Senator the Hon Michaelia Cash
Attorney-General
Minister for Industrial Relations
Deputy Leader of the Government in the Senate

Reference: MC21-040942

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

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

Dear Senator Polley

Thank you for your request for advice to inform the Senate Scrutiny of Bills Committee's consideration of the Court and Tribunals Legislation Amendment (2021 Measures No 1) (CATLA) Bill 2021.

I note the Committee's concern that the regulation-making power under proposed paragraph 41(5)(b), to be inserted into the *Admiralty Act 1988* will provide that the *Legislation Act 2003*, as it applies to the Admiralty Rules 1988, is subject to such further modifications or adaptations as prescribed by the regulations.

The proposed amendments to the *Admiralty Act 1988* have been introduced to apply the *Legislation Act 2003* to the Admiralty Rules 1988 so that the Admiralty Rules 1988 are dealt with in the same way as other federal rules of court, including by being registered and published. This is appropriate for reasons of transparency, accessibility and accountability.

Equivalent provisions to proposed paragraph 41(5)(b) are found in other Commonwealth legislation under which federal rules of court are made, including the *Federal Court of Australia Act 1976*, *Federal Circuit Court Act 1999*, *Family Law Act 1975* and the *Judiciary Act 1903*. That approach has consistently been considered appropriate in light of the traditional independence of the courts.

I also note that these amendments will not allow any modification to, or affect the operation of, the parliamentary scrutiny provisions in the *Legislation Act 2003* in respect of the Admiralty Rules. This is because proposed paragraph 41(5)(b) expressly limits the power to make regulations modifying the application of Part 2 of Chapter 3 of the *Legislation Act 2003* to the Admiralty Rules, thereby ensuring Parliamentary scrutiny remains in place.

To clarify this matter, I have asked that my department table an addendum to the Explanatory Memorandum for the CATLA Bill noting that proposed paragraph 41(5)(b) is not intended to allow for modifications to the application of relevant Parliamentary scrutiny provisions to the Admiralty Rules.

I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
30 / 07 / 2021

Perth
44 Outram Street, West Perth WA 6005
Ph 08 9226 2000

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7300

The Hon Alan Tudge MP

Minister for Education and Youth

Ref: MS21-000839

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Parliament House
Canberra ACT 2600

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

Dear Senator Helen

Thank you for your email of 14 July 2021 regarding the Education Services for Overseas Students (Registration Charges) Amendment Bill 2021 (the Bill). Below are responses to the questions posed by the Committee regarding the Bill.

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

- *why it is considered necessary and appropriate to give the minister broad discretionary powers to exempt providers from a charge in delegated legislation.*

Response:

It is appropriate to include the capacity to exempt providers, should it be necessary, in the instrument that defines the parameters of the charge. Having an exemption power in delegated legislation provides the flexibility necessary for the Government to be responsive to the needs of international education providers, either as a whole or for particular classes of providers, and to act quickly if needed. The COVID-19 pandemic has provided numerous examples where the Government needed to respond quickly to provide targeted financial relief to particular groups. This included, for example, the exemption or refund of the regulatory charges for international education providers from 1 January 2020 to 31 December 2021.

Any such exemption, should it be instituted, would necessarily be consistent with the legislative intent outlined in the Bill and the Government's overarching policy framework, including the Australian Government Charging Framework. The latter requires that entities that create the demand for a function should contribute to the cost of regulation through cost recovery unless the Government has decided to fund that activity. A decision to exempt one or more classes of registered providers from a charge or a component of a charge for a period of time, could not be taken lightly or without careful consideration.

- *whether the bill can be amended to include at least high-level guidance on the face of the primary legislation regarding when it will be appropriate provide for such exemptions.*

Response:

The Government does not consider it is necessary to amend the Bill to provide guidance on the application of an exemption provision. As outlined above, any exercise of such a power could only be done after careful consideration and in manner consistent with the legislative intent of the Bill and the Australian Government's overall cost recovery policy.

Thank you for the opportunity to respond to these matters. I trust the information provided is helpful.

