Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC24-000739

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

Dear ~~Chair~~ Dean

I refer to a request received from the Senate Scrutiny of Bills Committee (the committee) on 28 February 2024 regarding the Appropriation Bill (No. 3) 2023-2024 and Appropriation Bill (No. 4) 2023-2024 (2023-24 Additional Estimates Bills).

The committee has sought my advice as to whether future Department of Finance (Finance) guides on preparing portfolio budget or portfolio additional estimates statements can include guidance that, where a measure is marked as 'not for publication' (nfp), as much detail should be provided as is necessary to substantiate the decision to not publish the financial details of the measure due to the public interest.

I acknowledge the importance of parliamentary scrutiny over the appropriation process and note the committee's scrutiny concerns in relation to budget measures that may need to be marked as nfp due to the public interest. To assist the committee in their future consideration of annual appropriation bills, I have asked my department to consider, where possible, enhancing the guidance on information which may be provided as part of measure descriptions in budget papers and/or portfolio budget statements in relation to measures that have been marked as nfp.

The committee has also sought my advice as to the basis on which the financial details of the measures 'Northern Endeavour decommissioning – future funding' and 'National Quantum Strategy – implementation' have been marked as nfp.

I can advise that for the measure 'Northern Endeavour decommissioning – future funding', the amounts are commercially sensitive as the Department of Industry, Science and Resources (DISR) will undertake a procurement process for services to continue work to decommission the Northern Endeavour floating oil production, storage, and offtake facility. Disclosure of amounts would impair the Commonwealth's position in negotiating contracts for these services. The application of nfp marking due to commercial sensitivities is consistent with previous expenditure measures related to the Northern Endeavour.

For the measure 'National Quantum Strategy – implementation', the amounts include funding for Finance and DISR to test the maturity of the market around quantum computing and evaluate commercially sensitive information. Publication of the amounts would impair the Commonwealth's negotiating position in relation to these activities.

I trust this advice will assist the committee in its consideration of the 2023-24 Additional Estimates Bills.

Yours sincerely

Katy Gallagher

7 MAR 2024

THE HON RICHARD MARLES MP
DEPUTY PRIME MINISTER
MINISTER FOR DEFENCE

Ref No: MC24-000217

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

Dear ~~Chair~~ Dean

Thank you for your correspondence of 19 January 2024 concerning the Australian Naval Nuclear Power Safety Bill 2023 (ANNPS Bill).

The Senate Standing Committee for the Scrutiny of Bills (Committee) sought information from me on a number of matters related to the ANNPS Bill. My response is enclosed.

I trust this information is of assistance to the Committee.

Yours sincerely

RICHARD MARLES
Encl.

5/3/24

ENCLOSURE – RESPONSES TO COMMITTEE QUESTIONS IN *SCRUTINY DIGEST 1 OF 2024*

Significant penalties

Committee Question: *1.9 In light of this, the committee requests the minister's detailed advice as to: • the appropriateness of the penalties proposed in subclauses 18(4), 18(5), 19(3), 20(3), 21(5), 22(3), 24(3) and 25(3); and • whether these penalties are broadly equivalent to similar offences in Commonwealth legislation and if not, why not.*

The penalties in the Australian Naval Nuclear Powered Safety Bill (ANNPS Bill) were developed having regard to relevant principles in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide), specifically guidance that significant penalties may be appropriate where "the consequences of the commission of the offence are particularly dangerous or damaging" (paragraph 3.1.1). The penalties in the ANNPS Bill were also developed having regard to existing offences of a similar kind or of a similar seriousness (paragraph 3.1.2).

In the context of the nuclear safety of regulated activities, the consequences of offending conduct could involve serious harm to the environment, injuries or death, and significant social, economic, diplomatic or strategic harm to Australia. This would involve prejudice to the defence of Australia and also to the United States (US) and United Kingdom (UK) Naval Nuclear Propulsion programs.

Offences and penalties in the *Australian Radiation Protection and Nuclear Safety Act 1998* (ARPANS Act) were considered. However, reproducing offences and penalties is not appropriate or adapted to serving the objects of the ANNPS Bill (clause 6), which include the promotion of nuclear safety of activities related to AUKUS submarines and to promote public confidence and trust in relation to the nuclear safety of Australia's conventionally-armed, nuclear-powered submarine enterprise. The ARPANS Act was not designed in contemplation of these matters.

Particular penalty amounts have been determined by assessing the relative seriousness of the offence within the legislative scheme, having regard to the classes of persons to which the offence would apply (licence holders, who must be a Commonwealth-related person (subclause 29(1)), and other persons who may be authorised by a licence), and whether the offence involves a nuclear safety incident.

The most serious criminal offence in the ANNPS Bill, subclause 18(5), applies where a person engages in conduct that is a regulated activity and a nuclear safety incident occurs. The penalty amount was benchmarked against penalties for industrial manslaughter offences which were recently enacted in the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023*, and are broadly commensurate with the seriousness of the offence in subclause 18(5) of the ANNPS Bill.

Penalty amounts for the other offences were determined on the basis of their relative seriousness, compared to subclause 18(5). That is:

- Subclause 18(4) – This offence supports a foundational obligation in the ANNPS Bill and is the second most serious offence (noting that – unlike subclause 18(5) – its commission may not result in a nuclear safety incident). As such, penalty amounts equivalent to half of those applying to subclause 18(5) are considered appropriate.
- Subclause 19(3) – As stated in the explanatory memorandum, this offence is intended to provide an effective deterrent to conduct that contravenes the duty to hold a licence authorising the person to conduct a regulated activity. This offending conduct which constitutes an offence may not have compromised nuclear safety, nor resulted in a nuclear safety incident and as such penalty amounts equivalent to half of those applying to subclause 18(4) are considered appropriate.
- Subclauses 20(3), 21(5) and 22(3) – These offences relate to breaches of obligations by licence holders. Licence holders will have particular statutory obligations (for example, supervising and overseeing persons authorised by a licence, establishing, implementing and maintaining nuclear safety systems). This position to influence and ensure the nuclear safety of regulated activities means it is appropriate they are subject to higher penalties which correspond to the nature of their obligations. As such, penalty amounts equivalent to half of those applying to subclause 18(4) are considered appropriate.
- Subclauses 24(3) and 25(3) – These offences relate to breaches of obligations by persons authorised by a licence. Applicable penalties must effectively deter conduct which contravenes statutory obligations, while recognising that persons authorised should not be subject to as significant penalties as licence holders, given the nature and scope of their obligations. As such, penalty amounts equivalent to half of those applying to comparable breaches by a licence holder are considered appropriate.

Reversal of the evidential burden of proof

Committee Question: *1.18 The committee requests the minister's detailed advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in subclauses 19(5), 23(5) and 25(5).*

Paragraph 4.3.1 of the Guide states that a matter should only be included in an offence-specific defence where "it is peculiarly within the knowledge of the defendant."

Broadly, clauses 19, 23 and 25 of the ANNPS Bill would require the conduct of regulated activities to be authorised by a licence and in accordance with conditions applicable to the licence. In order to conduct a regulated activity, a person must be authorised by a licence (clause 19) or be exempted from the application of subclause 19(1) in relation to a regulated activity.

Only Commonwealth-related persons can apply for, and obtain a licence (clause 28). A 'Commonwealth-related person' is defined by subclause 29(1) as the Commonwealth, a corporate Commonwealth entity, a Commonwealth company or a Commonwealth contractor.

While only Commonwealth-related persons can be licence holders, those licences may authorise other persons and classes of persons (subclause 31(3)) to perform regulated activities specified in the licence. The matter of whether a person is authorised by a licence, or falls within a class of persons specified within a licence, will be information that is within the knowledge of a defendant. For example, persons who are, from time to time, agents and employees of the Commonwealth-related person and sub-contractors to a Commonwealth contractor are likely to fall within the meaning of a 'class of person'. Over time, a class of person within the nuclear-powered submarine enterprise may be engaged by any number of different licence holders and may also be engaged to perform a range of regulated activities.

Paragraph 4.3.1 of the Guide also states that a matter should only be included in an offence-specific defence where "it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter." The Guide further clarifies that "the Committee has indicated that it may be appropriate for the burden of proof to be placed on a defendant…where proof by the prosecution of a particular matter would be extremely difficult or expensive whereas it could be readily and cheaply provided by the accused."

