The Hon Greg Hunt MP
Minister for Health and Aged Care

Senator the Hon Richard Colbeck
Minister for Senior Australians and Aged Care Services
Minister for Sport

Ref No: MC21-036227

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600
scrutiny.sen@aph.gov.au

4 November 2021

Dear Chair Helen,

We refer to your correspondence of 22 October 2021 on behalf of the Senate Standing Committee for the Scrutiny of Bills concerning the Aged Care and Other Legislation (Royal Commission Response No. 2) Bill 2021 (Bill No.2).

We have responded to each of the issues raised in the Committee's Scrutiny Digest (Number 16), dated 21 October 2021, below.

Broad delegation of administrative powers – Schedule 1

Section 96–2 of the *Aged Care Act 1997* (Act) deals with delegation of the Secretary's powers and functions. Item 51 of Schedule 1 of Bill No.2 repeals and substitutes subsection 96–2(14) (except the heading) to provide that the Secretary may, in writing, delegate all or any of the Secretary's powers and functions under Part 2.3 to a person making an assessment for the purposes of section 22–4. The effect is to omit a former reference to delegation of the Secretary's powers and functions in relation to respite supplement and is consequential to repeal of provisions for respite supplement (see item 35 of Schedule 1).

We further note that Part 2.3 of the Act deals with approval of a person as a recipient of one or more of residential care, home care, and flexible care. Under section 22–4, before deciding whether to approve a person under Part 2.3, the Secretary must ensure the care needs of the person have been assessed.

The assessment, and the subsequent decision about whether a person is eligible to be approved as a recipient of care, is a highly specialised task requiring health professional expertise. Since the commencement of the Aged Care Act, this task has appropriately been performed, under delegation, by the personnel of Aged Care Assessment Teams (ACAT) within Aged Care Assessment Organisations. Delegates are health sector employees of state or territory governments. This continues an arrangement that pre-dates the Aged Care Act itself.

The delegation is currently set out in the Aged Care Act (Secretary) Delegation (No.3) 2021, which limits the subsection 96-2(14) delegation to a Medical Practitioner, Registered Nurse, Social Worker, Occupational Therapist, Physiotherapist, Other Health Professional or Psychologist employed by a listed ACAT. A copy of the delegation is **at Attachment A.**

The assessment tools and procedures that delegates rely on are developed by the Department of Health. Delegates undertake role-specific training when commencing in the role and subsequent annual refresher training.

In response to the recommendations of the final report of the Royal Commission into Aged Care Quality and Safety, the Australian Government has committed $228.2 million to establishing a single assessment workforce capable of performing, under delegation, the Secretary's current assessment powers and functions under both Part 2.3 and Part 2.4A (classification of care recipients) of the Act. To allow for maximum flexibility while current arrangements continue and future arrangements are being finalised, we do not propose to amend item 51.

Legislative instrument not subject to disallowance – Schedule 2

It is proposed that the passage of state and territory 'aged care screening laws' will provide the basis for state and territory governments to conduct 'aged care screening checks', which involve making an assessment about whether an aged care worker or governing person of an approved provider, or someone seeking to become an aged care worker or governing person, poses a risk to care recipients. Bill No.2 provides for the results of aged care screening checks to be included in the Aged Care Screening Database, which is to be maintained by the Aged Care Quality and Safety Commissioner (Commissioner).

In making a determination under new section 7A, the Minister must have the agreement of the state or territory that has passed the law being specified. It is necessary and appropriate to provide that determinations made under new section 7A not be subject to disallowance as this recognises that it is undesirable for Parliament to disallow instruments that have been made for the purpose of a multi-jurisdictional body or scheme, as disallowance would affect jurisdictions other than the Commonwealth. This is also consistent with the approach taken under the National Disability Insurance Scheme (NDIS).

Further, if a determination made under new section 7A were open to disallowance, there would be a risk of having no legislative basis in place to give effect to aged care worker screening, including providing for the results of worker screening checks conducted under a particular state or territory's legislation to be included in the Aged Care Screening Database. Among other things, if such a determination were disallowed, this would severely limit the Commissioner's ability to ensure compliance with new paragraph 63-1(1)(la) of the Act. As anticipated by new paragraph 63-1(1)(la), the Accountability Principles 2014 will be amended to include requirements relating to the screening of aged care workers and governing persons. It is intended that these requirements will include screening in accordance with any 'aged care screening laws'. Should a determination under new section 7A be disallowed, there would be no legislative basis under the Accountability Principles for requiring approved providers operating in a particular state or territory jurisdiction to ensure their aged care workers and governing persons had been screened in accordance with the applicable state or territory legislation. This could negatively impact the safety, health and well-being of care recipients.

Based on the above, it is not considered appropriate to amend Bill No.2 to allow a determination made by the Minister under new section 7A to be open to disallowance.

Significant matters in delegated legislation – Schedule 3

The Code of Conduct (Code) will be based on the NDIS Code of Conduct, with modifications to ensure it is relevant to the aged care sector. Bringing the Code into effect through subordinate legislation is consistent with the approach taken in the NDIS, whereby the NDIS Code of Conduct is specified in the National Disability Insurance Scheme (Code of Conduct) Rules 2018.

The Code is being developed in consultation with stakeholders. Stakeholder input will be sought into the content and operation of the draft Code. A consultation paper will be released in the latter part of 2021, with targeted stakeholder forums to be hosted in November 2021. There will be opportunities for aged care providers, aged care workers and consumers, as well as stakeholders from the broader care and support sector, to contribute. It is therefore expected that the final draft Code will reflect a broad consensus view of the types of matters that should be included.

Bill No.2 provides that the Aged Care Quality and Safety Commission (ACQSC) Rules 2018 (Rules) may establish a scheme for dealing with information given to the Commissioner relating to a failure by an approved provider, or an aged care worker or governing person of an approved provider, to comply with the Code. This approach is consistent with the approach taken in relation to equivalent functions and powers of the Commissioner under the ACQSC Act, including with respect to the procedural aspects of the Commissioner's complaints functions (see, for example, Part 2 of the Rules).

It is appropriate that the scheme for dealing with suspected breaches of the Code is dealt with in subordinate legislation as the arrangements will expand upon the operational detail of processes and procedures to deal with suspected breaches of the Code. While the implementation of the Code is in its initial stages, it is also appropriate to include these matters in delegated legislation to ensure there is the ability to promptly respond to unforeseen implementation issues and sector feedback and ensure there are timely responses to matters affecting the safety, health and wellbeing of care recipients.

Based on the above, it is not considered necessary to amend Bill No.2 to include high-level guidance regarding these matters, including in relation to the content of the Code, in primary legislation.

