THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-002485

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

Dear Senator

Response to Scrutiny Digest No. 7 of 2017 from the Senate Scrutiny of Bills Committee – Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017

Thank you for your letter of 22 June 2017 to my Senior Adviser, inviting me to respond to issues identified by the Senate Standing Committee for the Scrutiny of Bills (the Committee) in its *Scrutiny Digest No. 7 of 2017* concerning the Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (the Bill).

Item 43, proposed paragraph 21(2)(fa): Requiring an applicant for citizenship by conferral to demonstrate their integration into the Australian community.

The Committee suggested the Bill may require amendment to detail how an applicant for Australian citizenship demonstrates they have integrated into the Australian community, and how this criterion should be applied.

The Government considers it appropriate to set out integration factors in a legislative instrument. The instrument will provide opportunities to address particular details of how an applicant may meet the integration requirement. This instrument is disallowable. The Parliament can scrutinise and disallow the instrument when it is tabled in Parliament.

Examples of an applicant's demonstrated integration have been detailed in the Government's announcements as well as in the Explanatory Memorandum. These include evidence of maintaining competent English, sending children to school, seeking employment rather than relying on welfare, earning income and paying tax, and contributing to the Australian community.

The Department of Immigration and Border Protection (the Department) will also assess applicants' criminal records, adherence to social security laws, conduct inconsistent with Australian values such as domestic or family violence, involvement in gangs and organised crime.

The Department is currently preparing the legislative instrument which will outline these relevant factors to consider in assessing an applicant's integration.

Item 41, proposed paragraph 21(2)(e): Requiring an applicant for citizenship by conferral to demonstrate competent English

The Committee requested the Minister clarify why 'competent English' is not defined in the Bill, and requested more information as to what level of English language an applicant needs to meet this requirement.

The Government announced that applicants must provide results of an approved English language test at competent level in listening, speaking, reading, and writing skills. This is comparable to an International English Language Testing System score of 6 or the equivalent score from a test accepted by the Department. This is consistent with the current 'competent English' test score requirement in the *Migration Regulations 1994* (the Migration Regulations).

The Government considers it appropriate to set out the technical details of the level of English language required in a legislative instrument. This gives the Minister the opportunity to determine particular circumstances such as the approved test providers and test scores. It also provides the Minister flexibility to update the instrument in instances where, for example, there is a change in the approved test providers, without going through the legislative amendment process.

This instrument that will be made to set out the detail of the English language requirement will be subject to scrutiny and disallowance when it is tabled in the Parliament. This approach mirrors the definition of 'competent English' in regulation 1.15C and the 'Language Tests, Score and Passports 2015' instrument in the Migration Regulations.

The Bill provides certain applicants exemptions from the English language requirement for example, due to their age, impairment, or incapacity.

Limited exemptions will be available to holders of valid passports of the United Kingdom, the Republic of Ireland, Canada, the United States of America or New Zealand. This is consistent with the 'competent English' requirement for skilled migrants under the Migration Regulations. There will also be exemptions available to applicants who have undertaken specified English language studies at a recognised Australian education provider. All of these exemptions will be detailed in the instrument.

Item 68, proposed subsection 22AA(4): Providing the Minister with power to waive general residence requirement

The Committee requested an explanation as to why the Minister does not have a duty to consider exercising the new personal, non-compellable power to waive the general residence requirement.

The Minister may exercise this power where he is satisfied that either:

- an administrative error made by or on behalf of the Commonwealth causes an applicant to believe that he or she was an Australian citizen, and the error contributed to the applicant not being able to satisfy the general residence requirement; or

- it is in the public interest to do so.

Further, the Minister has no duty to consider whether or not to exercise this power, which is consistent with the Ministerial intervention power in the *Migration Act 1958*.

The Government considers this provision appropriate because the power is discretionary in nature. It would place an undue burden for the Minister to consider exercising this power in every circumstance, particularly where applicants may seek to abuse this provision with frivolous claims.

It is anticipated that there will be minimal cases that will be referred to the Minister to consider exercising this power, and that the power will not be exercised regularly.

Under the current special residence requirements in subsections 22A(1A) and 22B(1A) of the *Australian Citizenship Act 2007* the Minister does not have a duty to consider exercising these personal powers. Therefore, the proposed measure is consistent with the current personal and non-compellable powers.

Further, where the Minister exercises this power to waive an applicant's general residence requirement, he must table it in each House of Parliament. This means that the Parliament can supervise the Minister's exercise of this power adequately.

Item 119, proposed subsections 46(5)-46(6): Providing the Minister with power to determine an Australian values statement and any requirements relating to the statement

The Committee asked for further justification for exempting a determination setting out an Australian values statement from disallowance.

The determination will be a registered legislative instrument, which will be publicly available on the Federal Register of Legislation. There will also be an explanatory

statement accompanying the determination to demonstrate the purpose and necessity of the Australian Values Statement as well as to justify the inclusion of values considered as Australian values. Therefore the determination will be subject to Parliamentary and public scrutiny. The Parliament can scrutinise the Minister's determination and provide comment on this instrument through other mechanisms. The Committee made the suggestions below to ensure that the Australian Values Statement is not subject to unexpected change:

- including at least core 'Australian values' in the primary legislation;
- requiring the positive approval of each House of the Parliament before the instrument comes into effect;
- providing that the instrument does not come into effect until the relevant disallowance period has expired; or
- a combination of these processes.

The Government notes the suggestions. Currently, provisional, permanent and a small number of temporary visa applicants are already required to sign the Australian values statement as stated in clause 4019 of Schedule 4 to the Migration Regulations. The 'Australian values statement for Public Criterion 4019 – 2016/113' instrument, which is not disallowable, outlines two different Australian Values Statements in visa application forms. These applicants are also asked to understand what may be required of them if they later apply for Australian citizenship.

Aspiring citizens are currently required to sign the long form of the Australian values statement in the declaration in their citizenship application forms. The new Australian values statement will be incorporated into the citizenship application forms.

This provision is consistent with the requirement to sign the Australian values statement in the Migration Regulations.

Applicants can access the *Life in Australia* book to understand more about life in Australia, including values that are important to Australian society. Further, the public has been made aware of Australia values through the discussion paper – *Strengthening the test for Australian Citizenship* as well as public announcements made by the Government. In brief, Australian values include, but are not limited to, democratic beliefs, freedom of speech, freedom of expression, and equality of women and men. Conduct that is inconsistent with Australian values includes criminality and domestic and family violence.

Items 136, 137 and 139: Retrospective application of the amendments to applications made on or after 20 April 2017

The Committee asked for detailed advice as to the number of persons likely to be affected by the retrospective application of the following amendments:

- requirement to make a pledge of allegiance (extended to applicants over 16 years of age in all streams of citizenship by application);

- requirement to demonstrate integration;
- requirement to demonstrate competent level of English language;
- new general residence requirement; and
- new requirements for a valid application.

As of 16 July 2017, the Department has received 39,081 applications for citizenship by conferral (for 47,328 primary and dependent applicants) which had been lodged on or after 20 April 2017.

Of these applications, the Department provides the following estimates:

- General residence requirement:
    - 21,540 (46%) will meet
    - 25,788 (54%) will not meet
    - The Department notes that there are other residence requirements and Ministerial discretions that these applicants may be eligible for to meet this requirement. These enable reduced residency periods under the 4 years.
- Competent English:
    - a number of these applicants will be exempt from the English language requirement on the grounds of:
        - age (under 16 or 60 or over); or
        - incapacity; or
        - speech, hearing or sight impairment; or
        - applied under born to a former citizen, born in Papua or stateless provisions; or
        - valid passport holder of United Kingdom, Canada, United States, New Zealand or Republic of Ireland
    - The potential failure rate for an upfront English language test cannot be determined as the Department does not hold information on citizenship applicants' English language proficiency.
- Integration requirement:
    - a number of these applicants will be exempt from the integration requirement including on the grounds of:
        - age (under 18 or over 60); or
        - incapacity; or
        - having applied under born to a former citizen, born in Papua or stateless provisions
    - This is a new requirement. The potential failure rate for a new integration test thus cannot be determined as the Department does not hold information that supports this requirement.

Requirement to make the pledge

An additional 429 applicants[1] who have applied for citizenship by application (conferral, descent, adoption and resumption) on or after 20 April 2017 over 16 years of age will be required to make the pledge of allegiance who would not have been required to under the previous arrangements.

Whilst the additional requirement may increase the time it takes these applicants to acquire citizenship it is not known how many of these applicants would fail to make the pledge and therefore not meet the eligibility requirements to become a citizen.

Yours sincerely

PETER DUTTON 21/07/17

[1] *As at 25 June 2017. This includes number of people aged 16 years and over at time of lodgement with citizenship applications lodged from 20 April 2017, which were still on-hand at 25 June 2017. This includes the Citizenship by Conferral (born in Papua, born to a former Australian citizen, statelessness streams), Descent and Resumption caseloads. Data was not available for the on-hand adoption cases.*
Note: the figures in this statement are based on finalisation data and are indicative only. Unable to determine exact figures due to insufficient information stored in data.

Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MC17-004603

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

04 AUG 2017

Dear Senator Helen,

Thank you for your letter of 15 June 2017 raising the Senate Scrutiny of Bills Committee's (the Committee's) queries in relation to the Education Legislation Amendment (Provider Integrity and Other Measures) Bill 2017 (the Bill). I note that the Committee is seeking my response in relation to some of the amendments being made by the Bill to the *Education Services for Overseas Students Act 2000* (ESOS Act), *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act), and the *Higher Education Support Act 2003* (HESA).

The Committee has requested my advice on why flexibility is needed in determining whether a person is 'fit and proper' for the purposes of the ESOS Act, and why it is more appropriate that the matters to be considered in relation to 'fit and proper' person requirements under the TEQSA Act are determined in a legislative instrument rather than set out in primary legislation. As has been shown in other sectors, such as family day care and vocational education and training (VET), unscrupulous operators are very nimble in developing business models which exploit vulnerable people and systems. Given this, both the Department of Education and Training and Tertiary Education Quality and Standards Agency (TEQSA) need the ability to act flexibly and swiftly to ensure such operators and their business practices are not able to engage with higher education or international education.

