THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MC17-015948

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

Dear Senator

I refer to the letter from the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 17 August 2017.

The Committee has asked two questions concerning the Australian Border Force Amendment (Protected Information) Bill 2017.

Those questions, and my answers to them, are:

Question 1 – Broad scope of offence

The Committee requests the Minister's advice as to why it is necessary and appropriate to include a broad definition that effectively makes it an offence to disclose or record any information that has a security classification, in circumstances where there is no defence available if the classification was inappropriately applied and where there is no definition of what constitutes a 'security classification'.

The concept of security classification is described in the Australian Government's Protective Security Policy Framework – Glossary of security terms. That document describes the Security classification system as a set of procedures for identifying official information whose compromise could have a business impact level of high or above for the Australian Government. It is the Government's mechanism for protecting the confidentiality of information generated by it or provided to it by other governments and private entities.

The concept of security classification is not easily reduced to a neat all-encompassing definition within an Act of Parliament. It is for this reason that the concept of 'security classification' is not defined in the Bill. The intention is to adhere to the Protective Security Policy Framework when implementing the amendments.

The test in section 50A to be inserted by the Bill is that the Secretary has certified that it is appropriate that the Immigration and Border Protection information had a security classification at the time of the disclosure of the Immigration and Border Protection information that is alleged to constitute the offence.

The Secretary is not required to certify that the information in question was appropriately classified.

Further, the Secretary certifies that it is appropriate that the Immigration and Border Protection information had a security classification before a decision is made to prosecute the entrusted person under section 42 of the *Australian Border Force Act 2015* (the ABF Act). Due diligence also requires that the information in question was classified at the correct level before a decision is taken to prosecute the entrusted person.

For these reasons, it is not necessary, or appropriate, for a defence concerning the appropriateness of the security classification to be available.

Question 2 – Significant matter in delegated legislation

The Committee's view is that significant matters, such as what constitutes the type of information which, if recorded or disclosed, would result in the commission of an offence (subject to up to two years imprisonment), should be included in the primary legislation unless a sound justification for the use of the delegated legislation is provided. In this regard, the Committee requests the Minister's advice as to:

- *what categories of information it is envisaged may need to be prescribed under this provision; and*
- *if the matters are to be retained in a legislative instrument, the appropriateness of requiring the positive approval of each House of the Parliament before an instrument comes into effect.*

Examples of the kinds of information that may come within paragraph (f) of the proposed definition of *Immigration and Border Protection information* in subsection 4(1) of the ABF Act are:

- internal tools for making visa decisions (such as those concerning risk profiling) which, if disclosed, could increase a person's prospects of being granted a visa which they may not otherwise be eligible to be granted;
- internal procedures for assessing applications for Australian Trusted Trader status under Part XA of the *Customs Act 1901* which, if disclosed, could lead to an entity receiving Australian Trusted Trader status that would not otherwise be given that status.

I note the Committee's view that, if this matter is to remain in a legislative instrument, Parliamentary scrutiny over it could be increased by requiring positive approval of each House of the Parliament before the instrument comes into effect. This would defeat the purpose of the provision, which is to allow the Secretary to act swiftly to protect information that is not covered by one of the other limbs of the definition of *Immigration and Border Protection information* from disclosure.

In addition, the legislative instrument referred to in subsection 4(7) would be subject to public scrutiny and would be disallowable under the *Legislation Act 2003*.

Thank you for bringing this matter to my attention.

Yours sincerely

PETER DUTTON 29/08/17

Senator the Hon Simon Birmingham

Minister for Education and Training
Senator for South Australia

Our Ref MC17-005532

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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31 AUG 2017

Dear Senator Helen,

I thank the Senate Scrutiny of Bills Committee for writing to me on 17 August 2017 seeking my advice in relation to the Education Services for Overseas Student (TPS Levies) Amendment Bill 2017 (the Bill). I understand the Committee's view is that Parliament, rather than makers of delegated legislation, should set the levy and has suggested possible amendments to provide further parliamentary oversight.

The Bill amends the *Education Services for Overseas Students (TPS Levies) Act 2012* (the Act). I consider the Bill in its current form already contains strong safeguards that ensure appropriate parliamentary oversight over the powers of the Minister, to make a legislative instrument to set the administrative and base fee components of the Tuition Protection Service (TPS) levy under the Act. As such, I do not propose to proceed with any amendments to the Bill.

The proposed new subsection 7A(3) of the Act (see item 5 of the Bill) sets maximum fee caps in the primary legislation which the Minister cannot exceed in determining the administrative and base fees through a legislative instrument. The maximum fee caps reflect the current legislated indexed amounts in the Act which were previously passed in Parliament. The imposition of a maximum fee cap limits the amount of administrative and base fees which can be collected each year, preventing any excessive financial impact on international education providers.

I have considered the Committee's suggestion to provide that the determination does not come into effect until after the relevant disallowance period has expired. However, I consider that existing disallowance processes give sufficient parliamentary oversight. Legislative instruments made under the proposed new section 7A of the Act are legislative instruments for the purposes of the *Legislation Act 2003*. These instruments will be subject to the usual disallowance procedures and parliamentary scrutiny under section 42 of the *Legislation Act 2003*.

As the Committee has noted, given the funds reside in a Special Account, they cannot be redirected toward any other program or portfolio, as legislation prescribes how the funds can be used.

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The Australian Government's objective in amending the Act is to be able to act quickly and proactively in adjusting the levy settings when market conditions demand. Requiring positive approval from both Houses of Parliament to change the fee settings would impede the Government's ability to respond with agility.

I have emailed a copy of this letter to the Senate Scrutiny of Bills Committee secretariat.

Thank you for bringing this matter to my attention.

Simon Birmingham

cc. Anita Coles, Committee Secretary, the Senate Scrutiny of Bills Committee.

THE HON ALEX HAWKE MP
ASSISTANT MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS17-002967

Senator Helen Polley
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Dear Senator

Thank you for your letter dated 10 August 2017, to my Senior Advisor, inviting me to respond to comments made in the Committee's *Scrutiny Digest No. 8 of 2017* concerning the Migration Amendment (Regulation of Migration Agents) Bill 2017 (the Bill).

I would like to provide the following advice to the Committee in response to comments in the Scrutiny Digest.

Broad delegation of administrative powers: Schedule 3, Item 17, proposed subsection 320(1):

> ***The committee requests the Assistant Minister's advice as to why it is considered necessary to allow all of MARA's powers and functions to be delegated to any APS employee in the Department 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. For example, the committee notes that it may be possible to provide that MARA's significant cancellation, suspension and information gathering powers (such as those referred to in paragraph [1.9] above) may only be delegated to SES officers.***

The delegation of power at proposed subsection 320(1) is appropriate and consistent with the current framework of the *Migration Act 1958* (the Act).

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It is currently the case that powers and functions of the MARA under Part 3 of the Act are delegated to a person in the Department who is appointed or engaged under the *Public Service Act 1999*. The committee may note that the proposed amendment to subsection 320(1) does not extend the delegation of administrative powers; rather it provides that the Minister may delegate the MARA's powers and functions under Part 3 of the Act more specifically to an APS employee in the Department. The use of the term "APS employee" is consistent with the *Acts Interpretation Act 1901*.