Broad discretionary power – Schedule 3
Significant penalties

The Government is seeking to align worker regulation arrangements across the care and support sectors where it is reasonable and practical to do so. The proposed provision enabling a banning order to be made subject to specified conditions aligns with the NDIS and is based on Item 32 of the *National Disability Insurance Scheme Amendment (Improving Supports For At Risk Participants) Bill 2021*. Item 32 inserts new paragraph 73ZN(3)(c) into the *National Disability Insurance Scheme Act 2013*. It does not limit nor specify in the legislation the kinds of conditions that may be included in a banning order.

The ability to impose conditions allows a more targeted regulatory response to ensure the most appropriate measures are in place to safeguard the health, safety and well-being of care recipients. The decision to subject an approved provider or aged care worker or governing person to a banning order is one of the most serious regulatory actions the Commissioner can take.

The discretion to impose conditions on a banning order will allow for a more nuanced approach and enable the Commissioner to be flexible and tailor banning orders to the specific circumstances of each case. 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 care or services to care recipients. This could be skill development or training in a particular area, such as medication management.

The imposition of conditions can also provide greater safeguards where a banning order restricts a person only from providing particular types of care, for example, from providing direct care but not from providing indirect care services, such as working in an administrative or clerical role which involves no direct contact with care recipients. The condition might be that the aged care worker provides a copy of the banning order with this restriction to each prospective employer. In these circumstances, this will provide greater certainty for care recipients and approved providers that the person subject to the banning order will not be working in a direct care role.

It is appropriate not to specify the nature of the conditions in the primary legislation to allow for flexibility and appropriate tailoring to the specific circumstances of the banning order. It is therefore not considered necessary to amend Bill No.2 to include high-level guidance regarding the conditions that may be placed on a banning order in primary legislation.

A banning order will be one of the most serious compliance actions the Commissioner can take in response to conduct by an aged care worker and will only be imposed after other possible compliance responses have been considered. The imposition of a civil penalty for breach of a banning order or condition under the banning order is intended both to act as a deterrent and safeguard the safety and well-being of care recipients. Although it is acknowledged that often a breach of a banning order is more serious than breach of a condition, there are instances in which a breach of a condition can be very serious and could justify the imposition of a significant civil penalty.

It is understood that in applying any civil penalty for a breach of a condition of a banning order, a court would impose a penalty that is commensurate with the overall impact of the breach in question, with due regard to circumstances around the breach.

The application of a civil penalty is necessary as a further deterrent for an aged care 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 care recipients. Protecting and safeguarding care recipients from the risk of harm is the highest priority.

Significant matters in delegated legislation – Schedule 3
Privacy

In order to ensure that the register of banning orders (Register) functions properly, it is considered necessary for the personal information of banned individuals to be made public. This is due to the importance of preventing banned individuals from working in the aged care sector and the potential significant consequences for public health if this does not happen. It is important to note that this would only extend to personal information that is reasonably necessary to identify the individual concerned to ensure they are not employed in roles within the aged care sector that may cause harm to care recipients. It is appropriate to retain flexibility in this regard as such a register has not been created or used previously in the aged care sector and this would allow the Register to adapt to the needs of the Commissioner over time.

This is also consistent with the approach taken in the NDIS. Having regard to the purpose of the Register in seeking to protect care recipients from the risk of harm, the information to be included in the Register will be limited to information that will meet this objective.

It is therefore not considered necessary to amend Bill No. 2 to include high-level guidance regarding what details will and will not be included on the Register in primary legislation.

Reversal of the evidential burden of proof – Schedule 8

Item 78 of Schedule 8 of Bill No.2 deals with new section 215A that sits within Part 4.14 of the *National Health Reform Act 2011* (NHR Act). Part 4.14 of the NHR Act deals with secrecy provisions relating to protected Pricing Authority information.

We note that new section 215A is consistent with existing section 213 of the NHR Act. Under section 213, a person commits an offence if that person is or has been an official of the Pricing Authority, has obtained protected Pricing Authority information in the course of their work and discloses or uses the information, except where the disclosure or use is authorised by Part 4.14 or is compliant with another law of the Commonwealth or a prescribed law of a State or Territory (subsections 213(1) and (2)).

A defendant being prosecuted for an offence under section 213 or section 213A who wishes to rely on an exception is required to demonstrate that disclosure was covered by one of the exceptions to the offence. This is because it would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions, whereas a person disclosing information should reasonably be aware of the basis for their disclosure.

We also note that the Aged Care Advisory Committee or other committees established under section 205 of the NHR Act will handle protected Pricing Authority information that is aged care information. Such aged care information may include protected information within the meaning of Division 86 of the Aged Care Act.

The relevant offence provision in the Act (s86–2) is similar to the approach proposed to be taken in new section 215A of the NHR Act, with a defendant bearing an evidential burden in relation to exceptions.

For the reasons set out the Government does not propose to further amend new section 215A of the NHR Act.

We thank the committee for its attention to these matters.

Yours sincerely

Greg Hunt

Richard Colbeck

Encl (1)

The Hon David Littleproud MP

Minister for Agriculture and Northern Australia
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MS21-009384

03 NOV 2021

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

Dear Chair

I write in response to the observations of the Senate Standing Committee for the Scrutiny of Bills (the Committee) on the Biosecurity Amendment (Enhanced Risk Management) Bill 2021 (the Bill) in the *Scrutiny Digest 16 of 2021*.

The Committee has sought additional advice on matters identified following consideration of my initial advice dated 5 October 2021 (initial advice). I provide the following additional advice on matters requested by the Committee. This advice has been prepared in consultation with officials from the Department of Health, noting that the Minister for Health and Aged Care also has responsibility for the *Biosecurity Act 2015* (the Biosecurity Act).

Human biosecurity group directions

(a) whether the bill can be amended to include at least high-level guidance in relation to proposed sections 108N (requiring body examinations) and 108P (requiring body samples for diagnosis), including guidance in relation to:

- ***what examinations or sampling procedures may be included within a human biosecurity group direction;***
- ***in what circumstances it is appropriate to require an examination or body sample;***
- ***when consent must be given and how consent is to be given; and***
- ***what medical and professional standards will, or may, apply when undertaking a procedure under proposed sections 108N or 108P.***

(b) whether it would be possible to include high-level guidance in relation to safeguards protecting an individual's right to bodily autonomy and an individual's right to provide and withdraw consent.

After carefully considering the matters raised by the Committee, I remain of the view expressed in my initial advice that it is not necessary for high-level guidance to be included as a requirement in the Bill itself. The inclusion of such guidance would duplicate existing medical and professional standards detailed in various other legislation, policies and requirements at the state, territory and Commonwealth level, with the attendant risks of obsolescence, inconsistency, or unintended legislative consequences. It would also reduce the flexibility necessary to ensure the Australian Government remains able to respond to future listed human diseases which may have different testing and diagnostic methods.