A number of developments in the higher education and international education sectors highlight the need for an effective and flexible regime to ensure that providers and their key personnel are 'fit and proper' persons. These include:

- a significant number of prospective entrants to the higher education and international education sectors, particularly from entities currently operating in the VET sector
- increasing challenges to established patterns of higher education delivery, accreditation and credentialing posed by applications of online and technology-led learning
- widespread interest in the acquisition of existing registered providers by private equity firms and other companies.

These developments are further amplified as a result of recent measures taken to eliminate the exploitation of VET FEE-HELP as some providers are seeking opportunities in other sectors, including higher education and international education.
Departmental data has shown that there are a number of VET-FEE HELP providers currently operating under the Commonwealth Register of Institutions and Courses for Overseas Students, with some being

Adelaide
107 Sir Donald Bradman Drive, Hilton SA 5033
Ph 08 8354 1644

Canberra
Parliament House Canberra ACT 2600
Ph 02 6277 7350

recent entrants having engaged with the scheme subsequent to 2015. TEQSA has also recently experienced a significant increase in expressions of interest related to gaining accreditation as a higher education provider, many from organisations who are currently, or have previously been, active in the VET sector. Where these providers, or associated staff, have previously been engaged in unscrupulous practices in the VET sector, this raises the risk of seeing the same practices emerge within the higher education and international education sectors.

Given the above, the flexibility built in to the proposed ESOS Act 'fit and proper' person requirements will provide an additional regulatory tool for the Australian Government to respond to unscrupulous business models. This will allow the Government to maintain a high entry barrier and ensure only appropriate providers participate in the international education sector; protecting overseas students studying in Australia and maintaining Australia's excellent reputation for international education.

Further, I note that the proposed section 7A of the TEQSA Act does not affect the substantive requirements, introduced in the Bill, that providers and their key personnel must be 'fit and proper' persons. Instead, the proposed section 7A provides the capacity for further clarification as to the matters which may be taken into account by TEQSA in making decisions in relation to the 'fit and proper' person requirements. This approach is consistent with other legislative schemes dealing with the regulation of education, including section 186 of the *National Vocational Education and Training Regulator Act 2011* and subsection 16-25(4) of the HESA.

In addition, TEQSA undertakes extensive consultation prior to making legislative instruments, consistent with the requirements of the *Legislation Act 2003* and the *Australian Government Guide to Regulation*. My decision about whether to give approval to any such proposed instrument will take account of the extent to which TEQSA has undertaken appropriate consultation, while any instrument put forward would also be subject to disallowance by Parliament.

The proposed section 7A of the TEQSA Act therefore provides the necessary flexibility to respond to these developments in the higher education sector, while maintaining appropriate parliamentary and ministerial oversight of TEQSA's approach.

In relation to the HESA amendments, the Committee has queried why it is necessary to confer investigatory powers under the *Regulatory Powers (Standard Provisions) Act 2014* to 'other persons' without specifying who those persons may be or that they have a specified level of training and experience. This has been done so as not to unnecessarily limit the range of expertise and advice available to the department in undertaking assessments of a provider's compliance with HELP program requirements. The range of issues which may need to be considered when conducting an investigation is significant and will vary from one provider to another in line with their tuition, business and compliance practices. By not limiting the range of external expertise the department is able to engage, this provision ensures that relevant subject matter or investigatory experts can be appointed, where necessary, to adequately ascertain compliance with program requirements.

The investigatory powers and related matters in the *Education Legislation Amendment (Provider Integrity) Bill* have been modelled from the *VET Student Loans Act 2016* - Sections 82 to 90. This was done to ensure consistency for the department and providers as a large number of providers operate both as VSL and FEE-HELP providers.

I thank the Committee for their consideration of this Bill and trust that I have addressed its queries.

Simon Birmingham

SENATOR THE HON MATHIAS CORMANN
Minister for Finance
Deputy Leader of the Government in the Senate

REF: MC17-001167

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

Dear Senator Polley

I am writing in relation the Senate Scrutiny of Bills Committee's request for advice on the *Government Procurement (Judicial Review) Bill 2017* (the Bill) in the *Scrutiny Digest No. 6 of 2017*.

I appreciate the Committee's consideration of the Bill and have attached a detailed response below. I hope this information will be of assistance to you.

Mathias Cormann
Minister for Finance

13 July 2017

Government Procurement (Judicial Review) Bill 2017

Clause 5 - The committee requests the Minister's advice as to why it is necessary to provide a broad power for the Minister to make a determination exempting classes of procurements from the definition of a 'covered procurement' and whether it is appropriate for the bill to be amended to ensure that additional procurements could only be exempted from the definition if there are such provisions in Australia's free trade agreements (if this is the intention of the provision).

Australia is a party to several free trade agreements (FTA) with procurement obligations. These obligations can vary between FTAs. For example, there are differences in the government entities covered, the financial thresholds that apply and the exemptions that may be used.

The Commonwealth Procurement Rules (CPRs) incorporate relevant obligations from Australia's FTAs. The CPRs also reflect Government policies, such as the application of the CPRs to all non-corporate Commonwealth entities and the reporting of contracts valued at or above $10,000. The CPRs set a 'watermark' which incorporates FTA obligations and Government policies. This 'watermark' can be equal to or higher than the obligations of a single FTA when viewed on its own.

Government functions and entities change from time to time. The intention of this provision of the Bill is to allow the Government of the day flexibility to exempt additional procurements from the definition of 'covered procurements', if needed, and to do so in a manner that reflects the Government's particular circumstances and requirements. It is not envisaged that it would be used regularly.

The Government seeks to uphold its obligations under FTAs, and any exemption of procurements from the definition of 'covered procurements' in the Bill would be exercised in a manner that is consistent with Australia's FTAs. However, for the reasons discussed above, a specific reference to Australia's FTAs should not be included in this provision.

Clause 23 - The committee requests the Minister's advice as to whether clause 23 could operate to extinguish existing legal rights relating to impugning the validity of a contract by way of proceedings not brought under this legislation, or whether the provision is intended to operate only in relation to proceedings brought under this bill.

The intention of the clause is to provide certainty to both suppliers and the officials of relevant entities on the validity of contracts awarded following a procurement process. It allows contracted suppliers to proceed with their work without concern that a breach of the CPRs by a relevant entity could render their contract invalid. It also reaffirms earlier clauses in the Bill which provide that the remedies available to suppliers under the Bill are injunctions and compensation.

Compliance with the CPRs is not a condition for entering into a contract under section 23 of the *Public Governance, Performance and Accountability Act 2013*, and I am advised that, currently, a breach of the CPRs is unlikely to be viewed by the courts as affecting the validity of a contract.

The provision has not been limited to proceedings brought under the Bill.

The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref: MC17-004528

13 JUL 2017

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

Dear Senator Polley Helen,

Thank you for your letter of 15 June 2017 in relation to *Scrutiny Digest 6 of 2017* of the Senate Standing Committee for the Scrutiny of Bills (Committee).

The Committee has requested my advice in relation to items 4, 10, 25 and 43 of the Imported Food Control Amendment Bill 2017 (Bill). I thank the Committee for its comments in relation to certain provisions within the Bill. My response to the Committee is attached.

I trust that the information provided in the attachment confirms that the relevant measures in the Bill are appropriate in relation to the matters to which they are applied.

Yours sincerely

Barnaby Joyce MP

Enc.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120 Email: minister@agriculture.gov.au

Attachment A

IMPORTED FOOD CONTROL AMENDMENT BILL 2017

RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS—SCRUTINY DIGEST 6 OF 2017

Significant matters in delegated legislation (item 4 of the Bill)

> *Given the important role that the guidelines have in the making of determinations about recognised food safety management certificates, the committee requests the Minister's advice as to why the guidelines are not to be included in a disallowable legislative instrument (and therefore subject to parliamentary scrutiny).*

Item 4 of the Bill proposes to insert section 18A into the *Imported Food Control Act 1992* (the Act). This proposed section will provide for matters in relation to food safety management certificates and includes proposed subsection 18A(2) of the Act, which provides that the Secretary of the Department must, in writing, make guidelines that the Secretary must have regard to before making a determination under proposed subsection 18A(1) of the Act. Proposed subsection 18A(4) of the Act provides that guidelines made under proposed subsection 18A(2) of the Act are not legislative instruments.

Subsection 8(4) of the *Legislation Act 2003* provides for the definition of 'legislative instrument'. If a proposed instrument satisfies the definition in that subsection, it will have legislative character and will be subject to the requirements of the Legislation Act.

The guidelines proposed by subsection 18A(2) of the Act do not have legislative character because the material in the guidelines will not determine or alter the content of the law or create or affect a privilege, interest or right. This is due to the fact that the proposed guidelines will be program specific operational guidance material, which is designed to assist the Secretary, or his or her delegate, to make decisions in relation to the presentation of recognised food safety management certificates by food importers (for example, does the certificate relate to the food described in the consignment; is the certificate bona fide or a forgery).

Further, it is the intention that the guidelines will list what food safety management schemes will be recognised and provide the framework on which these decisions were made. This will enable stakeholders to understand how the Department has made decisions, and will enable other food safety management schemes to approach the Department for recognition. The rationale for providing this information in an administrative instrument is two-fold:

- the decision making parameters are based on food science and risk management approaches and are of a technical and complex nature, and
- recognised food safety management schemes will be selected on the basis of the supporting food science and risk management approach.

Accordingly, as the guidelines proposed by subsection 18A(2) of the Act will not be legislative instruments, those guidelines will not attract the application of the disallowance provisions of the Legislation Act. Further, it would be inappropriate to subject these types of instruments to disallowance, as the decisions underpinning the listed recognised food safety management schemes will be made in reliance on established international initiatives that independently assess schemes against an established criteria (for example, the Global Food Safety Initiative).

Further, as proposed subsection 18A(5) of the Act will require the Secretary to publish any guidelines made under proposed subsection 18A(2) of the Act on the Department's website, importers will be able to access these guidance documents.

