THE HON JULIE BISHOP MP

Minister for Foreign Affairs

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

Dear Senator

Thank you for the letter of 15 February 2018 from the Senate Standing Committee for the Scrutiny of Bills, which conveyed a request in the Committee's *Scrutiny Digest No.2 of 2018* for me to provide information related to the *Australian Passports Amendment (Identity-matching Services) Bill 2018.*

I attach a written response to the Committee's request.

07 MAR 2018

+61 2 6277 7500 Parliament House, Canberra ACT 2600, Australia foreign.minister@dfat.gov.au

WRITTEN RESPONSE TO A REQUEST FOR INFORMATION BY THE SENATE SCRUTINY OF BILLS COMMITTEE IN RELATION TO THE *AUSTRALIAN PASSPORTS AMENDMENT (IDENTITY-MATCHING SERVICES) BILL 2018*

The committee requests the Minister's detailed advice as to why it is considered necessary and appropriate to leave to delegated legislation the details of the kind of personal information that may be disclosed, to whom such information may be disclosed, and the services to which such information may be disclosed.

Section 46 of the *Australian Passports Act 2005* (the Act) lists particular purposes for which personal information may be disclosed under the Act. Section 46 further provides that the kind of personal information disclosed for these purposes, and the persons to whom it may be disclosed, are to be specified in a Minister's determination.

Section 46 currently lists five purposes for which personal information may be disclosed:

(a) confirming or verifying information relating to an applicant for an Australian travel document or a person to whom an Australian travel document has been issued

(b) facilitating or otherwise assisting the international travel of a person to whom an Australian travel document has been issued

(c) law enforcement

(d) the operation of family law and related matters

(e) the purposes of a law of the Commonwealth specified in a Minister's determination.

The *Australian Passports Determination 2015* (the Determination) specifies in section 23 the kinds of information that may be disclosed for each of these purposes, the persons to whom it may be disclosed and, with regard to paragraph 46(e) of the Act, laws in respect of which it may be disclosed.

The matters regulated in section 23 are matters of administration and detail and are subject to frequent technical changes, such as changes to the titles of the agencies and office-holders to whom different disclosures may be made. In enacting the Act, Parliament considered it appropriate that these matters be regulated through delegated legislation.

The *Australian Passports Amendment (Identity-matching Services) Bill 2018* (the Bill) will amend the Act to add a new purpose for disclosing information, namely to participate in a service to share or match information relating to the identity of an individual. It is appropriate, and consistent with the general operation of the Act, that this new purpose be inserted into the list in section 46, and that, by normal operation of that section, details about the kinds of information that may be disclosed, the persons to whom it may be disclosed, and the services or kinds of service by which such disclosures may be made, be specified in the Determination.

SENATOR THE HON MITCH FIFIELD
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS

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

Broadcasting Legislation Amendment (Digital Radio) Bill 2017 – Response to the Senate Standing Committee for the Scrutiny of Bills

Dear Chair Helen

I refer to the letter from the Senate Standing Committee for the Scrutiny of Bills dated 8 February 2018 in relation to the Broadcasting Legislation Amendment (Digital Radio) Bill 2017, drawing my attention to the Committee's *Scrutiny of Bills Alert Digest No.1 2018.*

This includes a request for further information justifying the proposed removal of the current, specific requirements in the *Radiocommunications Act 1992* for consultation by the Australian Communications and Media Authority (ACMA) prior to the preparation or variation of a digital radio channel plan by legislative instrument.

The nature of digital radio planning necessarily requires that the ACMA consults with affected broadcasters. Digital radio channel plans are technical documents that are prepared by the ACMA following a detailed analysis of the number and type of digital radio multiplex transmitter licences that are likely to be required in the relevant licence area and having regard to the availability of suitable spectrum in that licence area. It would not be possible for the ACMA to properly undertake the steps necessary to prepare a digital radio channel plan without consultation with commercial, community and national broadcasters in those areas.

In practice, digital radio channel plans are the outcome of a lengthy, multi-stage consultative process. In response to the Digital Radio Report prepared by the Department of Communications in 2015, the Digital Radio Planning Committee for Regional Australia was established. The Planning Committee is chaired by the ACMA and has representatives from the commercial radio industry peak body, the community radio peak body, ABC, SBS and the Department of Communications and the Arts and the Australian Competition and Consumer Commission. It meets two to three times a year, and is the formal collaborative mechanism for driving the rollout of digital radio into regional Australia.

The Planning Committee recommended that the ACMA endorse planning principles which were developed by its technical sub-committee over a 12 month period. These planning principles are informing the ACMA's development of indicative regional allotment plans, which form the basis for making the detailed digital radio channel plans. The ACMA invited broadcasters to a workshop that explained the ACMA's approach to the development of the allotment plans. The ACMA has sought on-going feedback from broadcasters on iterations of the allotment planning through a consultation site which broadcasters may subscribe to.

The Bill would not alter the form by which digital radio channel plans are made or varied by the ACMA; they would continue to be through legislative instruments and the consultation provision under section 17 of the *Legislation Act 2003* would still apply in respect of the making of such instruments. However, the proposed amendment will provide the ACMA with greater flexibility in how and when it conducts consultation for digital radio planning.

This is consistent with the ACMA's flexibility in relation to planning for analogue radio services, as licence area plans are not subject to specific legislative consultation requirements. The increased flexibility will enable the ACMA to target consultation to the affected parties, including in relation to minor variations of digital radio channel plans. It would also assist to avoid delays that may be caused by the existing requirement to allow at least 30 days for public submissions, particularly in circumstances where consultation and drafting occur concurrently or iteratively, or where affected parties provide quick feedback.

Thank you for your consideration of these issues.

21/2/18

SENATOR THE HON MITCH FIFIELD
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS

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

Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017 – Response to the Senate Standing Committee for the Scrutiny of Bills

Dear Chair Helen

I refer to the letter from the Senate Standing Committee for the Scrutiny of Bills dated 8 February 2018 in relation to the Broadcasting Legislation Amendment (Foreign Media Ownership and Community Radio) Bill 2017 (the Bill), drawing my attention to the Committee's *Scrutiny of Bills Alert Digest No. 1 2018*.

I welcome the opportunity to respond to the Committee's comments, and provide the following advice under each.

Committee comment

1.12 The committee requests the minister's advice as to why it is considered necessary for the ACMA to have a broad power to delegate the power to issue notices under new Division 10A of the Broadcasting Services Act 1992, and seeks the minister's advice as to the appropriateness of amending the bill to confine to delegates to the holders of nominated offices or members of the Senior Executive Service.

Response

It is not unusual for Commonwealth agencies to be permitted to delegate statutory powers and functions to individual members or staff. The Australian Communications and Media Authority's (ACMA) source of legislative authority to delegate its powers is found in Part 4 of the *Australian Communications and Media Authority 2005* (ACMA Act).

The proposed amendment, under item 1 of Schedule 1 to the Bill, to section 53 of the ACMA Act has the effect that sections 51 and 52 of that Act will not apply to the issuing of a notice under proposed Division 10A of the *Broadcasting Services Act 1992* (BSA). This will enable the ACMA to delegate directly to any ACMA staff member the power to issue the abovementioned notices, providing greater flexibility and efficiency in the day to day administration of the proposed Register of Foreign Owners of Media Assets (the Register).

Although the proposed delegation power would enable the ACMA to delegate the issuing of notices to officers below the Senior Executive Service (SES) level, this does not necessarily mean that the ACMA would exercise the power in such a way. Ultimately this would be a matter for the ACMA, as an independent statutory body, and it will have in place appropriate governance and supervisory arrangements for all staff, including for those staff exercising delegations below the SES Band 1 level. Prior to the commencement of the Register, the ACMA will have in place procedures that will ensure that only those staff with appropriate qualifications and experience, and relevant training, are delegated key functions associated with the administration of the Register. I am satisfied that, in light of the above safeguards, that amendments to the proposed delegation powers are not necessary.

Committee comment

1.15 The committee requests the minister's advice as to why it is considered appropriate to provide the Commonwealth, the ACMA and ACMA officials with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

Response

Proposed section 74T (at item 5 of Schedule 1 to the Bill) would provide an immunity to the Commonwealth, the ACMA, and ACMA officials for an act or matter in the performance or purported performance of any function, or in the exercise or purported exercise of any power conferred on the ACMA by proposed Subdivision B, unless bad faith can be established. As noted in the Explanatory Memorandum to the Bill, the operation of this provision is designed to prevent the Commonwealth, ACMA or individual ACMA officials from being sued for any error in the information published on the Register.