Yours sincerely

Alan Tudge

28 / 7 / 2021

The Hon Alan Tudge MP

Minister for Education and Youth

Ref: MS21-000836

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

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

Dear Chair

Thank you for your correspondence of 14 July 2021 regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the Family Assistance Legislation Amendment (Child Care Subsidy) Bill 2021 (the Bill).

As the Committee notes, the Bill will give effect to the 2021–22 Budget measure relating to the removal of the Child Care Subsidy (CCS) annual cap and increased support for families with multiple children in care (Multi Child Subsidy, or MCS).

The Committee has requested more detailed advice on why it is necessary and appropriate to allow the Minister's rules to prescribe different numbers of weeks in relation to items 10, 11 and 13 of Schedule 2 of the Bill, which relate to paragraphs 67CC(2)(b) and 67CC(2)(d) of the *A New Tax System (Family Assistance) (Administration) Act 1999* and proposed paragraph 3B(1)(d) of the *A New Tax System (Family Assistance) Act 1999.* I have provided a further explanation of these provisions, in response to the Committee's request, below.

Items 11 and 13
Item 11 provides additional circumstances when the Secretary may make a cessation of eligibility determination. This includes where no sessions of care have been provided to the child for at least 26 consecutive weeks, or a different number of consecutive weeks as prescribed by Minister's Rules. The purpose of this amendment is to address the risk that a parent makes a claim for CCS for their eldest child aged five years or under, with no intention of that child ever using child care, in order to receive a higher rate of subsidy for any younger children.

Item 13 requires that in order for a child to receive a higher rate of subsidy, at least one session of care has to have been provided to the 'other child' (that is, an eldest child aged five years or under), in at least one week out of the past 14 weeks, or a different number of weeks as prescribed by Minister's rules. This item is intended to supplement the amendment at item 11 and provide an additional safeguard for the measure.

Including the ability to be able to change the time periods set out in item 11 and 13 is critical to ensure policy integrity is maintained. The intent of the Bill is to provide increased support to families who actively use child care for multiple children aged five years and under. Following implementation, the Department of Education, Skills and Employment and Services Australia will monitor the number of individuals who receive CCS eligibility determinations for their eldest child aged five years and under, but do not enrol or use care for this child. This will allow the Department to identify where the MCS is being paid to families who are not actively using child care for their multiple children, and respond to this through potential changes to the time periods in items 11 and 13. This is appropriate to ensure the Australian Government's investment is spent in line with policy intent.

The ability to change the time periods through Minister's rules will also allow the Government to quickly respond if it becomes evident the provisions are negatively impacting families who are genuinely accessing child care. A contemporary example of when these timeframes may require expeditious adjustment is where, because of an extended COVID-19 related lockdown, or a period of local emergency, no sessions of care have been provided to children enrolled at a service for more than 14 weeks. In such circumstances, it would be essential for the Government to be able to immediately extend the 14 week period via Minister's Rules, to ensure families and child care providers are not adversely affected.

Item 10
Item 10 amends an existing provision in *A New Tax System (Family Assistance) (Administration) Act 1999*, which allows the Secretary to make a cessation of eligibility determination if the individual has not been entitled to be paid CCS for at least 52 weeks. The item will allow the Minister to prescribe a different number of weeks in Minister's rules.

As this provision also affects CCS eligibility, it is appropriate that this period should also be amended by Minister's rules. This will enable the appropriateness of the period to be considered alongside any changes to the time periods in items 11 and 13 of Schedule 2 of the Bill. Looking at these three time periods together will ensure that the cumulative impact on families of the three provisions can be considered and that there is policy consistency around CCS eligibility determinations.

I trust this information is of assistance.

Yours sincerely

Alan Tudge

28 / 7 / 2021

SENATOR THE HON JANE HUME
MINISTER FOR SUPERANNUATION,
FINANCIAL SERVICES AND THE DIGITAL ECONOMY
MINISTER FOR WOMEN'S ECONOMIC SECURITY

Ref: MS21-001746

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

Dear Senator Helen

I refer to the Scrutiny Digest 10 of 2021 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Financial Sector Reform (Hayne Royal Commission Response - Better Advice) Bill 2021 (the Bill).

