The Hon Tony Burke MP
Minister for Employment and Workplace Relations
Minister for the Arts
Leader of the House

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
Parliament House
CANBERRA ACT 2600

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

Dear Chair

Thank you for your correspondence of 10 August 2023 regarding the Senate Standing Committee for the Scrutiny of Bills' consideration of the Social Security and Other Legislation Amendment (Miscellaneous Measures) Bill 2023 (the Bill).

The Committee has asked for additional information on issues related to the Bill, and the provisions it amends, which I enclose at Attachment A.

I trust this information is of assistance.

Yours sincerely

TONY BURKE

24 / 8 / 2023

Encl.

Attachment A: Additional Information

1.89 The committee reiterates its scrutiny concerns and requests the minister's detailed advice as to:

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

The Employment Secretary, on behalf of the Commonwealth, already has a broad power to make arrangements and grants under section 1062A of the *Social Security Act 1991* (SS Act). Section 1062A was inserted into the SS Act by the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act 2021* (the SPROM Act), which was introduced by the previous Government. Section 1062A commenced on 2 April 2022.

The wording of section 1062A closely reflects the wording of section 32B of the *Financial Framework (Supplementary Powers) Act 1997* (FFSP Act) as both provisions provide legislative support for Commonwealth expenditure in a similar way. Both provisions confer a broad power on the Commonwealth to enter into arrangements and make grants, which is appropriate for a provision that (in both cases) provides legislative authority for a wide range of Commonwealth programs[1]. Details regarding individual programs supported by those provisions are specified in documentation relevant to those programs, for example in program guidelines, funding agreements or services contracts, tender documentation etc.

The Bill, if passed, would constrain and clarify the broad power already afforded to the Employment Secretary under the current section 1062A. Specifically, the Bill will amend section 1062A so that it can only provide legislative support for grants and arrangements if they are for a program specified in a new notifiable instrument made by the Employment Secretary (see item 4). That new notifiable instrument, which will be publicly available, will list programs supported by section 1062A and provide a short description of such programs in a similar way that the FFSP Regulations do. It would be the intent that in the main only programs of my department (the Department of Employment and Workplace Relations) would be listed as being supported. In short, this change will mean section 1062A will provide legislative support for less programs than is currently the case, and the programs that are supported will be known with certainty and publicly listed. The amendment therefore promotes greater transparency than the current provision.

As noted above the wording of section 1602A closely reflects that of section 32B of the FFSP Act, which is appropriate for a provision that provides legislative authority for many programs. However, all of the usual rights for persons/organisations under programs apply, irrespective of the legislative source of support for that program (whether it be Chapter 2D, section 32B of the FFSP Act or otherwise). Depending on the nature of the program rights could for example include:

- Rights under the *Government Procurement (Judicial Review) Act 2018*;
- Rights under Program Grant Guidelines; paragraph 8.6 of the Commonwealth Grant Rules and Guidelines (CGRGs) specifies that review and/or and complaint mechanisms should form part of all grant opportunity guidelines, as relevant. As an example the

[1] Section 32B of the FFSP Act gives the Commonwealth the power to make vary or administer arrangements and grants of financial assistance for many Commonwealth programs that are specified in the FFSP Regulations.

Australian Apprenticeships Incentive System (AAIS program) derives legislative support from Chapter 2D. The AAIS program guidelines set out a process for internal review of an eligibility or payment decision;

- Rights to raise issues with the Commonwealth Ombudsman (and for the Ombudsman to investigate the matters raised); and
- Rights at common law to seek review of decisions.

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

The programs administered by my department are varied in their size, scope, complexity and requirements, and the terms and conditions on which grants and arrangements are made must be appropriately adaptable to reflect this. In particular, my department administers many programs to assist Australians to obtain and maintain work. As noted in the Explanatory Memorandum to the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Act 2022* (SPROM Act), which introduced section 1062A, job seekers are among the most vulnerable members of society, and the adverse consequences of having no or inadequate paid work are widely known. It is therefore important for the Employment Secretary to maintain a broad power to make arrangements or grants on terms most suited to the individual program, to enable the Commonwealth to respond flexibly to changing labour market conditions. Even high-level guidance as to the terms and conditions on which grants or arrangements can be made may unnecessarily restrict the Secretary's ability to assist vulnerable job seekers in accordance with their needs, particularly where programs require funding to respond quickly to sudden industry downturns or mass redundancies.

My department ensures that relevant arrangements or grants are made consistently with the *Public Governance, Performance and Accountability Act 2013*, and with value for money and other requirements in the Commonwealth procurement and grants frameworks[2].

My department also ensures that arrangements or grants are subject to robust conditions proportionate to the amounts and issues involved. For instance, it is the longstanding practice of the department that, in relation to sizable employment programs, service providers must enter deeds with the department which contain extensive terms and conditions, in order to receive funding. Similarly, the terms and conditions for larger scale procurements are required to be published on the Austender website.

Such an amendment is therefore not necessary, and might detract from my department's ability to respond in an appropriately flexible way to labour market changes and community needs, and ensure funding arrangements that are proportionate and appropriate given the size, scope, complexity and purpose of the relevant program. The need for flexibility in Commonwealth program administration is also the reason why section 32B of the FFSP Act similarly does not attempt, even at a high level, to provide guidance regarding the terms on which arrangements and grants can be made.

• why it is considered appropriate that instruments made under proposed subsection 1062A(1A) of the *Social Security Act 1991* are notifiable instruments

Section 1062A of the SS Act, as it currently stands, does not require that grants and

[2] In particular the department complies with the requirements in the Commonwealth Procurement Rules and Commonwealth Grant Rules and Guidelines as relevant to departmental programs.

arrangements be made in respect of a specified program. Section 1062A operates so that, so long as the proposed arrangement or grant of financial assistance comes within the scope of the matters specified in subsection 1062A(1), and within the constitutional limits of section 1062B, the Employment Secretary may make, vary, or administer that arrangement or grant without expressly identifying the particular programs in respect of which that power is being exercised. In short, the legislative authority that section 1062A provides is currently "automatic". This has led to uncertainty about the programs to which section 1062A applies, particularly where a program is not administered by my department.

As noted above, the Bill would ensure that section 1062A only applies to grants and arrangements made for the purposes of a program specified in a notifiable instrument that will be publicly available as it will be registered on the Federal Register of Legislation. It will list programs supported by section 1062A and provide a short description of such programs in a similar way that the FFSP Regulations do.