The granting of immunities to public authorities is both appropriate and necessary to ensure that public authorities can perform their statutory duties effectively. The grant of executive immunities is also relatively common across Commonwealth legislation. In this regard, the civil immunity provision under proposed section 74T was modelled on, and consistent with, similar immunities that protect Commonwealth agencies and their officials against liability for acts performed in good faith in the performance of legislative functions. These include:

- subsection 68(6) of the *Interactive Gambling Act 2001*;
- section 58 of the *Age Discrimination Act 2004*;
- section 246 of the *Australian Securities and Investments Commission Act 2001:*
- section 57 of the *Australian Sports Commission Act 1989*; and
- section 35 of the *Australian Information Commissioner Act 2010.*

Proposed section 74T is also sufficiently constrained such that any impact on the rights of an individual to bring a civil action against the Commonwealth, the ACMA, or ACMA officials, is proportionate having regard to the stated objective of the Register. The immunity provisions only apply to the Commonwealth, the ACMA, or ACMA officials to the extent that such persons were performing, or purporting to perform, their functions as required for the effective administration of the Register. The immunity is therefore targeted to particular persons in a specific regulatory context.

In a practical sense, the proposed immunity is both necessary and justified. In the absence of immunity, it would be extremely difficult to achieve an effective administration of the Register, as ACMA officials may be unwilling to perform the necessary functions in light of the risk of being held personally liable. The effect would be that even acts done honestly and in good faith could expose such persons unjustifiably to liability. On the basis of the above analysis, I am satisfied that the immunity from civil liability is appropriate.

Thank you for your consideration of these issues.

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SENATOR THE HON MITCH FIFIELD
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS

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

Standing Committee for the Scrutiny of Bills – Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017

Dear Chair Helen

I refer to the letter from the Senate Standing Committee for the Scrutiny of Bills dated 8 February 2018 in relation to the Communications Legislation Amendment (Online Content Services and Other Measures) Bill 2017 (OCS Bill), drawing my attention to the Committee's *Scrutiny of Bills Alert Digest No. 1 2018*.

I welcome the opportunity to respond to the Committee's comments, and provide the following advice under each.

Committee comment

1.21 The committee requests the minister's more detailed justification for amending paragraph 53(2)(k) of the ACMA Act to permit the delegation to a broad class of persons of the power to issue and extend the time for compliance with notices under proposed Schedule 8 to the Broadcasting Services Act 1992 and related provisions.

1.22 The committee considers it may be appropriate to amend the bill to require that persons authorised to issue notices under proposed Schedule 8 to the Broadcasting Services Act 1992 and related provisions hold special attributes, qualifications or qualities, and seeks the minister's advice in relation to this matter.

Response

It is not unusual for Commonwealth agencies to be permitted to delegate statutory powers and functions to individual members or staff. The Australian Communications and Media Authority's (ACMA) source of legislative authority to delegate its powers is found in Part 4 of the *Australian Communications and Media Authority 2005* (ACMA Act).

The proposed amendment, by item 2 of Schedule 1 to the Bill, to paragraph 53(2)(k) of the ACMA Act has the effect that sections 51 and 52 of that Act will not apply to the issuing of a notice under proposed Schedule 8 of the *Broadcasting Services Act 1992* (BSA), or under any other provision of the BSA that relates to Schedule 8. This will enable the ACMA, or a Division of the ACMA, to delegate directly to a range of persons, including any member of staff of the ACMA the power to issue the abovementioned notices, providing greater flexibility and efficiency in the day to day administration of the proposed online content service provider rules (the rules).

Although the proposed delegation power would enable the ACMA to delegate the issuing of notices to officers below the Senior Executive Service (SES) level, this does not necessarily mean that the ACMA would exercise the power in such a way. Ultimately this would be a matter for the ACMA, as an independent statutory body, having regard to the particular circumstances, and it is expected it will have in place appropriate governance and supervisory arrangements for all staff, including for any staff exercising delegations below the SES Band 1 level.

Committee comment

1.28 The committee seeks the minister's more detailed justification for why it is considered necessary and appropriate to permit the ACMA to determine, by delegated legislation, which decisions under gambling promotion program standards and online content provider rules will be subject to merits review, including examples of decisions that would or would not be reviewable.

1.29 The committee also seeks the minister's advice as to the appropriateness of amending the bill to prescribe classes of decision that must be subject to review, or to prescribe matters that the ACMA must take into account before determining whether a particular decision will be reviewable.

Response

The gambling promotions reforms to be made by the Bill will mean that, for the first time, broadcast-like program standards may be applied to online content services in the form of online content service provider rules to be made by the ACMA. The content of the rules is not yet known, although the bill provides guidance on matters that may be covered, and it is envisaged that the ACMA may make decisions under those rules that could be appropriate for merits review. Item 15 of Schedule 1 to the Bill proposes to amend section 204 of the BSA by inserting two new subsections 204(3) and (4) to give the ACMA power to determine which decisions under any gambling promotion program standard or online content service provider rules would be reviewable. I note the committee's concern that this gives the ACMA significant discretion. As neither the content of any gambling promotion program standard nor the online content service provider rules is yet known, it is not possible to identify particular types of decisions of an administrative character that might be made by the ACMA under those instruments.

The range and type of available online content services is not static, and it is not therefore possible to predict the types of online content services and providers who may be regulated by Schedule 8 into the future. The Bill is designed to be adaptable to respond to changes in the future, and to legislatively prescribe classes of decisions that must be subject to review in this circumstance could be premature, and reduce the future flexibility of the ACMA to regulate services in a fast changing environment.

I note that gambling promotion program standards or online content service provider rules made by the ACMA will be subject to scrutiny and potential disallowance by either House of Parliament.

Committee comment

1.37 The committee seeks the minister's detailed justification as to why it is proposed to confer on the ACMA broad powers to exempt online content services and service providers from online content service provider rules made for the purposes of subclauses 13(1) and (2) of proposed Schedule 8, including examples of when it is envisaged that such powers would be exercised.

1.38 Noting that clause 15 of proposed Schedule 8 specifies matters to which the ACMA must have regard before making a determination, the committee also seeks the minister's advice as to whether it would be appropriate to amend the bill to insert similar guidance concerning the exercise of the ACMA's powers under clause 16 of that Schedule.

Response

The Government recognises that there are a range of online content services, with different business models and technical characteristics, and that the online content service provider rules will not need to regulate all online content services. The Government recognises that online content services are rapidly changing and evolving, with new online content services emerging with relative frequency.

It is therefore essential that the regulatory framework established by Schedule 8 is flexible enough to address new services as they emerge, and for the ACMA to identify whether or not online content service provider rules should apply to these services. An example of when it is envisaged the exemption powers would be exercised may include instances where children are unable to access the content provided by a particular online content service (and so there is minimal risk a child would be exposed to gambling promotional content provided on the online content service).

It is not considered appropriate to amend the bill to insert guidance concerning the exercise of the ACMA's powers under clause 16 of Schedule 8. Class exemption determinations made under clause 16 will be legislative instruments and subject to the standard legislative instrument consultation requirements. As legislative instruments, class exemption decisions will also be subject to scrutiny and potential disallowance by either House of Parliament. This is considered an adequate check on the ACMA's power.

I note also that subclause 15(12) is designed to ensure transparency around the exercise of the ACMA's individual exemption power (i.e. by requiring that an ACMA determination under subclause (1), (2), (3) or (4) must be published on its website). In addition, a provider of an online content service to which an individual exemption determination relates may seek AAT review of an ACMA decision to refuse to make, vary or revoke the exemption determination.

Thank you for your consideration of these issues.

21/2/18

SENATOR THE HON MITCH FIFIELD
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS

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

Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017 – Response to the Senate Standing Committee for the Scrutiny of Bills

Helen

Dear Chair

I refer to the letter from the Senate Standing Committee for the Scrutiny of Bills dated 8 February 2018 in relation to the Communications Legislation Amendment (Regional and Small Publishers Innovation Fund) Bill 2017 (the Bill), drawing my attention to the Committee's *Scrutiny of Bills Alert Digest No. 1 2018.* I welcome the opportunity to provide the following advice in relation to the Committee's comment on the Bill.