The scale and volume of classes of persons authorised by a licence to conduct regulated activities will vary according to the nature of regulated activities being conducted at any point in time and the identity of a licence holder. Information about whether an individual is either specifically authorised by a licence or within a class of persons authorised by a licence, or exempt from the requirement to be authorised by a licence (subclause 19(1)) will be more readily and cheaply provided by a defendant. For example, it is reasonable to expect an individual will have information that they were, at a relevant point in time, an employee or agent of a licence holder who fell within the class of persons authorised by the licence, or specifically exempt from the application of subclause 19(1). An exemption under subclause 144 may only be granted on application of a person or on the initiative of the Australian Naval Nuclear Power Safety Regulator.

The Guide also states that it may be appropriate to cast the matter as a defence if "the conduct proscribed by the offence poses a grave danger to public health or safety." Notwithstanding clause 18 (which requires that a person who conducts a regulated activity must, so far as reasonably practicable, ensure nuclear safety when conducting the activity), contraventions of relevant offences could involve conduct that compromises nuclear safety and poses a grave danger to public health or safety and the environment.

Coercive powers – entry and search powers

Committee Question: *1.26 The committee requests the minister's detailed advice as to whether consideration has been given to including a monitoring warrant regime in Part 4, division 2 of the bill and, if it was considered not appropriate, why that is the case.*

Paragraph 8.7 of the Guide states that the principles for monitoring warrant regimes should be followed unless there are clear reasons for departure. The unique operating circumstances of the conventionally-armed, nuclear-powered submarine enterprise necessitate a departure.

The monitoring regime in Division 2 of Part 4 of the ANNPS Bill is a key feature that will enable appointed inspectors to determine whether the Act has been, or is being, complied with, information provided is correct, or investigate a nuclear safety incident. Monitoring powers will be exercised in parts of shipyards and Australian Defence Force facilities, and eventually on Australian conventionally-armed, nuclear-powered submarines, which may be underway, at a port in Australia, or a foreign port. The exercise of monitoring powers is integral to fulfilling the objects of the ANNPS Bill, which includes the promotion of the nuclear safety of regulated activities as well as public confidence and trust in relation to the nuclear safety of Australia's nuclear-powered submarine enterprise.

As a result of the operating environment and inherent mobility of Australian submarines, monitoring activities must to be undertaken as and when the opportunity presents. The inclusion of a monitoring warrant scheme was considered but would be impractical for the exercise of powers contained in Part 4, Division 2 of the Bill. Further, it is expected that inspectors will have a significant and enduring presence and require routine access at places in Australia where regulated activities are set to occur. A requirement to obtain a warrant to enter those places on each occasion to exercise relevant powers would frustrate the objects of the Bill to promote nuclear safety.

It is also reasonable for a licence holder who conducts regulated activities in a monitoring area to expect that compliance with the nuclear safety requirements of the Bill will be monitored by suitably qualified and appointed inspectors. It will be necessary for inspectors to enter relevant places for this purpose.

Appropriate safeguards are included in the Bill to ensure the lawful and appropriate use of monitoring powers through:

- a requirement that inspectors must not be appointed unless the Director-General is satisfied of their competence, technical and other relevant expertise to properly exercise an inspector's powers (subclause 86(2));
- a requirement that inspectors must exercise their monitoring powers with regard to safety and security (clause 92);
- reporting requirements to the Director-General if an inspector exercises seizure powers during monitoring (subclause 42(3)) within 28 Days;

Additionally, as the new regulator is established, inspectors will be provided with appropriate training and guidance in the exercise of powers, including monitoring powers.

Coercive powers – seizure
Use and derivate use of seized material

Committee Question: *1.38 The committee requests the minister's detailed advice as to: what is meant by the term 'not practicable to obtain a warrant' in subparagraph 43(1)(b)(ii) and what guidance exists for inspectors.*

Clause 43 of the ANNPS Bill applies where something is found during the exercise of a monitoring power under clause 41 and where the inspector reasonably believes something is evidential material (defined in clause 5) and that the powers in subclause 43(2) need to be exercised without a warrant because it is not practicable to obtain a warrant or the circumstances are serious and urgent. The term 'not practicable to obtain a warrant' is intended to apply in limited circumstances.

In practical terms, it is reasonable to expect that because of the remote nature of the relevant location (for example an Australian conventionally-armed, nuclear-powered submarine), limited circumstances may arise where it would not be practicable for an inspector to obtain a warrant including by telephone, fax or other electronic means or where doing so may be prejudicial to national security.

Appropriate safeguards (referred to above) are included in the Bill to ensure the lawful and appropriate use of monitoring powers, including the powers mentioned in clause 43.

Committee Question: *1.38* (continued) *whether consideration has been given to including remote warrant provisions in relation to clause 43, and if it is not considered appropriate, why not.*

Consideration was given to including a remote warrant provision in relation to clause 43. Ordinarily, the starting point for an inspector exercising monitoring powers would be to apply for and obtain an investigation warrant in relevant circumstances, including during the course of the exercise of monitoring powers, where necessary (Subdivision E of Part 4 of the ANNPS Bill). Clause 69 makes clear that an inspector may apply to an issuing officer by telephone, fax or other electronic means for a warrant in an urgent case, or if the delay that would occur if an application was made in person would frustrate the effective execution of the warrant. Clause 43 of the ANNPS Bill only applies in limited circumstances, as outlined above. Clause 43 is intended to operate in circumstances where an investigation warrant is unable to be obtained by any means, because it is not practicable or the circumstances are serious and urgent.

The term 'circumstances are serious and urgent' is intended to apply to scenarios where it is necessary to seize material to prevent concealment, loss or destruction of the evidential material.

Committee Question: *1.38* (continued) *whether consideration has been given to including limits on the use and derivative use of seized material in relation to clauses 43 and 52.*

Paragraph 8.5.5 of the Guide states that consideration should be given to including limits on the use and derivative use of incidentally seized material. Limits have been considered and are applied in relation to powers exercisable in relation to 'evidential material' (defined in clause 5) which, as outlined in the explanatory memorandum, is limited to material concerning offence provisions or civil penalty provisions of the ANNPS Bill. It does not encompass material concerning other Commonwealth, state or territory offences.

Committee Question: *1.38* (continued) *whether the bill can be amended to more clearly define the extent of the seizure powers under clauses 43 and 52.*

The Government is committed to ensuring sensible amendments are considered through the SSCFADT Committee enquiry process and the broader legislative process. The explanation above notwithstanding, the Government will consider the matters raised by the Scrutiny of Bills Committee as the Bill progresses through the Parliament.

THE HON DR ANDREW LEIGH MP
ASSISTANT MINISTER FOR COMPETITION, CHARITIES AND TREASURY
ASSISTANT MINISTER FOR EMPLOYMENT

Ref: MC24-004603

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

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

Dear Senator

I am writing in response to the Senate Standing Committee for the Scrutiny of Bill's comments in Scrutiny Digest 3 of 2024 regarding the Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024.

I have attached a detailed response to the Committee's enquiries about the Bill. I trust that the information attached provides further context about the Bill and assists with the Committee's deliberations.

Thank you again for your letter.

Yours sincerely

Andrew Leigh

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ATTACHMENT A

Competition and Consumer Amendment (Fair Go for Consumers and Small Business) Bill 2024

As set out in the Committee's *Scrutiny Digest No. 3 of 2024*, the Committee has requested advice as to:

- whether proposed subsection 154ZH(5) of the Competition and Consumer (Fair Go for Consumers and Small Businesses) Bill 2024 (the FGCSB Bill) could be amended to provide guidance as to the mandatory and discretionary factors that will be set out in delegated legislation for the ACCC to consider when deciding to issue a no further action notice;
- whether proposed subsection 154ZH(3) could be amended so that it refers to 'content requirements' as opposed to 'any requirements'; and
- whether proposed subsection 154ZQ(5) could be amended to provide at least a minimum threshold to the cap on the overall number of complainants that may be approved.