The Committee sought my advice as to the appropriateness of:

- including offence-specific defences for the unauthorised use or disclosure of information by current and former members of a Financial Services and Credit Panel (FSCP);
- providing the Minister with a broad discretion to create a Code of Ethics by legislative instrument without any guidance in the Bill as to the matters that may be in the Code of Ethics; and
- a no-invalidity clause that applies to the requirement to notify financial advisers about instruments made against them.

The Committee also noted that the strict liability offence for the publication of restricted evidence or material is subject to a maximum penalty of 120 penalty units.

Issue 1: Reversing the evidential burden of proof

The Committee sought justification for the reversal of the evidential burden of proof in proposed section 171D of the Bill.

Proposed subsection 171D(1) of the Bill provides that a current or former member of an FSCP commits an offence for the use or disclosure of information obtained in connection with the performance or exercise of the panel's functions or powers. Proposed subsection 171D(2) of the Bill specifies exceptions to this offence by setting out the circumstances in which the use or disclosure of this information is permitted.

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7320 | Facsimile: 61 2 6277 5782

Proposed section 171D of the Bill supports the establishment of the new single disciplinary body regime for financial advisers by providing that the panel may share information with:

- the Australian Securities and Investments Commission (ASIC);
- the Tax Practitioners Board (TPB);
- another FSCP;
- as required for the performance or exercise of the panel's functions or powers; and
- as required or permitted by a law of the Commonwealth, state or territory.

Proposed section 171D of the Bill has been modelled on sections 70-35 and 70-40 of the *Tax Agent Services Act 2009* (TAS Act), which provides that a current or former member of the TPB commits an offence for making a record or disclosing information obtained in the course of performing their functions, with specified exceptions.

The purpose of proposed section 171D of the Bill is to prohibit the use or disclosure of information about sensitive disciplinary matters involving financial advisers, except in specified circumstances. This is required to protect individuals and businesses from reputational and financial harm and to deter panel members from misusing their office, particularly as panel members may be drawn from the financial advice industry.

The exceptions listed in proposed subsection 171D(2) are offence-specific defences to the general offence applying to use or disclosure. The exceptions are designed having regard to the principle that the use or disclosure of information obtained in connection with the panel's functions should be permitted only in circumstances where the use or disclosure is required for effective administration of this, and other related regulatory regimes. The authorised disclosures are set out as offence-specific defences as the evidence needed to prove the defence is peculiarly within the knowledge of the defendant (that is, the person making the disclosure), who has specific knowledge of the basis on which they made the decision to use or disclose this information. It would be more significantly more difficult and costly for the prosecution to disprove this, than for the defendant to establish the matter.

In accordance with subsection 13.3(3) of the *Criminal Code Act 1995*, a defendant who wishes to rely on this exception, bears an evidential burden in relation to that matter. I consider it is appropriate to reverse the evidential burden of proof in these circumstances because this burden is limited to the codified exceptions and does not require the defendant to positively prove their innocence of the offence.

Issue 2: Minister's power to make a Code of Ethics

Proposed section 921E of the Bill provides that the Minister may, by legislative instrument, make a Code of Ethics. The Committee raised concerns that the Bill fails to provide any guidance as to the matters that may be included in the Code of Ethics.

The *Financial Planners and Advisers Code of Ethics 2019* was developed by the Financial Adviser Standards and Ethics Authority (FASEA) in consultation with financial services licensees, financial advisers, consumer representatives, industry professional associations, ASIC and Treasury. The Code of Ethics came into force on 1 January 2020.

The Bill provides for FASEA to be wound up and for the power to make a Code of Ethics to be transferred to the Minister responsible for administering the *Corporations Act 2001* on 1 January 2022. To ensure a seamless transition, proposed section 1684P of the Bill provides that the Code of Ethics, as made by FASEA, continues in force on and after 1 January 2022 until it is amended or re-made by the Minister. It is intended that any Code of Ethics made by the Minister will be informed by the existing Code of Ethics.