Any attempt to specify details of the level of delegation in the Act would create an unnecessary administrative and legislative burden, as it would require a change to the Act each time there was a restructure to the administrative arrangements of the MARA. Further, the Committee may not be aware that, while the MARA reports to a SES Band 1, there are currently no SES level positions within the MARA itself. Delegation to the SES level would therefore be impractical in this instance.

Further, the existing powers and functions under Part 3 of the Act have been delegated by the Minister under a legislative Instrument and have been working effectively, with no findings of inappropriate use or abuse of powers have been made against the MARA under these arrangements.

Significant matters in delegated legislation: Schedule 4, Item 1, proposed paragraph 288B(4)(a):

> ***The committee requests the Assistant Minister's advice as to why it is proposed to leave the determination of the time limit for complying with a request for information to delegated legislation.***

The Act is structured to contain broad concepts, with the specific details, such as time periods for responding to notices, contained in delegated legislation.

The proposed legislation, requiring an applicant for registration as a migration agent to answer questions or provide information, is specifically for an applicant who has not previously applied for registration as a migration agent.

Under current subsection 288B(1) of the Act, the MARA may require such an applicant to provide further information by statutory declaration or in person. However, if the applicant does not comply, the MARA is prevented from acting further. The matter remains an open application, which cannot be further resolved or closed, which is neither satisfactory to the MARA nor the applicant.

While the proposed paragraph 288B(4)(a) provides that the MARA may consider refusing an application if the applicant fails to comply with the time period for responding to the notice, as specified in delegated legislation, the proposed notice must comply with subsection 309 (1) which provides that:

> *If the Migration Agents Registration Authority is considering refusing a registration application, it must inform the applicant of that fact and the reasons for it and invite the applicant to make a further submission in support of his or her application.*

The proposed notice would clearly advise the applicant of the significance of not replying to the request to answer questions or provide information within the specified time period.

An example of the Act providing the broad parameters, with regulations dealing with details, is subsection 280(1) of the Act, which provides that a person who is not a registered migration agent, must not give immigration assistance. The *Migration Agent Regulations 1998* set out the contents of the infringement notice relating to giving of immigration assistance. Under regulation 3K(1)(e), the infringement notice must:

> *state that, if the person on whom it is served does not wish the matter to be dealt with by a court, he or she may pay that penalty within 28 days after the date of service of the notice unless the notice is withdrawn before the end of that period.*

Strict liability offence: Schedule 5, Item 4:

> ***The committee requests a detailed justification from the Assistant Minister for the proposed imposition of strict liability at Subitem 4(1) of Schedule 5, with particular reference to the principles set out in the Guide to Framing Commonwealth Offences.***

Under sub item (4)(1) of Schedule 5, a migration agent who has paid the registration charge to act on a non-commercial basis, then proceeds to give immigration assistance on a commercial basis, is required to notify MARA within 14 days of the commencement of the Schedule. It is further provided under sub item 4(2) that failure to comply is a strict liability offence with a maximum penalty of 100 penalty points.

The definition of strict liability is subject to the definition contained in the Criminal Code, which allows the defence of honest and reasonable mistake of fact. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that 'a defendant must turn his or her mind to the existence of the facts, and be under a mistaken but reasonable belief about those facts.' Therefore, although the offence is one of strict liability, a migration agent has a defence if he or she can demonstrate making a reasonable mistake of fact, regarding the difference between operating on a non-commercial versus a commercial basis.

The application of strict liability to this offence significantly enhances the ability of the MARA to effectively regulate the migration agent industry and deter the conduct of registering on a non-commercial basis, then proceeding to give advice on a commercial basis without informing the MARA. It is significantly cheaper to register on a non-commercial basis; therefore, it would be tempting for an agent to continue to be registered on this basis, regardless of work undertaken, if the penalty were not significant. Requiring the MARA to prove guilt to a higher standard would undermine deterrence by the MARA.

The proposed amendment seeks to repeal and substitute the provisions of paragraph 312(1)(ea) of the Act to provide these new requirements for migration agents.

Other parts of subsection 312(1), which have not been repealed and replaced, provide that a registered migration agent must notify the MARA in writing within 14 days of the following events, failure of which to do so are offences of strict liability, incurring the penalty of 100 penalty units:

(a) he or she becomes bankrupt;
(b) he or she applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;
(c) he or she compounds with his or her creditors;
(d) he or she makes an assignment of remuneration for the benefit of his or her creditors;
(e) he or she is convicted of an offence under a law of the Commonwealth or of a State or Territory;
(f) he or she becomes an employee, or becomes the employee of a new employer, and will give immigration assistance in that capacity;
(fa) he or she becomes a member of a partnership and will give immigration assistance in that capacity;
(g) if he or she is a member or an employee of a partnership and gives immigration assistance in that capacity — a member of the partnership becomes bankrupt;
(h) if he or she is an executive officer or an employee of a corporation and gives immigration assistance in that capacity:
(i) a receiver of its property or part of its property is appointed; or
(iii) it begins to be wound up.

Further, under the proposed Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017, it is clear that a registered migration agent must work for or with a charity or an organisation that works for the benefit of the Australian community to be eligible to pay the lower, non-commercial fee.
This provides clarity as to the difference between providing advice on a commercial versus non-commercial basis.

Thank you for considering this advice.

ALEX HAWKE

28 / 8 / 2017

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
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Ref No: SB17-001157

Senator Helen Polley
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Dear Ms Polley

Migration Legislation Amendment (Validation of Decisions) Bill 2017

Thank you for your letter dated 10 August 2017 in relation to comments made in the Committee's *Scrutiny Digest No. 8 of 2017* concerning the *Migration Legislation Amendment (Validation of Decisions) Bill 2017*. I would like to provide the following advice to the Committee in response to the comments in the Scrutiny Digest, at Attachment A.

Yours sincerely

PETER DUTTON 23/08/17.

Attachment A

Advice for Scrutiny of Bills Committee

Migration Amendment (Validation of Decisions) Bill 2017

Committee's question:

In light of the discussion above, the committee requests the Minister's detailed justification of seeking to retrospectively validate decisions made in circumstances which may have denied an applicant the right to a fair hearing, and where the practical effect of the legislation would be to reverse any High Court declaration of constitutional invalidity.

Advice:

The *Migration Amendment (Validation of Decisions) Bill 2017* (the Bill) supports the Australian Government's commitment to protect the Australian community from people who have had their visa cancelled or their visa application refused because they are of serious character concern. The amendments in this Bill proactively address the risk to the safety of Australians and reflect the Government's and the Australian community's low tolerance for criminal behaviour by those who are given the privilege of holding a visa to enter into and stay in Australia.

Retrospective application and the right to a fair hearing

The Bill validates decisions that have already been made to cancel visas, or refuse the application for a visa, of non-citizens who are of character concern, based on information provided by intelligence or law enforcement agencies and protected from disclosure under the *Migration Act 1958* (the Act).

The changes to Australian law will apply to:

- people who have had their visa cancelled, or their visa application refused, on character grounds, or there has been a decision not to revoke such a cancellation or refusal on character grounds, under section 501 prior to the legislation taking effect; and
- their cancellation, refusal or revocation decision relied on, or otherwise took into account, information that was provided by intelligence or law enforcement agencies on the basis that it was protected from disclosure under section 503A of the Act; and
- they have not accrued any rights or liabilities as a result of other court proceedings, in which their case has either been fully heard, or finally determined, by a court at the time of commencement.