Proposed section 154ZH(5)
Proposed subsection 154ZH(1) empowers the Australian Competition and Consumer Commission (the ACCC) to give a designated complainant a notice that no further action will be taken in relation to a complaint. Pursuant to subsection 154ZH(2) and paragraph 154ZH(1)(a), the ACCC must give a no further action notice if the ACCC is not satisfied that the complaint relates to a significant or systemic market issue that affects consumers or small businesses in Australia (or both) and either relates to a potential breach of the *Competition and Consumer Act 2010* (the Act) or relates to one or more of the Commission's powers or functions under the Act. These are known as the mandatory requirements for a designated complaint.

The ACCC may also issue a no further action notice in three circumstances.

First, pursuant to subsection 154ZH(3) and paragraph 154ZH(1)(b), the ACCC may give a no further action notice if the ACCC is not satisfied that the complaint meets any additional requirements (beyond the mandatory requirements in subsection 154ZH(2)) prescribed by a designated complaints determination (a subordinate legislative instrument that may prescribe matters required or permitted by Part XIE to be prescribed in the designated complaints determination, pursuant to section154ZZ).

Second, the ACCC may give a no further action notice pursuant to subsection 154ZH(5) and paragraph 154ZH(1)(b) if:

- the ACCC has assessed the complaint; and
- the ACCC is satisfied that it is appropriate to take no further action in relation to the complaint.

Pursuant to subsection 154ZH(6), the Minister may prescribe, in a designated complaints determination, matters to which the ACCC must, or may, have regard for the purposes of being satisfied that it is appropriate to take no further action.

Third, the ACCC may give a no further action notice pursuant to subsection 154ZH(4) and paragraph 154ZH(1)(b) if the ACCC is satisfied that the subject matter of the complaint is, or is part of a matter:

- into which a committee of Parliament or of either House of the Parliament, a Royal Commission, coronial inquiry, coronial investigation or coronial inquest is inquiring or has inquired within the past 2 years; or
- which is the subject of legal proceedings, or an inquiry, investigation or review conducted by the Commonwealth, a State or Territory, an industry organisation, a consumer organisation or other person that is, or is of a kind prescribed in a designated complaints determination.

As set out in the explanatory memorandum to the FGCSB Bill, the ability for the Minister to prescribe matters to which the ACCC must or may have regard for the purposes of being satisfied that it is appropriate

to take no further action under paragraph 154ZH(5)(b), pursuant to subsection 154ZH(6), is appropriate to ensure the designated complaints function can be responsive to changes in circumstances such as changes in operational requirements, market conditions and ACCC regulatory procedures.

The designated complaints function deals with market conditions and issues that are likely to change quickly and in an unpredictable manner. Such matters are likely to have a high level of public interest. As a result, it may be necessary to provide for the ACCC to consider additional matters that are currently unforeseeable, in a timely manner, when deciding whether to issue a no further action notice pursuant to paragraph 154ZH(1)(b), in reliance on the grounds in subsection 154ZH(5).

I consider that the explanatory memorandum provides appropriate guidance as to the kinds of matters that may be prescribed. The key aspects of the scheme, including prescriptive detail regarding when the ACCC must or may issue a no further action notice, are established in the Bill as described above. Subsection 154ZH(5) (together with subsection 154ZH(6)) is appropriate to future proof the legislation, considering unpredictable market conditions and the need for the function to be responsive to possible changes in circumstances.

For the reasons described above, limiting the kinds of matters that may be set out in the designated complaints determination through prescriptive guidance within the primary law could limit the effective operation of the designated complaints scheme. As such, I do not intend to amend subsection 154ZH(5) of the FGCSB Bill to provide guidance as to the mandatory and discretionary factors that will be set out in delegated legislation for the ACCC to consider when deciding to issue a no further action notice.

Proposed section 154ZH(3)
As described above, subsection 154ZH(3) in conjunction with paragraph 154ZH(1)(b), allows the ACCC to give a no further action notice if the ACCC is not satisfied that the complaint meets any requirements (beyond the mandatory requirements in subsection 154ZH(2)) prescribed by a designated complaints determination.

The Committee noted that the explanatory memorandum in relation to this provision provides that '[t]he ability to prescribe additional content requirements is appropriate as such requirements are likely to be technical and detailed' and queried whether proposed subsection 154ZH(3) could be amended so that it refers to 'content requirements' as opposed to 'any requirements'.

The explanatory memorandum is intended to indicate that in most circumstances, requirements will deal with the content of a designated complaint and such requirements are likely to be technical and detailed. However, this is not intended to be a strict limitation on requirements being 'content requirements'.

The designated complaints function deals with market issues that are likely to change quickly. As a result, new, unforeseeable requirements may emerge. Subsection 154ZH(3) is appropriate to future proof the legislation in light of possible market changes and the need for the designated complaints function to operate effectively. I further consider that the explanatory memorandum provides sufficient guidance on the kinds of requirements that may be prescribed. Limiting this provision to 'content requirements' within the primary law could limit the adaptability and effective operation of the designated complaints scheme.

For the reasons described above, I do not support amending proposed subsection 154ZH(3) so that it refers to 'content requirements' as opposed to 'any requirements'.

Proposed section 154ZQ(5)
Under proposed subsection 154ZQ(5), the Minister must not grant approval to an entity as a designated complainant if doing so would result in the number of designated complainants being above the limit prescribed in the designated complaints determination.

It is necessary for this limit to be flexible to ensure that the ACCC have appropriate resources to respond to designated complaints and to ensure that designated complaints do not unduly detract from the ACCC's identified compliance and enforcement priorities. Enabling the Minister to limit and expand the number of designated complainants will also ensure that the scheme is responsive to changes in circumstance, such

when a significant market issue must be investigated or enforced, or in exceptional circumstances such as a global pandemic. It will also allow for the expansion of the designated complaints function over time. Further, the designated complaints determination is a disallowable legislative instrument for the purposes of the *Legislation Act 2003* and is subject to Parliamentary scrutiny. For the reasons described above, I do not support amending the FGCSB Bill to provide a minimum threshold to the cap on the overall number of designated complainants that may be approved.

Independent merits review

You also sought my advice as to why it is necessary and appropriate not to provide for independent merits review of a decision made under proposed subsections 154ZQ(1) and 154ZV(1) of the FGCSB Bill.

Proposed subsection 154ZQ(1)

Proposed subsection 154ZQ(1) provides that the Minister may approve an applicant as a designated complainant if the Minister is satisfied that it is appropriate to grant the approval. For the purposes of being satisfied that it is appropriate to grant the approval, the Minister must have regard to a number of prescribed factors pursuant to subsection 154ZQ(2), including the experience and ability of the applicant in representing the interests of consumers or small businesses (or both) in Australia in relation to a range of market issues that affect them. The Minister may also have regard to matters prescribed under subsection 154ZQ(3).

The approval may be subject to conditions if the Minister has afforded the applicant procedural fairness; that is, the Minister must give the entity a notice under subsection 154ZR(3) setting out the conditions and 14 business days must have passed since that notice was given.

Proposed subsection 154ZQ(5) also provides that the Minister must not grant the approval if doing so would result in the number of designated complainants being above the limit prescribed in the designated complaints determination.

The number of designated complainants that may be approved is intended to be strictly limited in the designated complaints determination. The number of designated complaints that may be made by each designated complainant is also intended to be limited in the designated complaints determination pursuant to paragraph 154ZFZ(2)(d). This is to ensure that the ACCC have appropriate resources to respond to designated complaints alongside their identified enforcement priorities. For example, there may be a maximum of four designated complainants at any one time, each of whom are only able to make one designated complaint in a specified period.

In accordance with the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* decisions where there is no appropriate remedy are not suitable for merits review.

As there will be a limit on the number of designated complainants, I consider that there is no appropriate remedy for merits review in relation to a decision under subsection 154ZQ(1).

For example, assume the designated complaints determination prescribes a maximum of five designated complainants, and five entities are approved. If a sixth entity applies to be a designated complainant, that entity could not be approved, even if they had an otherwise meritorious application, pursuant to subsection 154ZQ(5).

Further, in accordance with the Guide, the Government must allocate resources in an effective way. It would be inappropriate to provide a system of merits review where the cost of that system would be disproportionate to the significance of the decision under review, particularly in light of the finite resources of the ACCC.

