpose of ensuring compliance with the Basin Plan 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.**

Why it is considered necessary and appropriate to leave the conferral of functions and powers on the Inspector-General for the purpose of ensuring compliance with the Basin Plan to delegated legislation.

Proposed subsection 22(8A) provides that the Basin Plan or prescribed by the regulations may confer functions or powers on the Inspector-General for the purpose of ensuring compliance with provisions of the Basin Plan.

The department considers it appropriate that the conferral of functions and powers be in delegated legislation as this will allow the Basin Plan or regulations to be more easily amended so as to accommodate changing or uncertain situations that require adaptability of the Inspector-General's compliance powers. The scope for the conferral of power is limited to functions and powers for ensuring compliance with the Basin Plan, or otherwise relating to that matter. The Basin Plan itself is limited content to those matters set out in subsection 22(1) which further limits the functions and powers that can be conferred onto the Inspector-General.

Further, the Act sets out a detailed process for amendment of the Basin Plan, under which the Murray-Darling Basin Authority prepares amendments of the Basin Plan in consultation with the Basin States, Basin Officials Committee, Basin Community Committee and affected entities before seeking submissions from Basin States and members of the public, and comments from the Murray-

Darling Basin Ministerial Council on any proposed amendment, and then providing the amendment to the Minister for approval. Section 35 of the Act provides that the Murray Darling Basin Authority and other Commonwealth agencies must perform their functions and exercise their powers consistently with, and in a manner that gives effect to the Basin Plan. This means that irrespective of the functions and powers conferred onto the Inspector-General in relation to compliance, the Inspector-General must give effect to the Basin Plan.

Whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.

The department does not consider it necessary or appropriate to describe the scope for the types of functions that should be conferred on the Inspector-General in the Basin Plan as this could limit the function of the Inspector-General.

Proposed section 215C sets out the functions and powers of the Inspector-General. In particular, subsection 215C(1)(e) provides the compliance functions conferred on the Inspector-General in relation to Part 8, Part 10AA and Part 10AB. As the Inspector-General is already limited to the functions and powers set out in section 215C, it is not considered necessary to include further high-level guidance in the primary legislation.

In addition, proposed subsection 22(8A) limits the matters in relation to which powers and functions may be conferred on the Inspector-General by the Basin Plan. Under the proposed section, powers and functions must relate to matters mentioned in subsection 22(1) of the Act or matters prescribed by regulations for the purpose of subsection 22(8) of the Act. At present no matters are prescribed by regulations and no regulations are proposed for this purpose, so the only matters in relation to which the Basin Plan may confer functions or powers on the Inspector-General are those mentioned in subsection 22(1).

Tabling of documents in Parliament

1.187 Noting the impact on parliamentary scrutiny of not providing for reports to be tabled in Parliament, the committee requests the minister's advice as to whether the bill can be amended to provide that the minister must arrange for a copy of a report prepared under each of the provisions listed at paragraph 1.184 be tabled in each House of the Parliament.

Whether the bill can be amended to provide that the minister must arrange for a copy of a report prepared under each of the provisions listed at paragraph 1.184 be tabled in each House of the Parliament.

Audit

Proposed section 73L establishes the power of the Inspector-General to conduct audits and prepare audit reports. Subsection 73L(4) provides that after the report is finalised, the Inspector-General would be required to publish a copy of the report on the Inspector-General or Department's website.

Responses to Audits

Proposed section 73M requires an agency of the Commonwealth or State or Territory to respond to audit reports where the report included a recommendation that the agency take certain action. Subsection 73M(3) provides that the Inspector-General may publish a copy of a response provided by the agency on the Inspector-General's website or Department's website.

Guidelines

Proposed section 215V permits the Inspector-General to issue guidelines relating to the management of Basin water resources, which Commonwealth and Basin State agencies must have regard to in performing certain Basin water management obligations. Subsection 215V(4) requires the Inspector-General to publish any such guidelines) on the Inspector-General's website or the Department's website.

Annual report

Section 215Y provides for the Inspector-General's preparation of an annual report. Subsection 215Y(2) provides that the Inspector-General must give the annual report to the Minister and publish the report either on the Inspector-General's website or the Department's website as soon as practicable after the report is prepared.

Inquiry reports to the Minister

Proposed section 239AE would require the Inspector-General to report to the Minister on inquiries conducted under proposed section 239AA. Subsection 239AE(5) would provide that the Inspector-General may publish the report on the Inspector-General's or the Department's website.

Responses to inquiry reports

Proposed section 239AF would require Commonwealth, State and Territory agencies to respond to recommendations made to the agency by the Inspector-General, where the Inspector-General's inquiry report has been published online. Subsection 239AF(4) would provide that the Inspector-General may publish a copy of a response provided pursuant to new subsection 239AF(2) on either the Inspector-General's website or the Department's website.

The Committee has commented that not providing for the review of reports to be tabled in Parliament reduces the scope for parliamentary scrutiny, and that tabling provides opportunity for debate that are not available where documents are not made public or are only published online.