The introduction of a notifiable instrument therefore promotes greater transparency than the current provisions, by ensuring that the programs in respect of which funding is authorised are publicly available and able to be scrutinised. However, the requirement for a notifiable instrument will not impede my department's ability to respond quickly and flexibility to changing labour market conditions and community needs when it needs to do so.

Listing programs to which section 1062A applies in a notifiable instrument therefore appropriately balances transparency with the need for the department to stand up new programs quickly when required.

• whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight

The instrument should not be a legislative instrument, because it is administrative rather than legislative in character. Section 8 of the *Legislation Act 2003* (Legislation Act) provides a definition of the circumstances in which an instrument is a legislative instrument, which reflects some key considerations in determining whether an instrument is of legislative character.

Relevantly for these purposes, subsection 8(4) of the Legislation Act defines when an instrument is a legislative instrument by effect – rather than being otherwise designated as such by primary law, registration, or declaration. An instrument is a defined as being a legislative instrument where the instrument:

> (b)(i) determines the law or alters the content of the law, rather than determining particular cases or particular circumstances in which the law, as set out in an Act or another legislative instrument or provision, is to apply, or is not to apply; and
>
> (ii) has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

The instrument in this case does not determine or alter the content of section 1062A of the SS Act. The effect of the instrument is better described as being simply to identify the circumstances in which the power in section 1062A is exercised. The instrument does not affect any privilege or interest, create a right, or impose an obligation on the Employment Secretary or any person who would receive funding from a grant or arrangement. It merely provides the clarity required to ensure that the Employment Secretary is making, varying, or administering grants and arrangements in a transparent and accountable way. As such, the instrument is best characterised as being administrative in character and should therefore be a

notifiable rather than a legislative instrument.

Section 1062A was inserted to provide an alternative, more streamlined source of legislative authority for employment focused programs, than section 32B of the *Financial Framework (Supplementary Powers) Act 1997*. Adding a new item to the FFSP Regulations involves reasonably substantial administrative effort and time, which has caused implementation delays on occasions for new Commonwealth programs. Section 1062A enables the Commonwealth to respond more promptly to changes in the labour market, for example, sudden industry downturns or mass redundancies or otherwise to community need. That ability to act quickly when needed will be adversely impacted by a requirement to have a legislative instrument (rather than notifiable instrument). Each time a new legislative instrument is made it would need to be accompanied by a detailed explanatory statement, including a statement of compatibility with human rights. More pertinently, given the risk of disallowance, the Secretary would each time need to consider delaying a new measure until such time as it is clear that the legislative instrument would not be disallowed.

Given the benefits to the use of a notifiable instrument as listed above, and the purposes for which the instrument is created, it is considered appropriate that the instrument is a notifiable instrument and not a legislative one.

1.90 The committee again draws to the attention of senators and leaves to the Senate as a whole the appropriateness of not including a requirement that written agreements with the states and territories about arrangements or grants made under proposed section 1062A be tabled in the Parliament

It would be very uncommon for grants or arrangements under section 1062A of the SS Act to be made to the states or territories, because of the nature of the programs in respect of which grants may be made, varied, or administered under section 1062A. This is contrasted to the more general section 32B of the FFSP, which contains numerous items that may enable grants and arrangements to be made to the states or territories, and therefore which has the linked requirement in section 32C that grants and arrangements made to the states and territories must be in writing.

To the extent that a grant or arrangement might be made to a state or territory under section 1062A, the department is likely to require a written agreement with the state or territory commensurate with the nature of the funding. The department's practice is also to widely publicise employment programs for which it administers funds and this will continue.

However, it may be that some agreements with the States and Territories could contain confidential or sensitive information which would not be appropriate to publish.

It is therefore not considered necessary or appropriate to include a requirement that written agreements with the states and territories be tabled in the Parliament.

Attorney-General

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600 By email: scrutiny.sen@aph.gov.au

Dear Chair

I refer to the Senate Standing Committee for the Scrutiny of Bills' request for further information on the *Telecommunications (Interception and Access) Amendment Act 2023* (the Act) in *Scrutiny Digest 9 of 2023*. I note that the Telecommunications (Interception and Access) Amendment Bill 2023 received Royal Assent on 10 August 2023.

I appreciate the time the Committee has taken to consider the Act. Please see below my response in relation to the questions raised by the Committee.

The Committee has sought detailed advice as to:

a) why it is necessary and appropriate to allow the Director-General of Security to authorise any person to communicate foreign intelligence information in accordance with proposed subsection 65(1A)
b) why it is necessary and appropriate to confer a broad power on the Director-General of Security to communicate foreign intelligence information
c) what further limitations or safeguards have been considered in limiting the broad discretionary power of the Director-General of Security, and why these have been considered inappropriate to include in the Act
d) why it is considered necessary and appropriate to confer a broad power on a 'second person' to communicate foreign intelligence information to another person, and use and make a record of it, and
e) what safeguards exist in the *Telecommunications (Interception and Access) Act 1979* or elsewhere to limit the broad power of a second person to communicate, use and make a record of foreign intelligence information.

(a) Power for the Director-General of Security to authorise a person to communicate foreign intelligence information

Section 65(1A) provides that the Director-General of Security, or a person authorised by the Director-General of Security, may communicate foreign intelligence information to another person (the second person), for the purposes approved by and subject to the conditions specified by the Attorney-General.

The ability for the Director-General of Security to authorise another person to communicate foreign intelligence information is limited to ASIO employees and affiliates performing ASIO's functions set out in the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

The amendments also enable the Attorney-General to limit or constrain the exercise of this power by specifying conditions. This could include limiting the persons who can communicate and use the information, and the manner in which the information may be communicated and used.

Any person approved by the Director-General of Security to communicate foreign intelligence information must operate in accordance with relevant protective security policies, privacy rules, guidelines and sensitive information handling practices to protect this information from unauthorised disclosure, including the *Minister's guidelines in relation to the performance by the Australian Security Intelligence Organisation of its functions and the exercise of its powers* (Minister's Guidelines).

ASIO is subject to robust and independent oversight by the Inspector-General of Intelligence and Security (IGIS). The IGIS is an independent statutory office established to ensure the legality and propriety of the activities of agencies within its jurisdiction. IGIS conducts inspections, inquiries, and investigations into complaints to ensure intelligence agencies act lawfully, with propriety and consistently with human rights. IGIS publishes an annual report on its oversight activities each financial year.