A designated complainant will be empowered to make a limited number of designed complaints to the ACCC as discussed above. The ACCC can only issue a further action notice for a designated complaint if it relates to a significant or systemic market issue that affects consumers or small businesses in Australia and relates to a potential breach of the Act or relates to one or more of the ACCC's powers under the Act. These are matters that have a high level of public interest and may result in actions that have a high impact on the

market. Allowing for merits review in relation to decisions under section 154ZQ(1) may frustrate the designated complaints function and result in systemic or significant market issues not reaching the attention of the ACCC, which is not in the public interest. Therefore, the cost of a merits review system would be disproportionate to the benefit.

For the reasons outlined above, administrative review of decisions to approve designated complainants cannot be justified for decisions under subsection 154ZQ(5).

Proposed subsection 154ZV(1)

Proposed subsection 154ZV of the FGCSB Bill empowers the Minister to vary or revoke an existing approval. Proposed paragraph 154ZV(1) only allows the Minister to vary or revoke an existing approval (on the Minister's own initiative) if the Minister has afforded the complainant procedural fairness; that is, the Minister must provide the designated complainant with a notice under subsection 154ZV(5) and 14 business days must have passed since the notice has given to provide the designated complainant with an opportunity to respond, and the Minister is satisfied that it is appropriate to make the variation or revocation.

Proposed subsection 154ZV(3) provides that for the purposes of being satisfied that it is appropriate to make the variation or revocation, the Minister may have regard to the following matters:

- any matter mentioned in subsection 154ZQ(2) or (3);
- whether the designated complainant has contravened, or is contravening, a condition to which the approval is subject;
- any matter prescribed in the designated complains determination ; and
- any other matter the minister considers relevant.

Similar to the justification for the exclusion of merits review in relation to decisions under subsection 154ZQ(1), there is not an appropriate remedy for a decision under subsection 154ZV(1) to justify merits review.

Decisions under subsection 154ZV(1), particularly those made in relation to revocation of the approval of a designated complainant, will affect the number of designated complainants.

For example, assume the designated complaints determination prescribes a maximum of four designated complainants, and four entities are approved. If the approval of one entity is revoked, another designated complainant is likely to be approved to take their place shortly after, to ensure the designated complaints function operates effectively. Reinstating an entity as a designated complainant after their approval had been revoked through a merits review process would exceed the maximum number of permitted designated complainants.

Further, as discussed above, in accordance with the Guide, the Government must allocate resources in an effective way. It would be inappropriate to provide a system of merits review where the cost of that system would be disproportionate to the significance of the decision under review, particularly in light of the finite resources of the ACCC. The ACCC can only issue a further action notice for a designated complaint if it relates to a significant or systemic market issue that affects consumers or small businesses in Australia and relates to a potential breach of the Act or relates to one or more of the ACCC's powers under the Act. These are matters that have a high level of public interest and may result in actions that have a high level of impact on the market. Allowing for merits review in relation to the revocation or variation of an approval may frustrate the designated complaints function, which is not in the public interest. Therefore, the cost of a merits review system would be disproportionate to the benefit.

For the reasons outlined above, I do not consider it necessary to provide for independent merits review of a decision made under proposed subsection 154ZV(1).

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THE HON RICHARD MARLES MP
DEPUTY PRIME MINISTER
MINISTER FOR DEFENCE

Ref No: MC24-000218

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

Dear ~~Chair~~ Dean

Thank you for your letter of 19 January 2024 concerning the Defence Trade Controls Amendment Bill 2023 (the Bill).

The Senate Standing Committee for the Scrutiny of Bills sought information from me on a number of matters related to the Bill. My response is enclosed.

I trust this information is of assistance to the Committee.

Yours sincerely

RICHARD MARLES

Encl. Responses to Committee questions

14/3/24

ENCLOSURE – RESPONSES TO COMMITTEE QUESTIONS ON DEFENCE TRADE CONTROLS AMENDMENT BILL 2023

Offence specific defences

i. **why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to proposed sections 10, 10A, 10B and 10C**

The Defence Trade Controls Amendment Bill 2023 (the Bill) utilises offence-specific exceptions for the offence in section 10 of the *Defence Trade Controls Act 2012* (the Act), and the proposed offences in sections 10A, 10B and 10C of the Bill, as subsection 13.3(3) of the *Criminal Code Act 1995* (the Criminal Code) provides that a defendant who wishes to rely on any exception, exemption, excuse, justification or qualification bears an evidential burden in relation to that matter. This provision of the Criminal Code accords with the principles reiterated by the High Court in the case of *He Kaw Teh v The Queen* [1985] 157 CLR 523.

Additionally, the matters contemplated by the offence-specific exceptions are not central to the question of culpability for the offences in the Act or the Bill. The offences are primarily concerned with determining whether a person is engaging in supplies of Defence and Strategic Goods List (DSGL) goods or DSGL technology, or the provision of DSGL services, without a permit or in breach of permit conditions. Disproving the matters contained in the offence-specific exceptions would not be relevant to determining culpability for the offence itself. Therefore, it is more appropriate to frame these matters as exceptions to the offences.

Supplementary information prepared by Defence about the appropriateness of each of the offence-specific exceptions contained in the Bill, with reference to the Attorney-General's Department's 'Guide to Framing Commonwealth Offences, Infringment Notices and Enforcement Powers', is provided as an appendix.

Delegation of Minister's functions or powers

ii. **why it is considered necessary and appropriate to provide the power to delegate the Minister's functions or powers under proposed subsection 73(2A) to an Executive Level 1 or 2 employee in the Department of Defence**

The level of delegation set out in proposed subsection 73(2A) of the Bill is considered necessary and appropriate to enable Defence to efficiently administer permits and their associated conditions under sections 11 and 12 of the Act. The Act already allows for delegation to EL2 APS employees, with delegates at this level in the Defence Export Controls Branch experienced in deciding and issuing permits.

Defence, through a delegation instrument, will enable EL1 employees, in limited circumstances, to assess and approve low risk and low complexity applications. Defence will ensure that EL1 employees exercising this delegation will have the appropriate training and experience to make such a decision. There will continue to be oversight from senior executive management on the decisions made by Executive Level staff. This level of delegation under the Act would be consistent with the permit issuance delegations under the

Customs (Prohibited Exports) Regulations 1958, which allows EL1 employees and above to issue permits.

Proposed subsection 73(9) of the Bill reasonably limits the exercise of powers and functions of delegates at the EL1 or EL2 APS level, by restricting them from making a decision under section 11 of the Act to refuse to give a person a permit for an activity, if the delegate is satisfied that the activity would prejudice Australia's security, defence or international relations. Subsection 73(10) of the Bill requires that these delegates must refer such cases to the Minister, the Secretary or a member of the Senior Executive Service within Defence to decide the case.

This ensures that, where the decision to refuse a permit would be based on certain sensitive matters, the case must be escalated to the Minister or a more senior delegate to make the decision. The Bill therefore establishes appropriate safeguards on the exercise of powers and functions at the lower APS levels.

iii. **whether those exercising the delegated powers or functions will possess the appropriate training, qualification, skills or experience.**

Defence provides its staff with both formal and informal training to enable the appropriate exercise of these powers and functions, including training regarding the export controls legislative framework, and administrative law principles. Furthermore, only EL1 and EL2 APS employees within the Defence Export Controls Branch in Defence will exercise those delegations and functions, in accordance with the delegation instrument. These staff hold a range of technical qualifications that are relevant to assessing permit applications, and many have prior regulatory and compliance expertise.

The delegation to EL1 APS employees for low risk and low complexity applications will also be addressed by the Minister in the Parliamentary debate on this Bill.

APPENDIX A – DETAILED INFORMATION ON OFFENCE SPECIFIC DEFENCES

Supplies or provision of services to an officer or employee: Subsections 10(3), 10A(5), 10B(6), 10C(4) of the Defence Trade Controls Amendment Bill 2023 (the Bill) provide an offence-specific exception for the existing offence in the *Defence Trade Controls Act 2011* (DTC Act), and the three new offences contained in the Bill. The purpose of these exceptions are to ensure that the relevant offence provisions do not apply when the supply or DSGL services are provided by a supplier to their officers or employees in the course of work duties, and that officer or employee is a citizen or permanent resident of a Foreign Country List country.