The department considers that it is appropriate and sufficient that reports under sections 73L, 73M, 215V, 215Y, 239AE and 239AF are required to be published on the Inspector-General or Department's website, on which they are readily accessible to the public for free. I consider that the online publication under the relevant sections provides an appropriate level of transparency and a sufficient platform for debate.

Instruments not subject to parliamentary disallowance

1.192 In light of the above, the committee requests the minister's detailed advice regarding:

- **why it is considered necessary and appropriate to specify that guidelines made under proposed section 215V are not legislative instruments; and**
- **whether the bill could be amended to provide that the guidelines are legislative instruments to ensure they are subject to appropriate parliamentary scrutiny.**

Why it is considered necessary and appropriate to specify that guidelines made under proposed section 215V are not legislative instruments.

Proposed section 215V permits the Inspector-General to issue guidelines relating to the management of Basin water resources, which Commonwealth and Basin State agencies must have regard to in performing certain water management obligations.
Guidelines issued by the Inspector-General under section 215V are not intended to be legislative in nature or impart a binding obligation onto Basin States, the Commonwealth, the Inspector-General or auditors, rather it is the intention that these guidelines act as policy guidance. The guidelines are to impart a level of consistency and uniformity between States.

Any concern that may arise out of the guidelines not being subject to parliamentary scrutiny can be mitigated by the requirement under section 215VB which provides that the Inspector-General must consult with the Basin States and have regard to any submissions made by the Basin States in connection with the consultation in preparing guidelines under proposed section 215V.

I therefore consider it appropriate and necessary in these circumstances to specify that the guidelines made under proposed section 215V are not legislative instruments.

Broad delegation of administrative powers

1.198 In light of the above, the committee requests the minister's detailed advice as to:

- **which powers and functions it is proposed to allow the Inspector-General to delegate under proposed subsection 215W(1) that will not be subject to the limitations in subsections 215W(2), (3) and (4); and**
- **why it is considered necessary and appropriate to allow the Inspector-General to delegate their functions and powers to any APS employees under proposed subsection 215W(1) and to Executive Level 2 employees under proposed subsection 215W(4), rather than restricting the delegation of these powers to members of the Senior Executive Service or to holders of nominated offices.**

Which powers and functions it is proposed to allow the Inspector-General to delegate under proposed subsection 215W(1) that will not be subject to the limitations in subsections 215W(2), (3) and (4).

The Inspector-General's powers and functions that will not be subject to the limitations in subsections 215W(2), (3) and (4) relate to administrative matters such as publication of work plans under subsection 215E(4), amendments of workplans under subsection 215G(2) and guidelines under subsection 215V(4).

Why it is considered necessary and appropriate to allow the Inspector-General to delegate their functions and powers to any APS employees under proposed subsection 215W(1) and to Executive Level 2 employees under proposed subsection 215W(4), rather than restricting the delegation of these powers to members of the Senior Executive Service or to holders of nominated offices.

Subsection 215W(4) sets out that the Inspector-General is permitted to delegate specified functions and powers to an SES employee, or an acting SES employee, or an APS employee who holds, or performs the duties of either an Executive Level 2 (EL2) or equivalent position in the Department.

The relevant functions that may be delegated under subsection 215W(2) are giving notice to the appropriate agency of a State of the intention to take action in relation to an alleged contravention

of section 73A or 73B under subsection 73E(1), disclosing information to an enforcement body under subsection 215UB(2) and disclosing information to an agency of the Commonwealth or an agency of a State under subsection 215UB(3).

I consider it necessary and appropriate to permit the Inspector-General to be able to delegate the powers and functions for the reasons below.

The powers that may be delegated to an EL2 are confined in nature and limited by subsection 215W(4). The powers that will be delegated under subsection 215W(4) relate only to matters that have the potential to rapidly change which requires flexibility and responsiveness from the Inspector-General (and the Inspector-General's delegates) without any undue delay or deferral. The organisational structure and pool of staff available to the Inspector-General will be limited so to require the delegation of these powers to SES or equivalent position in the Department would significantly impinge the effectiveness and efficacy of the Inspector-General. To allow delegation to the EL2 level would provide the administrative and operational flexibility for prompt disclosure of information and notice being provided to the appropriate State agencies.

I further note that Executive Level 2 or equivalent positions in the Department are required pursuant to sections 25 to 29 of the *Public Governance, Performance and Accountability Act 2013* ('the PGPA Act') to exercise their powers with due care and diligence, honestly, in good faith and for proper purposes. This ensures that an EL2 will perform their duties with integrity and to a high standard as would a member of the Senior Executive Service. EL2 employees are the highest level of Executive level employees in the public service and have significant training, knowledge and experience.