All non-citizens who have had a visa decision have access to specified review rights under law. This can include merits or judicial review. This amendment does not affect access for these individuals to avail themselves of judicial review should they decide to seek it.

Does the amendment reverse any High Court declaration of constitutional invalidity?

I want to make it clear that this amendment is not an attempt to undermine the jurisdiction of the High Court. This amendment will not affect the High Court's decision in the cases of *Graham* and *Te Puia*, but will rather ensure that decisions that had already been made under the law at that time are not invalidated merely because of their use of protected information.

Similarly, the amendments do not seek to affect cases that the court has already fully heard, or cases that have already been decided by the court. The amendments have been written to specifically exclude such cases from being affected by the validating provision.

THE HON JOSH FRYDENBERG MP
MINISTER FOR THE ENVIRONMENT AND ENERGY

MC17-016849

Senator Helen Polley
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Dear Senator Polley

I refer to your letter concerning the Senate Standing Committee for the Scrutiny of Bills' consideration of the Product Emissions Standards Bill 2017, the Product Emissions Standards (Customs) Charges Bill 2017 and the Product Emissions Standards (Excise) Charges Bill 2017.

My advice in response to the matters raised by the Committee is set out in Attachment A.

Thank you for writing on this matter.

JOSH FRYDENBERG

ATTACHMENT A

Response to the Senate Standing Committee for the Scrutiny of Bills regarding the Product Emissions Standards Bill 2017, the Product Emissions Standards (Customs) Charges Bill 2017 and the Product Emissions Standards (Excise) Charges Bill 2017

Product Emissions Standards Bill

1. Significant matters in delegated legislation

(a) The Committee has requested advice as to why it is considered necessary and appropriate to leave most of the elements of this new scheme to delegated legislation

As the Bill is a framework bill, rules made for the purposes of the Bill will determine the products that are to be regulated under the framework and how those products are to be regulated.

The capacity to prescribe elements of the emissions standard framework in rules is consistent with good regulatory practice, particularly where there is a high level of scientific and technical detail that underpins the legislative scheme. Using rules enables flexibility and adaptability in an area where there are frequent scientific developments and advancement in relation to products, emissions standards, certification testing requirements and the risks to human health and the environment.

The extent and technical complexity of the information needed to set out what certification is required or recognised for each type of product means that these matters are better dealt with in rules rather than the Act. This also enables regular updating as new products are released, emissions standards are updated and foreign certification schemes change.

The ability to prescribe these matters in rules made for the purposes of the Bill avoids the need for product-specific legislation and promotes a consistent approach to matters such as reporting, compliance and enforcement.

(b) The Committee has requested advice as to whether, if significant matters are to be included in delegated legislation, why it is appropriate to include these in rules rather than regulations

The Bill enables rules to be made which will specify the types of products to be regulated under the framework and how those products are to be regulated. Specifying these matters in rules rather than regulations accords with the Office of Parliamentary Counsel's *Drafting Direction No. 3.8 – Subordinate Legislation.* Paragraph 2 of that Drafting Direction states that "OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so".

Consistent with paragraph 16 of the Drafting Direction, the approach of including the elements of the new emissions standards framework in rules (rather than regulations) has a number of advantages including:

(a) it facilitates the use of a single type of legislative instrument being needed for the Bill, thereby reducing the complexity otherwise imposed on the regulated community if these matters were to be prescribed across a number of different types of instruments;

(b) it simplifies the language and structure of the provisions in the Bill that provide the authority for the legislative instruments; and

(c) it shortens the Bill.

Due to these advantages, paragraph 17 of the Drafting Direction states that drafters should adopt this approach where appropriate with new Acts.

Paragraph 3 of the Drafting Direction states that matters such as compliance and enforcement, the imposition of taxes, setting amounts to be appropriated, and amendments to the text of an Act, should be included in regulations unless there is a strong justification otherwise. The Bill does not enable the rules to provide for any of the types of matters listed. This is clarified by clause 51(5) of the Bill, which specifically prevents the rules from including these types of matters. As rules made under the Bill cannot provide for these types of matters, it is appropriate that the elements of the emissions standards framework be prescribed in rules rather than regulations.

In addition, clause 51 clarifies that the rules made under the Bill are a legislative instrument for the purposes of the *Legislation Act 2003*. Pursuant to sections 38 and 39 of that Act, all legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within 6 sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the rules will be subject to the same level of Parliamentary scrutiny as regulations (including consideration by the Senate Standing Committee on Regulations and Ordinances), and a motion to disallow the rules may be moved in either House of the Parliament within 15 sitting days of the date the rules are tabled (see section 42 of the *Legislation Act 2003*).

(c) The Committee has requested advice as to why the Bill only provides that the rules 'may' provide for the review of decisions under the Act, rather than the Bill stating that decisions made regarding the certification of an emissions-controlled product, the granting of exemptions relating to those products, and the imposition of fees for service will be subject to merits review

As stated above, the Bill creates a framework for the regulation of emissions from products. The manner in which those products are to be regulated will be specified in the rules.

It is appropriate that the Bill provides that the rules 'may' and not 'must' make provision for the merits review of certain decisions because decisions pertaining to particular types of emissions-controlled products may not apply to others. This will in turn inform what decisions contained in the rules would be subject to merits review. For example, the first rules made under the framework will be for non-road spark ignition engines and equipment (NRSIEE). It is anticipated that the rules for these products will establish an Australian certification process, including merits review for decisions to certify, or refuse to certify, products. However, future emissions-controlled products regulated under the framework may not require an Australian certification process. In this instance, it would not be possible to specify that decisions to certify products will be subject to merits review. Therefore the use of 'may' provides the necessary flexibility to adapt the rules to the manner in which each particular emissions-controlled product is to be regulated.

The use of 'may' in this context is consistent with other powers in the Bill to prescribe matters in the rules. For example, clause 9 of the Bill provides that the rules *may* prescribe a product as

an emissions-controlled product, and clause 20 provides that the rules *may* require a person who imports or supplies emissions-controlled products to make and keep records in relation to the imports or supplies. It is also consistent with the standard form of legislative instrument-making provisions as set out in the Office of Parliamentary Counsel's *Drafting Direction No. 3.8 – Subordinate Legislation* (see, for example, paragraph 12 of that Drafting Direction). The use of 'may' ensures that the Minister's rule making power in clause 51 is not fettered and that the Bill does not pre-empt future Ministerial decisions on the content of the rules.

Clause 51 clarifies that the rules made under the Bill are a legislative instrument for the purposes of the *Legislation Act 2003*. Once tabled, the rules will be subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances. Amongst other things, the Committee examines each instrument to ensure "that it does not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal". This scrutiny will also ensure that administrative decisions made under rules are subject to an appropriate level of review.

(d) The Committee has requested advice regarding the type of consultation that it is envisaged will be conducted prior to the making of the 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 *Australian Government Guide to Regulation* requires every policy proposal designed to introduce or abolish regulation to be accompanied by a Regulation Impact Statement (RIS). This ensures that every policy option is carefully assessed, its likely impacts costed and a range of viable alternatives considered in a transparent and accountable manner. The *Australian Government Guide to Regulation* defines regulation as 'any rule endorsed by government where there is an expectation of compliance'.

As stated above, rules made under clause 51 of the Bill will specify the types of products to be regulated under the framework and how those products are to be regulated. As the rules determine how emissions-controlled products are to be regulated, there is an expectation of compliance associated with the rules. Therefore, before the rules can be made, the policy options available to regulate an emissions-controlled product will be informed through the development of a RIS.