(b) Discretionary power for the Director-General of Security to communicate foreign intelligence information

The amendments clarify the ability of agencies to communicate foreign intelligence information about threats to Australia in accordance with the proper performance of their functions. Foreign intelligence information obtained under the relevant warrants plays a critical role in enabling intelligence agencies to identify threats to Australia's national security. The communication and use of such information is critical to identifying and mitigating those threats.

It is necessary and appropriate to provide a discretionary power to the Director-General of Security to communicate foreign intelligence information in accordance with subsection 65(1A). ASIO works with other agencies and authorities to achieve outcomes that protect Australia's national security. The ability to use and disclose foreign intelligence information is critical to ASIO's ability to achieve its functions.

ASIO is subject to a stringent legal and policy framework. The Director-General of Security's ability to communicate foreign intelligence information under subsection 65(1A) is limited by section 20 of the ASIO Act, which requires that the Director-General take all reasonable steps to ensure that the work of ASIO is limited to what is necessary for the purposes of the discharge of its functions.

In addition to this, the Minister's Guidelines outlines the standards and other procedural requirements that ASIO is required to adhere to when it performs its functions and exercises its powers. Part 4 of the Minister's Guidelines requires the Director-General to take all reasonable steps to ensure that ASIO's collection, retention, use, handling and disclosure of personal information is limited to what is reasonably necessary to perform its functions.

As explained above, ASIO is subject to robust and independent oversight by the IGIS.

(c) Limitations and safeguards that apply to the discretionary power of the Director-General of Security

The Director-General's ability to communicate foreign intelligence information pursuant to subsection 65(1A) is appropriately limited by a stringent legal and policy framework as outlined above. These measures provide appropriate limitations on the Director-General of Security's discretionary power to communicate foreign intelligence information, for the purposes approved, and subject to any conditions specified, by the Attorney-General.

(d) and (e) Power of a 'second person' to communicate foreign intelligence information to another person, and use and make a record of it

Subsection 65(1B) ensures that where the second person receives foreign intelligence information from the Director-General of Security, or a person authorised by the Director-General, they may communicate that information to another person. The recipient (and any future recipients) are likewise permitted to communicate, use and make a record of that information.

Foreign intelligence information plays a critical role in enabling intelligence agencies to identify threats to Australia's national security. The communication and use of such information is critical to identifying and mitigating those threats. The amendments enable agencies to use or communicate foreign intelligence information to persons who are best placed to take actions, mitigate risk and protect Australia's national security interests.

I have copied this letter to the Hon Clare O'Neil MP, Minister for Home Affairs.

I thank the Committee for raising these issues for my attention and trust this information is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
23 / 08 / 2023

CC. *The Hon Clare O'Neil MP, Minister for Home Affairs*

SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
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CANBERRA ACT 2600

scrutiny.sen@aph.gov.au

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 (Advanced Compliance Measures) Bill 2023 (the Bill) in the *Scrutiny Digest 8 of 2023*.

The Committee has sought advice on matters identified during the Committee's assessment of the Bill which is addressed in the advice below.

a) The nature of personal information that can be collected and used from the production or scanning of a passport or travel document in accordance with proposed subsection 196(3A) and to whom that information can be disclosed;

The personal information to be collected from the production or scanning of a person's passport or travel document under proposed subsection 196(3A) may include a person's name, place of birth, date of birth, date of issuance, date of expiry, document number, photo and signature. It is intended that some or all of this personal information may be used.

The disclosure of information is governed and limited by the statutory framework under the *Biosecurity Act 2015* (Biosecurity Act) and under other relevant legislation such as the *Privacy Act 1988* (the Privacy Act). The personal information collected under proposed subsection 196(3A) will be considered 'relevant information', defined under section 9 of the Biosecurity Act as information that has been obtained or generated by a person in the course of, or for the purposes of, performing functions, duties or exercising powers under the Biosecurity Act, or assisting another person to do so. This information will therefore be subject to the information management provisions set out in Division 3 of Part 2 of Chapter 11 of the Biosecurity Act. Each provision in Division 3 provides an authorisation for the purposes of the Privacy Act and other laws. This includes, but is not limited to, disclosure to a Commonwealth entity or a law enforcement body.

Proposed subsection 196(3A) will not enable the collection of any additional personal information beyond the personal information contained within a passport or travel document. The collection of any sensitive information as defined in section 6 of the Privacy Act, is protected information under the Biosecurity Act and an offence or civil penalty provision may apply to unauthorised disclosure. Personal information collected from the production or scanning of a passport or travel document will not be used or disclosed beyond what is permitted under the Biosecurity Act.

b) The meaning of the 'future profiling, or future assessment, of biosecurity risks';

The Department of Agriculture, Fisheries and Forestry (the department) currently collects and analyses data in relation to biosecurity interventions that are undertaken in response to travellers who demonstrate non-compliance with biosecurity requirements at the Australian border. The analysis of this data is currently used to inform the development of traveller cohort profiles which enable the department to better predict and manage the biosecurity risks posed by future traveller cohorts, as well as to modify and enhance the department's biosecurity screening activities, at international airports and ports. The department's traveller cohort profiles are developed in collaboration with the Centre of Excellence for Biosecurity Risk Analysis.

The data is used to determine the likelihood that a cohort of travellers will fail to declare high biosecurity risk goods and prioritise these cohorts for biosecurity intervention. However, this currently involves the use of complex statistical processes to account for a lack of data for travellers who undergo biosecurity screening but are found to be compliant with biosecurity requirements, which is not currently incorporated into the datasets that are used to build the cohort profiles. The proposed amendments are intended to enable the department to obtain information from all travellers, instead of just those provided voluntarily or in relation to those who demonstrate non-compliance with biosecurity requirements, for the development of a reliable and complete dataset.

The proposed amendments are intended to ensure that the data collected in relation to the department's interventions with incoming travellers can be consistently recorded and analysed, which will enable a more intelligence and evidence-based approach to predicting and managing the biosecurity risk posed by future traveller cohorts. This will inform the department's biosecurity intervention rate and enhance the traveller biosecurity clearance process.

c) Whether the Privacy Act 1988 applies to personal information that is collected in accordance with proposed subsection 196(3A).

As an Australian Government agency, the department is bound by the Australian Privacy Principles (APPs) in the Privacy Act and the Australian Government Agencies Privacy Code (the Privacy Code). These obligations extend to the department's employees, contractors and agents. The department's approach to handling personal information, including information that is intended to be collected in accordance with proposed subsection 196(3A), is aligned with the APPs.