Comment

1.41 The committee seeks the minister's advice as to why the criteria for the award of the grants and the standard terms and conditions to be imposed are not included in the bill or subject to any other appropriate level of parliamentary scrutiny.

Response

It is common practice for the details for a competitive grant program, including any criteria relating to eligibility, to be set out in the program's guidelines, as part of a call for grant applications. The Government has determined a set of eligibility criteria for grants under the Regional and Small Publishers Innovation Fund, which forms part of the Regional and Small Publishers Jobs and Innovation Package. Whilst the program guidelines are under development, these eligibility criteria have already been made public and will be incorporated into the guidelines for the grant program. In addition, the guidelines will specify a set of merit criteria against which the Australian Communications and Media Authority will assess the relative merits of applications.

It is expected that the guidelines for the Regional and Small Publishers Innovation Fund will be released in the first quarter of 2018, following a process of consultation with industry and key stakeholders.

Thank you for your consideration of this issue.

22/2/18

The Hon Christian Porter MP
Attorney-General

MS18-000369

- 6 MAR 2018

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

scrutiny.sen@aph.gov.au

Dear ~~Senator Polley~~

I am writing in response to a request from the Committee Secretary of the Senate Scrutiny of Bills Committee, Ms Anita Coles, dated 8 February 2018, seeking advice on several Bills within my portfolio.

I have considered the Committee's comments in *Scrutiny Digest No. 1 of 2018* and in this letter I provide additional information to address the issues identified by the Committee in relation to the Family Law Amendment (Parenting Management Hearings) Bill 2017 and the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017. I will write to you separately to respond to matters in relation to the Foreign Influence Transparency Scheme Bill 2017; the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017; and the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.

Family Law Amendment (Parenting Management Hearings) Bill 2017 (PMH Bill)

No-invalidity clauses

The Committee has sought detailed justification for including no-invalidity clauses in proposed subsections 11LG(8), 11PB(8) and 11PC(7) of the PMH Bill (paragraph 1.198 of the Digest). These subsections provide that a failure to inform the Panel of relevant matters, or a failure by the Panel to provide reasons for, or explain the consequences of, making a parenting determination, will not invalidate a parenting determination.

Further information on each no-invalidity clause is provided below.

Obligation to inform the Panel of certain matters

Section 11LG of the PMH Bill requires parties to a PMH to inform the Panel of particular matters relating to family violence orders, care arrangements for a child under child welfare laws, and notifications to and investigations by state or territory agencies. The provision is intended to encourage parties to make full and frank disclosures to the Panel about these issues, as these matters will be relevant to the Panel in making a

determination in the best interests of the child. Subsection 11LG(8) provides that failure to inform the Panel of one of these matters does not affect the validity of a determination made by the Panel.

Section 11LG of the PMH Bill is a modelled on the following provisions in the *Family Law Act 1975*:

- Section 60CF—informing court of relevant family violence orders
- Section 60CH—informing court of care arrangements under child welfare laws, and
- Section 60CI—informing court of notifications to, and investigations by, prescribed State or Territory agencies).

Each of these sections in the Family Law Act provides that 'failure to inform the court of the matter does not affect the validity of any order made by the court'.

I consider the inclusion of the no-invalidity clause in subsection 11LG(8) is justified.

The no-invalidity clause is necessary to ensure that a party's non-compliance with the obligation cannot of itself be used to invalidate a determination. This is particularly important in the context of parenting disputes, where it may be tactically advantageous for one party not to inform the Panel (or a court) about the existence of a prior order, notification or arrangement in relation to the child. For example, the Panel may be notified about a family violence order by Party A; Party B does not notify the Panel about this family violence order; the Panel may then make a determination giving appropriate consideration to the existence of the family violence order. Without subsection 11LG(8), it would be open to Party B to rely on his or her own non-compliance with section 11LG to argue that the determination is invalid, notwithstanding the Panel had been informed about the family violence order by Party A.

Under the PMH Bill, the Panel would have broad information gathering powers and would be able to gather information in range of ways. Paragraph 11LD(1)(c), section 11M and section 11MK of the PMH Bill would ensure that the Panel is able to obtain all relevant information prior to making a parenting determination in relation to a child.

The no-invalidity clause in subsection 11LG(8) does not restrict the availability of judicial review of a Panel determination in relation to the Panel's obligation to consider all relevant considerations when making a determination. Rather, the restriction only applies to prevent the availability of judicial review on the grounds of jurisdictional error solely in relation to non-compliance with the requirement to inform the Panel of certain matters.

The legislative framework in the Bill clearly provides that when deciding whether to make a particular parenting determination the Panel must regard the best interest of the child as the paramount consideration (section 11P). Section 11JB sets out the matters the Panel must consider in determining the child's best interests. A primary consideration is 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'. Additional considerations, to the extent that they are relevant to a particular application, include: 'any family violence involving the child or a member of the child's family,' and 'if a family violence order applies, or has applied, to the child or a member of the child's family—any relevant inferences that can be drawn from that order.'

Additionally, section 11PA expressly requires the Panel to consider family violence when making a parenting determination. Should the Panel make a determination that is inconsistent with an existing state and territory order, the existing state and territory order would prevail (due to the operation of section 11PH). State and territory courts will have the power to adjust a parenting determination to ensure consistency with a subsequent family violence order (section 68R).

This legislative framework ensures that the Panel is able to undertake its own investigations to obtain information relevant to a particular application, and is not solely reliant on parties complying with their obligations under section 11LG. The Panel is required to consider family violence and prioritise the safety of the child in making any parenting determination.

For the above reasons, I consider that inclusion of the no-invalidity clause in subsection 11LG(8), is justified and that the section appropriately places an obligation on parties to disclose relevant information, whilst ensuring that non-compliance with the requirement is not used tactically to invalidate otherwise sound determinations.

Duties of the Panel when making determinations

Section 11PC of the Bill sets out the duties of the Panel when making determinations, including that the Panel must set out particulars of the obligations created by a determination and consequences arising from a breach of a determination. If a party is not represented by a legal practitioner, the Panel must explain to each person about the availability of programs, and location and recovery orders.

Subsection 11PC(8) provides that a failure by the Panel to comply with a requirement to set out and explain certain matters in, or in connection with, the making of a determination does not affect the validity of the determination. This provision is modelled on, and equivalent to, section 65DA of the Family Law Act which provides, in the context of orders made by the family law courts, a failure by the court to comply with equivalent requirements under that section does not affect the validity of a parenting order.

I consider that the no-invalidity clause is justified in this context for the following reasons.

The objective of proposed section 11PC is to ensure that parties are aware of their obligations and, therefore, are more likely to comply. In this sense, it is a preventive measure directed at improving rates of compliance. The no-invalidity clause recognises that failure to comply with the requirements of section 11PC does not go to the substance of the determination itself. The determination must have been made in accordance with the decision-making framework provided for in the Bill, and the process for making the determination must have been procedurally fair.

Further, in the context of contraventions of parenting orders, section 70NAE of the Family Law Act sets out the meaning of 'reasonable excuse', and includes where a person has contravened an order 'because, or substantially because, he or she did not, at the time of the contravention, understand the obligations imposed by the order on the person who was bound by it' and the court is satisfied that the person should be excused in respect of the contravention. The PMH Bill would amend section 70NAE to ensure that that section also applies in the context of parenting determinations (Schedule 1, Part 1, item 69 of the PMH Bill). This would ensure that any misunderstanding of a party

as to the obligations a parenting determination creates, and the consequences that may follow if he or she contravenes the determination, can be appropriately taken into account in the context of any contravention proceedings.

For the above reasons, I consider that non-compliance with section 11PC is not of such a nature to justify a sound determination being invalid, and that the no-invalidity clause in subsection 11PC(8) is justified.

How parenting determinations are made

Sections 11PB of the PMH Bill sets out the requirements for how a parenting determination is to be made. Subsections 11PB(1) and (2) provide that a parenting determination may be made orally or in writing; and that the Panel must give a written copy of the determination to each party within 28 days. Subsection 11PB(3) provides that the Panel must give each party a statement notifying parties that they may request written reasons and that they have a right to appeal the determination to the Federal Circuit Court.

Subsections 11PB(4), (6) and (7) provide for the provision of reasons for determinations made by the Panel. Subsection 11PB(5) provides that if the Panel does not give written reasons for a parenting determination, the Panel must give each party a notice stating that the parties to the hearing may request written reasons. Subsection 11PB(8) provides that a failure by the Panel to comply with the section does not affect the validity of the determination.