The *Australian Government Guide to Regulation* requires policy makers to consult in a genuine and timely way with affected businesses, community organisations and individuals. A RIS will need to demonstrate that appropriate consultation has been undertaken.

It is anticipated that the first emissions-controlled products to be regulated under the Bill are NRSIEE. Extensive stakeholder consultation with affected industry bodies and other Commonwealth agencies has been undertaken to inform the development of these rules through the preparation of the RIS for NRSIEE (available at http://ris.pmc.gov.au/2016/05/12/reducing-emissions-small-engines).

The main Australian industry bodies that represent the recreational marine engine and powered outdoor equipment sectors support the regulation of NRSIEE through emissions standards. Initial consultation was undertaken as part of the Consultation RIS, released in May 2010. In 2012, additional consultation was undertaken and clarification sought on issues that were raised during the 2010 consultation period. Since 2012 leading up to the introduction of the Bill in August 2017, there has been ongoing consultation with industry, community organisations,

consumer groups and some major retailers/suppliers, for example, through correspondence and briefing sessions. It is also intended that affected industry stakeholders will be provided with an opportunity to comment on the draft rules before they are made, including through the release of an exposure draft of the rule and a subsequent meeting with industry representatives.

Due to the extensive consultation that has occurred to date, the intention to release an exposure draft of the rules and the consultation requirements as part of the development of a RIS, it was not considered necessary to specify particular consultation requirements for the making of the rules in the Bill.

2. Reversal of evidential burden of proof

(a) The Committee has requested a detailed justification as to the appropriateness of including the specified matter as an offence-specific defence. The Committee suggests that it may be appropriate if clause 33(1) were amended to add an additional paragraph providing that a person will commit the offence if the Minister has not given a direction to the person to engage in that conduct (and the defence at subclause 33(2) were removed). The Committee has also requested advice in relation to this matter.

Subclause 33(1) of the Bill makes it an offence for a person to engage in conduct which causes an emissions-controlled product that is the subject of a forfeiture notice under subclause 32(2) to be moved, altered or interfered with. Subclause 33(2) provides that subclause 33(1) does not apply if the person engages in conduct in accordance with the direction given to the person by the Minister. The note to subclause 33(2) directs readers to subsection 13.3(3) of the *Criminal Code* which provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

An evidential burden of proof requires a defendant to adduce or point to evidence which suggests there is a reasonable possibility that the defence is made out (section 13.6 of the *Criminal Code*). If the defendant meets the standard of proof required, the prosecution then has to refute the defence beyond reasonable doubt (section 13.1 of the *Criminal Code*).

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that an evidential burden is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (only defers that burden). Thus as a general rule, the default position in section 13.3 of the *Criminal Code* should apply and the defendant should bear an evidential burden for an offence-specific defence, unless there are good reasons to depart from this position[1].

Framing this as a defence has the effect of requiring the defendant to put forward adequate evidence that their conduct, which caused an emissions-controlled product that is the subject of a forfeiture notice, to be moved, altered or interfered with, was in accordance with a direction given by the Minister. It would then be for the prosecution to refute that evidence beyond reasonable doubt. This does not place the defendant in a position in which he or she would find it difficult to produce the information needed to suggest there is a reasonable possibility that the defence is made out. It is peculiarly within the knowledge of the defendant whether their

[1] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p 52.

conduct was in accordance with a direction given by the Minister. It would be relatively easy for the defendant to raise evidence of this, whereas it would be significantly more difficult and costly for the prosecution to establish that the defendant's conduct was not in accordance with that direction.

For the reasons outlined above, it is appropriate and consistent with the provisions of the *Criminal Code* and the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that the evidential burden of proof be imposed on a defendant seeking to prove the existence of the defence. As this is the case, it is not necessary to amend clause 33 of the Bill to add an additional paragraph as suggested by the Committee.

Product Emissions Standards (Customs) Charges Bill 2017 and Product Emissions Standards (Excise) Charges Bill 2017

Significant matters in delegated legislation

(a) The Committee has requested advice regarding the following matters:

- **whether at least some level of guidance (for example, limiting the charges to 'the estimated cost of regulating the type of emissions-controlled product') or a maximum level of charge can be specifically included in each Bill**
- **if no guidance is to be included on the face of the bill, the Committee considers that it may be appropriate for the bill to be amended to increase parliamentary oversight by:**
  - **requiring the positive approval of each House of the Parliament before new regulations under clause 6 come into effect; or**
  - **providing that the regulations do not come into effect until the relevant disallowance period has expired (while retaining the usual procedures in subsection 42(2) of the *Legislation Act 2003* so that any regulations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period).**

Specifying the amount of the charge, or the method for working out the amount of the charge, in the regulations provides the level of flexibility required as different charges may be prescribed for different emissions-controlled products. It also avoids the need to amend the primary legislation each time a new charge is imposed, an existing charge is updated or the method for calculating an existing charge is updated.

Consistent with the *Australian Government Cost Recovery Guidelines*, the amount of any applicable charge for different types of emissions-controlled products will be determined on a case-by-case basis through a Cost Recovery Implementation Statement (CRIS). The amount of the charge imposed would reflect the overall costs of the activity being recovered and be set at a level that is designed to recover no more than the estimated cost of regulating the type of emissions-controlled product.

A CRIS must detail the activities that are to be cost recovered, an explanation of how an activity is costed, an explanation of the design of the charges, an assessment of the regulatory charging risk, a stakeholder engagement strategy, financial estimates for the activity, and

reporting on the financial and non-financial performance of the activity. A finalised CRIS must also be published which provides the necessary transparency to ensure that the amount of the charge imposed by regulation is not excessive.

In addition, as the Minister recommends the Governor-General make the regulations specifying the amount of the charge or the method for calculating the amount of the charge, the Minister must be satisfied that the fees and charges are not excessive. Regulations must be tabled in both Houses of the Parliament, and are subject to motions of disallowance and scrutiny by the Senate Standing Committee on Regulations and Ordinances. This Parliamentary scrutiny provides another safeguard against over-recovery through the imposition of excessive charges. This provides a high degree of accountability and transparency to stakeholders, such that the need to include a maximum charge in the bills is reduced.

Specifying a maximum level of charge in each bill has the potential to cause confusion for the regulated entities. As more products are regulated under the emissions standard framework, it would be unclear to importers and manufacturers of different types of products how that maximum charge would apply in their circumstances.

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. In addition, as the amount of the charge, or the method for calculating the charge, will be informed through the development of a CRIS, which involves extensive stakeholder consultation, it is also considered unnecessary to amend the Bills to require the periods for Parliamentary scrutiny of the regulations to expire before the charge can commence.

The Hon Christian Porter MP
Minister for Social Services

MC17-010049

28 AUG 2017

Senator Helen Poley
Chair
Senate Scrutiny of Bills Committee
Suite 1.111
PARLIAMENT HOUSE ACT 2600

Dear Senator Poley

Thank you for your Committee's letter of 10 August 2017 regarding the Scrutiny Digest No. 8 of 2017 which requested additional information in relation to the Social Services Legislation Amendment (Payment Integrity) Bill 2017 and the Social Services Legislation Amendment (Welfare Reform) Bill 2017.