As set out above, the personal information to be collected in accordance with proposed subsection 196(3A) will be subject to the information management provisions provided for in Division 3 of Part 2 of Chapter 11 of the Biosecurity Act, which are authorisations for the purposes of the Privacy Act.

My department maintains robust policies and procedures to protect any personal information which it holds, as documented in the Department's Privacy Policy (agriculture.gov.au/about/commitment/privacy).

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

Yours sincerely,

MURRAY WATT 17 / 08 / 2023

Attorney-General

Senator Dean Smith
Chair
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By email: scrutiny.sen@aph.gov.au

Dear Chair

I refer to the Senate Standing Committee for the Scrutiny of Bills (the Committee) request in *Scrutiny Digest 8 of 2023*, dated 2 August 2023, for further information on the Intelligence Services Legislation Amendment Bill 2023 (the Bill).

I appreciate the time the Committee has taken to consider the Bill. Please find below my response.

Paragraph 1.49 – significant matters in delegated legislation

The Committee has requested more detailed advice as to why it is considered both necessary and appropriate to set out the meaning of 'intelligence function' for the Department of Home Affairs (Home Affairs) within delegated legislation. The Committee has also queried whether the Bill could be amended so that any of Home Affairs' intelligence functions that are already legislated are set out within the Bill and to provide further high-level guidance about the use of the regulation-making powers set out in proposed subsections 3A(4) and (5).

Proposed subsection 3A(4) of the Bill provides that the 'intelligence function' for Home Affairs would have the meaning given by regulations made under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). This regulation-making power would enable Home Affairs' intelligence functions to be defined with as much detail required to accurately characterise those functions, and provide certainty to agencies, the Parliament and the public about the scope of oversight. For example, the regulations could refer to a specific area within Home Affairs in which the intelligence functions are contained, or to specific functions.

Proposed subsection 3A(5) of the Bill provides that the regulations may also provide for consultation requirements in relation to changes relating to the performance of intelligence functions by Home Affairs. This would allow for consultation to ensure the regulations made under proposed subsection 3A(4) continue to accurately reflect Home Affairs' intelligence functions and identify when changes may be required.

As a department of State, Home Affairs' functions are provided for in the Administrative Arrangements Order (AAO) and are therefore subject to change, such as the removal, addition or amendment to intelligence functions, in a manner that may occur more quickly and with higher frequency than experienced by agencies established in legislation. Further, the legislation relating to Home Affairs broadly refers to the minister responsible for administering the legislation, rather than specifically naming the minister responsible for Home Affairs. As such, the intelligence functions that Home Affairs perform could be changed via an AAO rather than legislative amendments.

The Bill demonstrates the Government's commitment to ensure intelligence functions are comprehensively and uniformly overseen by the Inspector-General of Intelligence and Security (IGIS). To ensure there are no gaps in oversight and to provide assurance to the public that Home Affairs' intelligence functions are subject to ongoing robust oversight, it is important that those functions are defined for the purposes of oversight in a manner that allows timely updates as required.

Paragraphs 1.58 and 1.59 – reversal of the evidential burden

The Committee has sought further advice as to why it is proposed to use offence-specific defences which reverse the evidential burden of proof.

A number of provisions in Schedule 1 of the Bill would add defences to a range of existing offences, contained in various Commonwealth Acts, that relate to the disclosure, use or making records of certain information.

These new defences would apply to conduct that is for the purpose of an IGIS official exercising a power, or performing a function or duty, as an IGIS official. These amendments intend to make it clear that information can be shared with IGIS officials for the purpose of IGIS officials performing their oversight functions, without attracting criminal liability.

As the Committee has noted, the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that a matter should be included in an offence-specific defence only where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costlier for the prosecution to disprove than for the defendant to establish the matter.[1]

The defences would place the evidential burden of proof on the defendant to establish the purpose for which the defendant engaged in the conduct. The purpose for which information is disclosed is a matter that is peculiarly within that person's knowledge. Reversing the burden of proof will better enable the reason for the relevant conduct to come to light as the defendant is best placed to identify and point to evidence as to the purpose of their conduct. In addition, information that is disclosed to IGIS officials is likely to be highly classified in nature and the reasons for, and context surrounding, such a disclosure may be similarly sensitive.

As such, the prosecution may be unable to adduce evidence of the defendant's purpose in disclosing the information. Once the defendant has adduced evidence on this matter, the onus will shift back to the prosecution to prove beyond a reasonable doubt that the purpose was not for the purpose claimed.

Paragraphs 1.69 and 1.70 – immunity from civil and criminal liability

The Committee has sought further advice on a range of matters, including why the immunities conferred under proposed subsections 476.7(1) and 476.7(2) are both necessary and appropriate.

Schedule 4 of the Bill seeks to provide an exemption from criminal and civil liability for defence officials who engage in conduct inside or outside of Australia, on the reasonable belief that such conduct is likely to cause a computer-related act, event, circumstance or result to take place outside of Australia. The exemption will only apply if the conduct was engaged in the proper performance of authorised activities of the Australian Defence Force (ADF).

[1] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p.50.

Why conferring civil and criminal immunity is both necessary and appropriate?

Offensive and defence cyber operations are integral to supporting the ADF. Cyber attacks have increasingly become part of modern warfare. It is necessary and appropriate to provide immunity to defence officials to protect them from legal risk that could arise out of any actions they take in the course of exercising their duties as defence officials.

The amendments provide that civil and criminal immunity is only conferred if conduct was engaged in the proper performance of 'authorised ADF activities'. 'Authorised ADF activities' are defined to mean activities of the ADF that are authorised by the Chief of the Defence Force and connected with the defence or security of Australia. Further, the Bill provides a specific immunity from the conduct covered by Part 10.7, and reflects that there may be conduct that could cause a 'computer-related act, event, circumstance or result' that may attract civil or criminal liability under other laws. The activity that is covered is limited by several aspects, notably the scope of the definition of computer-related act, event, circumstance or result.

The amendment also requires that a person must provide written notification if they engage in conduct that causes material damage, material interference or material obstruction to a computer in Australia. This notification will go to the Chief of the Defence Force (CDF) for persons who fall under the CDF's command and to the Secretary of the Defence Department in other cases. The notification process will facilitate consideration at the most senior levels within Defence of any necessary or appropriate internal review processes, to ensure accountability. Such review could include consideration of the legal basis for the original conduct, or operational review to ensure computer capabilities were used appropriately and in line with Defence standard operating procedures. The CDF and Secretary of Defence would also be able to take steps to remedy any issues identified in such an internal review, such as updating procedures and guidelines, and take any disciplinary action.