In accordance with the requirements for making legislative instruments under the *Legislation Act 2003*, the Minister must be satisfied that appropriate consultation has been undertaken in relation to the proposed

instrument and the instrument is required to be subject to Parliamentary scrutiny, disallowance and sunsetting requirements.

For these reasons, I do not think it is necessary to amend the Bill to provide high level guidance on the matters that would be included in the Code of Ethics.

Issue 3: No-invalidity clause for notice requirements

Proposed section 921M of the Bill provides that an FSCP must provide a copy of an instrument taking administrative action against a financial adviser to the adviser, the adviser's Australian financial services licensee and to ASIC. This notice must be accompanied by a statement of reasons setting out the panel's reason(s) for deciding to make the instrument. The notice given to the financial adviser is also required to inform the adviser of their right to request a variation or revocation of the instrument. Proposed subsection 921M(3) of the Bill provides that a failure to provide these notices does not affect the validity of the instrument.

The no-invalidity clause is intended to ensure that an administrative failure (such as technological or logistical malfunction), which prevents the timely giving of a notice to any of the required recipients, does not affect the validity of administrative action taken against a financial adviser. This is considered important to ensure the integrity of the regulatory regime and to increase certainty for financial advisers where a failure of the notice requirement may be established at some later time.

However, to ensure financial advisers are adequately protected against action being taken without their knowledge, the Bill puts in place a number of important protections.

Firstly, proposed section 921K of the Bill provides that an FSCP cannot take administrative action against a financial adviser without giving the adviser a proposed action notice. The notice is required to set out the details of the alleged contravention or relevant circumstances, the action that the panel proposes to take and the adviser's right to request a hearing or make a written submission to the panel. If the adviser requests a hearing or makes a submission, the panel must take into account the evidence given at the hearing or contained in the submission. This ensures that, in all cases, the adviser has an opportunity to participate in the disciplinary proceedings against them.

Secondly, proposed subsection 922Q(3) of the Bill provides for regulations to be made prescribing the administrative sanctions that must be listed on the publicly accessible Register of Relevant Providers (Financial Advisers Register) maintained by ASIC. This will enable financial advisers to access the Financial Advisers Register to view the details of a sanction taken against them. In the event of any uncertainty, the adviser could also request this information directly from ASIC.

In the case of sanctions affecting an adviser's right to provide financial advice (orders suspending or cancelling registration), the Bill provides that these sanctions only come into force at a time that is at, or after, a copy of the notice is given to the adviser. This ensures that the adviser does not inadvertently contravene their obligations by providing financial advice while unregistered.

Finally, I note the Committee's concern that a failure to give notice would prevent the adviser from being able to exercise their right to merits review or judicial review. It is expected that this would be addressed through the development of regulatory guidance on FSCP's functions and processes, which will be available on ASIC's website. This guidance will set out an adviser's right to apply to ASIC for a variation or revocation of the instrument, to the Administrative Appeals Tribunal for merits review or the court for judicial review.

In view of the various protections and alternative pathways available for accessing this information and the need for certainty for financial advisers, I consider the use of a no-invalidity clause is appropriate.

Issue 4: Maximum penalty for strict liability offence

Proposed section 171A of the Bill provides that a person commits an offence of strict liability if they publish evidence given before, or matters contained in documents lodged with, an FSCP in circumstances where a direction made by the FSCP restricting the publication of that evidence or those matters is in force. The penalty for this offence is 120 penalty units.

The Attorney General's Department's Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide to Framing Commonwealth Offences) recommends that strict liability offences are punishable by a maximum fine of 60 penalty units for an individual and 300 penalty units for a body corporate.

Proposed section 167 of the Bill provides that the panel may, at a hearing of an FSCP, make a written direction restricting the publication of evidence or matters contained in a document lodged with the panel. In determining whether to make a direction, the panel must have regard to the following:

- whether the evidence or matter is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence against an Australian law;
- any unfair prejudice to a person's reputation that would be likely to be caused unless the panel gives a direction restricting the publication of that evidence or those matters;
- whether it is in the public interest that the panel gives a direction restricting the publication of that evidence or those matters; and
- any other relevant matter.