Please find enclosed a response to the Committee in relation to each of the issues identified. This response includes input from the Minister for Employment, Senator the Hon Michaelia Cash, in relation to the elements of the Welfare Reform Bill which fall within her portfolio responsibilities. I have also copied this letter to Minister Cash.

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

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Attachment A

SOCIAL SECURITY LEGISLATION AMENDMENT (PAYMENT INTEGRITY) BILL 2017

Retrospective effect

1.39 – The committee therefore requests the Minister's advice as to why it is considered necessary to apply the amended residency requirements to individuals who may have arranged their affairs on the basis of the existing law, and the number of people likely to be adversely affected by these proposed changes.

This measure balances a number of policy objectives, strengthening residency requirements and encouraging people who intend to migrate to Australia to be more self-supporting, while maintaining the existing basic social security safety net for Australian residents who are in financial need.

It is unreasonable to expect Australian taxpayers to fund the retirement of migrants who have arranged their circumstances in order to retire in Australia on the Age Pension having spent the vast majority of their working lives in a foreign country. The Australian community reasonably expects people who plan on migrating to Australia for the purposes of retirement to have spent a large proportion of their working life in Australia, or to have made provision for their retirement before migrating to Australia, such as being supported by their family sponsors.

The measure addresses concerns raised by the Productivity Commission (No. 77, 13 April 2016, Migrant Intake into Australia) regarding the cost of parent migrants who have not resided in Australia during any part of their working lives and who subsequently receive Australian social security payments to financially support themselves in their retirement.

This measure reinforces the residence-based nature of the Australian social security system and contributes to the ongoing sustainability social welfare system.

This measure will only apply prospectively to qualification for the Age Pension and Disability Support Pension (DSP) from 1 July 2018, and will not have retrospective effect for those who have already previously been granted the Age Pension or DSP at any time prior to 1 July 2018. If grandfathering arrangements were to be applied to this measure, they would be required to operate for a significant period. Operating parallel residency systems for the Age Pension and DSP would also be complex from a policy and administrative perspective.

This measure will affect approximately 2,390 people on average each year over the forward estimates. This includes future migrants and people already in Australia who have not already qualified for Age Pension or DSP at the time of commencement.

The vast majority of Age Pension and Disability Support Pension claimants (98 per cent) will be unaffected by this measure as they already have the required 10 continuous years residence with five years during their working life, having being born in Australia and/or lived here for many years. People who qualified and received Age Pension or DSP at any time prior to 1 July 2018 will not be affected by the changed residence rules.

Newly arrived residents who do not meet the Age Pension and Disability Support Pension residency requirements will continue to have access to other social security payments, if eligible, after the existing two-year newly arrived residence waiting period.

In addition, migrants within their first two years of Australian residence or where the person is not residentially qualified for Age Pension or DSP will continue to have access to Special Benefit. Special Benefit is an income support payment that provides financial assistance to people who, due to reasons beyond their control, are in financial hardship and unable to earn a sufficient livelihood for themselves and their dependants. The rate of Special Benefit is the same as Newstart Allowance. Recipients of Special Benefit may also be entitled to supplementary payments such as Rent Assistance and the Pension Supplement, if over age pension age.

The measure contains safeguards for individuals who incur a continuing inability to work after arrival in Australia, by not applying the residency requirements for the purposes of DSP in such instances. It is important to note that the measure also maintains Age Pension and DSP residency exemptions for humanitarian and refugee entrants.

In addition, Australia has 30 International Social Security Agreements that allow people from these agreement countries to apply for and receive their foreign pension contributions in Australia. These Agreements reinforce the idea that retirement costs and pensions paid should reflect where they have spent periods of their working life. These International Social Security Agreements also commonly allow people to combine periods of residence in those countries with Australian residence for the purpose of meeting pension residence requirements.

SOCIAL SECURITY LEGISLATION AMENDMENT (WELFARE REFORM) BILL 2017

Significant matters in delegated legislation (Schedule 12)

1.43 – The committee requests the Minister's advice as to:

- why it is considered necessary to leave significant matters of the type referred to above to delegated legislation; and
- the type of consultation that it is envisaged will be conducted prior to the making of rules and determinations 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).

As described in the House of Representatives Practice (6th Edition), delegated legislation is necessary and often justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently, and its adaptability for other matters such as those of technical detail. Once Parliament has laid down the principles of a new law, delegated legislation is the appropriate method through which to work out the application of the law in greater detail within, but not exceeding, those principles. The items on which you seek further advice fall within this category of business.

Drug Test Rules

With respect to Schedule 12 of the Social Security Legislation Amendment (Welfare Reform) Bill 2017 (the Welfare Reform Bill), the introduction of a two year drug testing trial for new claimants of Newstart Allowance and Youth Allowance (other), clause 38FA allows for the creation of Drug Test Rules via legislative instrument that will set out certain details relating to the establishment and operation of the trial. This includes the rules for conducting the tests, including the taking of samples, carrying out of the tests and disclosure of results.

The reason for the use of delegated legislation to set out the rules for conducting the tests is that these technical and more administrative details rely to an extent on the advice of the preferred tenderer for the provision of drug testing trial services as well as other stakeholders. Use of a legislative instrument gives the necessary flexibility to ensure that the arrangements for the drug testing will meet the intention of the legislation but can accommodate practicalities that may have been unknown at time the Bill was drafted.

The Drug Test Rules will also set out the three areas in which the trial will operate. The Government had not finalised the selection of the trial sites at the time the Bill was drafted. Using subordinate legislation to set out these areas gives flexibility for consultation, and consideration of the relevant factors in making this decision, after introduction of the Bill to the Parliament.

The Department has been engaging with stakeholders from the health, alcohol and other drug, and welfare sectors and this consultation will be ongoing. The Department has spoken to all state and territory governments as well as a range of drug and alcohol treatment providers and peak bodies, and related experts across the country. The advice and feedback of stakeholders will be considered in finalising the Drug Test Rules.

Income Management

New paragraph 1(B) of 123UFAA of the *Social Security Administration Act 1999* (the Administration Act) will give the Secretary the power to determine a longer period of time than 24 months for a person to remain on Income Management. It is intended that this power would be used where it is considered to be beneficial to the person and/or their drug rehabilitation outcome to remain on Income Management. For example, to return the job seeker to unrestricted welfare payments part way through their rehabilitation could jeopardise their long term outcomes, if the use of Income Management as a tool in helping them to manage their payments is proving successful overall.

Broad delegation of administrative powers (Schedule 12)

1.49 – The committee requests the Minister's advice as to:

- the appropriateness of allowing contractors to make a determination as to who is to be subject to income management;
- the qualifications to be required of such contractors;
- any accountability or oversight mechanisms that contractors will be subject to (covering matters such as the protection from unauthorised disclosure of personal information obtained by a contractor); and
- the availability of review of a contractor's decision to give, vary or revoke a written notice to the Secretary subjecting a person to income management or a refusal to vary or revoke such a notice.

Referral to Income Management and Review of this Referral

The drug testing provider does not make determinations as to who is subject to Income Management. The contracted provider will be contracted by the Department of Human Services (DHS) to drug test individuals and to notify DHS of test results under the drug testing trial. The circumstance in which the drug test provider is to provide DHS with a notice of the test results will be if the individual returns a positive drug test. DHS then cross reference the results of the drug test with customer information to confirm the drug test relates to a specific customer.