Formal notification by the Panel to a party about their ability to request written reasons and their appeal rights following a determination is important. However, the Panel's non-compliance with the notification requirements in subsections 11PB(3) and (5) would not go to the substance of the determination itself. It would not be in a child's best interests to allow a party to argue that a determination made in accordance with the relevant statutory decision-making framework, and following a full and fair hearing process, is invalid because the Panel did not provide formal notice about the right to obtain written reasons and to appeal. For this reason, I consider that the no-invalidity clause is justified.

Having had regard to the Committee's concerns about the additional scope of the no-invalidity clause I am giving further consideration to the operation of subsection 11PB(8).

Reversal of evidential burden of proof

At paragraph 1.210 of the report, the Committee requested advice as to 'why it is proposed to use the offence-specific defences in the PMH Bill, which reverse the evidential burden of proof—see subsections 11PP(3) and (4), 11PQ(3) and (4), 11PR(4), 11PS(4), 11RA(4), 11PPA(3) and 11PQA(3) of the Bill.

The Committee notes that it would be assisted in its consideration of the appropriateness of a provision which reverses the burden of proof if the advice explicitly addressees relevant principles as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

I will address the Committee's concerns in three categories.

Removal of child from Australia offences

Sections 11PP, 11PQ, 11PR and 11PS of the Bill would create offences for wrongfully removing a child from Australia where a parenting determination has been made or an application is pending. These provisions replicate sections 65Y, 65Z, 65ZA and 65ZB of the Family Law Act, which make it an offence to wrongfully remove a child from Australia where a parenting order is in force or is pending.

As noted by the Committee, subsections 11PP(3), 11PQ(3), 11PR(4) and 11PS(4) of the PMH Bill provide for an exception to the offence of unlawfully removing a child, if the removal of the child was in accordance with a parenting determination; a court order; the written agreement of each party to the Parenting Management Hearing (sections 11PP and 11PQ); or the child leaves in the company, or with the written consent of, the person who made the statutory declaration (under sections 11PR and 11PS).

I am giving further consideration to these provisions; specifically, whether changes could be made to align the drafting of these provisions with the principles set out in the *Guide to Framing Commonwealth Offences*. The potential impact of such changes on the elements of the offences, and the evidentiary burden, is being considered.

Fleeing family violence exceptions

I note that subsections 11PP(4) and 11PQ(4), and sections 11PPA and 11PQA, are contained in Schedule 2 to the Bill and would take effect subject to the passage of the Civil Law and Justice Legislation Amendment Bill 2017.

Subsections 11PP(4) and 11PQ(4) would provide a defence of 'fleeing family violence' to the offences of removing a child unlawfully from Australia in proposed sections 11PP and 11PQ of Schedule 1 of the Bill.

Sections 11PPA and 11PQA would replicate proposed sections 65YA and 65ZAA of the Civil Law and Justice Legislation Amendment Bill 2017. These provisions would make it an offence for a person to retain a child outside Australia otherwise than in accordance with the written consent of the other parties, or an order of a court and provide a defence of 'fleeing family violence' (consistent with the defences proposed in subsections 11PP(4) and 11PQ(4)).

These provisions of the Civil Law and Justice Legislation Amendment Bill 2017 have been the subject of significant consideration, including by the Family Law Council who recommended that the defence of 'fleeing family violence' be included[1].The Senate Standing Committee on Legal and Constitutional Affairs, in its final report on the Civil Law and Justice Legislation Amendment Bill 2017 (10 May 2017), recommended:

"...that the Bill be amended to amend the *Family Law Act 1975* to include a defence of 'fleeing from family violence' to ensure that the existing and proposed offences of unlawful removal and retention of children abroad do not apply in circumstances of family violence."

I am of the strong view that victims of family violence should not be further harmed or disadvantaged through exposure to a criminal sanction. The defence of fleeing family violence would help to protect against this, by ensuring that the existing offences in

[1] Letters of advice to the Hon Robert McClelland MP, International Parental Child Abduction, 14 March 2011 and 5 August 2011.

sections 65Y and 65Z of the Family Law Act, and the proposed offences of unlawfully retaining a child (proposed sections 65YA and 65ZAA, put forward in the Civil Law and Justice Legislation Amendment Bill) do not apply in circumstances of family violence.

I consider it appropriate that the fleeing family violence defence is available for the equivalent offences in the PMH Bill 2017.

Importantly, the proposed defence will only be able to be relied on where the removal or retention of a child in breach of the offence provisions was reasonable and done in response to the defendant's *perception* that it was necessary to prevent family violence.

As the Committee has highlighted, at common law, it is ordinarily the duty of the prosecution to prove all elements of the offence, which is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof require a defendant to disprove, or to raise evidence to disprove, one or more elements of the offence and this interferes with the common law right.

While this is an important principle, I do not consider that this particular defence in the context of the international parental child abduction offences would interfere with the defendant's right to be presumed innocent unless proven guilty. The Parliamentary Joint Committee on Human Rights has noted that offences that reverse the burden of proof are likely to be 'compatible with the presumption of innocence where they are … reasonable, necessary and proportionate in pursuit of a legitimate objective'[2]

I consider that the reversal of the evidentiary burden, as provided for in subsections 11PP(4), 11PQ(4), 11PPA(3) and 11PQA(3), is reasonable and proportionate.

A specific defence of fleeing family violence is necessary because the circumstances are not sufficiently addressed by the general defences in the Commonwealth Criminal Code. The defence of self-defence in section 10.4 of the Commonwealth Criminal Code has shown to have practical impediments for defendants who have experienced family violence.[3] The defence needs to be applied in a way that recognises the nature and dynamics of family violence which may include non-physical violence and coercive and controlling behaviour over a period of time.

To ensure that the 'fleeing family violence' defence is applied only in appropriate cases, the proposed defence includes both a subjective and objective element. The defence would be satisfied if it is reasonable to carry out the conduct constituting an offence (of removing or retaining a child overseas) (the objective element) in response to the defendant's own perceptions that it was necessary to take the action to prevent family violence (the subjective element).

Similar to self-defence, the new defence would include conduct which may constitute a reasonable response to an honest but unreasonable misapprehension of the relevant circumstances. The more unreasonable the perception, however, the more likely it is that a trier of fact will determine that this perception was not subjectively held at the time of the alleged offending. This allows the defence to apply in cases where a person believes

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[2] Parliamentary Joint Committee on Human Rights, 'Offence Provisions, Civil Penalties and Human Rights' (Guidance Note No 2, Parliament of Australia, 2014) 2.

[3] ALRC and NSWLRC, Family Violence – A National Legal Response (ALRC Report 114), chapter 14 (in the context of the application of the general defence of self-defence to victims of family violence who kill their partners and are charged with homicide), November 2010. See also: Victorian Law Reform Commission, *Defences to homicide: final report*, October 2004, pp. 61–64 at [3.8]–[3.14].

that a serious threat may exist, but does not have the opportunity to accurately assess this threat before taking action.

The objective element would ensure that the defence is limited to situations where fleeing the country or retaining the child out of the country is a reasonable response to the feared family violence. This would likely limit the defence to scenarios that involve more serious and direct forms of family violence. The defence does not require that family violence or threats of family violence have previously occurred, although evidence of actual family violence would likely make both elements easier to prove.

Clearly the matter of whether the defendant 'believes' that the retention of the child is necessary to prevent family violence will be peculiarly within their knowledge, and it is difficult to envisage how the prosecution would be able to more readily show that the defendant did not have this belief.

For the above reasons, I consider that the reversal of the evidential burden in respect of the 'fleeing family violence' defence provided for in subsections 11PP(4), 11PQ(4), 11PPA(3) and 11PQA(3) is appropriate.

Restriction on publication of parenting management hearings offence

Section 11RA of the PMH Bill is modelled on section 121 of the Family Law Act and creates two offences for publishing identifying accounts of a parenting management hearing and publishing identifying lists of the hearings. Section 11RA restricts the publication of any accounts of Panel proceedings, or parts of any proceedings, that identify the parties or others involved in the case. The restriction applies to publication, or other dissemination, to the public or a section of the public, and can apply to disclosures online as well as through the media. A breach of section 11RA is an offence punishable by imprisonment of up to one year.