This exception would be peculiarly within the knowledge of the defendant for several reasons. First, the exception applies to a defendant who is personally making the supply of DSGL technology to their officers or employees. That defendant would be reasonably expected to have unique knowledge and understanding of the supplies or services they are undertaking, as well as the purpose they are being made in connection with, noting that they are the one performing that conduct. Additionally, since the defendant is the employer of the person to whom the supply or service is made, they would have likely undertaken a check of the individual's working rights prior to hiring the employee or officer, which should well position the defendant to provide evidence of that person's citizenship or permanent residency status.

Secondly, as an employer, the defendant should have an understanding of the duties of their officers and employees who are employed by them, as well as access to relevant company policies and documentation that explicitly set out the duties of officers and employees within the company. Lastly, the employer should also have access to any employment agreement or contract entered into between the employer and the officer or employee, which should stipulate the duties of the officer or employee. All of these relevant circumstances demonstrate that the defendant, as the employer of the officer or employee, would have peculiar knowledge of the matters set out in this exception.

In comparison, it would be significantly more difficult for the prosecution to provide evidence of this matter, noting that this exception anticipates the tangible and intangible supply and provision of DSGL services taking place in complex corporate structures and private employment framework. Accordingly, it is deemed appropriate for a defendant to bear the evidential burden in relation to this exception, as it complies with the principles set out in the Guide to Framing Commonwealth Offences, Infringment Notices and Enforcement Powers.

Supplies or provision of services made under the Defence Trade Cooperation Treaty: Subsections 10A(4), 10B(5), 10C(3) of the Bill provide an offence-specific exception for the three new offences contained in the Bill. The purpose of these exceptions are to ensure that the relevant offence provisions do not apply when DSGL goods or DSGL technology are supplied, or DSGL services are provided, in compliance with the terms of the Defence Trade Cooperation Treaty.

This exception would be peculiarly within the knowledge of the defendant for several reasons. First, the exception only applies to members of the Approved Community—that being members of the Australian Community and the United States Community. An entity will

only be part of the Approved Community if they submit an application and are approved to be a member of either the Australian or United States Communities. As such, a defendant would be uniquely positioned to provide evidence of their membership of the relevant community. Additionally, section 26 of the *Defence Trade Control Regulation 2013* (DTC Regulation) requires that the holder of an approval under section 27 of the DCT Act must keep records of:

- The supply of goods or technology relating to goods that are an Article 3(1) US Defence Article or an Article 3(3) US Defence Article
- The provision of defence services in relation to goods that are an Article 3(1) US Defence Article or an Article 3(3) US Defence Article

Section 28 of the DTC Regulation sets out the information that must be contained in these records. This information relevantly includes matters such as a description of the goods or technology supplied, or the defence services provided and the date and time at which, and the place from which, goods or technology were supplied, or defence services were provided. This relevant information would enable a defendant to accurately and easily adduce evidence that would demonstrate whether the goods, technology or services are being supplied or provided in compliance with the terms of the Defence Trade Cooperation Treaty.

In comparison, it would be significantly more difficult for the prosecution to substantiate evidence of the matters outlined in this exception, noting that the prosecution would have no oversight or access to records of supplies made or services provided between members of the Approved Community, as they are not an approved community member. Accordingly, for these reasons, it is appropriate for a defendant to bear the evidential burden in relation to this exception, as it complies with the principles set out in the Guide to Framing Commonwealth Offences, Infringment Notices and Enforcement Powers.

Supplies or provision of services to or by a class of person in the course of their duties: Subsections 10(3A), 10A(6), 10B(7), 10C(6) of the Bill provide an offence-specific exception for the existing offence in the DTC Act, and the three new offences contained in the Bill. The purpose of these exceptions is to ensure that the relevant offence provisions do not apply when a supply or provision of DSGL services is made either by or to certain cohorts of people, such as employees of Australian intelligence agencies and members of an Australian police force, provided that the supply is made in the course of their duties.

This exception would be peculiarly within the knowledge of the defendant for several reasons. First, as the exception requires that the supply must occur in the course of the defendant's duties as a member of one of the specified agencies, employees or members of these agencies would be uniquely placed to adduce relevant workplace policies and guidelines to demonstrate that the supply or DSGL services were provided in the course of their employment duties. Similarly, a defendant would be well positioned to adduce some evidence of their own employment with one of the specified agencies. Regarding the person to whom a supply or provision of DSGL service is made, it is reasonable to expect that a defendant would have verified the identity of a recipient by way of correspondence in the process of making a supply or providing a DSGL service.

In comparison, the prosecution would have difficulty in proving the matters in this exception beyond a reasonable doubt, as they would be required to prove the person making or receiving the supply of DSGL goods or DSGL technology was a member of the relevant agency. Noting that this exception extends to cover supplies and services made to and from members of various intelligence agencies, the prosecution would likely have difficulty accessing the relevant identifying information required to discharge the burden of proof. Accordingly, for these reasons, it is deemed appropriate for a defendant to bear the evidential burden in relation to this exception, as it complies with the principles set out in the Guide to Framing Commonwealth Offences, Infringment Notices and Enforcement Powers.

Supplies or provision of services to a holder of a covered security clearance:
Subsections 10(3B), 10A(7), 10B(8), 10C(7) of the Bill provide an offence-specific exception for the existing offence in the DTC Act, and the three new offences contained in the Bill. The purpose of these exceptions are to ensure that the relevant offence provisions do not apply in circumstances where a person supplies DSGL goods or DSGL technology, or provides DSGL services, to a person who holds a covered security clearance.

This exception would be peculiarly within the knowledge of the defendant, as it is expected that entities supplying DSGL goods or technology, or providing DSGL services under the DTC Act will need to undertake a basic level of due diligence to ensure they are dealing with a legitimate end user in undertaking the supply or providing the service. Defence Export Controls provides guidance on this point, noting that 'exporters should take reasonable steps to screen consignees, end users, and overseas collaborators to establish, as far as possible, that the goods, software or technology will be used for legitimate purposes.' For the defendant to establish whether the person to whom the supply or service was made held a covered security clearance, they would be well positioned to adduce evidence of this matter, as they should have gathered it as part of due diligence processes.

In comparison, it would be significantly more difficult for the prosecution to provide evidence of this matter, as they would need to provide evidence that the person to whom the supply or service was made did not hold a covered security clearance. Since the meaning of covered security clearance includes security clearances issued by other jurisdictions, the prosecution would need to seek positive verification from every jurisdiction that a certain person does not hold a particular clearance. Noting the sensitivity of this information, it is not certain whether it would be provided to the prosecution upon request. Accordingly, for these reasons, it is deemed appropriate for this offence-specific defence to place the evidential burden on the defendant, as it complies with the principles set out in the Guide to Framing Commonwealth Offences, Infringment Notices and Enforcement Powers.

Provision of services in support of a lawful supply of DSGL goods or DSGL technology:
Subsection 10C(5) of the Bill provides an offence-specific exception that only applies to the new offence in subsection 10C(1) of the DTC Bill. The purpose of this exception is to ensure that a person who provides DSGL services purely for training or maintenance purposes in relation to a lawfully authorised supply of DSGL goods or DSGL technology, is not subject to the offence provision in subsection 10C(1). This exception would be peculiarly within the knowledge of the defendant, as the matters related to this exception concerns issues of conduct, specific technical capability and knowledge that would uniquely be within the

understanding of the defendant, as the entity responsible for providing the relevant maintenance or training of DSGL goods or technology. Additionally, it is likely there would be some form of contractual arrangement between the provider of the DSGL services and the recipient of the DSGL services, which the provider would be well positioned to adduce evidence of as a party to the arrangement.

In comparison, the prosecution would have significantly more difficulty proving this exception, as they would likely lack the essential technical knowledge and associated information necessary to determining matters such as whether the performed maintenance or training was limited to things such as calibration, repair and testing or whether it included modification and enhancement of the goods or technology. Further, it is also possible that the provision of these DSGL services could be provided in commercially sensitive matter, or provided in arrangements located offshore of Australia.

Accordingly, for these reasons, it is appropriate for a defendant to bear the evidential burden, as it complies with the principles set out in the Guide to Framing Commonwealth Offences, Infringment Notices and Enforcement Powers.