The imposition of a penalty for this strict liability offence that is higher than recommended by the Guide to Framing Commonwealth Offences is considered necessary and proportionate due to the serious implications of non-compliance with this requirement.

Firstly, this penalty is required to promote compliance with the obligation and to support the integrity of FSCP hearings and decisions. This is considered especially important at the inception of the new single disciplinary body regime for financial advisers. This offence provision also complements proposed section 171D of the Bill, which makes it an offence for current or former members of the FSCP to use or disclose information, except where permitted. The penalty for the unauthorised use or disclosure of information is two years imprisonment, which reflects the seriousness of unauthorised information disclosure within this regulatory regime.

Secondly, a failure to comply with a direction restricting publication or evidence or material may result in significant personal and financial harm to financial advisers, financial services businesses and other parties involved or mentioned in proceedings, as a result of reputational damage, or through the release of confidential or incriminating information.

Finally, I also consider that this penalty is appropriate to ensure legislative consistency by imposing the same penalty as the penalty that currently applies to the publication of evidence or matters restricted by ASIC at an ASIC hearing. This is particularly relevant as the FSCP is to be located within ASIC and administered within ASIC's operational arrangements.

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

Yours sincerely

Senator the Hon Jane Hume

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

Ref No: MC21-022557

28 JUL 2021

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

Dear Senator

I refer to your correspondence of 14 July 2021 concerning the Major Sporting Events (Indicia and Images) Protection and Other Legislation Bill 2021 (Bill).

As previously indicated, to support the delivery of the FIFA Women's World Cup Australia New Zealand 2023 (FWWC), FIFA established a wholly owned entity in Australia. However, this entity was not yet established at the time the Bill was introduced. The timing of introduction was necessary to provide appropriate lead-time to operationalise protections for another event (T20 World Cup 2022). Taking on board the Committee's reiterated concern on this matter, the Bill will be amended to prescribe the FIFA entity in the primary legislation as an event body for the FWWC.

As proposed by the Committee, the Bill will also be amended to include high-level guidance as to the circumstances in which it would be appropriate to prescribe additional event bodies through the rules. This specific amendment will maintain the desired flexibility to prescribe new event bodies through the rules to accommodate unforeseen or delayed requests from event owners to add new event bodies (as experienced with the delayed establishment of the FIFA entity). Additionally, it allows the option to address an event body undergoing a formal change of name (a genuine possibility given the number of sporting events postponed as a result of the COVID-19 pandemic).

Thank you for writing on this matter.

Yours sincerely

Richard Colbeck

THE HON ALEX HAWKE MP
MINISTER FOR IMMIGRATION, CITIZENSHIP, MIGRANT SERVICES AND MULTICULTURAL AFFAIRS

Ref No: MS21-001368

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

Dear Senator

Thank you for your correspondence of 17 June 2021, requesting advice on the *Migration Amendment* (Tabling Notice of Certain Character Decisions) *Act 2021*.

The Migration Amendment (Tabling Notice of Certain Character Decisions) Bill 2021 was introduced in the House of Representatives on 12 May 2021. It was passed by the House on the same date and by the Senate on 13 May 2021. The *Migration Amendment* (Tabling Notice of Certain Character Decisions) *Act 2021* commenced on 25 May 2021, the day after it received the Royal Assent.

The *Migration Amendment* (Tabling Notice of Certain Character Decisions) *Act 2021* amended the *Migration Act 1958* to require notice of the making of certain character decisions by personally the Minister under subsection 501(3) to be laid before each House of the Parliament within 15 sitting days of that House after the day the decision was made.

In the Scrutiny Digest 8 of 2021, the Committee sought clarification on why notice of the making of certain decisions by the Minister is not required to be tabled in both Houses of the Parliament under subsection 501(4A).

A copy of the response is enclosed.