Broad discretionary power (item 10 of the Bill)

> *The committee suggests that it may be appropriate for the bill to be amended to ensure that it is a legislative requirement that the decision to extend the period of a holding order is made by a different decision-maker to that who made the original holding order, and seeks the Minister's response in relation to this.*

Item 10 of the Bill proposes to insert subsections 15(3) to (9) into the Act. These proposed subsections will provide for matters in relation to temporary holding orders where food poses a serious risk to human health. The proposed temporary holding orders will initially be issued for a period of 28 days, but proposed subsection 15(4) of the Act will enable the Secretary of the Department to extend that period for a further 28 days. The Secretary is not prohibited from making more than one extension of that period. However, under proposed subsection 15(5) of the Act, the Secretary must review the appropriateness of the order before making any further extension.

It is anticipated that the extension power in proposed subsection 15(4) of the Act will be exercised where, within the initial 28 day period of the order:

- appropriate testing regimes are unable to be identified or established in relation to the food; or
- where adequate risk management strategies are unable to be implemented in relation to the food.

Further, proposed subsections 15(5) and (6) of the Act seek to provide safeguards against the exercise of arbitrary discretion in the making of an order under proposed subsection 15(3) of the Act or the extension of any such order under proposed subsection 15(4) of the Act. Proposed subsection 15(5) of the Act requires the decision-maker to review the appropriateness of an order before making an extension to that order under proposed subsection 15(4) of the Act. Proposed subsection 15(6) of the Act requires the Secretary to immediately revoke an order when the circumstances specified for its revocation have occurred.

Proposed subsections 15(3), (4), (5) and (6) of the Act include powers and functions that are vested in the Secretary. Under section 41 of the Act, the Secretary may delegate any or all of his or her powers under the Act to:

- a Senior Executive Service (SES) employee, or acting SES employee in the Department; or
- an Australian Public Service (APS) employee who holds or performs the duties of an Executive Level 1 or 2 position, or an equivalent position, in the Department.

The Secretary is not required to delegate his or her powers and functions, and any such delegation may be limited to particular powers and functions or particular persons. For example, the Secretary is able to delegate his or her powers and functions in:

- proposed subsection 15(3) of the Act to appropriate Executive Level 1 employees in the Department; and
- proposed subsections 15(4), (5) and (6) to appropriate Executive Level 2 employees in the Department.

The inclusion of a legislative requirement that the decision to extend the period of a holding order under proposed subsection 15(4) of the Act must be made by a different decision-maker to that who made the original holding order would necessarily require the Secretary to delegate his or her power in order for proposed subsections 15(3) and (4) to be operational.

I consider that amending the Bill in the manner suggested by the Committee would be inconsistent with the general principles of delegation. In particular, the Secretary's discretion to delegate his or her powers and functions under section 41 of the Act would be fettered. It is appropriate that the Secretary retains the ability to determine the relevant delegate or delegates (if appropriate) for the purposes of proposed subsections 15(3) to (9) of the Act.

Broad delegation of administrative power (item 25 of the Bill)

> *The committee therefore requests the Minister's advice as to why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised officer and whether it would be appropriate to amend the bill to require that any person assisting an authorised officer be confined to the occupier of the relevant premises (as is currently required by the Imported Food Control Act 1992) or require the person assisting have specified skills, training or experience.*

Item 25 of the Bill proposes to amend the Act to trigger the standard provisions in Parts 2 (monitoring powers), 3 (investigation powers), 4 (civil penalty provisions), 5 (infringement notices) and 6 (enforceable undertakings) of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act).

Proposed subsections 22(14) and 23(11) will be inserted into the Act by item 25 of the Bill. Those proposed subsections seek to enable an authorised officer (as defined by section 3 of the Act) to be assisted by other persons in exercising powers or performing functions or duties under Parts 2 or 3 of the Regulatory Powers Act.

Drafting Direction Series Number 3.5A (Drafting Direction 3.5A) published by the Office of Parliamentary Counsel (OPC) sets out matters to be included in an Act when it is amended to trigger the standard provisions of the Regulatory Powers Act. For example, where an authorised person exercising monitoring or investigation powers under Parts 2 or 3 of the Regulatory Powers Act is able to be assisted by another person in exercising those powers, a specific provision allowing this should be included in the amended Act. Attachment A to Drafting Direction 3.5A provides drafting examples of provisions that seek to trigger Parts 2 and 3 of the Regulatory Powers Act, including the following:

> *[Person assisting*
>
> *(x) An authorised person may be assisted by other persons in exercising powers or performing functions or duties under Part 2 of the Regulatory Powers Act in relation to [the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)].]*

It is necessary and appropriate that an authorised person can be assisted by other persons when exercising their powers or performing their functions or duties under Parts 2 or 3 of the Regulatory Powers Act because:

- no other authorised person may be available to assist;
- the premises to be subject to monitoring or investigation may be large;

- there may be a large number of documents or material that needs to be reviewed;
- the other person may be more familiar with the relevant premises or hold a particular set of skills that would enable the authorised person to effectively exercise their powers and perform their functions or duties;
- things may be heavy or difficult to move without assistance.

Sections 23 and 53 of the Regulatory Powers Act provide for matters in relation to other persons assisting authorised persons, and will apply to the Act by virtue of proposed sections 22 and 23 of the Act, which seek to trigger Parts 2 and 3 of the Regulatory Powers Act. In particular, sections 23 and 53 of the Regulatory Powers Act state that an authorised person may only be assisted by other persons if that assistance is necessary and reasonable, and that assistance is empowered by the particular Act seeking to trigger Parts 2 and 3 of the Regulatory Powers Act.

When determining whether it is necessary and reasonable for an authorised officer to be assisted by other persons in relation to the Act, it is intended that regard will be had to any skills, training or relevant experience of that other person, including whether other appropriate training is required.

Further, proposed subsections 22(14) and 23(11) of the Act are consistent with other comparable provisions across the Commonwealth statute book, for example:

- subsections 481(4) and 484(3) of the *Biosecurity Act 2015*;
- subsections 39FB(2) and 39FD(2) of the *Higher Education Support Act 2003*;
- subsections 13K(4) and 13M(3) of the *Narcotic Drugs Act 1987*; and
- subsections 82(4) and 83(3) of the *VET Student Loans Act 2016*.

The explanatory memorandum to the Bill states that proposed subsections 22(14) and 23(11) of the Act preserve the effect of current section 32 of the Act. However, the effect of current section 32 of the Act is in fact preserved by sections 31 (in relation to monitoring powers) and 63 (in relation to investigation powers) of the Regulatory Powers Act.

Sections 31 and 63 of the Regulatory Powers Act will apply to the Act by virtue of proposed sections 22 and 23 of the Act, which seek to trigger Parts 2 and 3 of the Regulatory Powers Act. Sections 31 and 63 of the Regulatory Powers Act provide that the occupier of premises to which a monitoring or investigation warrant relates (or another person who apparently represents the occupier) must provide an authorised person executing the warrant, or any other person assisting that authorised person, with all reasonable facilities and assistance required for the effective exercise of their powers.

Paragraphs 24(4)(a) and 26(4)(a) of the Act currently provide that a monitoring or investigation warrant must authorise any authorised officer (as defined by section 3 of the Act) named in the warrant with such assistance and by such force as is necessary and reasonable to enter the premises and exercise monitoring or investigation powers. Accordingly, proposed subsections 22(14) and (15) and 23(11) and (12) of the Act preserve the effect of current paragraphs 24(4)(a) and 26(4)(a) of the Act.

Adequacy of parliamentary oversight (item 43 of the Bill)

The committee requests the Minister's advice as to:

- *why the guidelines to be made by the Secretary in guiding the exercise of the power to disclose personal information to a wide range of bodies will not be subject to parliamentary disallowance;*
- *why the guidelines are confined to the exercise of the power under subsection 42A(3) (foreign governments) and not in relation to subsection 42A(2) (Commonwealth, State, Territory and local governments); and*
- *whether it would be appropriate to amend the bill to require that the Secretary must have regard to any submissions made by the Information Commissioner arising from the consultation required by subsection 42A(6).*

Item 43 of the Bill proposes to insert section 42A into the Act, which will provide for the use and disclosure of information obtained under the Act. Proposed section 42A of the Act will ensure that Australia can meet ongoing domestic and international obligations in relation to food safety management, including in relation to the protection of human health.

The proposed guidelines are not subject to disallowance because they are not legislative instruments

Proposed subsection 42A(5) of the Act provides that the Secretary must make written guidelines that the Secretary must have regard to before disclosing information under proposed subsection 42A(3) of the Act. Proposed subsection 42A(7) of the Act provides that guidelines made under proposed subsection 42A(5) of the Act are not legislative instruments.

Subsection 8(4) of the Legislation Act provides for the definition of 'legislative instrument'. If a proposed instrument satisfies the definition in that subsection, it will have legislative character and will be subject to the requirements of the Legislation Act.

The guidelines proposed by subsection 42A(5) of the Act do not have legislative character because the material in the guidelines will not determine or alter the content of the law or create or affect a privilege, interest or right. This is due to the fact that the proposed guidelines will be program specific operational guidance material, which will be designed to assist the Secretary, or his or her delegate, to make decisions in relation to the use and disclosure of information, including for the purposes of consistency and compliance with any applicable obligations under the *Privacy Act 1988*.

It is intended that information will only be shared internationally where:

- there is an existing information-sharing arrangement in place with the relevant foreign government; or
- there are applicable international agreements and treaties to which Australia is a signatory; or
- there is a significant and serious risk posed to human health in that particular country.

It is intended that the guidelines will provide consistent guidance on information-sharing, particularly where there are no existing arrangements with foreign countries. It is also important to note that proposed section 42A of the Act will enable Australia to share information with source countries of food that fails at Australia's border. This will result in safer food being imported into Australia, and will also assist our trading partners to address food safety concerns in their domestic markets.

As any guidelines proposed by subsection 42A(5) of the Act will not be legislative instruments, those guidelines will not attract the application of the disallowance provisions of the Legislation Act.

Further, as proposed subsection 42A(7) of the Act will require the Secretary to publish any guidelines made under proposed subsection 42A(5) of the Act on the Department's website, importers will be able to access these guidance documents.

It is appropriate that the proposed guidelines are confined to the exercise of power under proposed subsection 42A(3) of the Act

Proposed subsection 42A(3) of the Act provides that the Secretary may disclose information (including personal information) obtained under the Act to listed international parties where that disclosure is necessary for that international party to perform or exercise any of its functions, duties or powers. Proposed subsection 42A(2) of the Act provides for a similar power in relation to Commonwealth, state and territory, and local government bodies.