Subsection 11RA(4) sets out the circumstances in which the general prohibition does not apply. This mirrors the defences in subsection 121(9) of the Family Law Act which was introduced in 1983.

As the Committee has noted, an accused person bears the evidential burden in relation to proving that one of the circumstances applies, and this reverses the criminal law principle that the prosecution should ordinarily prove every element of the offence.

While the Committee is of the view that the range of circumstances which can be relied on as a defence appear to be primarily factual, I consider that the offence-specific defence is justified on the basis that an accused person is in the best position to discharge the burden of proof and would be readily able to do this.

The nature of the offence set out in section 121 (and mirrored in section 11RA) has been the subject of some commentary. A report by Professor Richard Chisholm on how experts' reports can be better shared between the federal family law system and the State and Territory child protection systems contained an analysis of section 121 which may assist the Committee:[4]

> The essential purpose of s 121 is to prevent the media from publishing to the public material that identify parties in family court proceedings. The substance

[4] *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration*: A report by Professor Richard Chisholm AM, published by the Attorney-General's Department, March 2013, p 32

of the section is the creation of a criminal offence: to publish or disseminate *to the public or to a section of the public* an account of proceedings that identifies a party or other person involved in a case.[5]

There are numerous exceptions and elaborations. But resort to them is unnecessary unless there is a publication or dissemination of the kind specified, namely *'to the public or to a section of the public'*. The case law indicates clearly that it would not include providing documents or copies of documents to a child protection officer or other person from that sector.[6] Such people are clearly not a 'section of the public': the communication — 'dissemination' to use the language of s 121 — is directed to individuals selected because they have a professional interest in it.[7]

Nevertheless, presumably to put the matter beyond doubt, the section spells out that providing documents to courts and other responsible agencies is not an offence. It specifically exempts *the communication, to persons concerned in proceedings in any court*, of any pleading, transcript of evidence or other document for use in connection with those proceedings.[8] And there are other such exemptions, for example communications to legal aid. But these detailed exemptions should not distract from the basic point, namely that none of these communications would constitute an offence anyway, because they are not communications to the public or a section of the public.

I consider that it is appropriate for the evidential burden to remain on the accused person in this context. If the prosecution successfully establishes that the accused's dissemination of information is 'to the public or a section of the public', then the defendant would be in a better position to point to the evidence that the sharing of information was authorised by, for example, the need to share information with authorities of States and Territories that have responsibilities relating to the welfare of children (paragraph 11RA(4)(b)) or communication of any document to a body that is responsible for disciplining members of the legal profession in a State or Territory (subparagraph 11RA(4)(c)(i)). Given the number of defences that are available (eight in total) it would also be difficult and costly for the prosecution to prove the non-existence of a particular authorisation.

Further, I also note that subsection 11RA(5) of the PMH Bill provides that proceedings for an offence against subsections (1) or (3) must not be commenced except by, or with the written consent of, the Director of Public Prosecutions. This is consistent with subsection 121(8) of the Family Law Act which also requires the written consent of the Director of Public Prosecutions to commence proceedings for an offence relating to publishing information about court proceedings under the Act. This is an important safeguard in addition to the Prosecution Policy of the Commonwealth which requires that a prosecution only be pursued where there is sufficient evidence to prosecute the case, and the prosecution would be in the public interest.

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[5] Section 121(1). Section 121(2) creates a similar offence, relating to court lists, but involves the words about a section of the public.
[6] See *Marriage of Tingley* (1984) 10 Fam LR 707; FLC 91–588 (the transmission of documents to the Attorney-General or departmental officers is not a communication to the public or to a section of the public); *Marriage of Bateman and Patterson* (1981) 7 Fam LR 33; FLC 91–057; *Marriage of P & P* (1985) 9 Fam LR 1100 at 1113; FLC 91–605; *Marriage of Toric* (1981) 7 Fam LR 370; FLC 91–046.
[7] Of course those people, too, are bound by s 121; but again, using the documents in the course of their work would not seem to involve disseminating them to a section of the public.
[8] Section 121(9)(a).

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

In response to the Committee's question at paragraph 1.48, section 70.3 of the *Criminal Code Act 1995* (Criminal Code) provides a defence to the foreign bribery offence where a written law in force in the place conduct occurs permits the provision of the benefit to the relevant foreign public official. The Bill incrementally expands the definition of foreign public officials to also cover candidates for a foreign public office. The proposed defence in subsection 70.3(2A) is necessary to extend the existing lawful authority defence to also apply to conduct involving candidates for a foreign public office, ensuring consistency across all categories of foreign public official.

This offence-specific defence for foreign bribery is consistent with the broader principle in Australian law of a defence of lawful authority, for which the defendant bears the evidential burden of adducing evidence that suggests a reasonable possibility that the lawful authority exists (sections 10.5 and 13.3 of the Criminal Code).

The defence (and the proposed extension of it to bribery of candidates) is appropriate because:

- The defendant would be in a better position to point to the evidence of the written foreign law he or she relied on when offering or providing the benefit. The defendant could readily and cheaply provide evidence of the existence of the foreign law and their reliance on it to support their case. Corporate defendants in particular are likely to have working relationships in the foreign country and to have undertaken due diligence prior to providing a benefit or making a payment.
- It would be difficult and expensive for the prosecution to prove the non-existence of a law in a foreign jurisdiction. For example, this would require the prosecution to seek evidence of any written law pursuant to a mutual assistance request, which is often time consuming and not always successful.
- The question of whether the benefit was required or permitted under a foreign country's written law is not central to the question of culpability for the offence. The essential elements of the proposed foreign bribery offence are that the defendant provided, offered or caused to be provided or offered, a benefit to another person with the intention of improperly influencing a foreign public official in order to obtain an advantage.

In response to the Committee's questions at paragraph 1.55, the guidance under proposed section 70.5B will be principles-based, aimed at helping corporations understand the types of steps they can take to prevent bribery of a foreign public official. The guidance will be designed to be of general application to corporations of all sizes and in all sectors. It will comprise suggested anti-bribery policies and procedures that should be read in the light of two overarching guiding principles: proportionality and effectiveness.

It is reasonable to expect companies of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their business. However, the application of steps to prevent foreign bribery will differ substantially from corporation to corporation – I do not consider it reasonable to expect small and medium-sized enterprises to put in place a compliance program of the same size that would be required of a large multi-national company. Similarly, a corporation with limited exposure to foreign bribery risk should not be expected to take mitigation measures as extensive as another corporation that has a significantly greater risk profile.

It is for this reason that I propose to provide guidance, rather than a legislated, prescriptive checklist of compliance. In this way, it will not be for Government to determine or clarify the limits of criminal liability with respect to the offence. This is appropriately a matter for courts, taking into account the circumstances of each case without the encumbrance of rigid statutory requirements.

Departure from the guidance's suggested procedures will not of itself give rise to a presumption that a corporation does not have adequate procedures in place. Indeed, not all of the policies and procedures suggested in the guidance are necessarily applicable to the circumstances of each corporation. However, companies will need to implement robust and effective steps to prevent foreign bribery to their circumstances. Companies with effective and well integrated compliance regimes would not be convicted of the failure to prevent foreign bribery offence.

The guidance will be broadly consistent with the guidance that the United Kingdom Ministry of Justice has published in relation to section 9 of the Bribery Act 2010 (UK). This is in line with the preference Australian industry has expressed and will enable Australian companies that have already framed their anti-bribery policies on international guidelines to easily incorporate additional policies relevant to the Australian context. I will ensure that the Attorney-General's Department publicly consults on the guidance and I will review and incorporate industry and other feedback.

Foreign Influence Transparency Scheme Bill 2017
Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017
National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017

I note that the Committee has also sought my response in relation to its comments about these three Bills. I will respond to the Committee separately on those Bills.

Thank you again for bringing these issues to my attention. I trust this information is of assistance to the Committee and look forward to the Committee's final report.

Thank you for raising these matters with me.

Yours sincerely

The Hon Christian Porter MP
Attorney-General

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

REF: MC18-000356

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

Dear Chair

I thank the Senate Scrutiny of Bills Committee (the Committee) for its consideration of the *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017* (the Bill).

The Bill will significantly reform the electoral funding and disclosure regime in the *Commonwealth Electoral Act 1918*. Reform is necessary to support the integrity of Australia's electoral system, and Australia's sovereignty, by ensuring that only those with a meaningful connection to Australia are able to influence Australian politics and elections through political donations. It will also ensure that the Commonwealth's electoral funding and disclosure regime keeps pace with international and domestic developments and provides transparency for Australian voters.