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC24-000741

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

Dear Senator Smith

I refer to the email correspondence of 28 February 2024 from the Senate Scrutiny of Bills Committee (the Committee), requesting further information about the issues identified in the Digital ID Bill 2023.

My further responses to the questions outlined in the Committee's *Scrutiny Digest 3 of 2024* are set out in **ATTACHMENT A** to this letter.

I trust that the information provided will effectively cover the topics and offer the extra guidance you have asked for.

Yours sincerely

Katy Gallagher

7 MAR 2024

ATTACHMENT A – FURTHER RESPONSES TO ISSUES RAISED BY THE SENATE SCRUTINY OF BILLS COMMITTEE IN RELATION TO THE DIGITAL ID BILL 2023

Tabling of documents in Parliament

Committee comment
The committee considers that the tabling of documents in the Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are only published online.

Question: In light of the above, the committee requests that the minister move amendments to clause 145 of the bill to require the tabling in Parliament of reports prepared under subclause 145(4), and seeks the minister's further advice on this point.

Answer: In my response to the committee's comments in Scrutiny Digest 2 of 2024, I indicated that I had no reservations about tabling the reports of the periodic review of the charging framework in Parliament, should the committee express a preference for the tabling of these reports.

Given the committee's stated preference in Scrutiny Digest 3 of 2024, the Government will move amendments to the Bill to provide that the Minister must cause the report of each periodic review of the charging framework in the Digital ID Rules to be laid before each House of the Parliament.

Incorporation of external materials as existing from time to time

Committee comment
The committee remains concerned that entities will be required by the Accreditation Rules to comply with standards that are incorporated by those rules but are not fully and freely accessible to those entities, particularly as these standards relate to the handling of highly sensitive biometric information. Further, access to all materials which form the content of the law is essential for public confidence in the operation of regulatory schemes. Documents which are incorporated into the law should be freely available not only to the entities that are directly required to comply with these measures, but also to members of the public who have an interest in oversight and understanding of the law, particularly as it pertains to public health and safety and the use of Australian resources.

The committee understands that it is not uncommon for incorporated documents that may be subject to copyright to be made available by Departments in other manners, such as via access through public library systems, the National Library of Australia, or at Departmental offices, for free viewing by interested parties.

Although the committee notes summaries and previews of each standard are available, this is inadequate to properly comply with the standards in full, which the committee understands will be a requirement of the regulations.

Question: In light of the above, the committee requests the minister's further advice as to whether free access to documents that will be applied, adopted or incorporated by reference into legislative instruments as a result of clause 167 can be provided via other means such as display in public libraries or departmental offices.

Answer: I note the committee's comment that it is not uncommon for incorporated documents that may be subject to copyright to be made available via access through public library systems, the National Library of Australia, or at departmental offices, for free viewing by interested parties. The Department of Finance is further investigating the ways in which documents that are incorporated by reference and that are subject to copyright can legally be made available for free viewing by interested parties.

Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MS24-000169

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

Dear Dean
Dear Senator Smith

I refer to a request received from the Senate Scrutiny of Bills Committee (the Committee) on 28 February 2024 relating to the Financial Framework (Supplementary Powers) Amendment Bill 2024 (the Bill).

The Committee has asked a number of questions related to the Bill, my responses are provided as follows.

Insufficient parliamentary scrutiny – inappropriate delegation of legislative powers:

Why it is considered necessary and appropriate to delegate to the Executive the power to authorise the expenditure of public money rather than for such matters to be proposed to the Parliament for consideration and approval (subject to any agreed amendments) in primary legislation

The FFSP legislative framework was established in response to what is now known as the High Court decisions in *Williams*. The framework is one of the mechanisms to provide legislative authority for Commonwealth expenditure including on grants, programs and other spending arrangements, and provides appropriate parliamentary oversight for this spending.

The FFSP framework is an important legislative mechanism that in certain circumstances can provide for more immediate spending authority than primary legislation. The Government from time to time will need to deliver on its policy objectives, for example, including in response to recommendations from Royal Commissions reports or provision of support to the Australian community.

The Government remains of the view that legislative authority should be provided to deliver on policy objectives in accordance with the circumstance of the spending. Over time primary legislation has been enacted to allow relevant Portfolio Ministers or their delegate on behalf of the Commonwealth, to make, vary or administer an arrangement or

grants in relation to activities covered by the relevant legislation in order to provide legislative authority for spending. This includes the *Industry Research and Development Act 1986*, *Social Security Act 1991*, *Research Involving Human Embryos Act 2002*, *Water Act 2007*, *Biosecurity Act 2015* and *Disability Services and Inclusion Act 2023*.

In the recent past the framework has enabled the Government to implement measures to support vulnerable cohorts within the disability sector[1], defence and veterans' sector[2] and the aged care sector[3] in response to recommendations from the *Royal Commission into Aged Care Quality and Safety*, the *Royal Commission into Defence and Veteran Suicide* and the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* respectively.

The framework has also enabled government to rapidly respond to urgent situations such as relief for drought, and emergency payments during the COVID-19 pandemic and natural disasters relating to bushfires and floods. Without the FFSP framework, such essential support would not have been possible in these scenarios.

Whether consideration can be given to alternative approval or disallowance mechanisms for regulations made under section 32B of the FFSP Act as suggested previously by the committee and the Standing Committee for the Scrutiny of Delegated Legislation; or any other possible options to provide for additional parliamentary scrutiny of such matters; and, in each case, if not, why not

The Government considers that existing scrutiny mechanisms provide sufficient oversight for these regulations and remains of the view as provided in response to Recommendation 14 of the Senate Standing Committee on Regulations and Ordinances' Report: Parliamentary scrutiny of delegated legislation. The response relevantly stated that:

> Affirmative resolution would significantly hinder the government's ability to respond promptly to issues, and have sufficient time to develop robust policy and deliver initiatives. Long lead times before the commencement of legislative instruments would condense the development and settling of policy into more compressed timeframes. This poses a risk to the development of effective and evidence based policy. Delays to implementing legislative authority specifying expenditure could risk the Government not meeting its own policy objectives. For example, delays may occur for government spending in response to urgent issues such as funding for flood or drought relief, which rely on the legislative authority provided by instruments under the FFSP Act.[4]

The Government notes that the purpose of the instrument is to provide legislative authority for government spending, which has already been agreed to by the Government. The legislative instrument is subject to scrutiny and disallowance by the Parliament on a case-by-case basis. Other possible options would not provide the same balance of efficient delivery of funding in emergencies and parliamentary scrutiny provided by the tabling of legislative instruments under the legislation Act.

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[1] Explanatory Statement, *Financial Framework (Supplementary Powers) Amendment (Social Services Measures No. 3) Regulations 2019*, table item 356

[2] Explanatory Statement, *Financial Framework (Supplementary Powers) Amendment (Veterans' Affairs Measures No. 2) Regulations 2022*, table item 555

[3] Explanatory Statement, *Financial Framework (Supplementary Powers) Amendment (Health and Aged Care Measures No. 2) Regulations 2023*, table item 615

[4] Australian Government, Australian Government response to the Senate Standing Committee on Regulations and Ordinances report: Parliamentary scrutiny of delegated legislation (November 2019)

Retrospective validation – Parliamentary scrutiny:

Whether any persons are likely to be detrimentally affected by the retrospective validation of the matters provided for in items 20, 22 and 23 of Schedule 1 to the Bill, noting, for instance, that the validity of arrangements or grants entered into, varied or administered by the Commonwealth may impact individuals other than grant recipients

The purpose of the validation provisions is to regularise the status of spending in which the Commonwealth has previously engaged in reliance on sections 32B and 39B of the FFSP Act, in the event that the provisions may not have been available to support that spending by reason of the existence of an alternative source of power (for example in another Act). This ensures that there is no uncertainty in relation to the legal status of that past spending, so that no further action would need to be taken.

Any retrospective impact of the validation would be beneficial to recipients of spending programs by negating any risk of invalidity of payments and would have no detrimental effect on individuals. The Government does not consider that the retrospective validation of previous Government spending would impact any persons.

The necessity of the amendments and the circumstances by which it became apparent to the minister that the amendments, and the retrospective operation of the amendments, may be necessary

The necessity of the amendment was recently identified by the Department of Finance as part of ongoing and regular review of the operation of the FFSP Act. The amendments would put beyond doubt the validity of government spending programs that rely on section 32B of the FFSP Act, as well as any government involvement in companies in reliance on section 39B of the FFSP Act, in circumstances where other general powers could also be relied on.