The powers and functions in proposed section 42A of the Act must be exercised in compliance with the Privacy Act, which provides for protections on the collection, storage, use, disclosure or publication of personal information. The Privacy Act also establishes the Australian Privacy Principles (APP). In particular, APP 6 and 8 will be relevant to proposed subsections 42A(2) and (3) of the Act, as those proposed subsections may relate to the use or disclosure of personal information (APP 6) and cross-border disclosure of personal information (APP 8).

It is important to note that most information to which proposed subsections 42A(2) and (3) of the Act apply will in fact be commercial information.

The guidelines proposed by subsection 42A(5) of the Act are confined to the exercise of power under proposed subsection 42A(3) of the Act, and do not apply in relation to proposed subsection 42A(2) of the Act, because the Privacy Act, particularly Australian Privacy Principle 6, already provides appropriate requirements, safeguards and guidance in relation to disclosure of personal information to bodies in Australia. Further, guidance on the APPs is publicly available on the Australian Information Commissioner's website.

Proposed subsection 42A(3) of the Act will authorise the disclosure of information to overseas recipients by law, which falls within the exception to APP 8 at clause 8.2(c) of Schedule 1 to the Privacy Act. The consideration of guidelines prior to the disclosure of personal information to an overseas recipient ensures that the disclosure is appropriate in the circumstances. Proposed subsection 42A(5) of the Act is in line with guidance issued by the Australian Information Commissioner in relation to exceptions to APP 8.

The consultation requirements in proposed section 42A of the Act are appropriate in their current form

Finally, proposed subsection 42A(6) of the Act requires the Secretary to consult the Australian Information Commissioner before making guidelines under proposed subsection 42A(5) of the Act.

It is appropriate that the Secretary is required to consult the Australian Information Commissioner before making guidelines under proposed subsection 46A(5) of the Act to ensure that the guidelines remain contemporary and accurate. The proposed guidelines will also contemplate any guidance material in relation to APP 8 that is publicly issued by the Australian Information Commissioner on the Commissioner's website.

The Committee provided subsection 28(1A) of the *National Cancer Screening Register Act 2016* as an example of a provision that requires that the relevant person must have regard to submissions made by the Australian Information Commissioner.

Subsection 28(1A) of the National Cancer Screening Register Act can be differentiated from proposed subsection 42A(6) of the Act because:

- subsection 28(1A) of the National Cancer Screening Register Act relates to the power of the relevant Minister to make, by legislative instrument, rules relating to that Act; and
- the ***key information*** referred to in the National Cancer Screening Register Act is personal and sensitive information.

The guidelines under proposed subsection 42A(5) of the Act are not legislative instruments, and a disclosure under proposed subsection 42A(3) of the Act will not relate to sensitive information and will predominantly relate to commercial information.

The Hon Dr David Gillespie MP

Assistant Minister for Health
Member for Lyne

Ref No: MC17-011018

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

Dear Chair

Thank you for the correspondence of 15 June 2017 regarding the Senate Scrutiny of Bills Committee's request for information about the Industrial Chemicals Bill 2017 and related Bills.

I have reviewed the committee's *Scrutiny Digest No. 6 of 2017* which includes the detailed request for information in relation to five matters in the Industrial Chemicals Bill 2017 and related Bills.

Please find enclosed with this letter my response to the committee in relation to each of the issues identified.

Thank you for raising these matters and allowing me to provide additional information.

Yours sincerely

The Hon Dr David Gillespie MP

Encl

cc: The Hon Greg Hunt MP, Minister for Health and Minister for Sport

Response to the Senate Scrutiny of Bills Committee in relation to the Industrial Chemicals Bill 2017 and related Bills

Industrial Chemicals Bill 2017

Merits review

Question

The Committee has sought advice as to each of the decisions that could be made under the bill that are not listed as being a 'reviewable decision', and if decisions are excluded that might have an adverse impact on an individual, the justification for not including these in the list of 'reviewable decisions'.

Response

Certain decisions that could be made under the Industrial Chemicals Bill 2017, which are not included in the list of 'reviewable' decisions in clause 166, have intentionally been excluded from the clause. This is because, for example, the decision will have no adverse impact on the applicant, will not change the status quo or is automatic. All decisions that could adversely affect the interests of an applicant are reviewable. The tables below list the non-reviewable decisions included in the bill and the reasons why, due to their nature, they will not be reviewable.

Table 1: Decisions which are in favour of the applicant or do not change the status quo

Provision	Decision	Reason for not including in clause 166
17(2)(a)	To grant an application for registration	These are decisions that: • are in favour of the applicant, such that there is no adverse impact on a person (i.e. the Executive Director grants an application), or • do not change the status quo and as such do not result in an adverse outcome for the person affected by the decision. For example, an assessment certificate holder makes submissions as to why the terms of the assessment certificate should not be varied at the Executive Director's initiative, and the Executive Director subsequently decides not to vary the terms.
19(6)(b)	Not to cancel a person's registration (on Executive Director's initiative)	
37(1)(a)	To issue an assessment certificate	
42(5)(b)	Not to remove a person from an assessment certificate (on Executive Director's initiative)	
49(1)(a)	To vary the terms of an assessment certificate (on application)	
50(5)(b)	Not to vary the terms of an assessment certificate (on Executive Director's initiative)	
52(5)(b)	Not to cancel an assessment certificate (on Executive Director's initiative)	
58(1)(a)	To issue a commercial evaluation authorisation	

61(5)(b)	To not remove a person from a commercial evaluation authorisation (on Executive Director's initiative)	
63(4)(a)	To vary the terms of a commercial evaluation authorisation (on application)	
64(5)(b)	Not to vary the terms of a commercial evaluation authorisation (on Executive Director's initiative)	
66(5)(b)	Not to cancel a commercial evaluation authorisation (on Executive Director's initiative)	
93(1)(a)	To vary the terms of an Inventory listing (on application)	
108(1)(a)	To approve an application for protected information	
111(8)(b)	To approve an application for protected information on review	
114(2)(a)	To approve an application for protected information	

Table 2: Decisions that are automatic or mandatory

Provision	**Decision**	**Reason for not including in clause 166**
40(2)	Add person covered by an assessment certificate (at certificate holder's request)	These decisions are automatic or mandatory decisions in that they arise where there is a statutory obligation on the Executive Director to act in a certain way upon the occurrence of a specified set of circumstances. These decisions are therefore made on the basis of objective matters (i.e. the application complies with requirements for an application and the appropriate person's consent to the application). These provisions support the applicant to initiate certain limited changes to their authorisation to introduce industrial chemicals into Australia. The process is initiated by the applicant and there are no subjective considerations to which the Executive Director must
40(5)	Remove a person covered by an assessment certificate (at person's request)	
41(2)	Add person to an assessment certificate (at person's request)	
41(5)	Remove a person from an assessment certificate (at person's request)	
51(2)	Cancel an assessment certificate (at person's request)	
60(2)	Add person to a commercial evaluation authorisation (at person's request)	

60(5)	Remove a person from commercial evaluation authorisation (at person's request)	turn their mind. It is proposed that these decisions will be automated through an electronic process to minimise regulatory burden.
65(2)	Cancel commercial evaluation authorisation (at person's request)	

Table 3: Decision made at the initiative of the Minister

Provision	Decision	Reason for not including in clause 166
67(1)	Enables the Minister to issue an exceptional circumstances authorisation for the introduction of an industrial chemical	This decision is made at the initiative of the Minister, and not on application. It is exercised by the Minister personally, in the public interest, in order to address significant risks to human health or the environment. It is essentially an emergency power (in the public interest).

Privilege against self-incrimination

Question

The Committee has sought advice as to why it is proposed to abrogate the privilege against self-incrimination, particularly by reference to the matters outlined in the Guide to Framing Commonwealth Offences.

Response

The abrogation of the privilege against self-incrimination is limited in two important ways:

- The self-incrimination provision in clause 175 is limited to the circumstances described in clause 161. Clause 161 relates to information or a document requested by the Executive Director that is reasonably necessary to be obtained in order for Australia to comply with its obligations under the Rotterdam Convention.

- Any information given or document produced is not admissible in evidence against the individual in criminal or civil proceedings (other than in very limited circumstances described in the provision).

The provision relating to self-incrimination (in these very limited circumstances) was first included in the *Industrial Chemicals (Notification and Assessment) Act 1989* (the ICNA Act) in 2004, in order to ensure Australia meets its obligations (refer section 100H of the ICNA Act).

The provision has been included in the Industrial Chemicals Bill 2017 (and limited to clause 161) so that there is no change or disruption in the arrangements described in the new law, as they relate to Australia's international obligations.

Incorporation of external materials existing from time to time

Question
The Committee has sought the Minister's advice as to whether the type of international lists that it is envisaged may be applied, adopted or incorporated by reference will be made freely available to all persons interested in the law.

Response
The type of international lists that it is envisaged may be applied, adopted or incorporated by reference include:

- European Chemicals Agency (ECHA) Harmonised Classification and Labelling of Hazardous Substances (Annex VI to the CLP Regulation)
- European Union Substances of Very High Concern (EU SVHC)
- United States National Toxicology Program (US NTP) Report on Carcinogens, and
- International Agency for Research on Cancer (IARC) Monographs.

Any materials to be incorporated by reference are readily accessible (at no cost) and links to the materials will be made available on the AICIS website.

Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017

Retrospective application

Question
The Committee has sought advice as to why it is necessary, in relation to the making of transitional rules, to disapply the application of section 12(2) of the Legislation Act 2003 (which prohibits the retrospective application of legislative instruments which have a detrimental effect on a person or impose retrospective liability on a person).

Response
The Industrial Chemicals Bill 2017 will replace legislation (the ICNA Act) that is over 25 years old and has been progressively and repeatedly amended to cater for changes relating to the introduction and use of industrial chemicals. This has created a piece of legislation that is complex to interpret and contains overlapping provisions and powers.

The Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017 deals with the transition from the existing industrial chemicals legislation to the new scheme. A significant amount of detail will also be included in the rules to be made under this Bill to ensure that the transition from the existing scheme to the reformed scheme is as smooth as possible for stakeholders.

Given the complexity of the current ICNA Act and that the regulatory system under the Industrial Chemicals Bill 2017 will be significantly different; it is possible that the transitional arrangements at commencement may not cover every potential circumstance of necessary transition between the two Acts.