The matters suggested to be set out in high-level guidance in the primary legislation regarding consent, bodily autonomy and dignity, medical and professional standards for health professionals, and examination and sampling procedures are of a type already provided for in the Commonwealth health regulatory framework and appropriately engaged by the provisions of this Bill and existing safeguards in Chapter 2 of the Biosecurity Act. As detailed in my initial advice, this includes subsection 34(2) of the Biosecurity Act which sets out general protections requiring that Chapter 2 powers be carried out in the least intrusive and restrictive way possible; proposed section 108R which provides that a biosecurity measure set out in section 108N or 108P must be carried out in a manner consistent with appropriate medical and other relevant professional standards; and proposed section 108S which provides that there be no use of force against an individual to require the individual to comply with a biosecurity measure.

Subject to passage of the Bill, and consistent with other human biosecurity frameworks, further guidance will be provided through regulations and policies that will support implementation of the human biosecurity group direction. Any regulations made in relation to human biosecurity group directions would be subject to parliamentary oversight through the usual disallowance processes.

The development of these regulations and policies is to be led by the Department of Health in consultation with the states and territories through the Chief Human Biosecurity Officer Forum chaired by the Chief Medical Officer, and with the Department of Agriculture, Water and the Environment, and other relevant stakeholders.

(c) whether the bill can be amended such that guidance is included as to:

- ***whether an individual can be required to undergo invasive procedures, such as a procedure that involves breaking through the skin, including blood tests or biopsies;***
- ***when and how consent must be given under a group direction, particularly in relation to the circumstances in which a direction to undergo an examination under section 108N does not need to be accompanied by a requirement to give consent;***
- ***when consent is validly given, including that consent is not validly given if the person giving consent does not have capacity; and***
- ***how examinations or sampling procedures must be carried out including, at a minimum, that they be carried out in a way that respects an individual's dignity and privacy.***

(d) whether it is appropriate to include similar guidance in relation to human biosecurity control orders set out under Part 3 of Chapter 2 of the Biosecurity Act 2015.

As set out in my initial advice, the Bill already provides guidance in relation to when consent must be given and how it is to be given for examinations and obtaining body samples for the purpose of determining the presence of listed human diseases. Decisions to impose such a biosecurity measure and to determine how consent is to be given will be made by the chief human biosecurity officer or human biosecurity officer and informed by clinical knowledge and expertise.

Such decisions will also be subject to the safeguards set out in the Bill, such as in proposed subsection 108B(6), and the general protections under section 34 of the Biosecurity Act. Where a person is not capable of giving consent, section 40 of the Biosecurity Act provides an additional mechanism for an accompanying person (such as a family member or guardian) to provide consent on the person's behalf.

Proposed section 108R provides that a biosecurity measure under proposed sections 108N or 108P must be carried out in a manner consistent with appropriate medical or other relevant professional standards. Relevant medical and professional standards would require examinations or sampling procedures to be carried out in a way that protects bodily autonomy and respects the individual's dignity and privacy.

The safeguards provided by the general protections under section 34 of the Biosecurity Act also apply to human biosecurity control orders, and I do not consider it necessary to insert further guidance into the Biosecurity Act as suggested by the Committee in relation to human biosecurity control orders.

Further guidance relating to the application of human biosecurity group directions will be provided through the regulations and supporting policies, such as guidance on exploring all relevant avenues to obtain informed consent. For example, where appropriate, this may include seeking translators and/or psychological support. It is critical that flexibility is provided in the primary legislation to respond to emerging diseases and to apply new diagnostic methods, ensuring the most appropriate biosecurity measures are applied in the circumstances of each case. Any regulations made in relation to human biosecurity group directions would be subject to parliamentary oversight through the usual disallowance processes.

Over time, there will be advances in medical technology and diagnostic measures may change. In this context, it would be inappropriate for the Bill to seek to include guidance in the primary legislation as to the kinds of procedures that may be required under section 108N and the circumstances in which they will need to be undertaken. To do so would inappropriately limit the options of medical professionals in the kinds of settings in which this direction would be used, reducing the flexibility of the Biosecurity Act in response environments to deal with human biosecurity risks.

Under a human biosecurity group direction, biosecurity measures for examination or sampling would apply the relevant testing standards and available technologies of the day to meet the human biosecurity risk of an identified or suspected listed human disease. For example, in the context of COVID-19, the current kinds of testing could include nasal pharyngeal swabs, however in the future, if a suitable alternative examination could be used for diagnostic purposes that was less invasive, for example a saliva test, then the appropriate test that is no more invasive or restrictive than necessary could be required. The regulations and operational policies will provide suitably flexible guidance for these measures to be carried out with regard to an individual's circumstances.

Subject to passage of the Bill, the regulations and supporting policies will serve to provide suitable guidance and certainty for the exercise of the human biosecurity group direction mechanism without impeding the exercise of clinical discretion and application of relevant contemporary medical and professional standards.

Consistent with the underlying policy objectives of this Bill, the human biosecurity group direction would be well suited to addressing the risk of contagion of a listed human disease in the context of a large cruise ship, due to the unique disease risk profiles associated with this form of travel and the large numbers of passengers and crew on-board. For example, on a large passenger vessel with thousands of passengers, where the vessel operator submits a pre-arrival report declaring that there are travellers on-board with COVID-19 signs and symptoms, a group direction could be made to apply to a specified class of individuals, including a biosecurity measure requiring individuals in the class to undergo a COVID-19 diagnostic test, subject to consent. That specified class may be considered by the chief human biosecurity officer or human biosecurity officer as being at a high risk of contagion of COVID-19 because, for example, they were showing signs and symptoms of the virus or had been near other travellers showing such signs and symptoms.

(e) whether the bill can be amended to include requirements that:

- ***human biosecurity group directions made under proposed section 108B must be published online, and***
- ***information about human biosecurity group directions and human biosecurity control orders imposed under Part 3 of Chapter 2 of the Biosecurity Act 2015, such as the total number of directions made and the total number of orders imposed in a year and high-level details as to the nature and contents of each direction and order, must be set out in the department's annual report prepared under section 46 of the Public Governance, Performance and Accountability Act 2013.***

As detailed in my initial advice, the time-limited nature of human biosecurity group directions means that, in practice, if a direction were published, this would likely occur sometime after the direction ceased to be in effect. It is not clear what additional benefit online publishing would provide, noting these practical challenges and that the individuals affected by the direction will already be notified of the contents of the direction and how it applies.