If the amendments are not made, Commonwealth entities that had relied on these provisions for authority for Commonwealth spending (read together with items in the FFSP Regulations) are potentially affected in circumstances where another source of legislative authority for the spending may exist (for example where spending is separately authorised in other specific legislation).

The operation of the validation provisions would provide reassurance that past spending was conducted with the authority that was understood to have been provided by the FFSP Act.

Why it is appropriate to retrospectively apply the legislation

The validation provisions would provide that in such cases the Commonwealth is, from the commencement of the Bill, taken to have had the necessary power under section 32B at relevant times in the past. The Bill would make similar provision in respect of the legal status of any past activities that relied on section 39B.

It will ensure any past spending under the FFSP framework is not at risk for being purportedly authorised under the FFSP Act when another source of legislative authority may have also existed.

The number of instances in which the Commonwealth made, varied or administered an arrangement or grant under existing section 32B of the Act in instances where, but for the retrospective validation provided by item 20 of the Bill, the Commonwealth did not have the power to do so, and the detail of how much money was spent pursuant to such exercises of power as are proposed to be retrospectively validated by the Bill

At the date of introduction, I am not aware of any spending that is invalid as a result of the existence of an alternative source of legislative authority and there is no litigation on foot relating to this issue. The amendments are intended to put beyond doubt the intended operation of the FFSP framework, and ensure that it can continue to function as it has been understood to operate.

I trust that the above responses will be of assistance in the Committee's consideration of the Bill.

Yours sincerely

Katy Gallagher

6 MAR 2024

The Hon Brendan O'Connor MP
Minister for Skills and Training

Reference: MC24-000721

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

By email: Scrutiny.Sen@aph.gov.au

Dear Chair Dean,

Thank you for the correspondence from the Senate Standing Committee for the Scrutiny of Bills (the Committee) of 28 February 2024 regarding its consideration of the National Vocational Education and Training Regulator Amendment (Strengthening Quality and Integrity in Vocational Education and Training No. 1) Bill 2024 (the Bill).

The Committee has requested my advice on two matters, which I enclose at Attachment A. I thank the Committee for taking the time to consider the Bill and for raising these matters with me.

I hope this information is of assistance.

Yours sincerely

BRENDAN O'CONNOR

12 / 3 / 2024

Encl.

Attachment A

Exemption from disallowance

1.158 In light of the above, the committee requests the minister's advice as to whether the bill could be amended to omit subsections 231C(6) and 231D(4) so that legislative instruments made under subsections 231C(1), 231C(3) and 231D(1) are subject to appropriate parliamentary oversight through the usual disallowance process.

As the Committee has noted, item 22 of Schedule 1 to the Bill would insert to the *National Vocational Education and Training Regulator Act 2011* (the NVETR Act):

- proposed subsection 231C(1) and 231C(3), which would empower the Minister to, by legislative instrument, determine that the National VET Regulator (the Regulator) is not required to, or must not, deal with initial applications for registration until after a day specified in the instrument;
- proposed subsection 231D(1), which would empower the Minister to, by legislative instrument, determine that no initial applications for registration may be made under section 16 of the NVETR Act; and
- proposed subsection 231C(6) and 231D(4), which would provide that section 42 (disallowance) of the *Legislation Act 2003* does not apply to an instrument made under proposed subsection 231C(1), 231C(3) or 231D(1).

For the reasons set out below, I do not consider that the Bill should be amended to omit proposed subsection 231C(6) and 231D(4).

The development of the NVETR Act followed:

- the then Council of Australian Governments' decision to establish a new approach to national regulation for the vocational education and training (VET) sector; and
- the Commonwealth and every State and Territory formally agreeing, through the *Intergovernmental Agreement for Regulatory Reform in Vocational Education and Training* (the IGA), to establish under Commonwealth legislation a National VET Regulator supported by, in the case of New South Wales, Queensland, South Australia and Tasmania (the referring States), text-based State referrals of certain matters to the Commonwealth Parliament and, in the case of Victoria and Western Australia, mirror legislation.

This means the NVETR Act applies differently in referring States and other jurisdictions. In other jurisdictions, the NVETR Act relies on other heads of Commonwealth legislative power (see section 4 of the NVETR Act). In Victoria and Western Australia, the NVETR Act applies on a more limited basis reflecting the scope of those powers (see subsection 8(4) of the NVETR Act). The referrals from the referring States are essential to the current application of the NVETR Act in those States.

The Commonwealth and every State and Territory also agreed, through the IGA, to establish a Ministerial Council (presently known as the Skills and Workforce Ministerial Council). The

IGA tasks the Ministerial Council, which consists of each minister with portfolio responsibility for skills and training from every Australian jurisdiction, with various responsibilities concerning the operation and maintenance of the national VET system. This includes providing advice to the Regulator about quality issues in VET; issues which could motivate the Minister to, after consulting with the Regulator in accordance with proposed section 231E, seek to make a determination under proposed section 231C or 231D (see pages 37-43 of the Explanatory Memorandum to the Bill).

The NVETR Act currently contains 34 references to the Ministerial Council. In many instances, the NVETR Act requires the Minister to obtain the Ministerial Council's agreement before making a legislative instrument. In other instances, the NVETR Act requires the Minister to consult, or the Regulator to cooperate, with the Ministerial Council. Proposed section 231F would prohibit the Minister from making a determination under proposed section 231C or 231D unless the Ministerial Council has agreed to the determination.

Subsection 44(1) of the Legislation Act provides:

44 Legislative instruments that are not subject to disallowance

(1) Section 42 does not apply in relation to a legislative instrument, or a provision of a legislative instrument if the enabling legislation for the instrument (not being the *Corporations Act 2001*):

(a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories; and

(b) authorises the instrument to be made by the body or for the purposes of the body or scheme;

unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.

Some of the expressions used in subsection 44(1), such as 'intergovernmental scheme', are not defined. The Explanatory Memorandum to the Legislative Instruments Bill 2003 provides, on page 22, some guidance on their intended meaning and the underlying purpose of subsection 44(1):

> *Subclause 44(1) provides that instruments made under enabling legislation that facilitates an intergovernmental body or scheme involving the Commonwealth and one or more States are not subject to the disallowance provisions of this Act, unless the enabling legislation has the effect that the instrument is disallowable. This is because there is an argument that the Commonwealth Parliament should not, as part of a legislative instruments regime, unilaterally disallow instruments that are part of a multilateral scheme. However, the Parliament, in creating the relevant enabling legislation, would be in a position to determine that such instruments should be disallowable.*

The NVETR Act – viewed as a whole and in the context of relevant extrinsic materials – can reasonably be characterised as 'enabling legislation [which] … facilitates the establishment or operation of an intergovernmental body or scheme'. The requirement in proposed section 231F for the Minister to obtain Ministerial Council agreement before making a determination under proposed section 231C or 231D would authorise an instrument under proposed subsection 231C(1), 231C(3) or 231D(1) to be made 'for the purposes of the … scheme'.

This means that merely omitting proposed subsection 231C(6) and 231D(4) from the Bill would likely not subject an instrument made under proposed section 231C or 231D to disallowance; the Bill would need to be amended not only to omit those subsections, but also to have the effect that those instruments would be disallowable. I do not consider, though, that the Bill should be amended in such a manner. That is because:

- the proposed requirement for the Minister to consult with the Regulator and to obtain Ministerial Council agreement before making a determination under proposed section 231C or 231D reflects the shared expectation in the IGA about the Ministerial Council's responsibilities in relation to promoting quality in the national VET system;
- an instrument made under proposed section 231C or 231D would necessarily be the product of significant negotiation in the process of obtaining Ministerial Council agreement, and sufficient scrutiny of such an instrument would be provided through that process (as is the case with other legislative instruments made under the NVETR Act that are not subject to disallowance, such as those made under subsection 185(1), 186(1), 187(1), 188(1) and 189(1));
- it would not be appropriate for the Commonwealth Parliament to unilaterally disallow a legislative instrument that is part of the intergovernmental scheme that the NVETR Act facilitates (particularly given the NVETR Act implements that scheme in some reliance on text-based State referrals); and
- the Commonwealth Parliament unilaterally disallowing a legislative instrument that is part of the intergovernmental scheme that the NVETR Act facilitates could undermine confidence in the IGA, discouraging ongoing State/Territory cooperative support and the intended operation of the cross-jurisdictional system that underpins the NVETR Act.