My substantive response to the Committee's request for information is attached.

I trust this information is of assistance.

Kind regards

Mathias Cormann
Minister for Finance

28 February 2018

Response of the Minister for Finance to the Senate Scrutiny of Bills Committee in relation to the Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Bill 2017 (the Bill)

Significant matters in delegated legislation

Committee comment

1.61 The committee's view is that significant matters, including key policy aspects of the electoral reform framework and core elements of offences, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the minister's detailed advice as to:

- why it is considered necessary and appropriate to empower the minister to determine, by delegated legislation, that Australian residents are not 'allowable donors';
- the type of consultation that it is envisaged will be undertaken prior to making such a determination; and
- whether specific consultation obligations (beyond those in the *Legislation Act 2003*) could be included in the bill (with compliance with such obligations a condition of the validity of a determination made under proposed subsection 287AA(2)).The preceding analysis raises questions about the compatibility of the registration requirement for political campaigners, third party campaigners or associated entities with the right to freedom of expression, the right to freedom of association, the right to take part in public affairs and the right to privacy.

Response

I consider it necessary and appropriate to establish ministerial powers to determine, by delegated legislation, who is an 'allowable donor' while guaranteeing the right to donate of those with the most significant connection to Australia. Such delegation ensures appropriate flexibility in the operation of the legislation to maintain the integrity of Australia's electoral system, and Australia's sovereignty. I further consider that the fact that the determination is disallowable provides the opportunity for appropriate parliamentary oversight of the proposed ministerial discretion.

Consultation
I consider the consultation obligations as set out in the *Legislation Act 2003* are appropriate and sufficient.

Compatibility with human rights
I consider the Bill's requirements are sufficiently circumscribed and proportionate, given the significant public interest in promoting the transparency of our political system. I set out my reasons in relation to registration below.

As stated in the Bill's Statement of Compatibility with Human Rights (Statement of Compatibility), registration of key non-party political actors promotes the rights of citizens to participate in elections by assisting them to understand the source of political communication. These key non-party actors are already required to identify themselves in political communications by the *Electoral and Other Legislation Amendment Act 2017* (the Authorisation Amendment Act). Registration will complement the Authorisation Amendment Act's transparency reforms by:

a) allowing voters to form a view on the effect of political expenditure; and
b) discouraging corruption and activities that may pose a threat to national security.

Registration with the Australian Electoral Commission will be simple and involve the provision of information readily available to the applicant. No fees will apply.

The Bill narrows the current definition of 'political expenditure', as currently set out in the Authorisation Amendment Act. This definition captures expenditure promoting political views. Whether or not the views or the issue are partisan in nature is immaterial to whether they are political in nature, and therefore the transparency of expenditure used to raise the prominence of such views in public debate is in the public interest.

It is also in the public interest for citizens to be able to identify where an issue is prominent in public debate because its supporters or detractors incurred a significant amount of expenditure. Without such transparency, citizens could reasonably infer that the issue was a priority for government intervention, at the cost of other, perhaps more worthy or pressing, issues.

Presumption of innocence: entry in Register constitutes prima facie evidence

Committee comment

1.70 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to effectively reverse the evidential burden of proof by providing that an entry in one of the Registers is prima facie evidence of the information contained in the entry.

Response

This provision is consistent with similar existing provisions in the *Commonwealth Electoral Act 1918*, such as subsection 391(2), on records of claim for enrolment. I consider that anyone who has an entry in a register is best placed to address issues on their particular entry. This is particularly the case given obligations on registrants under section 287P of the Bill to notify the Electoral Commissioner within 28 days of the information relating to their entry on a register ceasing to be correct or complete. The consistent use of the provision in the *Commonwealth Electoral Act 1918* ensures administrative efficiency for the Australian Electoral Commission.

Significant penalties

Committee comment

1.76 It is not apparent to the committee that the penalties in proposed sections 302D to 302L of the bill are appropriate by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences.*

1.77 The committee therefore seeks the minister's detailed advice as to the justification for the significant custodial penalties proposed by these provisions. In particular, the committee seeks the minister's advice as to specific examples of applicable penalties for comparable Commonwealth offence provisions.

Response

The penalties in proposed sections 302D to 302L of the bill are consistent with the serious nature of the offences and the potential effect that such offences have on the integrity of Australia's electoral system, and Australia's sovereignty. The provisions provide the option of custodial penalties alongside, or in addition to, financial penalties. The proposed penalties are comparable to fraud and bribery offences in chapter 7 of the Commonwealth Criminal Code. I consider that such penalties are appropriate to ensure the integrity of Australia's electoral system by restricting foreign influence on Australian political actors including campaigners.

SENATOR THE HON MITCH FIFIELD
DEPUTY LEADER OF THE GOVERNMENT IN THE SENATE
MINISTER FOR COMMUNICATIONS
MINISTER FOR THE ARTS

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

Response to Standing Committee for the Scrutiny of Bills,

Helen

Dear Senator Polley

Thank you for your letter of 8 February 2018 regarding the Senate Standing Committee for the Scrutiny of Bills' (the Committee) assessment of the Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Bill 2017 (the Bill). Please note the Bill is now referred to as the Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Bill 2018.

The Bill will introduce a federal civil penalty regime targeted at perpetrators and content hosts who share intimate images without consent. The regime's civil penalties will allow the eSafety Commissioner (the Commissioner) and the Office of the eSafety Commissioner (eSafety Office) to take action to quickly remove intimate images posted online without consent and to address the threat of intimate images being shared without consent. Civil penalties of up to $105,000 for individuals and up to $525,000 for corporations can be applied for breaches of the prohibition.

The Committee, in the *Scrutiny Digest 1 of 2018,* sought my advice in relation to three aspects of the Bill:

1. Reversal of evidential burden of proof.
2. Broad delegation of administrative powers.
3. Exclusion of merits review.

Reversal of evidential burden of proof

I note the Committee's view that the explanatory materials do not provide any justification for the reversal of the evidential burden of proof, merely stating the effect of the relevant provisions. Under the Bill, in any proceedings for a civil penalty, if intending to rely on any of the three exceptions to the prohibition the onus is on the alleged perpetrator to provide evidence that the exception applies. The three exceptions to the prohibition are: where consent to share an intimate image was provided by the person depicted; the post of the intimate image is an exempt post; or the perpetrator was not aware that the person depicted in the image consistently wears attire of religious or cultural significance in public.

Specifically, the Bill states that consent must be express, informed and voluntary. I note the Committee's comment that in cases where there is a reversal of a burden of proof this should merit careful scrutiny, as there could be a risk that this might unduly trespass on personal rights and liberties. I consider the reversal of the onus of proof in these circumstances is appropriate, notwithstanding the possibility of the imposition of a significant civil penalty on an individual.

The civil penalty provisions under the Bill are enforceable under the *Regulatory Powers (Standard Provisions) Act 2014* (the RPSP Act), which provides that in proceedings if a person intends to rely on any exception, exemption, excuse, qualification or justification provided in the civil penalty provision, then the person bears an evidential burden in relation to that matter. Accordingly, this is the general approach adopted for civil penalty provisions enforceable under the RPSP Act, and the current Bill does not depart from this approach.

Placing the evidential burden on a person relying on an exception to the prohibition on the non-consensual sharing of intimate images is appropriate as the exceptions are generally matters which are peculiarly within the person's knowledge, for example, in relation to consent, and whether the person knew that the person depicted in the image ordinarily wore particular attire for a religious or cultural reason when in public. In the case of the latter, the person sharing the image would be best placed to provide evidence that they were not aware that the person depicted in the image ordinarily wore attire of religious or cultural significance.

With regards to an exempt post, this is often determined by the purpose of the post, such as if it is for genuine medical or scientific purposes, or the post is for the purposes of proceedings in a court or tribunal. Again, the person sharing the image is best placed to provide evidence as to why the image was shared, and whether this would amount to an exempt post.

In addition to the reasons set out above, the intent of the evidential burden of proof resting with the perpetrator is to minimise the impact on victims of the non-consensual sharing of intimate images. Victims are often traumatised and to require the burden to rest with the Commissioner that consent was not provided to the perpetrator by the victim could result in re-victimisation. Thus, such an arrangement meets this objective.