There are protections for the use and disclosure of information collected in the exercise of functions or powers under the Biosecurity Act, including the kind of sensitive information that would be collected during the making of a group direction. While measures could be taken to provide that an individual would not be named in the published material, the group direction may still include information that could be personally identifiable or would risk the privacy of individuals subject to that direction or may indicate information about the person's health status.

The privacy concerns with publication of information about human biosecurity group directions, and the pragmatic issues with the online publication of such directions, mean that it is not suitable to insert a requirement in the Biosecurity Act to publish the information requested by the Committee. In any event, there is nothing in the Biosecurity Act that would affect the ability of an individual to voluntarily disclose their personal information to other persons or organisations, including information about a human biosecurity group direction that applies to the individual, if they wish to do so.

As noted in my initial response, publication of the nature and contents of human biosecurity group directions in the annual report of either the Department of Agriculture, Water and the Environment or the Department of Health would be inconsistent with existing provisions of the Biosecurity Act and raise privacy concerns identified above.

Further, both human biosecurity control orders and the proposed human biosecurity group direction mechanism are underpinned by sensitive personal information and, when such information is used, this could be captured by existing annual reporting requirements under section 590 of the Biosecurity Act. This provision requires the Director of Biosecurity and Director of Human Biosecurity to each prepare a report on the use by the Commonwealth of protected information to be included in the annual reports of the Department of Agriculture, Water and the Environment and the Department of Health respectively. Protected information, which is defined in section 9 of the Biosecurity Act, includes personal information that is obtained under or in accordance with the Biosecurity Act, or derived from a record of personal information or from a disclosure or use of personal information that was made under or in accordance with the Biosecurity Act. Including a further requirement for reporting would be duplicative and could lead to inconsistency.

I therefore do not consider it necessary to include a specific requirement for information about human biosecurity group directions to be published in the annual report.

Grants of financial assistance to a state or territory

I indicated in my initial advice that I would give consideration to moving an amendment to the Bill to provide a framework for setting out high-level guidance in relation to the terms and conditions on which financial assistance may be granted to a state or territory, and to include a requirement that written agreements with the states and territories be tabled in Parliament and published on the internet. I have now considered these proposals further, and the Department of Agriculture, Water and the Environment has also consulted with relevant Commonwealth agencies.

I consider the Bill provides appropriate guidance as to how the power to make arrangements and grants may be exercised. Under the Bill, the Agriculture Minister or the Health Minister (the Ministers) may, on behalf of the Commonwealth, make, vary or administer an arrangement for the making of payments by the Commonwealth, or make, vary or administer a grant of financial assistance only in relation to one or more specified activities.
The exhaustive list of particular activities the Ministers may make arrangements or grants of financial assistance in relation to is listed in proposed subsection 614B(1), and are directly referrable to identifying, preventing, preparing for and managing biosecurity risks.
Further restrictions are set out in proposed subsection 614B(2) which outlines the types of risks posed by disease and pests that are intended to be covered by the activities set out in proposed subsection 614B(1). This limitation would ensure that arrangements or grants must have a direct link to addressing the likelihood of pests or diseases emerging or spreading and the potential for harm to human, animal and plant health, the environment and the economy.

Whilst guidance as to the terms and conditions of an agreement is not provided on the face of this Bill, financial relations between the Commonwealth and states and territories are governed by the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008*. Further, the Council on Federal Financial Relations (CFFR) comprising the Commonwealth Treasurer as Chair and all state and territory treasurers, is responsible for overseeing the financial relationship between the Commonwealth and state and territory governments. I consider that this existing framework provides appropriate guidance for all grants between the Commonwealth and states and territories under the Biosecurity Act and any additional high-level guidance in the Bill in relation to the terms and conditions on which financial assistance may be granted to a state or territory would add unnecessary administration to what is already a highly regulated activity.

Similarly, the Federation Funding Agreement (FFA) framework and FFA Principles implemented by the CFFR require funding agreements between the Commonwealth and state and territory governments to be published on the CFFR website (see in particular, principle 8 on accountability and transparency). I consider this requirement provides sufficient transparency and accountability and it would be duplicative to include additional publication requirements in the Bill.

I therefore do not propose to introduce amendments to the Bill.

I thank the Committee for raising these issues for my attention.

Yours sincerely

DAVID LITTLEPROUD MP

Cc: The Hon. Greg Hunt MP
Minister for Health and Aged Care

ATTACHMENT

OFFSHORE ELECTRICITY INFRASTRCUTURE BILL 2021

Reversal of the evidential burden of proof

1.58 The committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in sub clauses 15(2), 95(4), 96(4), and 116(3), clause 149, and sub clauses 203(4) and 211(4).

1.59 The committee also requests the minister's advice as to why it is appropriate to use a defence of reasonable excuse in sub clauses 203(4) and 211(4), including why it is not possible to rely upon more specific defences.

1.58

The *Guide to Framing Commonwealth Offences* (the Guide) indicates that a change in the burden of proof can be appropriate in circumstances where the issues are 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. Having regard to the Guide, it is nevertheless my view that the reversal of the burden of proof is necessary in these circumstances for the following reasons.

Clause 15(2)

Clause 15 relates to the prohibition of unauthorised offshore electricity infrastructure activities. The exceptions, at subclause 15(2), to this offence are that conduct is authorised by a licence or otherwise authorised or required by or under the *Offshore Electricity Infrastructure Bill 2021* (the Bill).

The defendant should know whether the activity in question is authorised by a licence or otherwise authorised or required by or under the Bill and should have quick and easy access to such evidence. While I acknowledge that the prosecution would also be in a position to know if the defendant had been issued with a licence, and what the licence authorised, it is unlikely that it will be able to be determined as quickly and efficiently, whether the activities in question were authorised given the remote nature of offshore electricity infrastructure activities. This information would be readily available from the defendant as they will have intimate knowledge of the specific activities they undertook and the licence or authorisation they hold.

Clause 95(4)

Clause 95 provides that a change in control must be approved by Registrar. Subclause (4) provides that the offence does not apply if the person did not know, and could not reasonably be expected to have known, that the person has begun to control, or ceased to control, the licence holder.

The corporate workings of a licence holder are peculiarly within the knowledge of the defendant. The Offshore Infrastructure Registrar will likely not be aware of all commercial transactions that occur in relation to a licence holder particularly as in some cases, depending on the company ownership structure, transactions may not be publically reported. It would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that they were not aware that they had begun to control, or ceased to control, the licence holder.

Clause 96(4)

Clause 96 provides for notification of change in control that takes effect without approval. Subclause (4) provides that the offence does not apply if the person did not know, and could not

reasonably be expected to have known, that the person has begun to control, or ceased to control, the licence holder.