The notice of decision that an individual will be placed on Income Management is provided in a letter sent by DHS to the individual requiring attendance at an initial Income Management interview. At this initial interview, an individual can request a wellbeing review if being placed on Income Management will be a serious risk to the person's mental, physical or emotional wellbeing. DHS officers can then refer the individual to DHS social workers to review whether this would be the case. While the drug testing provider is responsible for the drug testing and the notification of test results to DHS, the decision to place an individual on Income Management will be a decision made by a DHS officer under social security law.

This safeguard has been strengthened in response to comments made by the Senate Standing Committee for the Scrutiny of Bills in Scrutiny Digest No.8 of 2017. These comments noted it might be appropriate to review the provisions in the *Social Services Legislation Amendment*

(Welfare Reform) Bill 2017 governing when and how the Secretary might make determinations to remove people from Income Management. In response, the Government made amendments to the provisions in the Bill to limit the Secretary's discretion to make determinations to remove people from Income Management.

The drug testing provider will also be required to notify DHS to revoke a person's referral to Income Management if they subsequently become aware that the positive test result was in error. This may be because:

- the job seeker requested a re-test and the sample was subsequently found to return a negative result;
- the drug test provider was given evidence (by the job seeker or their representative) of legal medications or other circumstance which would, in their professional opinion, produce a positive drug test result without the consumption of illicit drugs; or
- they became aware of any other error within their testing process for that person's sample.

These circumstances and requirements will be stipulated in the Drug Test Rules.

Referral of a person to Income Management by an external party is already an established process under existing Income Management provisions in the Administration Act. For example, the local child protection authority or, in Queensland, the Families Responsibility Commission can refer people to Income Management under certain circumstances.

The decision that a person is subject to Income Management, based on a referral from a third party (such as the drug testing provider) is a decision under social security law. Any decision made under social security law, including implementation of the drug test provider's referral of a person to Income Management, may be appealed in accordance with existing review and appeal provisions. Under existing review and appeal mechanisms in the Administration Act, recipients can request a review of the decision by a DHS Authorised Review Officer and, if they disagree with the decision by this officer, can appeal the decision to the Administrative Appeals Tribunal.

Qualifications of the Drug Test Provider

The minimum requirements, including qualifications, of the drug test provider and its officers will also be set out in the Drug Test Rules. It is intended that the drug testing provider will need to deliver testing services in accordance with the relevant Australian Standards (where these exist) being *AS/NZS 4308:2008 Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* and *AS4760:2006 Procedures for specimen collection and the detection and quantitation of drugs in oral fluid.* It is also intended that the provider will also be required by the Rules to utilise authorised laboratories – those accredited by the National Association of Testing Authorities, Australia - and to use authorised analysts for the purposes of analysing the results of samples taken for drug testing. The final details of the Drug Test Rules may be subject to further consultation with stakeholders.

Privacy

With respect to privacy concerns, there are existing privacy safeguards in place under the *Privacy Act 1988* and the confidentiality provisions in Division 3 of Part 5 of the Administration Act.

These confidentiality provisions stipulate that protected information, including any personal information such as health information, can only be accessed, used or disclosed in limited circumstances. This includes for the purposes of administering the social security law; for research, statistical analysis or policy development; and where it has been certified as being in the public interest.

These existing safeguards will apply to any information gathered as part of this trial, including that obtained or generated by the drug test provider. Any accessing, use or disclosure of this information, including test results, will only occur in accordance with these existing laws.

Restriction on judicial review (Schedule 12)

1.54 – The committee notes that the no-duty-to-consider clause has not been thoroughly justified in this case. The explanatory memorandum indicates that once the Secretary is made aware of facts which indicate income management may seriously risk a person's well-being, the Secretary *will* consider making a determination. The committee considers it may be appropriate to amend the no-duty-to-consider clause to ensure it does not apply where the Secretary is made aware of facts that indicate that income management may risk a person's well-being. The committee requests the Minister's response on this matter and an explanation as to why proposed subsection 123UFAA(1D) is otherwise considered necessary and appropriate.

The Committee's comments regarding the no-duty-to-consider clause have been noted. I agree to amend new clause 123UFAA (1C) of the Welfare Reform Bill through Government amendments to read that the Secretary will determine that a person is not subject to the income management regime under subsection (1A) if the Secretary is satisfied that being subject to the regime under that subsection poses a serious risk to the person's mental, physical or emotional wellbeing.

Broad delegation of legislative power (Schedule 14)

1.58 – The committee requests the Minister's advice as to:

- why it is necessary to bind decision-makers via delegated legislation as to what must not be considered a 'reasonable excuse' for a participation failure, given the existing requirement that any excuse be 'reasonable'; and
- the appropriateness of providing a broad and unfettered power to prescribe any matter that must not be considered when determining a reasonable excuse (rather than more specifically limiting this power to provide that drug or alcohol abuse or dependency must not be considered in relation to determining whether a person has a reasonable excuse for committing a second or subsequent participation failure if they have previously refused available and appropriate treatment).

The need for delegated legislation to specify what must not be considered a 'reasonable excuse'

Implementing the measure purely on the basis of what individual decision-makers believe is reasonable would lead to administrative inconsistency and inequity and may not achieve the policy intent of providing an incentive to job seekers with drug and alcohol issues to try to address those issues.

Without the proposed legislative change allowing the Secretary to determine, by legislative instrument, what factors must not be considered when deciding whether a person had a reasonable excuse, decision-makers would continue to be required to consider drug and alcohol dependency for every failure. This is not consistent with policy intent of the measure. Policy guidelines could be used to specify that decision makers should consider whether a job seeker has turned down treatment in determining whether a job seeker has a reasonable excuse. However, without an instrument specifying the circumstances in which drug and alcohol must and must not be taken into account, the discretion to find a reasonable excuse in circumstances that are inconsistent with the policy intent would remain in place. This would allow inconsistent application of the policy, as different decision-makers will have different views on what is reasonable, depending on their experience and values.

The appropriateness of providing a broad power to prescribe matters that must not be considered when determining 'reasonable excuse'

The alternative to providing a broad power in the primary legislation to specify, in a legislative instrument, matters which must not be taken into account when considering reasonable excuse would be to use the primary legislation itself to specify the circumstances in which drug or alcohol dependency must or must not be taken into account.

This would require the inclusion of an inappropriate level of detail in the primary legislation. Also, using a legislative instrument is preferable because it provides greater flexibility should any refinement to the policy be required, while still allowing appropriate Parliamentary oversight through the disallowance process. This oversight will ensure that the instrument does not include matters that go beyond the Government's declared policy intent.

Significant matters in delegated legislation (Schedule 15)

1.62 – The committee requests the Minister's advice as to:

- why it is considered necessary to leave significant matters of the type referred to above to delegated legislation; and
- the type of consultation that it is envisaged will be conducted prior to the making of rules and determinations 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 use of delegated legislation

The reliance on legislative instruments to specify micro-policy details in relation to the application and administration of the compliance framework is based on the principle that

delegated legislation is necessary and justified because it allows administrative and technical detail to be adjusted relatively quickly (compared to provisions of the primary legislation), in the event that shifting policy imperatives give rise to the need to change policy at an administrative level. The use of delegated legislation such as legislative instruments allows policy departments, with appropriate parliamentary scrutiny, to work out the application of the law in greater detail within, but not exceeding, the principles that the Parliament has laid down by statute in the primary legislation.