For the same reasons as set out in the above dot points, all instruments made under various other provisions in the NVETR Act (e.g. under subsection 185(1), 186(1), 187(1), 188(1) and 189(1)) are also exempt from disallowance. The exemptions from disallowance in subsection 231C(6) and 231D(4) are consistent with these provisions.

Privacy

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

- **what kinds of personal information are expected to be included in audit and compliance audit reports under sections 17A and 35 of the National Vocational Education and Training Regulator Act 2011**

The Regulator collects information and evidence from NVR registered training organisations (RTOs) to conduct audits to assess the NVR RTO's compliance with the NVETR Act or the VET Quality Framework (see the definition in section 3 of the NVETR Act). These audits are undertaken in the context of the Regulator determining an NVR RTO's application for registration under subsection 17(1) and (3), or whether an NVR RTO continues to comply with the NVETR Act under subsection 35(1). The information and evidence collected during such an audit includes personal information within the meaning of the *Privacy Act 1988*. The information collected will vary depending on the scope of the audit, but may include:

- the NVR RTO's policies and procedures, and training and assessment strategies;
- photographs of the NVR RTO's premises;
- student files, including enrolment forms and completed student assessments;
- training or assessor records;
- other documentation and evidence relevant to the scope of the audit;
- observations of facilities, and physical and virtual training and assessment equipment and resources; and
- evidence from interviews with the NVR RTO's management and trainers and assessors and students over 18 years of age.

Page 10 of the Regulator's privacy policy contains more detail about the information the Regulator collects for the purposes of audits.

Section 17A of the NVETR Act requires the Regulator to prepare a report of an audit conducted under subsection 17(3). Subsection 35(1A) of the NVETR Act provides that the Regulator must prepare a report of an audit conducted under subsection 35(1). Subsection 17A(3) and 35(1C) prohibit a report from including personal information unless the personal information is the name of the NVR RTO to which the report relates or, in the case of section 17A, unless the personal information is the name of the applicant.

As the Committee has noted, items 67 and 69 of Schedule 1 to the Bill would amend the NVETR Act such that, for both subsections 17A(3) and 35(1C), the requirement for the report to not include personal information would only apply if the report was published. These amendments seek to clarify that personal information can be included in reports the Regulator prepares under sections 17A and 35 but, where the report is to be published, it is incumbent on the Regulator to ensure that no personal information is included in the published report, aside from the name of an NVR RTO or, in the case of section 17A, the name of the applicant. This ensures that personal information included in a published report are appropriately protected.

The amendments would also ensure that a report the Regulator prepares under sections 17A and 35 can, provided the report is not published, contain other forms of personal information. This would:

- ensure that audit reports contain a full and accurate record of the evidence and information collected during an audit;
- promote transparency in decision making (i.e. by clarifying that the Regulator can clearly set out the reasons for its findings); and
- assist the Regulator in fulfilling its statutory obligations to carry out effective audits of NVR RTOs (see section 17 and 35, as well as paragraph 157(1)(c) of the NVETR Act).

- **what safeguards are in place to protect personal information, including whether the Privacy Act 1988 applies**

The Regulator is an APP entity for the purposes of the Privacy Act. This means that the Regulator is required to comply with the Australian Privacy Principles (APPs) in Schedule 1 to the Privacy Act. The APPs govern standards, rights and obligations around the collection, use and disclosure of personal information; an organisation or agency's governance and accountability; integrity and correction of personal information; and the rights of individuals to access their information. The amendments that the Bill proposes would not change this.

The Regulator's privacy policy sets out, in section 4, the types of information the Regulator collects, and how the Regulator uses and discloses that information, when preparing audit reports. This information includes personal information such as names, contact details, information about declarations relating to criminal offence convictions, *Corporations Act 2001* disqualifications, or bankruptcy or insolvency determinations.

Importantly, the privacy policy makes clear that the Regulator will only seek personal information, in the form of a declaration, from owners, directors or high managerial agents of NVR RTOs. In the context of conducting audits, the privacy policy also notes that the Regulator stores audit information securely and only for the purposes of the specific audit activity.

Sections 4, 5 and 6 of the privacy policy set out how the Regulator complies with its obligations under the Privacy Act. This includes requirements that the Regulator:

- only collect personal information reasonably relevant to the performance of its functions;
- notify individuals about the use and collection of personal information (including information from third parties and unsolicited information); and
- handle personal information in a manner consistent with the Privacy Act.

The NVETR Act imposes additional safeguards to protect the unauthorised use and disclosure of VET Information, which is broadly defined in section 3 to mean information that is held by the Regulator and that relates to the performance of the Regulator's functions (which therefore includes personal information). Section 204 provides that the Regulator (or staff/a consultant of the Regulator) will commit a strict liability offence in circumstances where VET information is disclosed without authorisation. The limited statutory authorisations for disclosure are set out in Subdivision B of Part 9 of the NVETR Act. These safeguards apply to any personal information the Regulator collects for the purposes of preparing an audit report under subsections 35(1A) and 17A(1). Items 67 and 69 of Schedule 1 to the Bill would not displace or otherwise alter the Regulator's obligations under the Privacy Act or the additional safeguards in the NVETR Act.

If these amendments are enacted, the Regulator will continue to protect personal information and will only handle personal and VET information in a manner consistent with the Privacy Act and the NVETR Act.

THE HON JIM CHALMERS MP
TREASURER

Ref: MC24-004606

Wednesday, 13 March 2024

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

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

Dear Senator

I am writing in response to the Senate Standing Committee for the Scrutiny of Bill's comments in Scrutiny Digest 3 of 2024 regarding Treasury Laws Amendment (Foreign Investment) Bill 2024.

I have attached a response to the Committee's enquiries about the Bill. I trust that the information attached provides further context and assists with the Committee's deliberations.

Yours sincerely

The Hon Jim Chalmers MP

Cc: The Hon Julie Collins MP, Minister for Housing, Minister for Homelessness, and Minister for Small Business

Treasury Laws Amendment (Foreign Investment) Bill 2024

As set out in the Committee's *Scrutiny Digest No. 3 of 2024*, the Committee has requested advice as to:

- whether any persons are likely to be detrimentally affected by the retrospective application of the legislation and, if so, to what extent their interests are likely to be affected; and
- why it is considered necessary and appropriate for the amendment to operate retrospectively.

Detrimental effects
The amendment maintains the status quo by clarifying the intended scope of Non-Discrimination Articles in Australia's bilateral tax treaties. Eight of these treaties have broad Non-Discrimination Articles which seek to extend this Article to 'taxes of every kind and description'. The eight tax treaties containing such provision are with Finland, Germany, India, Japan, New Zealand, Norway, South Africa, and Switzerland.

At the time Australia entered the relevant treaties, it was envisaged that the Non-Discrimination Articles ('NDAs') would apply in respect of income tax (including the petroleum resource rent tax), the GST, the fringe benefits tax and to state and territory taxes.

Some uncertainty has arisen however, in respect of the breadth of these Non-Discrimination Articles and their interaction with taxes that are not typically taxes that are covered by Australia's tax treaties, such as Commonwealth foreign investment fees and state and territory property surcharges.

The amendment seeks to maintain the status quo and provide certainty that these Commonwealth, state and territory taxes remain payable. Therefore, taxpayers having paid these taxes, including Commonwealth foreign investment fees or state or territory property surcharges, will not be detrimentally affected by the retrospective application of the legislation.

Appropriateness of retrospectivity
The amendment operates retrospectively to confirm that the collection of these fees, as intended by Parliament. It is necessary for the amendment to operate retrospectively to resolve any ambiguity in the law and to provide taxpayers with certainty that taxes already collected, such as Commonwealth foreign investment fees, remain payable. Providing this certainty for taxpayers is essential, in particular in respect of Commonwealth foreign investment fees, as it ensures that applications made and approved under the foreign investment regime remain valid and can continue to be relied on by taxpayers.