In my view, the same reasons for reversing the evidential burden of proof for subclause 95(4) apply to this subclause.

Clause 116(3)
Clause 116 relates to maintenance and removal of property etc. by a licence holder. The licence holder is the entity who has day to day operational control over the activities that occur within their licence area. Therefore the licence holder is the only entity under the regime who will be in a position to authorise, or not authorise, the bringing of property onto their licence area for the purposes of offshore infrastructure activities or for the removal of offshore infrastructure from their licence area.

It would be disproportionately time consuming, expensive and difficult for the prosecution to have to establish that items of property or equipment were brought into the licence area with the licence holder's authority or otherwise, whereas this information would be readily available to the licence holder as the entity who is in day-to-day control of activities on their licence area. It is therefore considered appropriate in this circumstance that the evidential burden of proof be placed on the licence holder.

Clause 149
Clause 149 provides for defences to the offence of engaging in prohibited or restricted activities in clause 148. Protection zones will be put in place in remote maritime locations in the Commonwealth offshore area. In the event that a person engages in prohibited or restricted conduct in a protection zone, that person's motivations for engaging in that conduct are likely to be peculiarly within their own knowledge. The prosecution will not have knowledge of the motivations of the defendant who is alleged to have engaged in the prohibited or restricted conduct and therefore it is considered appropriate for the burden of proof in relation to the motivations of the defendant to rest with the defendant.

Clause 203(4)
Clause 203 relates to obstructing or hindering Offshore Electricity Infrastructure (OEI) inspectors. Subclause (4) provides that a person does not commit an offence if the person has a reasonable excuse. The excuse for obstructing or hindering an inspector is peculiarly within the knowledge of the person who engaged in this conduct. It is therefore reasonable for the defendant to bear the evidential burden of proof in relation to establishing a reasonable excuse for their conduct.

Clause 211(4)
Clause 211 relates to tampering with and removing notices. This offence does not apply if the person has a reasonable excuse. In my view, the same reasons for reversing the evidential burden of proof for subclause 203(4) apply to this subclause.

1.59
Further to the above, and as noted by the committee, clauses 203(4) and 211(4) provide that the defendant bears an evidential burden to establish a defence of reasonable excuse, rather than relying on the general defences in the Criminal Code or more offence-specific defences adapted to the particular circumstances. In both instances the defence of reasonable excuse has been applied because it is considered appropriate to allow for a more 'open-ended' defence. This is because the matters relating to the offences will be peculiarly within the defendant's knowledge. For example, there may be any number of reasons why a defendant engaged in conduct that hinders an OEI

Inspector (clause 203). The reasons for this would be peculiarly within the defendant's knowledge. A more 'open-ended' defence is necessary to capture all of the circumstances which may reasonable explain the defendant's contravention. A contravention of clause 211 could similarly be explained by reasons peculiarly within the defendant's knowledge.

Additionally, these provisions have been considered and aligned with those in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act). The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) has regulatory functions under that act, and is also being provided the role of Offshore Infrastructure Regulator under the *Offshore Electricity Infrastructure Bill 2021*. As NOPSEMA is the regulator for both frameworks, and it is possible that there will be others who are participants in the industries regulated by both legislative schemes, it is important that there is a consistency in approach to the extent reasonably possible.

In addition, I note that there is a body of case law around the meaning of the expression 'reasonable excuse' and what is needed for a trier of facts to conclude that such an excuse exists. Accordingly, while I acknowledge that, in accordance with the Guide, this defence would usually be avoided in Commonwealth legislation, in view of the policy rationale outlined above, the need for consistency with similar legislative schemes, and the case law surrounding this legal test, I consider its use in this context to be appropriate.

Reverse legal burden of proof

1.67 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to reverse the legal burden of proof in sub clauses 133(1) and 139(8) and why it is not sufficient to reverse the evidential, rather than legal, burden of proof.

1.67

The Guide states that placing a legal burden of proof on a defendant should be kept to a minimum and where imposed, the burden of proof must be discharged on the balance of probabilities. Having had regard to the Guide, it is nevertheless my view that the reversal of the legal burden of proof is necessary in these circumstances for the following reasons.

Clause 133 provides for a defence in the case of a prosecution for failing to comply with a direction that may be given to a person by the minister or the Offshore Infrastructure Regulator under a number of provisions. It operates where that person has taken reasonable steps to comply with a direction.

Subclause (1) specifies that it is a defence in a prosecution for an offence, or in proceedings for a civil penalty order, for a breach of a direction in the case where the defendant is able to establish that they took all reasonable steps to comply with the direction. The explanatory note makes clear that the onus is on the defendant to establish this. The defendant bears a legal burden in a prosecution or proceedings for a civil penalty.

This is because the capacity of a person to comply with a direction, and information as to whether a person has taken a reasonable steps to comply with a direction, are all matters that are peculiarly within the person's knowledge and would not generally be available to the prosecution. The prosecution might have no knowledge of what the defendant actually did, and might know only that the direction was not complied with. In contrast, in bringing a defence, the defendant would know what steps were taken and would be better placed to establish the reasonableness of the steps.

Affected persons (offshore electricity infrastructure licence holders) are expected to maintain thorough records of their activities. Raising evidence of their capacity to comply with a direction or

proving on the balance of probabilities that they have undertaken reasonable steps to comply with the direction, should place no significant additional burden on them. The licence holder is in a unique position to understand the technical and financial resources available to them, which may allow them to take reasonable steps to comply with a direction.

If the burden of proof were not reversed, the prosecutor would be required to undertake costly and difficult investigations into the internal workings of the person in question. In many cases the prosecutor may have some difficulty accessing information about the person's capacity to comply with the direction or whether they have undertaken reasonable steps to comply.

Subclause 139(8) sets out a defence provision in a prosecution in relation to entering or being present in a safety zone. The offence provision provides for intentional breach, reckless breach, negligent breach and strict liability. In presenting a defence, again the defendant bears the legal burden. This is because the matters set out are ones that the prosecution would be unable to establish the absence of. For example, in relation to (a), the defendant would be peculiarly able to establish that there was an emergency, that it was unforeseen, and that it had the result outlined in that paragraph. Likewise for paragraphs (b) and (c), the defendant would be peculiarly able to establish the circumstances in which these subclauses apply.

In each case, the remoteness of the Commonwealth offshore area is likely to make it difficult for the prosecution to obtain evidence about what was transpired in any of the circumstances to which the above clauses apply.