In these circumstances, there may be unintentional and unforeseen adverse consequences that may require additional transitional arrangements being put in place to avoid adversely impacting on international trade or placing unnecessary additional costs on individuals and businesses. Additionally, risks associated with the introduction of industrial chemicals could go unmanaged, or the response to risks may be delayed due to uncertainty over how regulatory powers transition. Managing these risks is important, not only for the wellbeing of Australia's population and environment but also for the viability of the industrial chemicals sector.

The limited period of disapplication of subsection 12(2) of the Legislation Act has been included in the Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill to enable any issues that may arise at the time of transition (i.e. at the proposed commencement time of 1 July 2018) to be dealt with effectively through rules.

It is not intended or anticipated that persons would be disadvantaged through retrospective application of the rules (should they be required). Rather, the ability for the transitional rules to apply retrospectively means that any unintended consequences of transitioning the scheme can apply from the date of commencement. This flexibility allows for any errors or unintended consequences to be remedied at the point at which the issue arises. It also enables the law to clarify the correct and intended outcome for stakeholders, thereby avoiding the need for complex administrative 'fixes'.

While the Bill enables rules to be made, they must only be transitional in nature (creating a direct link with the transition from the existing industrial chemicals law to the new law).To ensure that there is continued parliamentary oversight, the rules will be subject to disallowance.

Industrial Chemicals Charges (General) Bill 2017

Charges in delegated legislation

Question

The Committee has sought advice as to why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and the maximum charge can be specifically included in each of the proposed Industrial Chemicals Charges bills.

Response

Specifying the amount of a charge or the method for calculating the amount of a charge in regulations, as opposed to the Act itself, ensures that there is appropriate flexibility to change the amount of a charge or the method for calculating the amount of a charge over time. This helps to avoid over or under recovery and will eliminate the need to amend primary legislation as necessary changes to cost recovery arrangements evolve because the efficient administrative costs of the new scheme become more evident.

AICIS will undertake a detailed annual consultation process (in accordance with the *Public Governance and Accountability Act 2013*, the Australian Government Charging Framework and the Australian Government Cost Recovery Guidelines), in order to inform the value of the charge included in the regulations for each registration class.

Consistent with current practice, AICIS will publish an annual Cost Recovery Implementation Statement (CRIS) that will detail AICIS activities that are cost recovered, the cost recovery model (outputs and business processes, costs of the activity and design of the cost recovery charges), as well as options for cost recovery. The CRIS will include detailed information about financial estimates and performance, and the rationale for the proposed fees and charges for the coming year.

This approach is compliant with the Australian Government Cost Recovery Guidelines which also provide that, where a cost recovery levy is being imposed (via a Taxation Act), the relationship between the charges and the costs should reflect the efficient overall costs of the activity where revenue generated for the activity approximates the expenses incurred in providing the activity (and this is also reflected in the annual CRIS).

There are two additional controls that govern the extent of cost recovery from the regulated industry:

- Fees and charges are set by regulation, which requires them to be proposed to the Executive Council by the responsible Minister. The Minister would therefore need to be satisfied that the fees and charges are not excessive prior to proposing the regulations.

- Regulations must be tabled in the Senate, and are subject to motions of disallowance. This Parliamentary scrutiny of fees and charges provides another safeguard against over-recovery.

This provides a high degree of accountability and transparency to stakeholders regarding the annual registration charge, such that the need to include a maximum charge in the bills is reduced.

Further, an arbitrary maximum has not been included in the bills because:

- any maximum described in the bills would necessarily be higher than the maximum amount charged (misrepresenting the amount payable by any registrant). This would be confusing for stakeholders and is likely to lead to criticism

- it would misrepresent the amount likely to be payable by most registrants. Under current arrangements, the amount of registration charge payable by a registrant varies between $138 and $24,800 per year, based on the value of the chemical introduced by the registrant in a registration year. In 2016-17, only around 5% of registrants are expected to pay the highest amount. Under the new legislation, the registration charges will also be tiered (based on brackets of introduction values). If the bills were to set a maximum charge, it would misrepresent the magnitude of charge likely to be payable by most registrants (reducing transparency), and

- there is minimal risk that the charge would be characterised as a general taxation (increasing the necessity for a maximum to be set in the bills). Rather, the charge is clearly a cost recovery levy, earmarked to fund activity that relates to the group of persons being charged (namely registrants introducing industrial chemicals into Australia in a registration year). As detailed in the Australian Government Cost Recovery Guidelines, this is an appropriate circumstance in which to apply the guidelines to determine the relevant charge.

For these reasons, the bills do not set an upper limit for the charge and instead rely on the general cost recovery rules to provide the necessary assurances and transparency to stakeholders.

The Hon Christian Porter MP
Minister for Social Services

MC17-008507

27 JUN 2017

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

Dear Senator Polley

Thank you for your correspondence of 15 June 2017 in which the Committee seeks clarification with regard to aspects of the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017*.

I appreciate the Committee's consideration of the Bill and am pleased to have the opportunity to provide clarification on the issues the Committee has raised.

Please find enclosed detailed responses to the specific issues the Committee has raised. A series of draft rules is also enclosed for the Committee's consideration. These draft rules are subject to ongoing consultation with states, territories, peak bodies representing people with disability and providers. As such, I would request they not be published.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Detailed responses to the specific issues raised by the Scrutiny of Bills Committee

1. Broad discretionary power

The committee requests the Minister's advice as to:

- **why (at least high-level) rules or guidance about the exercise of the Commissioner's disclosure power cannot be included in the primary legislation; and**
- **why there is no positive requirement that rules must be made regulating the exercise of the Commissioner's power (i.e. the committee requests advice as to why the proposed subsections have been drafted to provide that the rules may make provision for such matters, rather than requiring that the rules must make provision to guide the exercise of this significant power).**

As noted by the committee, the explanatory memorandum explains that the rationale for matters being set out in the rules rather than the primary legislation is that:

> *It is necessary to provide for the parameters of this discretion in the NDIS rules as the Commissioner will be operating within the context of complex mainstream systems and services. The purposes for disclosure, the bodies to whom disclosure can be made and the type of information which may be disclosed is likely to change over time as States and Territories withdraw from the regulation of disability services under the NDIS and establish new arrangements for the protection of vulnerable people under mainstream service systems.*[1]

States and Territories will remain responsible for quality and safeguards arrangements for mainstream services to people with disability such as health, education and child protection. It is therefore necessary to adapt guidance about the exercise of the Commissioner's disclosure power to the arrangements in each State and Territory during transition to the Commission's regulatory arrangements for NDIS providers.

In relation to the requirement that rules be made to regulate the exercise of the Commissioner's powers, the intention of the reference in subsection 67E(2) to 'the NDIS rules' rather than 'any NDIS rules', is that the Commissioner can only make disclosures under the relevant provisions if there are rules in place. In other words, the existence of the rules is a condition precedent, the satisfaction of which is necessary before a disclosure can be made.

A draft of the *NDIS (Protection and Disclosure of Information – Commission) Rules* is attached. The Department is currently consulting with the Office of the Australian Information Commission and States and Territories about these draft rules before consulting with peak bodies representing people with disability and providers. It is the intention that these rules be made to commence at the same time as Schedule 1 of the Bill establishing the Commission.

[1] Explanatory memorandum, page 12.

The Bill provides, at paragraph 181D(4)(a), for the Commissioner to use his or her best endeavours to provide opportunities for people with disability to participate in matters that relate to them and to take into consideration the wishes and views of people with disability in relation to those matters. This will guide the Commissioner in the disclosure of information.

Careful consideration has been given to ensuring any personal information held by the Commission is given due and proper protection. There are, however, concerns about including a requirement along the line suggested by the committee for the Commissioner to notify and receive submissions from a person, as a condition precedent to any disclosure on the basis that this would compromise situations of urgency such as where a child is at risk of harm or there are serious allegations of neglect, abuse or exploitation. The protections in relation to personal information contained in the Bill essentially cover the field and override State and Territory laws requiring mandatory reporting for example, section 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Provision for the facilitation of urgent disclosures by the Commissioner is consistent with the *NDIS (Protection and Disclosure of Information) Rules* and operational policy which govern the disclosure of information by the CEO of the NDIA.

2. Significant matters in delegated legislation

The committee's view is that significant matters, such as the provisions listed at paragraph 3.5 [conditions of registration, suspension or revocation of registration, standards, Code of Conduct, complaints and incident management], in particular the establishment of a Code of Conduct, breach of which could be subject to significant penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's advice as to:

- **why it is considered necessary, in each instance, to leave the details set out in paragraph 3.5 to delegated legislation; and**
- **the type of consultation that it is envisaged will be conducted prior to the making of regulations establishing the NDIS rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).**

The Bill sets out the core functions and framework for the Commission, and the NDIS rules provide the detail necessary for supporting the Commission's regulatory activities. The Commission will be established in jurisdictions over time and some flexibility will be needed to allow adjustments for the lessons learnt from the Commission's operations in participating jurisdictions.

Separating the rules from the Bill provides appropriate flexibility and enables the Commission to be responsive in circumstances where the NDIS market environment is uncertain and rapidly changing. The NDIS is still in transition and it is growing and evolving rapidly. Currently the NDIS involves almost 7,000 providers with about 73,000 workers, supporting about 75,000 participants with approved plans, and in full scheme this is expected to grow to 13,500-40,000 providers with perhaps 160,000 workers, supporting over 460,000 participants. These providers and workers will include current disability service providers and new entrants, including a number of emerging new "digital disrupter" models with "Uber" type service provision. The rapid change in scale and complexity of the NDIS market means that unpredictable risks may emerge in the medium term. The Commission will need to deal promptly with new and emerging areas of risk in the effective regulation of NDIS providers, both now and into the future. It is therefore appropriate that these aspects of the scheme be covered by rules that can be adapted and modified in a timely manner.

The following draft rules are attached for the Committee's consideration:

- *NDIS (Protection and Disclosure of Information – Commission) Rules*
- *NDIS (Incident Management and Reportable Incidents) Rules*
- *NDIS (Complaints Management and Resolution) Rules*
- *NDIS Practice Standards Rules*
- *NDIS Code of Conduct Rules*

These rules are subject to ongoing consultation with States and Territories and peak bodies representing people with disability and providers.