Broad delegation of administrative powers

I note the Committee's concern in relation to the delegation of administrative powers to a relatively large class of persons. Currently, under section 46A, the Commissioner can authorise, in writing, any member of staff of the Australian Communications and Media Authority to issue infringement notices.

I note that simply because a broad authorisation power is conferred on the Commissioner, this does not necessarily mean that the Commissioner would exercise the power in such a way. In practice, it is expected that the Commissioner would only authorise staff with appropriate attributes, qualifications, qualities and relevant experience. The eSafety Office has advised that it is considering empowering around three staff to be able to do this.

They are, the manager of the image-based abuse portal team (who is a permanent Executive Level 2), the Senior Investigations Officers in the team (who are permanent Executive Level 1) or a Senior Executive Service (SES) Band 1 (who currently holds the position of Executive Manager at the eSafety Office). From a resourcing perspective, it would be impractical and limiting to both have only one member of staff able to perform this function or only staff at the SES level. Furthermore, the reason the delegation refers to staff of the Australian Communications and Media Authority (ACMA) is due to the current legislative framework whereby under the *Enhancing Online Safety Act 2015*, staff of the eSafety Office are technically employed by the ACMA.

I note that the Committee's preference is that the legislation set a limit to the scope of the powers, to be confined to those that hold special attributes, qualifications or qualities. I am of the view that the eSafety Office has reflected these considerations in its proposed list of officers who may issue an infringement notice. Additionally, the eSafety Office has advised that the procedures around the issuing of an infringement notice will be approved in writing by the Commissioner.

Exclusion of merits review

I note the Committee's concern that a decision by the Commissioner to refuse to give a removal notice is not reviewable by the Administrative Appeals Tribunal (AAT).

Under the Bill a person can make a complaint, or give an objection notice, to the Commissioner in relation to an intimate image (sections 19A and 19B respectively). On receipt of a complaint or objection notice the Commissioner has a variety of options to affect removal of an intimate image. The issuing of a removal notice is one option., while other options include informally seeking removal, accepting an enforceable undertaking, or seeking an injunction from a court.

While a decision of the Commissioner to refuse to issue a removal notice would not be reviewable by the AAT, if a removal notice was not issued and the image was not removed, this would not prevent a person from making another complaint to the Commissioner. For example, if the person were able to provide more information to the Commissioner to demonstrate that it was an intimate image shared without consent.

Sections 44D, 44E and 44F sets out the conditions under which the Commissioner can issue a removal notice to an end-user (a perpetrator), hosting service providers, and to providers of a social media service, a relevant electronic service or a designated internet service. These sections also provide that if the Commissioner decides not to issue a removal notice he/she is required to notify the person who lodged the complaint or objection notice. It is expected that the Commissioner would also include reasons why the notice was not issued.

In order for the eSafety Office to affect rapid removal of an image, the complaint or objection notice must contain sufficient information. Lack of detail including for example, how and by whom the image was shared without consent, might impede this work and result in a decision not to issue a removal notice.

Given the significant harm that can be caused to victims of non-consensual sharing of intimate images, I remain satisfied with the current provisions in the Bill as they relate to the reversal of evidential burden of proof, the broad delegation of administrative powers and the exclusion of merits review for the reasons outlined above.

Thank you for providing the opportunity to respond to these issues.

MITCH FIFIELD

9/3/18

The Hon. David Littleproud MP

Minister for Agriculture and Water Resources
Federal Member for Maranoa

Ref: MS18-000262

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

26 FEB 2018

Dear Senator Polley

The Senate Scrutiny of Bills Committee (Committee) has requested further information about measures in the Export Control Bill 2017. The enclosure sets out my detailed response to the questions raised by the Committee.

I thank the Committee for their consideration of the Bill.

Yours sincerely

DAVID LITTLEPROUD MP

Enc

Parliament House, Canberra ACT 2600 Telephone: 02 6277 7630 Email: minister@agriculture.gov.au

Response to the Senate Scrutiny of Bills Committee request for information in relation to the Export Control Bill 2017.

Request at paragraph 1.95 – Delegation of legislative powers

The committee requests the minister's advice as to whether a variation of a temporary prohibition determination issued under clause 25 will be a legislative instrument and, if not, why it is appropriate to exclude such a variation from the parliamentary scrutiny afforded to legislative instruments.

I consider that a determination made under clause 24 and a variation to a determination under clause 25 would fall within the definition of a legislative instrument, based on the relevant provisions in the *Legislation Act 2003*. As a legislative instrument, the determination will be subject to parliamentary scrutiny through the usual disallowance process.

Subsection 5(1) of this Act provides that a legislative instrument is an instrument in writing of a legislative character. Subsection 5(3) states that, among other things, an instrument has legislative character if it determines the law or alters the content of the law, rather than applying the law in a particular case; and it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right. In addition, subsection 8(4) defines legislative instruments to include an instrument if any provision of the instrument is made under a power delegated by the Parliament. An instrument is also a legislative instrument if it has the direct or indirect effect of affecting a privilege or interest, imposing an obligation, creating a right, or varying or removing an obligation or right.

Request at paragraph 1.104 – Broad discretionary power

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

- **why it is proposed to confer on the secretary a broad discretionary power to exempt persons proposing to export relevant goods from provisions of the bill;**
- **why it is considered necessary and appropriate to leave core elements of the exemptions framework, particularly the matters to which the secretary must have regard before granting an exemption, to delegated legislation;**
- **the appropriateness of amending the bill to provide more specificity as to the circumstances in which a person is eligible to apply for an exemption or to set out the relevant considerations the secretary must take into account in deciding whether to grant an exemption; and**
- **why an exemption decision is not subject to any form of merits review.**

Proposed Part 2 of Chapter 2 of the Bill seeks to establish a framework for the Secretary to grant exemptions from provisions of the Bill in relation to particular goods in certain specified circumstances. An exemption may be granted if the goods are a commercial sample, if the goods are for experimental purposes, where there are exceptional circumstances, where there are special commercial circumstances, or where the importing country does not require the export controls to apply to the goods. The Bill does not provide for exemptions for kinds of goods in situations where these circumstances do not exist.

An exemption may be granted following an individual application rather than in relation to all goods of a particular kind or all goods exported to a particular importing country. The purpose of this is to enable a reduced level of regulatory oversight in circumstances where the risk posed by exporting the goods to the importing country is minimal and the importing country has accepted this risk.

There is a broad range of matters that the Secretary may need to take into account when deciding to grant an exemption. These matters may be detailed and specific to a particular circumstance, importing country or kind of goods, and are not appropriate to be included in the Bill. In addition, these circumstances may change at short notice in accordance with importing country requirements. For this reason, it is not practical to include these matters in the Bill.

The Administrative Review Council's publication '*What decisions should be subject to merit review?*' (1999) indicates that decisions for which there is no appropriate remedy may be suitable to be excluded from merits review. A decision to grant an exemption would be made on the basis of an individual application. In the majority of cases, decisions must be made quickly, as many of the goods subject to regulation under the Bill are perishable. In many cases it is likely that the goods to which the review relates would no longer be suitable for export. As such, there is no remedy available. In addition, a decision to grant an exemption is about determining the circumstances in which it is acceptable to exclude a consignment of goods from the requirements of the legislation. Such decisions may have implications beyond the interests of an individual exporter, including adversely impacting trading partners' confidence in the Australian Government's regulatory oversight of exported goods. This in turn may affect the interests of the export industry or a segment of that industry.

Request at paragraph 1.109 – Broad delegation of administrative powers: to non-Commonwealth officers or bodies

The committee requests the minister's advice as to:

- **why it is appropriate to allow decisions with respect to the issuing of government certificates to be made by any person or body as specified in the rules; and**
- **what accountability and review mechanisms will apply in relation to decisions made by non-Commonwealth officers.**

Clause 12 of the Bill provides that an 'issuing body' for a government certificate in relation to a kind of goods means a person or body that may issue a government certificate in relation to goods of that kind under clause 63. Clause 63 of the Bill provides that the issuing body for a kind of goods is the person or body specified in the rules. If there is no issuing body specified for a kind of goods in the rules, the issuing body is exclusively the Secretary.

In accordance with paragraphs 63(2)(b) and (c) of the Bill, an issuing body may be a person or body covered by an approved arrangement; or a specified person or body. Such third party issuing bodies are necessary in circumstances where a body or person has the specialisation, knowledge and expertise to certify a kind of goods. For example, bodies that have specialised expertise in organics certification would be authorised to issue certificates in relation to organic goods.