Thank you for raising this matter.

Yours sincerely

ALEX HAWKE

11 / 7 / 2021

Annex A – Response to queries raised by the Committee

STANDING COMMITTEE FOR THE SCRUTINY OF BILLS
Scrutiny Digest 8 of 2021

Migration Amendment (Tabling Notice of Certain Character Decisions) Act 2021

Minister's Response

1.113 The committee therefore requests the minister's advice regarding why notice of the making of certain decisions by the minister is not required to be tabled in both Houses of the Parliament under proposed subsection 501(4A).

Subsections 501(3) and (4) of the Act provide that the Minister, acting personally, may refuse to grant or cancel a visa if the Minister reasonably suspects that the person does not pass the character test (defined in subsection 501(6) of the Act). In exercising the power under subsection 501(3), the Minister must be satisfied that the refusal or cancellation is in the national interest.

Section 501 (4B) states that the requirement under section 501 (4A) will not apply to decisions made on the basis that the Minister reasonably suspects the person does not pass the character test under subsection 501(6) of the Act because the person:

- has a substantial criminal record (paragraph 501(6)(a)); or
- has been convicted or found guilty of sexually based offences involving a child (paragraph 501(6)(e)); or
- has been assessed by the Australian Security Intelligence Organisation (ASIO) as directly or indirectly a risk to security (paragraph 501(6)(g)).

The requirement also will not apply if the person was the subject of an adverse security assessment or a qualified security assessment under the *Australian Security Intelligence Organisation Act 1979* when the decision was made.

The Migration Amendment (Tabling Notice of Certain Character Decisions) Act 2021 thus strikes an appropriate balance between transparency before the Parliament in relation to decisions made by the Minister personally under subsection 501(3), and sensitivities in relation to national security, serious and organised crime and related matters (including the operations and capabilities of Australia's law enforcement and intelligence agencies).

The Hon Stuart Robert MP
Minister for Employment, Workforce, Skills, Small and Family Business

Reference: MS21-000881

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 14 July 2021 regarding the Senate Standing Committee for the Scrutiny of Bills' (the Committee) consideration of the Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021 (the Bill).

In relation to proposed section 40T of the *Social Security (Administration) Act 1999*, I note the Committee's comments about commencement and disallowance issues and its view that urgency is not generally a sufficient reason for instruments to be non-legislative, with 'minimal exceptions'. However, notwithstanding the Committee's points about commencement and disallowance, this case falls within the category of cases where an exception is warranted.

An example of a situation where the power in proposed section 40T may be needed is if a bushfire is spreading on a Sunday night. If the instrument is legislative, it would need to be drafted, signed and registered, with an accompanying explanatory statement. This would not physically be possible in time to provide job seekers in the bushfire affected areas the certainty they need that they would not risk their payments being affected by not complying with their requirements the next morning. This is not an uncommon scenario. During the 2019–20 bushfires, for example, there were 22 instances where requirements needed to be urgently paused for some job seekers.

The Committee also noted the role of Parliament in scrutinising 'possible encroachments on personal rights and liberties'. I can reassure the Committee that it would not be possible for an instrument under proposed section 40T to encroach on personal rights and liberties because the only purpose of such an instrument would be to exempt persons from needing to comply with mutual obligation requirements under the social security law in order to receive their social security payment.

Similarly, the power in proposed subsection 8(8AC) can only be used to specify that payments and benefits from employment programs are not to be considered income for social security law purposes, benefitting job seekers by allowing them to keep their full income support payments in addition to assistance from programs.

Queensland
Unit 1, 110 Brisbane Road, Labrador QLD 4215
Ph 07 5500 5919

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7610

I note the Committee's concerns about the power to make notifiable instruments in proposed subsection 40(3). In this instance, a notifiable instrument is preferred to a legislative instrument due to its technical nature, and because the Secretary already has the power to achieve the same effect, but with less benefit to job seekers, by requiring employment programs to be entered into a Job Plan under existing provisions, for example section 631C. The power to make a notifiable instrument means that job seekers can benefit more fully from the Points Based Activation System under the new employment services model. Under the new model, job seekers may have only a points requirement in their Job Plan, rather than specific activities.