The proposed amendments are consistent with the approach taken for ASD, AGO and ASIS under Part 10.7 of the *Criminal Code Act 1995* (Criminal Code).

Why it is necessary and appropriate to provide that the immunity would extend to persons other than ADF members, including employees of the Department of Defence, consultants, contractors, or persons specified by legislative instrument?

The term 'defence officials' intends to capture the various members of the integrated defence workforce, who ensure the security and defence of Australia. The immunity will only apply to defence officials engaging in the relevant conduct in the proper performance of authorised ADF activities.

Why it is necessary and appropriate to confer immunity on persons who are undertaking actions inside Australia?

The immunity only applies where a defence official had the reasonable belief that the conduct was likely to cause a computer-related act, event, circumstance or result to take place outside of Australia. The immunity will be available in circumstances where the computer related act was generated inside Australia, however the effect was likely to occur outside Australia.

Why is the threshold test of whether a computer-related event is 'likely' to take place outside of Australia is the appropriate test?

In a complex online environment it is not always possible to reliably determine the geographic location of a device, data or a computer. This challenge is exacerbated where both state and non-state adversaries take active steps to obfuscate their physical location or the assets being used.

The immunity is appropriately limited by the requirement that there be a reasonable belief that the activity is occurring outside Australia. The amendments will not provide Defence officials with immunity from civil or criminal liability in circumstances where they know or believe a target computer or device to be located inside Australia. Nor will it provide such persons with immunity where their belief that a target computer or device is likely located outside Australia is not reasonable. The immunity will also no longer apply once it is known to the defence official that the target is not outside Australia—any continued targeting in Australia by a defence official, once the relevant official is aware that it is within Australia, would constitute an offence.

Whether processes are in place to ensure that decisions as to whether the relevant conduct is likely to cause a computer-related event to take place outside of Australia are undertaken in a robust and consistent manner?

The Government is satisfied that there are appropriate processes to ensure robust and consistent decision-making as to whether the relevant conduct is likely to cause a computer-related event. This includes context-specific legal advice that addresses domestic and international law, targeting directives, and rules of engagement.

Why it is necessary and appropriate to confer an immunity on persons who are undertaking conduct that is preparatory to, in support of, or otherwise directly connected with, authorised ADF activities outside Australia?

Complex cyber operations may require varying levels of preparatory or supporting conduct before the actual conduct occurs. The ADF may be required to undertake computer-related activities when pre-positioning in theatre under properly authorised operations, but because armed conflict is yet to occur combat immunity does not apply to its activities.

The proposed immunity is appropriately limited to preparatory, supporting or directly connected acts that together with the act, event, circumstance or result that took place, or was intended to take place overseas, would amount to an offence. The immunity also only applies to conduct engaged in the proper performance of authorised ADF activities.

I thank the Committee for raising these issues for my attention and trust this response is of assistance.

Yours sincerely

THE HON MARK DREYFUS KC MP
23 / 08 / 2023

THE HON ANDREW GILES MP

MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
Suite 1.111 Parliament House
Canberra ACT 2600

Dear Senator Smith

Thank you for your correspondence of 3 August 2023 to Minister for Home Affairs and Minister for Cyber Security, the Hon Clare O'Neil MP, concerning the Scrutiny of Bills Committee's assessment of the Migration Amendment (Strengthening Employer Compliance) Bill 2023 (the Bill). I appreciate the time you have taken to review the Bill and outline the Committee's questions about the legislation. Your correspondence has been referred to me as the matter falls within my portfolio responsibilities.

Questions:

Significant matters in delegated legislation

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

- *why it is considered both necessary and appropriate to include the regulation making powers set out in Part 2 of Schedule 1 to the bill; and*
- *whether high-level guidance about the use of these powers can be included within the bill.*

As noted by the Committee, the Bill provides for the regulations to prescribe *Fair Work Act 2009* (Fair Work Act) criminal offences and additional civil contraventions as 'migrant worker sanctions'. For example, subsection 245AYF(3) provides that a person is subject to a 'migrant worker sanction' if they have been convicted of a prescribed offence under the Fair Work Act, and the offence related to a non-citizen. The subsection also provides that the regulations may prescribe circumstances that apply in relation to the offence.

Most breaches of the Fair Work Act are civil contraventions. However, the Fair Work Act also contains a limited number of criminal offences. Examples of these offences include employer or employee organisations giving, receiving, or soliciting bribes, and offences relating to the operations of the Fair Work Commission. While there are currently no criminal offences in the Fair Work Act considered appropriate to include as a 'migrant worker sanction', the regulation making power will ensure that changes to workplace laws can more easily be reflected under migration law.

For example, the Government has committed to introducing a criminal offence for wage theft in 2023, and the regulation making power will ensure that this offence can be considered for possible inclusion as a 'migrant worker sanction' to the extent the offence relates to a non-citizen with any proposed inclusion subject to parliamentary scrutiny of regulations. Similarly, the Bill's provision for additional civil remedy provisions to be prescribed will ensure that changes to the Fair Work Act's civil remedy provisions can be considered for possible inclusion as a 'migrant worker sanction' to the extent the contravention relates to a noncitizen.

The Bill also provides for the regulations to prescribe any circumstances that may apply in relation to a prescribed Fair Work Act criminal offence or civil contravention. The Fair Work Act provides for different types of legal responsibility, including accessorial liability, franchisor liability and holding company liability. The inclusion of the ability to prescribe any circumstances that apply to prescribed offences or contraventions is intended to enable these different types of liability to be included or excluded, as appropriate to the particular criminal offence or civil contravention.

Broadly, the flexibility of regulation making powers in these parts of the Bill allows consideration of future criminal offences and civil contraventions that may warrant inclusion in the migrant worker sanction regime, noting the clearly defined purpose of this Bill in the Explanatory Memorandum to prevent the exploitation of temporary migrant workers.

I will consider possible amendments to the Bill and the Explanatory Memorandum after the Legal and Constitutional Affairs Committee hands down its report, currently scheduled for 31 August. This will be a holistic consideration, including your queries about the need for additional guidance on the regulation making powers in the Bill.

Publishing information about prohibited employers

The committee also requests the minister's advice as to:

- *why it is considered necessary and appropriate to include proposed subsection 245AYM(5), so that the Minister is not required to arrange for the removal of information when a person stops being a prohibited employer; and*
- *what safeguards are in place to ensure the appropriate exercise of publication powers under section 245AYM, and whether these are set out in law or policy.*

As noted in your report, the Explanatory Memorandum states that although the Minister is not required to arrange for the removal of this information, the intention is that such information would be removed from the Department of Home Affairs website as soon as reasonably practicable after the person stops being a prohibited employer.