The targeted job seeker compliance framework is intended to deal with one-off instances of non-compliance through payment suspension (where the job seeker receives full back-payment once they re-engage) and apply penalties only to job seekers who have demonstrated persistent and deliberate non-compliance. It is intended that generally compliant job seekers would be dealt with through administrative processes while those who persist in their non-compliance, for no good reason, will be dealt with through the legislation.

A legislative instrument provides the best mechanism for specifying in detail when a job seeker should move from being primarily subject to the administrative regime to being fully subject to the legislative regime. An instrument will therefore be used to determine when a job seeker is considered to have been persistently non-compliant and, once they are so determined, the level of payment reduction that they would face for any subsequent failure (within constraints imposed in the primary legislation). The instrument will also stipulate that job seekers must have been assessed by the Department of Human Services as able to meet their requirements prior to becoming subject to financial penalties for repeated mutual obligation failures.

Also important is the potential need for future changes to these micro-policy settings. While it is informed by significant research, evidence and modelling, the targeted compliance framework is a new approach to job seeker compliance. Accordingly, some flexibility has been purposely built into the framework to allow rapid adjustment of some policy parameters. The use of legislative instruments to specify these policy parameters will allow such adjustment, while the disallowance process would ensure that Parliament is appropriately able to oversee and approve any particular policy changes.

The Bill would also introduce an instrument-making power for determining whether a job seeker has undertaken adequate job search. In the current job seeker compliance framework there is no such instrument-making power and no legislated definition of adequate job search. Using an instrument to specify this level of policy detail will therefore provide greater clarity regarding what does and does not constitute adequate job search, while not burdening the primary legislation with administrative detail. It will also provide greater flexibility should any refinement to the policy be warranted, while still allowing appropriate Parliamentary oversight through the disallowance process.

With regard to the instrument-making power relating to reasonable excuse decisions, the requirement to make an instrument specifying matters that must be taken into account reflects current arrangements. This power was introduced in 2006, as a result of Senate amendments to the Family and Community Services Legislation Amendment (Welfare to Work) Bill 2005. The requirement to specify matters that must not be taken into account will reflect the arrangements that will be in place on 1 July 2018, if Schedule 14 is passed and commences on 1 January 2018. The need for this latter power is outlined in the above response regarding Schedule 14.

Consultation

As part of the development of the targeted job seeker compliance framework, the Department of Employment consulted and worked with the Department of Human Services, the Department of Social Services and the Department of the Prime Minister and Cabinet. Other Australian Government Departments were also consulted as part of usual Budget processes. In addition, the Department of Employment continually seeks and reflects on feedback it receives regarding its policies and programmes. Views and evidence from other stakeholders, including welfare sector organisations, employment service providers and job seekers, were therefore able to be considered as part of the policy development process.

The Department of Employment will consult with other Government Departments and other affected parties on the specific content of the instruments. However, the inclusion of specific consultation obligations in the legislation is unprecedented in job seeker compliance legislation and the Government sees no value in including such a requirement in this Bill.

Merits review (Schedule 15)

1.65 – The committee requests that the Minister's advice as to why it is considered necessary and appropriate to remove the Secretary's ability to ensure that certain welfare payments continue to be paid pending the outcome of merits review.

Under the new compliance framework, while job seekers are able to appeal any financial penalty, they will not be paid pending the outcome of the appeal (payment pending review). However, job seekers will be back paid if their appeal is successful.

Under the current compliance framework, in practice payment pending review is only available for eight week serious failure penalties and unemployment non-payment periods, which will no longer exist under the new framework. Payment pending review is currently not available for the majority of penalty types.

Under the new framework, the appeal processes that will apply for all penalties will be the same as those that currently apply for all but eight week penalties. However, the longest penalty applicable under the new framework, which will apply only to those with a record of deliberate and persistent non-compliance, will be four weeks.

Before a job seeker faces any financial penalty under the new framework, they will have missed a minimum of five requirements in six months, without reasonable excuse, or will have refused work (and will therefore be demonstrably capable of obtaining work). The job seeker's capabilities will also generally have been assessed twice, by both their employment services provider and Human Services, before any penalties are applied. These arrangements are intended to ensure that only those job seekers who are fully capable of meeting their requirements but deliberately choose not to do so will lose payment. The intention is to provide such job seekers with a strong incentive to change their behaviour or find work. Allowing payment pending review for such job seekers would significantly undermine this incentive effect.

SENATOR THE HON MITCH FIFIELD
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS
MANAGER OF GOVERNMENT BUSINESS IN THE SENATE

Senator Helen Polley
Chair
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Standing Committee for the Scrutiny of Bills – Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 and Telecommunications (Regional Broadband Scheme) Charge Bill 2017

Dear Chair Helen

Thank you for your letter dated 10 August 2017 on behalf of the Standing Committee for the Scrutiny of Bills (the Committee) relating to the proposed regional broadband charge scheme in the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 (TLA Bill) and the Telecommunications (Regional Broadband Scheme) Charge Bill 2017 (RBS Bill) (together, the Bills).

A response to the Committee's request follows.

TLA Bill

Subsection 76AA(2) – Ministerial determinations affecting the meaning of 'designated broadband service'

The overriding objective underpinning the design of both the Ministerial powers under proposed subsection 76AA(2) and proposed section 79A of the TLA Bill has been to maximise parliamentary scrutiny whilst maintaining a sufficient degree of flexibility. While proposed subsection 76AA(2) of the TLA Bill would enable a Ministerial determination that a carriage service is not a designated broadband service for the purposes of the regional broadband scheme, the Minister has discretion whether or not to make such a determination. The effect of any determination made under proposed subsection 76AA(2) is to remove a carriage service from the scheme with the effect that any liability to pay the charge that might otherwise arise, is also removed.

Section 79A – Ministerial determinations affecting the meaning of 'premises'

Proposed section 79A would enable the Minister, by written determination, to specify locations that satisfy one or more conditions either to be, or not to be, premises for the purposes of the regional broadband scheme. This proposed power is discretionary. If the determination had the effect of excluding a particular location, or a class of locations, that would otherwise fall within

the ordinary meaning of 'premises', and therefore attract liability to pay the charge, the effect of any such determination would be to remove a legislative obligation to pay the charge. As the TLA Bill intends that the expression 'premises' has its ordinary meaning, rather than giving that term a precise technical meaning, this Ministerial determination power ensures that any unintended consequences that might arise from relying on the ordinary meaning of premises at large can be adequately dealt with in a timely manner to ensure that the regional broadband scheme does not have an anomalous, inequitable or otherwise unacceptable impact.

Section 102ZFB – modified disallowance of Ministerial determinations

I also note that proposed section 102ZFB of the TLA Bill provides for a modified disallowance procedure in respect of a Ministerial determination made under each of subsections 76AA(2), 79A(1) or (2). This modified disallowance procedure provides greater Parliamentary scrutiny over any such Ministerial determination than would be available under the usual disallowance procedure in section 42 of the *Legislation Act 2003* (Legislation Act). Under the usual disallowance procedure, a legislative instrument will take effect from when it is made, and by virtue of section 12 of the Legislation Act, commences from the day after the date of registration, and if disallowed, will only cease to have effect from the time of disallowance, with the result that there may be a period of time during which a subsequently disallowed instrument is in effect. Under the modified procedure in the TLA Bill, a Ministerial determination can only commence and take effect once the disallowance period has passed and the Parliament has had sufficient time to scrutinise the determination.