The Bill codifies a list for conditions of registration at proposed section 73F and outlines the circumstances in which the registration of a registered NDIS provider may be suspended or revoked (at sections 73N and 73P).

All of the rules are subject to consultation with States and Territories (item 79) with rules relating to behaviour support and worker screening subject to agreement with host jurisdictions as they interact with State and Territory laws and policies (item 78).

The draft NDIS Code of Conduct was developed in consultation with States and Territories and peak bodies and is currently the subject of public consultation, accompanied by a discussion paper which can be found at the following link: www.engage.dss.gov.au/ndis-code-of-conduct-consultation/

The NDIS Code of Conduct will cover a diverse range of NDIS providers (both registered and unregistered), from lawn mowing services through to providers of residential accommodation for people with disability. It is the mechanism through which participants, including self-managing participants will be empowered to enforce standards of conduct and service to which an appropriate and escalating range of sanctions will apply. The NDIS Code of Conduct will need to be subject to regular review and consultation to ensure that it is responsive to the needs and expectations of people with disability, providers and the community in terms of the appropriate standards and quality and safety of NDIS funded supports and services.

In addition to the consultation obligations in section 17 of the *Legislation Act 2003*, the Bill provides for the Commissioner to consult and cooperate with persons, organisations and governments on matters relating to his or her functions including in the course of making legislative instruments should the power to make rules be delegated to the Commissioner.

The consultation approach that has been adopted throughout the development of the NDIS Quality and Safeguarding Framework, the Bill and continuing development of the rules has proven to be effective and appropriate.

3. Broad delegation of administrative powers

The committee requests the Minister's advice as to why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised officer and whether it would be appropriate to amend the Bill to require that any person assisting an authorised officer have specified skills, training or experience.

Within the limited resources of the Commission, it is not possible to employ experts across the diverse ranges of supports who are appropriately qualified to investigate complex and often technical matters arising in connection with NDIS supports.

The disability support market is diverse and geographically dispersed and includes specialised supports such as aids and equipment. The investigation of a complaint or incident can be extremely complex for particular groups of NDIS providers including those providing supports to participants:

- with complex, specialised or high intensity needs, or very challenging behaviours
- from culturally and linguistically diverse backgrounds
- who are Aboriginal and Torres Strait Islander Australians
- who have an acute and immediate need (crisis care or accommodation).

It is therefore necessary to engage other persons who have specialist skills, training or expertise to assist an investigation including experts currently involved in regulating disability services.

Proposed section 73ZR provides for the appointment of inspectors, investigators and persons assisting under proposed section 181W and provides that the Commissioner may only make such an appointment if he or she is satisfied that:

- the person has suitable training or experience to properly exercise the powers for which the person will be authorised to use; and
- the person is otherwise an appropriate person to be appointed as an inspector, investigator or both (as the case requires).

A person appointed must also comply with any directions of the Commissioner in exercising powers (73ZR(3)).

The Bill triggers the *Regulatory Powers Act (Standard Provisions) Act 2014* (Regulatory Powers Act) which creates a consistent Commonwealth framework for investigations,

compliance and enforcement powers. Proposed section 73ZE of the Bill provides that new Part 3A is subject to monitoring under Part 2 of the Regulatory Powers Act. Section 23 of the Regulatory Powers Act provides that an authorised person may be assisted by other persons if that assistance is reasonable and necessary. Any use of powers is subject to the direction of an authorised person who will be an inspector.

Proposed section 73ZF of the Bill provides that Part 3A is subject to investigation under Part 3 of the Regulatory Powers Act. Similar to section 23 of the Regulatory Powers Act, section 53 provides that an authorised person may be assisted by other persons if that assistance is necessary and reasonable and any use of powers is subject to the direction of an authorised person (an investigator).

The Bill provides for persons who may assist the Commissioner under proposed section 181W to be employees of agencies (within the meaning of the *Public Service Act 1999*), officers or employees of a State or Territory, or officers or employees of authorities of the Commonwealth, a State or a Territory. A person who is engaged to assist the Commissioner under section 181W may also assist an authorised officer in the course of an investigation if they have suitable training or experience or they may be appointed as an inspector, investigator or both.

The approach taken in the Bill is comparable to other Commonwealth regulators such as for work health and safety and consistent with the Regulatory Powers Act which applies uniform regulatory powers and arrangements for Commonwealth bodies.

4. Fair hearing rights

The committee requests the Minister's advice as to the justification for removing the right of a person to make submissions to the Commissioner before a banning order is made in certain listed circumstances. The committee also requests the Minister's advice as to the appropriateness of amending the Bill to provide that the banning order could have a temporary immediate effect in specified circumstances but that it would only become a permanent order after the affected person has been given an opportunity to make submissions to the Commissioner on the matter.

Proposed section 73ZN provides that the Commissioner may, by written notice, make a banning order that prohibits or restricts specified activities by an NDIS provider in certain circumstances. Under proposed section 73ZN(3), a ban order may apply generally or be of limited application, it may also be permanent or for a specified period. Subsection 73ZN(7) provides that the Commissioner may only make a banning order against a person after giving the person an opportunity to make submissions to the Commissioner on the matter. However, subsection 73ZN(8) provides that subsection 73ZN(7) does not apply if the Commissioner's grounds for making the banning order include that there is an immediate danger to the health, safety or wellbeing of a person with a disability or where the Commissioner has revoked the registration of the person as a registered NDIS provider.

The committee notes that the exercise of this power could remove fair hearing requirements in these specified circumstances and notes the explanatory memorandum does not give a justification for limiting the right to a fair hearing in this way.

The approach taken in relation to banning orders in the Bill is that it represents the highest level of enforcement action that can be taken in the most serious cases in which a NDIS provider, or person employed (or otherwise engaged) by an NDIS provider poses an unacceptable risk to people with disability in the NDIS. This is in response to a series of recent inquiries and reports which have documented the weaknesses of current safeguarding arrangements and failures to respond to abuse, neglect and exploitation of people with disability.

In the case of a registered provider, prior to the application of a ban order, even in cases where there is an immediate danger to the health, safety or wellbeing of a person with disability, the provider's registration must first be revoked under proposed section 73P which includes the right of a person to make submissions before registration is revoked (paragraph 73P(4)). In practice, if a registered NDIS provider poses an immediate danger to a person with disability, the Commissioner may suspend the registration of the provider pending consideration of whether the provider's registration should be revoked. While the Commissioner is considering whether a provider's registration should be revoked, the Commissioner may also issue a compliance notice preventing the provider from providing any NDIS supports or services.

In the case of an unregistered provider, there is a series of compliance and enforcement action available to the Commissioner prior to issuing a ban order, ranging from compliance notices through to requiring a provider to undergo quality assurance checks. If, in the most serious of cases, the Commissioner has grounds to believe that there is an immediate danger to the health, safety or wellbeing of a person with disability, he or she may issue a ban order under proposed section 73ZN(7) for a specified period to allow for submissions to be made by the provider about the ongoing nature of the ban order. A ban order is also a reviewable decision and a person may apply under proposed section 73ZO(2) for the revocation or variation of a ban order.

The committee also notes that it would be possible to reconcile the need for urgent action and the right to a fair hearing by providing for the banning order to have immediate effect but only making it permanent after a hearing has been provided. The discretion for the Commissioner to apply a banning order for a limited period is intended to enable the Commissioner to act quickly if the circumstances indicate that it is appropriate to do so pending any further consideration of the matter.

On the basis that a ban order can be applied for a limited period and that a person may apply for revocation or review, the approach taken is considered to be the most appropriate to protect people with disability from unsafe NDIS providers or workers.

5. Merits review

The committee requests the Minister's advice as to whether there are any decisions that could be made under the *National Disability Insurance Scheme Act 2013* that are not listed as being a 'reviewable decision', and if any decisions are excluded that might have an adverse impact on an individual, the justification for not including these in the list of 'reviewable decisions'.

Proposed section 99 of the Bill includes all of the decisions which might have an adverse impact on an individual and which are reviewable internally and externally by the Administrative Appeals Tribunal.

The following table lists decisions that are not a reviewable decision and the circumstances around which they are made. The decisions are not reviewable because they are subject to separate review processes and/or guidelines not administered by the Commissioner.

Decision	Proposed section	Subject to
A decision to grant (or not to grant) financial assistance to a person or entity in relation to applications for registration/variations of registration.	73S	Commonwealth Grants Guidelines[2]
A decision to approve (or not to approve) a quality auditor	73U	Based on accreditation through a third party accreditation body
Monitoring & Investigations warrants, civil penalties and injunctions – must be issued by a court under the Regulatory. Powers Act		Appeal to Relevant Court
A decision to issue an infringement notice (Regulatory Powers Act)	73ZL	Appeal to Relevant Court

6. Broad delegation of administrative powers

The committee requests the Minister's advice as to why it is necessary to allow most of the Commissioner's powers and functions to be delegated to any Commission officer at any level and also requests the Minister's advice as to the appropriateness of amending the Bill to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

[2] https://www.finance.gov.au/sites/default/files/commonwealth-grants-rules-and-guidelines-July2014.pdf