The clause at 245AYM(5) is necessary because it may not be possible to guarantee that the information has been completely removed from the internet on any particular date, particularly if it has been shared or replicated elsewhere, including on the Department's social media channels or media releases. It is also possible that there may be unforeseen delays in removing information. The intention is clear, but the clause removes any doubt as to the Minister's responsibility in this regard.

By publishing the details of the prohibition, existing and prospective employees can make an informed decision about working for that employer. Publishing the prohibition will also support enforcement of the prohibition measure as it allows third parties to report concerns to the Department if they believe the employer is acting in breach of the prohibition.

This is in line with the existing registers, including:

- *The Register of sanctioned employers on the Australian Border Force (ABF) website, which lists details of sponsors who have breached their sponsorship obligations, and*
- *The register of Disciplinary decisions on the Office of the Migration Agent's Registration Authority (OMARA) section on the Department's website, which details disciplinary* decisions made by the OMARA.

In accordance with Australian Privacy Principles 10 and 13, the Department will be responsible for taking reasonable steps to ensure the information published is accurate, up-to-date, complete and relevant; and it will take appropriate action to review published information where requested by an individual, or where it otherwise has information that would indicate that a review is necessary.

As outlined in the Bill, commencement of the provisions must occur within 12 months from the day the Act receives Royal Assent. The intention of the delayed commencement is to give the Department sufficient time to embed policies, procedures and training to give effect to the intent to ensure information that will be published is accurate, to amend it where it is not accurate, and to remove the details of a prohibited employer from the Department's website as soon as reasonably practicable once the prohibition period has expired.

Immunity from civil liability arising from the publishing of information about prohibited employers

The committee draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing an immunity from civil liability, such that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

In accordance with Australian Privacy Principle 13, the Department's privacy policy sets out how an individual can seek correction of personal information held by the Department. As noted above, the delayed commencement of the provisions give the Department sufficient time to embed policies, procedures and training, to give effect to the intent to ensure any information published is done so in good faith that it is accurate, and to correct any incorrect information that may have been published as soon as practicable.

Retrospective application

The committee draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing that the amendments introduced by Part 5 of Schedule 1 to the bill, relating to compliance notices, have a retrospective application.

Compliance notices are largely non-punitive, providing a mechanism for government regulators to address alleged contraventions of the law instead of commencing court proceedings.

In developing reforms to address migrant worker exploitation, the Department considered compliance tools used by other enforcement agencies that might be utilised to improve compliance outcomes. For example, the Fair Work Ombudsman uses compliance notices as one of its main compliance tools because it has benefits for the employer, the migrant worker and the Government by providing a timely and efficient alternative to court proceedings, where appropriate.

Aside from the new work-related offences and civil penalty provisions introduced in this Bill, the work-related offences and work-related provisions in Subdivision C of Division 12 of Part 2 of the *Migration Act 1958* (Migration Act) are long-standing, well-established provisions. Even if an employer were for some reason unaware of their breach of obligations, issuing a compliance notice in response to the alleged breach is a less onerous and more timely alternative to a court order, which is more likely to involve a more significant impost on the employer and result in a punitive sanction.

The existing work-related provisions of the Migration Act involve longstanding offences such as ‘allowing an unlawful non-citizen to work’, ‘allowing a lawful non-citizen to work in breach of a work-related condition’, and related aggravated offences. Importantly, in considering whether to issue a compliance notice the ABF delegate would first need to form a reasonable belief an employer has contravened the law, including by looking at the available evidence.

The application of the amendments to the Migration Act by this Part of the Bill to conduct (including an omission) occurring before, on or after commencement ensures that the ABF has the necessary tools to deal effectively with non-compliance with provisions of the Migration Act that are intended to protect migrant workers. In some cases, this may include considering past and present conduct in respect to migration law where relevant and reliable evidence is available.

If compliance notices were not available in respect of past conduct, only the current compliance measures in the Migration Act would be available. This would mean that the available compliance options in respect of that non-compliant conduct would be less timely and more onerous and costly (e.g. an infringement or court process).

As noted at paragraph 399 of the Explanatory Memorandum, compliance notices will provide the necessary flexibility to require a person to take specific action to address the underlying non-compliance issue, based on the circumstances of the individual case.

The notice itself will only direct the employer / business about actions to undertake or to cease undertaking to support compliance with the law. In this regard, it is not a penalty or punitive in nature. Rather, it is a mechanism to draw attention to the non-compliant behavior and outline remedial action. In effect it is a preventative warning that should support the employer / business to comply with their obligations under law. Where the employer / business complies with a compliance notice, no further action is required. However, where they do not comply, the issue could result in punitive measures, such as an application refusal.

Importantly, in considering whether to commence litigation proceedings for breach of a compliance notice, the regulator would consider a range of public interest factors such as the seriousness of the alleged contraventions, any mitigating or aggravating circumstances, compliance history, the impact of the alleged contraventions, and suitability and efficacy of other enforcement mechanisms as an alternative to litigation.

Consideration of litigation would also include the passage of time since the alleged contraventions, and whether the proceedings are necessary to maintain public confidence in the administration of migration laws.

I have copied this letter to Minister O'Neil.

Thank you for raising these matters.

Yours sincerely

ANDREW GILES

28-08-2023

The Hon Ged Kearney MP
Assistant Minister for Health and Aged Care
Member for Cooper

Senator Dean Smith
Chair
Senate Scrutiny of Bills Comittee
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scrutiny.sen@aph.gov.au

Dear Chair

I refer to your correspondence of 3 August 2023 to the Minister for Health and Aged Care, the Hon Mark Butler MP, regarding the Senate Scrutiny of Bills Committee 'Scrutiny Digest 8 of 2023' which seeks further information on the National Occupational Respiratory Disease Registry Bill 2023 (Bill). This matter has been referred to me as the Assistant Minister for Health and Aged Care.

The Bill will establish the National Occupational Respiratory Disease Registry (National Registry), which will provide a centralised repository for the notification of diagnoses of occupational respiratory disease in Australia.

The Bill will put in place arrangements to provide an accurate record of incidence of occupational respiratory diseases in Australia and will provide an understanding of the nature and extent of occupational respiratory diseases in Australia.