In my view, it is appropriate to impose a legal burden of proof instead of an evidential burden because failing to comply with a direction is a serious offence which could result in loss of life, injury or significant damage to infrastructure. Similarly, the offence of entering a safety zone without authorisation is an equally serious offence that could also lead to loss of life, injury, or damage to infrastructure. In both instances it is appropriate that the onus is placed on the defendant to establish on the balance of probabilities.

For the reasons above, it is my view that the reversal of the legal burden of proof in subclauses 133(1) and 139(8) is appropriate.

Strict liability offences

1.82 In light of the above, the committee requests a detailed justification from the minister as to why it is proposed to apply strict liability to the offence set out at subclause 139(7), with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.

1.82

Safety zones are needed in order to protect offshore electricity infrastructure, vessels in the vicinity of such infrastructure, and the safety and lives of crew on infrastructure and vessels. They are in turn protective of the environment surrounding such infrastructure, as well as of the associated economic investment.

Two of the principal reasons that this Bill applies strict liability to the offence under subclause 139(7) are as follows.

First, an important consideration is alignment with similar offence provisions under sections 616 and 617 of the OPGGS Act, which apply to offshore petroleum infrastructure and offshore greenhouse gas infrastructure respectively. The matters that these existing provisions protect and the matter that clause 139 of this Bill is intended to protect are similar in many regards. Given this degree of

similarity, I am concerned that, if corresponding penalties were not applied to clause 139 of this Bill, the effect would be that this Bill would have significantly weaker penalties than existing laws for breaching safety zones, which could conceivably adversely affect investment in offshore renewable energy infrastructure as compared to investment in other offshore resources infrastructure.

Second, I consider that the use of strict liability offences for these safety zone provisions is justified as a result of the serious consequences of a breach of those provisions. In this regard, it is important to note:

- the vulnerability and physical defencelessness of offshore facilities of this nature, particularly unmanned ones; and
- the potentially serious consequences of damage to, or interference with, facilities or operations at such facilities.

When considering offences that are alleged to have occurred in an offshore area, this kind of legislation has traditionally taken account of the viability of conducting a successful prosecution, if that can be achieved only with proof of intention, recklessness or negligence.

Taken together, these factors have in the past led to the use of strict liability offences.

In relation to the points outlined in the *Guide to Framing Commonwealth Offences*, I note the following:

- Contrary to the *Guide*, subclause 139(7) imposes strict liability in circumstances where there is a term of imprisonment. However, the penalty for the strict liability offence is markedly lower than the penalties for the corresponding fault-based offences under that clause. In view of the above comments, and the cascading nature of the penalties, which reduce as culpability reduces, I consider a departure from this element of the *Guide* to be justified in this case.
- In light of the above comments, strict liability here is necessary in order to ensure the integrity of the regulatory regime under this Bill as it relates to safety zones. This also gives rise to associated environmental protections.
- There are no broad or uncertain criteria involved in subclause 139(7) of this Bill.
- Strict liability is not being imposed on the sole ground of minimising resource requirements.

Exemption from disallowance

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

- why it is considered necessary and appropriate to provide that directions made under clause 182 are not subject to disallowance; and
- whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.

1.90

Clause 182 provides that the minister may make a direction. Directions under this clause provide the minister with a degree of control over the exercise of the functions of the Offshore Infrastructure Regulator under the offshore electricity infrastructure framework. The provisions make it clear that the minister may only issue directions to the Offshore Infrastructure Regulator that are general in nature.

For example, I may wish the Offshore Infrastructure Regulator to increase monitoring and compliance activities in relation to the industry, in the event of a significant incident or series of significant incidents that warrant increased regulatory intervention and where I am not satisfied that

the Offshore Infrastructure Regulator is appropriately focusing regulatory effort on matters of this nature.

While the directions are given by legislative instrument, they are intrinsically of an administrative rather than a legislative character. This is primarily to ensure public notice of directions. Given the overall administrative character, disallowance would be inappropriate in this context.

In my view, it would be inappropriate to amend this Bill as suggested, as a power to direct a regulator such as this is not the kind of matter that is traditionally made subject to Parliamentary oversight and disallowance.

Instruments not subject to parliamentary disallowance

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

- why it is considered necessary and appropriate that determinations made under proposed clause 136 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.

1.96

Safety zones are needed in order to protect offshore electricity infrastructure, vessels in the vicinity of such infrastructure, and the safety and lives of crew on infrastructure and vessels. They are in turn protective of the environment surrounding such infrastructure, as well as of the associated economic investment.

Determinations of safety zones are likely to occur at different times throughout the life of an offshore electricity infrastructure project and are intended to be short term in nature. They prohibit vessels from entering an area for a period of time in order to minimise risks of collision during times of significant activity, such as during construction and installation of infrastructure where risks to the health and safety of workers and other marine users are heightened, or in response to an emergency.

Due to restrictions on the size of safety zones that stem from the United Nations Convention of the Law of the Sea (500m from the outer edge of infrastructure), it is likely that multiple safety zones will be required for an individual project depending on project layout. For example, a large windfarm with up to 300 wind turbines may require in excess of 300 safety zone determinations to cover all infrastructure, including turbines, cables and substations during periods of construction, installation and commissioning, and these determinations may be subject to amendment over time. These safety zones may also be progressively determined and then revoked over relatively short timeframes as needed.

In my view, safety zone determinations do not of themselves determine the content of the law. Rather, the content of the law is set out in Division 3 of Part 2 of this Bill. As the determinations do not determine the content of the law, they are not intrinsically of a legislative character, and so are appropriately classified as not being legislative instruments.

What the determinations do is determine the facts on which the law, as set out in this Bill, operates. It is accordingly more akin to an administrative determination that is given legal consequence by provisions of this Bill.

In my view it would not be appropriate for safety zone determinations to be subject to disallowance, as the time-critical nature of the implementation is key to its effectiveness. For this reason, and

those above, I consider it appropriate that safety zone determinations are notifiable instruments and that amending this Bill is not necessary.

Significant matters in delegated legislation – licensing scheme

1.100 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 details of the licensing scheme to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding the matters listed at subclause 29(1) on the face of the primary legislation.

1.100

In response to the specific queries of the Committee I make the following comments.

The framework of the licensing scheme has been set out in Chapter 3 of this Bill. The ability to set out the operational detail in delegated legislation is considered essential for flexibility to adapt to a changing industry and a cover a range of different technologies and infrastructure. Having the technical details that underpin these licence arrangements in delegated legislation allows for industry and other stakeholders to participate in the development of the regulations.