In relation to the Committee's comment on guidance related to grants, I confirm my advice of 26 June 2021 that grants are made in accordance 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 Committee has questioned whether there should be a requirement for grants made under proposed section 1062A to be tabled in Parliament. This is met in effect by proposed section 1062D that requires that the number and amount of grants or arrangements made under proposed section 1062A be published in the department's annual report. As the Committee would be aware, annual reports are tabled in Parliament.

I trust this information is of assistance.

Yours sincerely

Stuart Robert

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

Ref: MS21-001382

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

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

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 Treasury Laws Amendment (2021 Measures No. 3) Bill 2021.

In particular, the Committee requested my advice about:

- why it is considered necessary and appropriate to leave nearly all of the elements of the proposed Family Home Guarantee to non-disallowable delegated legislation; and

- whether the bill can be amended to set out the core elements of the Family Home Guarantee on the face of the primary legislation, or to at least provide that directions given to the NHFIC regarding the scheme be subject to the usual parliamentary disallowance process.

Thank you for bringing the Committee's concerns to my attention. I trust the information in the annexure to this letter will be of assistance to the Committee in addressing these questions.

Yours sincerely

The Hon Michael Sukkar MP

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

Annexure

Issue 1: Use of delegated legislation

The Treasury Laws Amendment (2021 Measures No. 3) Bill 2021 (the Bill) amends the *National Housing Finance and Investment Corporation Act 2018* (the Act) to expand the objects of the Act. The amendment provides that an object of the Act is to establish the National Housing Finance and Investment Corporation (the NHFIC) to improve housing outcomes for Australians by assisting earlier access to the housing market by single parents with dependants. This amendment enables the Minister to issue directions to the NHFIC concerning the proposed Family Home Guarantee through the *National Housing Finance and Investment Corporation Investment Mandate Direction 2018* (the Investment Mandate).

The amendment is consistent with the current framework of the Act. The Act provides that the Minister may give the NHFIC Board directions about the performance of the NHFIC's functions, one of which is for the NHFIC to issue guarantees to improve housing outcomes. The Act further provides that the Investment Mandate may include directions about strategies and policies the NHFIC is to follow, decision-making criteria and limits on the making of guarantees by the NHFIC.

In reliance of the current framework, the Government is preparing amendments to the Investment Mandate to outline key criteria for the Family Home Guarantee – for example, eligibility criteria for borrowers, limits on the number of Family Home Guarantees issued and how the Family Home Guarantee interacts with other guarantee types administered under the Investment Mandate. I note that the approach for establishing the proposed Family Home Guarantee is consistent with the approach taken in relation to the establishment of the First Home Loan Deposit Scheme and the New Home Guarantee.

It is appropriate for the Government's expectations for the proposed Family Home Guarantee to be included in the Investment Mandate to ensure the scheme promotes consistency with the existing legislative framework already approved by the Parliament and in place under the Act.

Issue 2: Possibility of amending the Bill to set out core elements in primary legislation

Providing the core elements of the Family Home Guarantee in the Investment Mandate rather than the primary legislation allows the legislative framework to be flexible and responsive to the changing needs of lenders and eligible borrowers. Consistent with the First Home Loan Deposit Scheme and the New Home Guarantee, it allows refinements to be made, within the scope of the Minister's power under the Act, to reflect new information and changes in market conditions.

Making the Investment Mandate subject to disallowance would be inconsistent with regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003* which provide that an instrument that is a direction by a Minister to any person or body is not subject to disallowance.

For these reasons, I consider that it would not be appropriate to amend the Bill such that the core elements of the Family Home Guarantee are set out in the primary legislation or to provide that directions given to the NHFIC regarding the Family Home Guarantee are subject to a parliamentary disallowance process.

THE HON MICHAEL SUKKAR MP

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

Ref: MS21-001739

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

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

Dear Senator Helen Polley,

I refer to *Scrutiny Digest 10 of 2021* from the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Treasury Laws Amendment (2021 Measures No. 5) Bill 2021.