The Bill will also assist in preventing further worker exposure to respiratory disease-causing agents by providing critical information on the occurrence of disease in workplaces (including tasks, occupations and industries) to state and territory health agencies, and work health and safety agencies. States and territories will only receive personal information relating to individuals diagnosed, residing or exposed to disease causing agents in their jurisdiction.

The handling of this information will ensure state and territory agencies can effectively investigate the occurrence of occupational respiratory disease within a workplace, assess the risks of further exposures and consider controls or actions to ensure further worker exposure does not occur, reducing and potentially preventing the likelihood of another individual developing the disease. Following these investigations, these agencies will be better equipped to identify and deliver further compliance and education and training programs across industries to address new and emerging risks associated with certain tasks or occupations.

The Bill will require the Commonwealth Chief Medical Officer to publish de-identified statistical information about notifications made to the National Registry each year and provide for other de-identified information on occupational respiratory disease to be publicly released.

The Senate Scrutiny of Bills Committee has requested advice as to:

Why it is considered necessary and appropriate to leave much of the information relating to the scope and operation of the National Registry to delegate legislation

The Bill seeks to achieve an appropriate balance between setting out the obligations and processes associated with the notification of occupational respiratory diseases in primary legislation while ensuring operational detail, which may need to be amended to ensure the currency of the National Registry is set out in legislative instruments.

The Bill embeds the fixed policy parameters recommended by the National Dust Disease Taskforce for notification of the diagnosis of an occupational respiratory disease to the National Registry by prescribed medical practitioners. The operational elements of the National Registry will be set out in the supporting rules and determinations to allow for adjustments when responding to new developments.

The Bill provides the Minister for Health and Aged Care or a delegate with the power to make rules prescribing which occupational respiratory disease diagnoses require notification, the kinds of medical practitioners to which the definition of 'prescribed medical practitioner' will apply, and the period in which notification must occur. This legislative structure enables a National Registry that is appropriately equipped to be responsive to emerging occupational respiratory diseases.

Consistent with the recommendations of the National Dust Disease Taskforce, only silicosis is intended to be initially prescribed upon commencement of the National Registry. Providing for the kinds of diseases to which the definition of 'prescribed occupational respiratory disease' will apply to be set out in the rules is necessary to ensure the National Registry can respond to new threats to workers' respiratory health as they arise in the future.

The ability to quickly mandate the notification of a disease will ensure information on incidence, exposure, task, job and occupation can be made available to work health and safety and health agencies to facilitate early and effective identification and response to emerging occupational respiratory disease. This will allow governments to remain responsive and able to take informed action to reduce or eliminate further exposures in the workplace and protect the health of Australian workers. The prescribing of occupationally caused or exacerbated respiratory diseases will require consultation with the Commonwealth Chief Medical Officer and state and territory authorities through their respective Health Ministers (in accordance with clause 33 of the Bill).

Similarly, the Bill provides the Minister for Health and Aged Care or a delegate with the power to make rules prescribing the kinds of medical practitioners who can notify the National Registry.

The kinds of practitioners to be prescribed in the rules are intended to be reflective of the necessary skills and experience required to ensure accurate diagnoses of occupational respiratory diseases. This definition of a prescribed medical practitioner will need to remain representative of the varied medical expertise required to diagnose prescribed occupational respiratory diseases, particularly those of a novel nature.

The Bill also allows the Commonwealth Chief Medical Officer to determine the scope of minimum and additional notification information captured in the National Registry. This will allow for changes to the type of information notified to the National Registry, when appropriate, and ensure the National Registry remains capable of supporting further investigation of emerging issues and research into occupational respiratory diseases.

Whether the Bill can be amended to include further detail in relation to the National Registry on the face of the primary legislation

As outlined in the previous response, the Bill seeks to strike an appropriate balance between embedding the obligations and processes for the National Registry in primary legislation while ensuring operational detail, which may need to be amended to ensure the currency of the National Registry, is set out in disallowable instruments.

The Bill seeks to provide certainty on the scope of the National Registry, as being the notification of the diagnosis of an occupational respiratory disease by prescribed medical practitioners. The Bill also defines how this information will be handled and the limitations on its use which will apply to Commonwealth bodies, state and territory agencies and researchers.

Including further detail on the face of the primary legislation would be counter to the strong feedback from key stakeholders, including state and territory agencies, medical peak bodies and worker representative organisations, that the National Registry needs to be capable of pivoting to address future occupational respiratory disease threats.

What criteria or considerations exist that limit or constrain the exercise of the Commonwealth Chief Medical Officer's broad discretionary powers in determining minimum and additional information

When exercising this power, it is intended the Commonwealth Chief Medical Officer will take into consideration:

- the implications for operational support of the National Registry from jurisdictions which currently operate mandatory disease registers
- the potential reporting burden on prescribed medical practitioners and their willingness to report non-prescribed occupational respiratory diseases and additional notification information
- the resourcing needs to implement changes to the functionality of the National Registry
- the outcomes of any consultations undertaken in compliance with s 17 of the *Legislation Act 2003*.

Both New South Wales and Queensland currently operate occupational dust disease registers which require certain prescribed medical practitioners to notify the diagnoses of particular occupational respiratory diseases. The design of the National Registry (including the scope of minimum and additional notification information) has been significantly informed by the requirements of these existing registers. This will support these states' adoption of notification to the National Registry to comply with their own existing legislation. Significant deviation from the scope of information notified under these schemes in the absence of extensive consultation with states, territories and other key stakeholders could undermine the adoption of the National Registry.

The minimum and additional notification information determined by the Commonwealth Chief Medical Officer will have a direct impact on prescribed medical practitioners. In the context of minimum notification information, a prescribed medical practitioner will be obliged to notify the National Registry. When considering whether to amend the scope of information to be notified to the National Registry, the Commonwealth Chief Medical Officer will take into account the extent of the burden placed on prescribed medical practitioners notifying diagnoses to the National Registry. This consideration will limit the extent of any changes to the scope of minimum and additional notification information that could be made without further consultation.

The operation of the National Registry will be supported by the establishment of an online notification and reporting portal through which the National Registry will collect the minimum and additional notification information set out in the Determination. When making these determinations the Commonwealth Chief Medical Officer may also have regard to the resourcing and timeframes required to make changes to the portal, which will limit the extent to which changes can be made to it.

The considerations outlined above will ensure the Commonwealth Chief Medical Officer will be conservative when determining the scope of minimum and additional notification information, and will undertake consultation with relevant stakeholders as required under s 17 of the *Legislation Act 2003*, in making any such determinations.