I understand that the Committee generally does not accept a desire for administrative flexibility in order to justify broad delegation legislation-making powers, and I appreciate the basis of the Committee's view in this regard. However, in my view, the need to permit these details to be set out in delegated legislation goes beyond what might be thought of as being mere administrative flexibility. Its need stems from the newness of the offshore energy industry, and the impossibility, at this stage, of predicting precisely what kind of regulatory scheme will be needed over time as the industry develops. If this Bill was to unduly limit the ability of the legislative scheme to develop as the industry develops, there would be a real risk that the legislation could then hamper the development of the industry, which would be an unwelcome outcome.

In relation to providing high-level guidance as to the matters listed at subclause 29(1) of this Bill, I note that this Bill already includes several provisions in addition to clause 29 which specify:

- particular matters that the licensing scheme must include – see subclauses 32(1) and (2), 41(2) and (3), 51(1) and (2), 60(1) and (2), 69(3) and 114(1), and
- particular matters that the licensing scheme may include – see subclauses 29(2), 32(3), 34(2), 36(3), 37(1), 44(2), 46(2), 47(1), 53(2), 55(3), 56(1), 62(2), 64(2), 65(1), 72(2) and (3), 84(3), 107(5), 114(1) and (3), and 115(2).

I consider that, in view of these provisions, this Bill already contains a sufficient level of guidance as to what must and may be included in the feasibility scheme, and more guidance than Bills ordinarily provide for delegated legislation. Because of that, while I appreciate the Committee's underlying concern here, I do not consider it necessary in this instance for this Bill to be amended to provide further high-level guidance regarding the the matters listed at subclause 29(1).

Fees in delegated legislation

1.105 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to provide at least high-level guidance regarding how the fees under clause 111 and clause 286 will be calculated, including, at a minimum, a provision stating that the fees must not be such as to amount to taxation.

1.105

In my view, it would be inappropriate for this Bill to be amended to provide further guidance regarding how the fees under clauses 111 and 286 will be calculated.

As the Committee notes, the explanatory memorandum to this Bill already indicates that fees will be set at cost-recovery levels. The fees will be calculated in line with the guidelines for Cost Recovery Implementation Statements (CRIS), and set out in delegated legislation. It is expected that this will be done within the 6 month proclamation period so that industry can be consulted and the details settled to coincide with commencement of the legislation. I consider that this is important to ensure that this new regulatory regime is able to be fully cost recovered. As the industry evolves, adjustments to the fees may be required to ensure that they continue to reflect industry needs. The regulations are subject to disallowance.

Further, in my view, clauses 111 and 286 are not intended to be read as independent, free-standing powers to prescribe fees by regulation.

Rather, clause 111 should be read as an obligation on the Offshore Infrastructure Registrar to (stated broadly) ensure that instruments are available for inspection upon payment of a fee, where the fee will be calculated in accordance with the licensing scheme. This clause does not deal with the actual power to prescribe the fee, which is dealt with elsewhere. Rather, this clause requires the Offshore Infrastructure Registrar to ensure that instruments are made open for inspection, where this requirement is condition on the payment of the relevant fee. The fee itself would need to be prescribed under the provisions contained in Part 3 of Chapter 5 of this Bill. Of this part, subclause 189(1) permits fees to be charged, and subclause 189(2) provides that the amount of such a fee is the amount prescribed, or worked out in accordance with a method prescribed, by the regulations. Subclause (3) provides that such a fee must not be such as to amount to taxation. Accordingly, my view is that the limitation sought by the Committee already exists in relation to clause 111, when the Bill is read in the intended way.

Similarly, I do not consider that clause 286 should be read as an independent, free-standing power to prescribe fees. This provision should be read as expressly providing that fees may be prescribed in relation to the matters referred to in paragraph 283(3)(a) or 285(4)(a), but it should also be read as operating alongside the provisions of Part 3 of Chapter 5 of this Bill, which relate to prescribing of fees, and as also being limited by subclause 189(3).

Accordingly, while I appreciate the Committee's concerns in this regard, I consider that these observations together obviate the need for further amendment to this Bill to address these concerns in relation to these provisions.

Power for delegated legislation to modify the operation of primary legislation (akin to Henry VII clause) – regulations for pre-existing infrastructure

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

- why it is considered necessary and appropriate to allow delegated legislation to modify the operation of the bill as it applies to pre-existing offshore infrastructure; and
- whether the bill can be amended to, at a minimum, provide that the regulations may only have a beneficial effect and to specify a timeframe as to when clause 309 ceases to apply within the primary legislation.

1.110

Henry VIII clauses are not uncommon as part of transitional arrangements. In my view, this clause is needed to deal with any unintended or unforeseen circumstances that may arise in the future. As the purpose of the provision is to assist with unintended or unforeseen circumstances, it is difficult to provide specific examples of when the rule-making power may be used or a timeframe for when they may apply.

The use of delegated legislation in this instance will provide the flexibility to work directly with owners of existing infrastructure to ensure that specific adjustments can be made, if needed, to minimise the impact on operations. It was not possible for this Bill to set out a comprehensive scheme for dealing with pre-existing infrastructure, because:

- When this Bill was introduced, it was not possible to state with certainty what pre-existing infrastructure there would be in the Commonwealth offshore area when the Bill commences.
- After this Bill enters into law, the appropriate way to regulate pre-existing infrastructure might develop, along with the general development of the offshore electricity infrastructure industry and the associated regulatory regime. For this reason, the flexibility provided by delegated legislation was needed to deal with regulation of this pre-existing infrastructure.

The Committee noted that there was no requirement under this Bill that regulations made for the purposes of clause 309 operate beneficially to individuals. In my view, it would be inappropriate to include a limitation of this nature. The regulatory scheme under this Bill necessarily balances a range of interests, and regulations made for the purposes of this clause will similarly need to balance the interests of owners or operators of pre-existing infrastructure against the interests of others affected by regulation of offshore electricity infrastructure, or with broader interests in the Commonwealth offshore area. Because of that, I think that it would be inappropriate for the Bill to impose a limitation of the kind proposed.

The Committee noted that there was no requirement under this Bill that such regulations cease to have effect after a specified timeframe. For similar reasons to those outlined above, in a new and evolving industry such as this, it is not possible to propose a particular date up-front by which transitional provisions of this nature will cease to be required.

As such, I consider it appropriate for delegated legislation to modify the operation of this Bill as it applies to pre-existing infrastructure, ensuring a fit for purpose approach can be taken.

Tabling of documents in Parliament

1.116 Noting that there may be impacts on parliamentary scrutiny where reports associated with the operation of regulatory schemes are not tabled in the Parliament, the committee requests the minister's advice as to why reports or documents prepared under clause 181 of the bill are not required to be tabled in the Parliament.

1.116

In response to the specific queries of the Committee I make the following comments.