The Explanatory Memorandum to the TLA Bill (at page 196) notes that, as the Ministerial determinations affect liability to pay the regional broadband scheme charge, it is appropriate to give the Parliament the opportunity to scrutinise and disallow the determinations before they take effect. Ensuring adequate Parliamentary scrutiny through only the disallowance process, rather than through that process and an additional process of uncertain duration, provides certainty for industry concerning liability to pay the charge.

The Committee has identified a preference for requiring the positive approval of each House of the Parliament before a new determination comes into effect and directed my attention to section 10B of the *Health Insurance Act 1973*, which provides in subsection (2) that a determination made as a legislative instrument does not come into effect until approved by resolution of each House of Parliament. Such a provision is irregular in the Commonwealth statute book and does not reflect customary legislative practice. Further, as the regional broadband scheme imposes liability on a carrier to pay a charge comprising two components, in cases where the consequential effect of the Ministerial determination is to remove or reduce the amount of one or both of those charge components because certain premises otherwise captured were no longer captured, it would not be appropriate to delay the date of effect of any such Ministerial determination beyond the closure of the period for moving a disallowance motion as it would impose an unnecessary compliance burden on carriers.

Subsections 101(1) and 102ZF(5) – strict liability offences

The Committee has raised concerns regarding proposed subsections 101(1) and 102ZF(5) of the TLA Bill. Under these provisions failure to provide a report about chargeable premises to the ACMA, and failing to provide a report about reportable premises to the ACCC, respectively, are strict liability offences. These proposed subsections are consistent with the principles for

strict liability offences as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) developed by the Attorney-General's Department, and further enable internal consistency between comparable reporting obligations in the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act).

The penalty proposed in subsections 101(1) and 102ZF(5) does not include imprisonment and being specified as 50 penalty units, is below the maximum fine of 60 penalty units suggested in the Guide. The Guide further indicates that strict liability offences may be appropriate where it is necessary to ensure the integrity of a regulatory regime. The reports to which the offence provisions relate are critical to the integrity to the regional broadband scheme, as they serve to establish the extent of a carrier's liability to pay the charge under proposed subsection 101(1), and to enable the ACCC to provide informed advice to the Minister under proposed subclauses 13(1) and 17(1) of the RBS Bill. The use of strict liability offences in this context helps ensure compliance by the carriers liable to pay the charge via specific deterrent effect and is considered justified.

In addition, the offence provisions are consistent with the principle in the Guide that specific criteria, as opposed to broad or uncertain criteria, should be included. In both proposed subsections, there is no criteria uncertainty. The content of the reports (and the circumstances under which a report is required to be given) are clearly set out in proposed sections 100 and 102ZF of the TLA Bill and the failure to provide the reports by the required timeframe (being the requirement for triggering the offence) is unequivocally clear.

An additional justification for these offences is that they provide the requisite deterrent effect consistent with the principle set out in the Guide. If carriers do not report as required the legitimate policy imperatives of ensuring that carriers pay regional broadband scheme charges and that the Minister can be appropriately advised by the ACCC will be substantially weakened. Enabling the ACCC to provide accurately informed advice to the Minister is particularly critical as this advice may form part of the advice that the Minister must have regard to in deciding whether to make a determination under proposed subclauses 12(4) and 16(8) of the RBS Bill as to the base component or the administrative cost component respectively.

Subsections 101(1) and 102ZF(5) are proposed to be inserted into the TCPSS Act as part of the proposed new Part 3 of that Act. The TCPSS Act already includes a strict liability offence in section 69 in Part 2 regarding failure to lodge an eligible revenue return. As proposed subsections 101(1) and 102ZF(5) will apply to the same industry group, it is important to maintain consistency between reporting obligations including between the consequences for failing to meet those obligations.

Subsections 102Z(2) and 102ZA(2) – authorised government agencies

The Committee notes that proposed subsections 102Z(2) and 102ZA(2) of the TLA Bill provide the ACMA and ACCC, respectively, with the power to declare, by notifiable instrument, that a specified department or authority of the Commonwealth, a State or a Territory is an authorised government agency to whom specified information may be disclosed. This power is constrained in each proposed subsections in two ways: first, by reference to the requirement that the information must have been obtained in specified ways; and secondly, by

the requirement that the ACMA and ACCC, respectively, be satisfied that the information will enable or assist the body (to whom disclosure is proposed to be made) to perform or exercise any of the functions or powers of the body.

The declarations under these proposed subsections will be consistent with the purposes for which notifiable instruments may be used as given in section 11 of the Legislation Act. It is generally accepted that permitted uses of notifiable instruments include the following three circumstances, which are applicable to declarations that would be made under proposed subsections 102Z(2) and 102ZA(2):

a) in determining particular cases or circumstances where the law is to apply or not to apply and not altering the content of the law;
b) where it is appropriate to be publicly available over the medium and/or longer term; and
c) where the integrity of the information needs to carefully maintained and/or updated over time.

Requiring additional government entities to be specified in a notifiable instrument ensures that the public in general, or a member of the public, will be able to benefit from access to an authoritative form of the information from a centrally managed source. I consider that it is appropriate for the instruments that would be made under proposed subsections 102Z(2) and 102ZA(2) to be notifiable, as industry would benefit from public access to the instrument, as well as the nominated government entities which are the subject of the notifiable instrument. Further, the class of persons to whom the ACCC and the ACMA can specify to be an authorised government agency is a confined class (i.e. department or authority of a State or Territory) and this provides further protection and justification for the notifiable instrument form. Disallowance of the notices would not be apt or practically suitable. It is expected that this specification power would only be exercised in exceptional cases. I also note that the ACCC and the ACMA, respectively, have the ability to impose conditions on any disclosures made under proposed subsections 102Z or 102ZA.

RBS Bill

Subclauses 12(4) and 16(8) – positive approval of effective date for determination

The Committee has expressed a preference for positive approval of each House of Parliament before a new determination under proposed subclause 12(4) or 16(8) of the RBS Bill comes into effect. In addition to the points raised above in relation to proposed subsections 76AA(2), 79A(1) and 79A(2) of the TLA Bill, it is important to note that any charge that might be set by Ministerial determination would apply on a financial year basis, and it is important to ensure that the commencement date is aligned to natural business cycles for the telecommunications sector, for instance to ensure that any changes to the charge are known in advance of the start of the relevant financial year to provide industry with certainty and the opportunity to make commercial and investment decisions based on known liability. Imposing an additional requirement, that operated on top of the existing disallowance mechanism, would undermine this ability to provide industry certainty.

Requiring the positive approval of each House of Parliament risks additional delay in commencement of any revised charge and, this additional uncertainty, risks imposing unnecessary compliance burdens on carriers, and potentially resulting in over-collection of the charge. As the Explanatory Memorandum to the RBS Bill notes the Ministerial determination

power in proposed subclause 12(4) is designed to provide a discretion that is necessary to reduce the risk that the regional broadband scheme over or under recovers the amount of money necessary to fund NBN Co Limited's (and other eligible funding recipient's) fixed wireless and satellite networks.

Subclause 19(2) – modified disallowance

The Committee notes that proposed subclause 19(2) modifies subsection 42(2) of the Legislation Act in the same way as proposed section 102ZFB of the TLA Bill. The response provided above in relation to those clauses applies equally to proposed subclause 19(2) of the RBS Bill.

I trust this information will be of assistance.

MITCH FIFIELD

23/8/17