I trust this information will assist the Senate Scrutiny of Bills Committee in its consideration of these matters.

Thank you for writing on this matter.

Yours sincerely

Ged Kearney

15 / 8 / 2023

THE HON STEPHEN JONES MP

ASSISTANT TREASURER AND MINISTER FOR FINANCIAL SERVICES

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
Parliament House
CANBERRA ACT 2600

Dear Senator

I am writing about the Senate Standing Committee for the Scrutiny of Bills' comments in Scrutiny Digest 9 of 2023.

I have attached a detailed response to the Committee's enquires about the Treasury Laws Amendment (2023 Measures No. 3) Bill 2023.

I trust that this information provides further context about the drafting of the bills and assists with the Committee's deliberations.

Yours sincerely

The Hon Stephen Jones MP

Parliament House Canberra ACT 2600 Australia
Telephone: (02) 6277 7230

ATTACHMENT A

Schedules 1 and 3 to the Bill

In your letter, you sought my advice as to:

- why it is considered necessary and appropriate to provide a broad power to exempt schemes or classes of schemes from proposed sections 1023U and 828R in delegated legislation;

- whether the Bill can be amended to provide that instruments made under proposed section 1023U and 828R are time-limited; and

- whether the Bill can be amended to include at least high-level guidance on the face of the primary legislation as to the circumstances in which an exemption may be granted, and general guidance in relation to the conditions which may apply to an exemption.

Proposed section 1023U

Schedule 1 to the Bill introduces new rules that prohibit schemes designed to avoid the application of a credit product intervention order. Where ASIC has made a credit product intervention order, a person must not engage in activity in the avoidance of that product intervention order. ASIC may, under proposed section 1023U, exempt a scheme or a class of schemes from the general prohibition.

ASIC may use the exemptions power in proposed section 1023U to address circumstances where the anti-avoidance legislation adversely captures products not intended to fall under the general prohibition. The proposed prohibition is wide reaching to protect consumers from potentially harmful credit products, as it applies in any circumstance where ASIC makes a credit product intervention order and there is an avoidance of that product intervention order. However, the general prohibition may capture some genuinely innovative credit products not designed with the intention of avoiding a credit product intervention order.

To ensure that the prohibition does not stifle innovation or market participation through over regulation, it is appropriate that ASIC be able to respond in a timely manner to provide certainty to credit product providers. The amendments enable ASIC to achieve this through delegated legislation. It is not appropriate to have an overarching time-limit on instruments made under proposed section 1023U. Determining the length of operation for such instruments needs to occur on a case-by-case basis to ensure each instrument operates as long as is strictly necessary. ASIC can vary, revoke or set the length of such instruments depending on evolving market conditions in a similar manner to other instruments already made by ASIC.

The exemption powers are appropriately broad to future-proof the primary legislation as an overarching prohibition. The explanatory memorandum provides high-level and specific guidance on when the exemption should apply in relation to specific factors. However, financial markets change quickly and, as a result, new products may emerge that this guidance does not foresee. As such, specific guidance within the primary law could prevent ASIC from providing appropriate exemptions in circumstances where there is no avoidance behaviour when considering the market conditions and the conduct of the product provider.

To enable ASIC to respond in timely and appropriate way to ensure the effective operation of the product intervention order regime, I do not support amending the Bill to time-limit these instruments or include specific guidance on the face of the primary legislation.

Proposed section 828R

Schedule 3 to the Bill provides ASIC with a rule-making power to facilitate competitive outcomes in the provision of clearing and settlement (CS) services. Proposed section 828R allows ASIC or the regulations to exempt a person or class of persons from specific or all provisions of the CS services rules framework. Where ASIC exempts a class, that exemption is a legislative instrument.

Proposed section 828R is a necessary element of the CS services rules framework because it allows ASIC to ensure that the CS rules making framework operates as intended and does not draw in entities that should not be subject to the CS services rules.

The CS services rules will apply to entities involved in the clearing and settlement of transactions on financial markets. This is a complex area that can experience rapid innovation and the regulatory framework operating in this area needs to contain mechanisms to ensure that these frameworks operate as intended. The exemption power in section 828R ensures that the CS services rules will apply only to those entities intended to be subject to them.

The Bill does not contain criteria or conditions that ASIC may or must consider prior to making an exemption because any relevant criteria and conditions that could arise at the time of the exemption are not foreseeable. ASIC requires a broad scope of action to be able to exempt entities that fall into definitions used in the rules that should not be in scope.

Additionally, I consider that limits on the exemptions beyond any sunsetting requirements imposed by the *Legislation Act 2003* are not appropriate in this instance. ASIC can determine a short sunsetting period tailored to the nature of the instrument. This is appropriate as ASIC is in the best position to determine the appropriate length of any exemption based on the circumstances that necessitate the exemption.

Schedule 3 to the Bill

In your letter, you sought my advice as to why it is necessary and appropriate not to allow for independent merits review of an ASIC decision to:

- make clearing and settlement services rules under section 828A; and
- provide directions to a person under subsection 828G(1).

CS services rules

Proposed section 828A would allow ASIC to make CS services rules that deal with the activities, conduct and governance of CS facility licensees in relation to CS services. The rules are subordinate legislation. I do not consider that it is appropriate or necessary for merits review to be available for legislative action. I note that this position is consistent across Commonwealth legislation and the Administrative Review Council's guidance document, *What decisions should be subject to merits review*?, states that legislative-like decisions should not be subject to merits review.

The *Corporations Act 2001* deems all decisions (adopting the same meaning of 'decision' as the *Administrative Appeals Tribunal Act 1975*) to be reviewable unless specifically excluded in Part 9.4A of that Act. The Bill amends section 1317C to include proposed section 828A in the list of excluded decisions consistent with my position outlined above. The exclusions include comparable decisions to engage in legislative action such as the decision to make market integrity rules under section 798G.

Directions

The intention is that ASIC only issue directions under proposed subsection 828G(1) where a person is not complying, or is not likely to comply, with its obligations under CS services rules. ASIC can issue directions with the aim of bringing the person into compliance with the CS services rules.

Directions issued under proposed subsection 828G(1) would not affect the interests of a person or place any burden on a person that the person would not otherwise experience if they were complying with their obligations under the CS services rules.

The decision to issue a direction is law enforcement in nature enabling ASIC to ensure compliance with CS services rules. The Administrative Review Council's guidance document, *What decisions should be subject to merits review?*, states that decisions of a law enforcement nature should not be made subject to merits review.