Clause 181 of this Bill provides that the minister may require the Offshore Infrastructure Regulator to prepare reports or give information. The Offshore Infrastructure Regulator must comply with that requirement. NOPSEMA is the specified Offshore Infrastructure Regulator and it is important that this process aligns with the specifications in the legislation NOPSEMA is created under, the OPGGS Act.

There are other mechanisms in this Bill whereby the Offshore Infrastructure Regulator is required to table or publish information on the performance of its functions and as such, I do not consider that an amendment is needed.

Importantly, this Bill does not preclude the tabling of these reports or documents, and so there is discretion to table in appropriate circumstances, in accordance with usual Parliamentary procedures.

Limitation on merits review

1.123 The committee therefore requests the minister's more detailed advice as to why merits review will not be available in relation to the grant of a feasibility licence under clause 33 or the varying of a licence under clauses 38, 48, 57 or 66 of the bill.

1.123

The principles as set out in the Administrative Review Council's guidance document *'What Decisions Should be Subject to Merit Review'?* (the ARC guidance document) were considered during development of the Bill.

In response to the specific queries of the Committee I make the following comments.

The ARC guidance document provides for the exclusion of merits review, amongst other things, where decisions are allocating a finite resource between competing applicants and an allocation that has already been made to another party would be affected by overturning the original decision.

A feasibility licence authorises the holder to construct, install, commission, operate, maintain and decommission offshore renewable energy infrastructure. The undertaking of these activities are exclusive to the licence holder within the licence area. Therefore, in granting a feasibility licence, I am allocating a finite resource. Where there is multiple parties applying for licences in the same, or overlapping, areas, I am allocating a finite resource between competing parties. It is not possible to grant a feasibility licence to each and every proponent.

Merit criteria have been set out to determine the suitability of applicants. The criteria for allocating feasibility licences will be made clear in the licensing scheme and associated guidance.

A successful feasibility licence applicant could be negatively affected if, for example, upon the successful grant of a feasibility licence, the holder proceeded to finance activities authorised under the feasibility licence. If a merits review application was then made, and the subsequent decision was to overturn the original decision, the original successful feasibility licence applicant could be left in an uncertain position and therefore be negatively affected.

In the case of a licence variation there are limitations to when a licence may be varied. The licence holder can make an application, in accordance with the licensing scheme, to vary the licence. Variation applications are expected to be mainly made in this way or connected to other applications (such as change of control). The licence holder will have visibility over the decision making processes for variation and the processes will be subject to procedural fairness.

I am satisfied that the approach in this Bill aligns with the ARC guidance document.

OFFSHORE ELECTRICITY INFRASTRCUTURE (REGULATORY LEVIES) BILL 2021

Levies in delegated legislation

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

- why it is considered necessary and appropriate to leave the persons on whom the offshore electricity infrastructure levy will be imposed, the kinds of levy that may be imposed and the amount of any levy to delegated legislation; and
- whether the bill can be amended to prescribe at least high-level guidance in relation to these matters on the face of the primary legislation, including whether the bill can be

amended to include, at a minimum, guidance in relation to the method of calculation of the levy and/or a cap on the amount of levy.

1.130

The *Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021* (the Regulatory Levies Bill) and *Offshore Electricity Infrastructure Bill 2021* (the main Bill) establish a statutory framework to allow for the complete cost recovery of the costs of the Offshore Infrastructure Registrar and Offshore Infrastructure Regulator. These cost recovery arrangements were highlighted repeatedly throughout the explanatory memorandum to the main Bill, and aim to ensure that the Offshore Infrastructure Registrar and Offshore Infrastructure Regulator have adequate funding for the performance of their functions.

In response to the specific queries of the Committee, I make the following comments.

First, as indicated in the explanatory memoranda that accompanied the Bills, the offshore electricity infrastructure industry is a new and emerging one, and it is expected to develop over time. In my view, it is not possible to foresee the ways in which the industry might develop at this early stage, and for that reason, the main Bill contains broad regulation-making powers to prescribe a licensing scheme for the purposes of the Bills. As noted in the explanatory memorandum to the Regulatory Levies Bill, at paragraph 20, there is a close link between the persons on whom levies will be imposed, and persons who would be regulated under this licensing scheme. Accordingly, given the reasonably broad power for regulations to prescribe the licensing scheme, there is a need for an adjoining, and hence reasonably broad, power for regulations to prescribe the kinds of levy that might be imposed, the persons on whom levies are imposed, and the amounts of those levies.

I understand that the Committee generally does not accept a desire for administrative flexibility in order to justify broad delegation legislation-making powers, and I appreciate the basis of the Committee's view in this regard. However, similarly to related questions on the main Bill, in my view, the need for these reasonably broad powers goes beyond what might be thought of as being mere administrative flexibility. Their need stems from the newness of this industry, and the impossibility, at this stage, of predicting precisely what kind of regulatory scheme will be needed over time as the industry develops. As I have stated earlier, if the Bills were to unduly limit the ability of the legislative scheme to develop as the industry develops, there would be a real risk that the legislation could then hamper the development of the industry, which would be an unwelcome outcome.

Second, I acknowledge that it would be possible, in principle, for the Bills to be amended to prescribe the kind of guidance that the Committee refers to in relation to the matters referred to in paragraph 1.130 of Scrutiny Digest 16/21. However, having regard to my comments above, in my view, it is not possible to arrive at reliable numerical caps as to the amount of these levies at this stage. Setting limits might give rise to the risks outlined above. In relation to high-level guidance as to these matters, I note that the explanatory memoranda to the main Bill and the Regulatory Levies Bill both refer on several occasions to recovery of costs under fees and levies, and so my view is that these documents have made the intention underlying the legislation sufficiently clear, even without these matters being addressed expressly in the Bills themselves. I also emphasise that regulations prescribing these matters are disallowable legislative instruments, and so the Parliament will have an opportunity to consider levies once they have been set, and disallow the regulations if it chooses to do so. That is to say, the relative breadth of these regulation-making powers in no way undermines the role of the Parliament in the setting of these levies and associated matters.

THE HON TIM WILSON MP

ASSISTANT MINISTER TO THE MINISTER FOR INDUSTRY, ENERGY AND EMISSIONS REDUCTION

MC21-007743

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

Dear Senator Polley

I refer to *Scrutiny Digest 16 of 2021* from the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Offshore Electricity Infrastructure Bill 2021 (OEI Bill) and the Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021 (OEI Regulatory Levies Bill).

I have considered the issues raised and I provide the attached detailed advice in response to the Committee's scrutiny concerns.

I trust this information will address the Committee's concerns, and I thank the Committee for bringing these to my attention.

Yours sincerely

TIM WILSON

Encl (1)

CC: The Hon Angus Taylor MP, Minister for Industry, Energy and Emissions Reduction