In particular, the Committee requested my advice about the appropriateness of having proposed subsection 496-10(2A) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) as an offence-specific defence that reverses the evidential burden of proof onto the defendant. I consider that this is appropriate for the reasons below.

Schedule 2 to the Bill makes consequential amendments necessary to integrate the new debt restructuring and simplified liquidation processes established by the corporate insolvency reforms within the special administration process for Aboriginal and Torres Strait Islander corporations. The proposed amendments to the CATSI Act ensure that arrangements already made through a restructuring plan are preserved to give creditors certainty that their rights under the plan are not affected by the commencement of a special administration.

Relevantly, the proposed new subsection 496-10(2A) ensures that a restructuring practitioner can continue to exercise their functions and powers in relation to a restructuring plan while an Aboriginal and Torres Strait Islander corporation is under special administration. It operates as an offence-specific defence to subsection 496-10(1), which makes it an offence for a person, other than the special administrator, to perform or purport to perform an exercise, function or power as an officer of an Aboriginal and Torres Strait Islander corporation while the corporation is under special administration.

Peculiarly within the knowledge of the defendant

The evidential burden of demonstrating that a person was performing or exercising their functions and powers as a restructuring practitioner in relation to a restructuring plan falls on the defendant. In other words, the defendant must point to the relevant evidence that suggests a reasonable possibility that they were exercising their powers and functions as a restructuring practitioner for a plan. Once the defendant discharges this burden, the onus is on the prosecution to disprove the matters beyond reasonable doubt.

The reversal of the evidential burden of proof is appropriate in this instance as the defendant is best placed to raise evidence of actions taken in relation to their status as a restructuring practitioner for a restructuring plan. In particular, the defendant will have the requisite knowledge as to why they had exercised certain functions or powers in their capacity as a restructuring practitioner, and therefore justify that those actions were taken to give effect to a restructuring plan. As the restructuring practitioner for a plan may do anything incidental to their functions and powers as well as anything that is necessary or convenient for the purpose of administering the plan, the reasons behind disputed actions may not always be available to the prosecution and could be easily and readily provided by the defendant. As such, whether a defendant's actions were undertaken to give effect to a restructuring plan in their capacity as a restructuring practitioner will be peculiarly within the knowledge of the defendant, and significantly more difficult and costly for the prosecution to disprove.

This approach is consistent with the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and section 13.3 of the *Criminal Code Act 1995,* both of which establish the general rule that a defendant should only bear an evidential burden of proof for an offence-specific defence.

Consistency with the current CATSI Act framework

The reversal of the evidential burden of proof in proposed subsection 496-10(2A) is appropriate as it is consistent with the existing legislative framework of the CATSI Act. In particular, it is consistent with the existing offence-specific defence in subsection 496-10(2), which provides that a person may exercise a power or function as an officer of the corporation if they first seek written approval from the special administrator. Here, the evidential burden of proof is also imposed on the defendant. The Act itself contains multiple offences wherein exceptions to the offence have also reversed the evidential burden of proof (see for example, subsections 279-1(3) – (4), 175-10(2) and 183-1(2), among others).

As stated in the Explanatory Memorandum, the purpose of Schedule 2 to the Bill is to provide a smooth integration of the corporate insolvency reforms into existing Commonwealth legislation. This is achieved by ensuring that any consequential amendments remain consistent with the existing legislative framework of each Act. Given that the existing offence in section 496-10 of the CATSI Act already contains an exception which reverses the evidential burden of proof (in relation to actions taken with the approval of the special administrator), it is appropriate to mirror this requirement when creating a second exception to that offence (in relation to actions taken by the restructuring practitioner). In contrast, not placing a reverse evidential burden in this case would depart from the current CATSI Act framework and would not align with the intention of Schedule 2 to the Bill.

Thank you for bringing the Committee's concerns to my attention. I trust this information will be of assistance to you.

Yours sincerely

The Hon Michael Sukkar MP