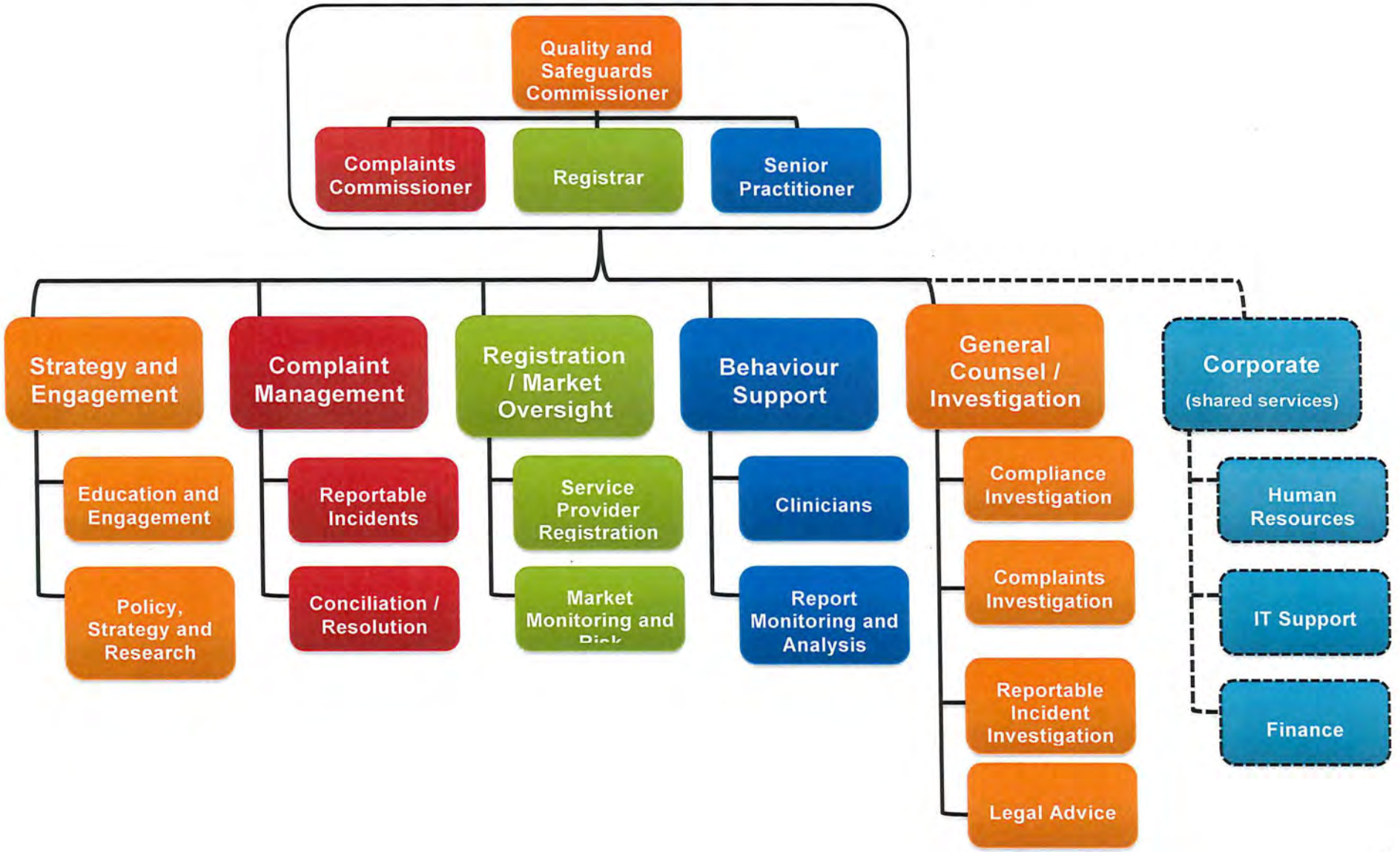
A broad delegation is necessary to enable the Commission to regulate the national NDIS market in an efficient manner which is responsive to the rapidly emerging and changing NDIS market.

Consistent with the NDIS Quality and Safeguarding Framework released by the Disability Reform Council, the core functions of the Commission outlined in proposed section 181E, will be undertaken by the Commissioner of the NDIS Quality and Safeguards Commission to be appointed under proposed 181L.

The explanatory memorandum (at pages 50 to 60) indicates that the Commissioner's registration and reportable incidents functions will be undertaken by a Registrar; the Commissioner's complaints functions will be undertaken by a Complaints Commissioner; and the Commissioner's behaviour support function will be undertaken by a Senior Practitioner. The draft organisational chart below indicates how those functions are intended to operate.

The organisational chart was provided to stakeholders during the development of the Bill and is intended to illustrate the scope of powers to be delegated and the categories of people to whom specific powers will be delegated.

Quality and Safeguards Commission Indicative Structure



SENATOR THE HON SCOTT RYAN
Special Minister of State
Minister Assisting the Prime Minister for Cabinet
Senator for Victoria

REF: MC17-002201

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

Dear Chair, Helen

I refer to the letter of the Senate Standing Committee for the Scrutiny of Bills (the Committee), dated 11 May 2017 seeking my advice concerning the Parliamentary Business Resources Bill 2017 (PBR Bill). I apologise for the delay in responding.

I note the Committee's specific concern relates to the non-disallowable legislative instrument (the Instrument) that sets out the activities covered by the definition of 'parliamentary business' (clause 6 of the PBR Bill). I understand that the Committee has asked for further justification as to why the detail of what constitutes 'parliamentary business' is to be included in delegated legislation rather than on the face of the Bill.

For the reasons below, I consider that exemption from disallowance is appropriate in this case, as the Bill effectively constrains the scope of what may be determined as an activity that is covered by 'parliamentary business' and the nature of the instrument in the context of the Bill requires more certainty than would be provided under the standard disallowance regime.

I further note the Committee's alternative suggestions for providing increased parliamentary oversight of the Instrument and have addressed the feasibility of these suggestions below.

Significant matters in non-disallowable delegated legislation

I note the Committee's position that central concepts relating to a legislative scheme should be defined in primary legislation unless a sound justification for the use of delegated legislation is provided.

However, the definition of 'parliamentary business' in the PBR Bill is not wholly left to be determined in the Instrument. Rather, clause 6 of the PBR Bill sets out the definition of parliamentary business and leaves it for the Instrument to determine the types of activities that fall within the meaning defined in the PBR Bill.

Consequently, it would not be possible for the Instrument to determine activities inconsistent with the meaning as set out in clause 6 of the PBR Bill. This ensures that the power that is delegated to the Instrument to specify activities is appropriately limited.

The Committee's suggestions for further parliamentary oversight

As the Explanatory Memorandum to the PBR Bill identifies, the types of activities that would fall within the meaning of parliamentary business are diverse as all parliamentarians exercise the freedom to determine how they conduct their business. Any attempt to express these activities in primary legislation would severely limit the flexibility of the legislation to address each member's individual requirements as they arise. Rather, a non-disallowable legislative instrument provides both flexibility and certainty in responding to the changing and future needs of members' roles.

I note the Committee's view that certainty could be provided in relation to what activities are covered at any particular time by increasing parliamentary oversight of the determinations, rather than exempting them from disallowance. I understand the Committee's suggestions to achieve this include:

- requiring the positive approval of each House of the Parliament before new determinations come into effect;
- providing that the determinations do not come into effect until the relevant disallowance period has expired; or
- a combination of these processes.

I thank the Committee for providing references to examples of these approaches in existing legislative schemes. While I acknowledge that these approaches would increase parliamentary oversight, they would do so at the expense of the flexibility of the scheme given either approach necessitates a parliamentary sitting period. Noting the parliamentary sittings calendar, under either approach, several weeks may elapse before the Instrument or any amendments to the Instrument could come into effect. Such an outcome would limit the ability to be responsive to changes or requests for clarity around the nature of parliamentary work. Therefore, I do not support amendments in this regard.

I thank the Committee for raising these issues and providing me with the opportunity to respond.

26 June 2017

The Hon. Barnaby Joyce MP

Deputy Prime Minister
Minister for Agriculture and Water Resources
Leader of The Nationals
Federal Member for New England

Ref: MC17-004724

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

14 JUL 2017

Dear Senator Polley Helen,

I am writing in response to the letter dated 22 June 2017 from Ms Anita Coles, Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee), about the Regional Investment Corporation Bill 2017 (the Bill).

The Committee has requested my advice in relation to clauses 8, 11, 12, 15, 46, 49, 50, 51 and 53 of the Bill, as outlined in *Scrutiny Digest 7 of 2017* of the Committee.

I thank the Committee for its comments and enclose my response.

I trust that the information provided confirms the relevant measures in the Bill are appropriate.

Yours sincerely

Barnaby Joyce MP

Enc.

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7520 Facsimile: 02 6273 4120 Email: minister@agriculture.gov.au

RESPONSE TO THE SENATE SCRUTINY OF BILLS COMMITTEE, DIGEST NUMBER 7 OF 2017

REGIONAL INVESTMENT CORPORATION BILL 2017

Parliamentary scrutiny—section 96 grants to the States (paragraphs 8(1)(b), 8(1)(c) and 15(1)(c), subclause 12(3) and clause 46 of the Bill)

> *1.113 Noting this, and the fact that the terms and conditions of financial assistance may be of significance to water infrastructure policy generally, the committee suggests it may be appropriate for the bill to be amended to:*
>
> - *include at least some high-level guidance as to the types of terms and conditions that States and Territories will be required to comply with in order to receive payments of financial assistance for water infrastructure projects;*
> - *include a legislative requirement that any directions made by the responsible ministers under subclause 12(3) and any agreements with the States and Territories about these grants of financial assistance are:*
>
> *- tabled in the Parliament within 15 sitting days after being made, and*
>
> *- published on the internet within 30 days after being made.*

Clause 8 of the Bill sets out the functions of the Regional Investment Corporation (the Corporation), including to administer on behalf of the Commonwealth, financial assistance to States and Territories in relation to water infrastructure projects. Subparagraph 8(1)(c)(iii) of the Bill links the function of entering into an agreement for the grant of financial assistance with a direction from responsible Ministers under subclause 12(3) of the Bill.

The Parliament will have an appropriate degree of visibility in relation to grants of financial assistance for water infrastructure projects. This visibility will be achieved via the Operating Mandate issued to the Corporation by the responsible Ministers under clause 11 of the Bill, and reporting requirements for corporate Commonwealth entities under the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act).

The Operating Mandate provides the key vehicle for the government to set out its expectations for the Corporation. It is expected to include high-level programme requirements associated with financial assistance under the National Water Infrastructure Loan Facility, including eligibility criteria and key loan specifications. Parliament will have visibility of these matters as the Operating Mandate is a legislative instrument (refer to subclause 11(1) of the Bill) and will be subject to tabling requirements of the *Legislation Act 2003*.

Subclause 12(3) of the Bill provides for the responsible Ministers to direct the Corporation to enter into an agreement, on behalf of the Commonwealth, for the grant of financial assistance to a State or Territory for a water infrastructure project. The direction may specify terms and conditions to be included in the agreement. These directions will not be legislative instruments (refer to later discussion); however, the Corporation will be required to publish details on any directions it receives from responsible Ministers in its annual reports, including those made under subclause 12(3) of the Bill.