Significant matters in delegated legislation

1.202 In light of the above, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave matters relevant to whether a person is fit and proper to be an authorised compliance officer 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.**

Proposed section 222G provides that the Inspector-General may appoint one or more individuals to be authorised compliance officers. Proposed subsection 222G(2) provides that to be eligible for appointment, an individual must be an APS employee, an individual whose services are available under subsection 215S(2), an individual who holds an office or position with a State or State authority, or a contractor; and must have a high level of expertise in fields relevant to the performance of duties of an authorised compliance officer.

Proposed subsection 222G(4) provides that when appointing a contractor as an authorised compliance officer, the Inspector-General must be satisfied that the individual is fit and proper to be an authorised compliance officer. Proposed subsection 222G(5) provides that in deciding whether a contractor is fit and proper, the Inspector-General must have regard to matters prescribed by regulation and may have regard to any other matter the Inspector-General considers appropriate.

However, it is the view of the Department that the requirement under subsection 222G(4) that the Inspector-General be satisfied that a contractor is a fit and proper person is sufficient. The department intends that the regulations will only prescribe matters that the Inspector-General must have regard to in deciding whether a contractor is fit and proper. Further, the requirement that a person is fit and proper applies only to contractors, not to all persons who are eligible for appointment as an authorised compliance officer. This is because Commonwealth and State/ Territory employees are already subject to behaviour and conduct frameworks as part of their initial employment.

It is therefore necessary and appropriate that the other matters the Inspector-General must consider in determining if a contractor is a fit and proper person are contained in delegated legislation. In addition, allowing for such criteria to be developed under delegated legislation would allow the regulations to be amended in a timely manner, as appropriate, to ensure they can adapt to the requirements of authorised compliance officers. The regulations will be disallowable. Also, under subsection 222G(6) there is a merits review right of appeal to the Administrative Appeals Tribunal with respect to a finding that an individual is not a fit and proper person to be an authorised compliance officer.

Immunity from liability

1.206 In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to confer immunity from liability on persons and bodies giving comments under proposed section 239AG.

Why it is considered necessary and appropriate to confer immunity from liability on persons and bodies giving comments under proposed section 239AG.

Proposed section 239AG requires that the Inspector-General to give a person or body an opportunity to comment on material proposed to be included in a report that is expressly or impliedly critical of them, before the report is finalised. Subsection 239AG(3) would provide that a person or body is not liable to civil proceedings or proceedings for contravening a law of the Commonwealth in relation to giving the comments, provided the comments are given in good faith.

Without such protection for the person or body acting in good faith, there is a risk that frank and open commentary will be hindered where a report has been critical. This will substantially minimise the purpose and object of giving the person or body the opportunity to comment on material proposed to be included in reports that have been critical of them.

The protection will only be available to a person or body who acts in good faith. Where a person or body have been exercising in good faith, they should not be exposed to proceedings aimed at frustrating their efforts. The response from the person or body is not necessarily intended to be published or made public.

I therefore consider that in the context of recognition of the importance of frank conversations relating to water management, this provision 239AG(3) is necessary and appropriate to allow a person or body to respond to criticisms that will be published by the Inspector-General in a report without fear of being liable for those comments, when responding in good faith.

Incorporation of external material into the law

1.211 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate to allow for the incorporation of documents as in force or existing from time to time, noting that such an approach may mean that future changes to an incorporated document could operate to change aspects of the Murray-Darling Basin Agreement without any involvement from the Parliament.

Subsection 18C(1) allows the regulations to make amendments to Schedule 1 of the *Water Act 2007,* being the Murray-Darling Basin Agreement, with the consent of the Murray-Darling Basin Ministerial Council to those amendments. Proposed subsection 18C(2A) provides that subsection 14(2) of the *Legislation Act* 2003 does not apply to regulations made for the purposes of subsection 18C(1). This will allow regulations amending the Murray-Darling Basin Agreement (the Agreement) to incorporate by reference any external material as in force or existing from time to time.

The purpose of Agreement is to promote and co-ordinate effective planning and management for the equitable, efficient and sustainable use of the water and other natural resources of the Murray-Darling Basin. The Agreement is amended from time to time by the Murray–Darling Basin Ministerial Council to ensure that the Agreement meets the current needs.

The purpose of proposed subsection 18C(2A) is to enable amendments to the Agreement that have been agreed between the Commonwealth and the States and Territories to be incorporated into the Act as in force or existing from time to time. This will ensure that Schedule 1 of the Act, which sets out the text of the Murray-Darling Basin Agreement, accurately reflects any amendments made to the Agreement. Enabling the incorporation of documents as in force or existing from time to time will allow the Act to remain commensurate with changing aspects of the Agreement.

In accordance with the guidelines of the Committee, an explanatory statement for regulations amending the Murray-Darling Basin Agreement will include information as to where a relevant incorporated instrument or writing may be readily and freely accessed.

I therefore consider it necessary and appropriate that proposed subsection 18C(2A) exclude the operation of subsection 14(2) of the *Legislation Act 2003* with respect to regulations amending the Murray-Darling Basin Agreement.