This requirement arises because of section 46 of the PGPA Act, under which corporate Commonwealth entities must prepare, and present to Parliament, annual reports that comply

with any requirements prescribed by the rules. Paragraph 17BE(d) of the *Public Governance, Performance and Accountability Rule 2014* (the PGPA Rule) requires details on any directions received by the entity to be published in its annual reports.

Section 16F of the PGPA Rule also requires annual reports to detail the performance of the entity, which, for the Corporation, will include reporting on its administration of grants of financial assistance to States and Territories for water infrastructure projects. Other applicable reporting requirements for corporate Commonwealth entities are set out in Part 2-3 of Chapter 2 of the PGPA Act.

Exemption from disallowance and sunsetting

> *1.122 The committee requests the Minister's advice as to why it is appropriate for all of the ministerial directions under clauses 11 and 12 not to be subject to disallowance and sunsetting, and why it is appropriate that there is no requirement to table 'other directions' made under clause 12 in the Parliament.*
>
> *1.123 The committee also requests the Minister's advice as to why there is no requirement to seek the Board's advice prior to the making of a direction about where the Corporation is to be located under subclause 12(5).*

The approach taken to the tabling, disallowance and sunsetting of the directions given by responsible Ministers under clauses 11 and 12 of the Bill reflects the character of the directions, the level of executive control considered appropriate, and the need for directions to remain in force until revoked.

As detailed in the explanatory memorandum to the Bill, the approach taken is also in line with the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Regulation). The Regulation exempts directions from ministers to corporate Commonwealth entities from being legislative instruments. It also exempts legislative instruments that are directions from a minister to a person or body from disallowance and sunsetting.

To assist the Committee's consideration of the Bill, further detail on the specific directions is provided below.

Operating Mandate (clause 11 of the Bill)

Section 6 of the Regulation exempts classes of instruments from being legislative instruments. This exemption includes a direction given by a minister to a corporate Commonwealth entity within the meaning of the PGPA Act (refer to item 3 of the table in section 6 of the Regulation). The explanatory statement to the Regulation states that the exemption is appropriate because these types of instruments are administrative in character, as they do not determine the law or alter the content of the law; rather, they determine how the law does or does not apply in particular cases or circumstances.

Despite this express exemption, the Bill provides for the Operating Mandate to be treated as a legislative instrument. This approach has been taken because the Operating Mandate relates to matters that are considered to be legislative in character. Given this, and due to subsection 8(2) of the Legislation Act, the tabling requirements of the Legislation Act will apply.

However, the Operating Mandate will not be subject to disallowance and sunsetting.

Section 9 of the Regulation exempts classes of legislative instruments from being subject to disallowance. Item 2 of the table in that section is relevant in this case. The explanatory statement to the Regulation states that this exemption appropriately recognises that executive control is intended for these types of instruments.

Section 11 of the Regulation exempts classes of legislative instruments from being subject to sunsetting. Item 3 of the table in that section applies in this case. The explanatory statement to the Regulation states that sunsetting is not appropriate for these types of instruments because they are intended to remain in place until revoked by the relevant Minister.

Other directions

The 'other directions' given to the Corporation under clause 12 of the Bill will be administrative in nature and will not determine or alter the law. For example, directions made under subclause 12(3) of the Bill will relate only to a particular State or Territory in relation to a particular water infrastructure project. As a result, the approach taken for 'other directions' in the Bill is different from the approach to the Operating Mandate.

Section 6 of the Regulation exempts classes of instruments from being legislative instruments. Item 3 of the table in that section is applicable in this case. Due to this express exemption, the provisions of the Legislation Act, including in relation to disallowance and sunsetting, will not apply to the 'other directions' in clause 12 of the Bill.

However, as noted above, under paragraph 17BE(d) of the PGPA Rule, the Corporation will be required to publish details on any directions it receives from responsible Ministers in its annual reports. This requirement ensures there will be appropriate transparency on ministerial directions to the Corporation.

Consultation on the location of Corporation

It is not appropriate for the Bill to require the Board to be consulted on the location of the Corporation prior to a direction being made under subclause 12(5). The decision to establish the Corporation in Orange, NSW, has already been made by the government. This decision, combined with subclause 12(5) of the Bill, will provide certainty to the Board about the location of the entity and allows it to focus on having the Corporation fully operational in Orange, NSW, by July 2018.

Broad delegation of administrative powers

> *1.128 The committee requests the Minister's advice as to why it is necessary to allow all of the powers and functions of the Corporation, Board and CEO to be delegated or subdelegated to any member of the staff of the Corporation and requests the Minister's advice as to the appropriateness of amending the bill to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.*

Clauses 49, 50 and 51 of the Bill relate to the delegation and subdelegation of the powers and functions of the Corporation (clause 8 of the Bill), the Board of the Corporation (clause 15 of the Bill) and Chief Executive Officer (CEO) of the Corporation (clause 35 of the Bill). As noted in the explanatory memorandum to the Bill, the ability of the Corporation, the Board and the CEO to delegate, or subdelegate, any or all of their powers or functions under the Act, or prescribed in any rules made under the Act, will provide operational flexibility for the Corporation.

The general principle is that delegations of power should only be as wide as necessary. However, this does not prohibit a wide delegation of power if such a delegation is necessary and appropriate in the circumstances. The approach proposed by the Bill is appropriate for a corporate Commonwealth entity that will be overseen by an independent Board, which is ultimately responsible for the proper, efficient and effective performance of the Corporation's functions.

It is also important to note that clauses 49, 50 and 51 of the Bill are not unlimited in scope:

- clause 49 of the Bill enables the Corporation to delegate any or all of its powers and functions to a Board member or the CEO;
- clause 50 of the Bill enables the Board to delegate any or all of its powers and functions to a Board member or the CEO; and
- clause 51 of the Bill enables the CEO to delegate, or subdelegate, any or all of his or her powers and functions to a member of the staff of the Corporation (see clause 44 of the Bill).

Accordingly, any delegation, or subdelegation, of power cannot occur beyond staff of the Corporation. On establishment of the Corporation, it is anticipated that there will be around 30 persons employed as staff of the Corporation. These people will have been selected for their expertise and skills in relation to the functions of the Corporation.

There are also relevant safeguards proposed by the Bill in relation to the powers of delegation. For example, a delegate exercising the power to enter into agreements with States and Territories for grants of financial assistance for water infrastructure projects (see subclause 12(3) of the Bill) must take all reasonable steps to comply with written directions from the responsible Ministers (as defined by clause 4 of the Bill).

Finally, the Corporation, the Board and the CEO are not required to delegate their powers and functions, and any such delegation may be limited to particular powers and functions or to particular persons. It is appropriate that the Corporation, the Board and the CEO are able to exercise their discretion in this decision, having regard to the relevant power or function, and an assessment of the skills, training and expertise needed for any particular decision.

No requirement to table the review report in Parliament

> *1.132 In order to facilitate appropriate parliamentary scrutiny of the operation of this Act (and the new Corporation), the committee suggests it may be appropriate for clause 53 of the bill to be amended to include a legislative requirement that any report of the review be:*
>
> - *tabled in the Parliament within 15 sitting days after it is received by the Agriculture Minister; and*
> - *published on the internet within 30 days after it is received by the Agriculture Minister.*

Clause 53 of the Bill requires the Agriculture Minister (defined by clause 4 of the Bill) to arrange for a review of the operation of the Act to be undertaken and finalised before 1 July 2024. The review must consider the scope of the activities of the Corporation after 30 June 2026 and the appropriate governance arrangements for the Corporation after that date. The persons who undertake the review must give the Agriculture Minister a written report of the review.

It is intended that the review, and the corresponding written report, will inform the government in its consideration of future arrangements for the Corporation. Accordingly, it is appropriate that the government is able to decide if and when the timing and method of release for the report.

Minister for Revenue and Financial Services

The Hon Kelly O'Dwyer MP

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

Dear Senator Polley

Thank you for your letter dated 15 June 2017 requesting that the Treasurer provide information to the committee about the Treasury Laws Amendment (2017 Measures No. 2) Bill 2017 (the 'Bill') and the Major Bank Levy Bills. The Treasurer has requested that I respond to the committee's request about the Bill on his behalf.

In the *Scrutiny Digest No. 6 of 2017*, the committee noted that item 27 of Schedule 1 to the Bill (the 'amendment') provides an application rule in relation to non-concessional contributions for the 2013-2014 financial year and later years. The committee has requested advice as to why the amendment is intended to apply retrospectively from the 2013-2014 financial year and whether this will cause any detriment to any individual.

By way of summary, the amendment addresses an application issue associated with earlier changes to certain objection rights available to individuals. The amendment will not cause any detriment to any individual because the associated changes expand the matters that can be objected to where an individual is dissatisfied with certain decisions of the Commissioner of Taxation.

I note that the amendment does not relate to item 5 of Schedule 1 to the Bill itself (which is about assumptions relating to income streams). Rather, the amendment relates to item 9 of Schedule 3 to the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* (the 'Fair and Sustainable Super Act'), which legislated the Government's superannuation reform package announced in the 2016-17 Budget.

Item 9 of Schedule 3 to the Fair and Sustainable Super Act is the application rule (the 'original application rule') for item 5 of Schedule 3 to that Act. Item 5 clarified the objection rights available to individuals for certain decisions about non-concessional contributions by making it clear that individuals can object to a decision of the Commissioner *not* to make a determination to disregard or reallocate a contribution to another financial year. Individuals request such determinations to prevent or reduce breaches of their non-concessional contributions cap.

Parliament House, Canberra ACT 2600, Australia
Telephone: 61 2 6277 7930 | Facsimile: 61 2 6273 0434

Prior to the changes made by item 5, the objection rights available to individuals only covered objections to determinations that the Commissioner had actually made.

However, the original application rule for those changes was ineffective because it referred to 'working out the non-concessional contributions cap', whereas the changes to objection rights applied in respect of non-concessional contributions (which are different to the cap).

Item 27 of Schedule 1 to the Bill addresses this issue by amending the original application rule to ensure that the changes to objection rights apply in respect of non-concessional contributions. Applying the changes from the 2013-2014 financial year also aligns them with equivalent changes that were made for concessional contributions.

As noted above, the expansion of these objection rights is wholly beneficial to individuals as it ensures that individuals are able to formally object to a wider range of decisions than may have previously been the case.