The authorisation for a person or body covered by an approved arrangement, or a specified person or body, to issue government certificates will be subject to safeguards that will be established by the Bill. First, the rules that specify an issuing body will be subject to parliamentary oversight, and therefore disallowance. Second, issuing bodies will be subject to accountability and review mechanisms administered by the Secretary. An issuing body who is covered by an approved arrangement will be subject to the checks and measures set out in Chapter 5 of the Bill (Approved arrangements). This includes the power to vary, suspend or revoke an approved arrangement in whole or in part. For example, if the functions of the issuing body will no longer ensure compliance with requirements of the Act in relation to export operations the approved arrangement may be suspended. These provisions in Chapter 5 also include the requirement to comply with any specified obligations and conditions to which the approved arrangement is subject.

This approach follows a similar model currently in place under the *Export Control Act 1982*. For example, the *Export Control (Organic Produce Certification) Orders* allows certain bodies to certify organic produce on behalf of the Government, subject to the establishment and maintenance of a documented system that the Secretary may audit to ensure certificates are issued in appropriate circumstances. It is intended that such documented systems will be managed under the Bill through approved arrangements and subject to similar requirements.

In circumstances where an issuing body is a non-Commonwealth officer that is not under an approved arrangement, the Secretary would be able to conduct audits of that issuing body in accordance with clause 267 of the Bill. Clause 267 provides that the Secretary may require an audit to be conducted of the performance of functions and the exercise of power under this Act by any other person (other than a Commonwealth authorised officer or a State or Territory authorised officer) who performs functions or exercises powers under the Bill (see subparagraph 267(1)(i)). This will include issuing bodies. The Secretary is also able to revoke any certificate issued by any issuing body, and may amend the rules to remove a third party issuing body.

In addition, the rules may prescribe that an issuing body, whether under an approved arrangement or not, may be required to satisfy the fit and proper person test before being able to issue government certificates (see clauses 372 and 373).

Request at 1.113 – Significant matters in delegated legislation

The committee therefore requests the minister's advice as to why it is appropriate to provide that all of the details as to what conduct will constitute an offence under clause 258 (which will be subject to a penalty of up to five years imprisonment) is to be set out in the rules.

Clause 258 of the Bill proposes to make it an offence for a person to engage in conduct that contravenes a rule made under Division 2 of Part 3 of Chapter 8 of the Bill in relation to official marks, marks resembling official marks and official marking devices. These rules address such matters as who may possess or manufacture an official mark or an official marking device, and the persons who may apply an official mark or a resemblance of an official mark. The rules are likely to relate to a particular commodity rather than to all prescribed goods covered by the Bill.

Paragraph 2.3.4 of the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers provides that it is appropriate to have the conduct that will constitute an offence set out in a legislative instrument in the following circumstances:

- the relevant content involves a level of detail that is not appropriate for the Act, and
- prescription by legislative instrument is necessary because of the changing nature of the subject matter.

This guideline is applicable to clause 258 for the following reasons. First, the law regarding official marks, marks resembling official marks and official marking devices is highly detailed and technical and will relate to commodity specific requirements. For example, the rules may prescribe detailed methods for the application of an official mark which is specific to a particular kind of goods and tolerances for dimensions of official marks. This operational level of detail is not appropriate to be set out in the primary legislation.

Second, the legal requirements for official marks, marks resembling official marks and official marking devices change relatively frequently. For example, pictorial representations of official marks for a particular kind of good may be required (see, for example, Part 13 of the *Export Control (Prescribed Goods – General) Order 2005*). These images may need to change quickly in accordance with importing country requirements or advances in manufacturing and application processes. To enable a response to these changes it is not appropriate to prescribe conduct that relates to the proper oversight and management of official marks, marks resembling official marks and official marking devices in primary legislation.

In addition, the rules are legislative instruments and will be subject to parliamentary oversight, including disallowance.

Request at 1.118 – Broad delegation of administrative powers: absence of training, qualification or skill requirements

The committee seeks the minister's detailed advice as to:

- **why the bill does not require that the secretary only appoint auditors, assessors or analysts that possess relevant skills, training or experience;**
- **at a minimum, why there is no obligation for the rules to set out the requirements that must be met for approval of an auditor, assessor or analyst; and**
- **what accountability and review mechanisms will apply in relation to decisions made by non-Commonwealth officers.**

The effectiveness of, and confidence in, the export control regime depends on the capacity and capability of persons performing functions and exercising powers under the Bill. Therefore, the Bill will enable the rules to make provision in relation to the approval of auditors and assessors and the assessment and competency of applicants. Relevant skills, training or experience will be taken into account before a person is approved to be an auditor, assessor or analyst under the Bill.

I note the Committee's comments in relation to the types of persons who may be appointed as auditors, assessors or analysts. The Bill will enable the rules to make provision for a fit and proper person test (under clause 372) to apply for the purposes of any provision under the Bill or rules. This will ensure that certain persons in the supply chain are trustworthy and demonstrate the required integrity necessary to uphold Australia's trading reputation. All Australian Public Service (APS) employees in the Department of Agriculture and Water Resources (Department) are subject to the APS Code of Conduct as well as other key performance indicators.

In relation to oversight of third party auditors, assessors and analysts, and to ensure an effective export control regime, the rules will set out the powers of the Secretary to be able to suspend or revoke the approval of these people. As legislative instruments, the rules will be subject to parliamentary oversight and disallowance. In addition I will be able to give directions to the Secretary about the rules which, for example, may require the Secretary to take certain things into account when making rules (see clause 289).

Request at 1.123 – Broad sub-delegation of administrative powers: to any APS level employee

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

- **each of the powers and functions under the bill that may be sub-delegated, the justification for each sub-delegation and examples of the persons to whom it is envisaged each sub-delegation would be made; and**
- **the appropriateness of amending the bill to require that persons to whom powers are sub-delegated be confined to officers or employees that hold special attributes, qualifications or expertise.**

Subclause 288(1) specifies powers under the Bill that must not be delegated and subclause 288(3) specifies powers that must not be subdelegated. Any other powers of the Secretary under the Bill that are been delegated to an SES officer may be subdelegated to an authorised officer or an APS employee of my Department. Subdelegable powers have been identified based on the following policy considerations. These decisions do not have the capacity to affect national interests or Australia's trading relationship with other countries.

As stated in the Explanatory Memorandum, administrative necessity may require these decisions to be made by staff at lower classification levels due to the high volume of decisions, or time-sensitivity of the decisions.

The effectiveness of, and confidence in, the export control regime depends on the capacity and capability of persons performing functions and exercising powers under the Bill. Therefore, my Department will ensure that only those persons with appropriate training, qualifications and expertise will be delegated (or subdelegated) powers under the Bill. The decisions that are able to be subdelegated will not have serious implications for Australia's export industry as a whole or a particular export industry.

All APS employees in my Department with delegated powers are subject to the APS Code of Conduct as well as other key performance indicators. Third party authorised officers may be suspended or commit an offence for failing to comply with the conditions of their authorisation. I believe that these oversight mechanisms provide sufficient safeguards for the exercise of powers under the Bill, including those with subdelegations.

The person or persons to whom a power is subdelegated will depend on the specific power and which area of my Department is responsible for regulating that export industry for that aspect of the Bill. For example, the power to approve an approved arrangement may be subdelegated to directors (APS Executive Level 2) in the relevant program areas for industries that use approved arrangements (such as live animal export, meat and plants). The power to cause forfeited goods to be sold, destroyed or otherwise disposed of may be subdelegated to directors in Department based in regional areas where goods may be forfeited to the Commonwealth. The power to approve the payment of compensation may be subdelegated to an APS employee of my Department, such as a Director (APS Executive Level 2), in the Finance and Business Support Division which deals with compensation payment.

It would not be appropriate to amend the Bill to limit subdelegation to officers or employees who hold special attributes, qualifications or expertise. The attributes, qualifications or expertise that are needed or desirable to exercise a subdelegated power will vary for each subdelegable power. These requirements will continue to be dealt with administratively, which will allow the delegate to consider the detailed attributes, qualifications or expertise required for a subdelegate to exercise a specific power.

The following powers under the Bill may be subdelegated are listed at Attachment A.

Request at 1.126 – Significant matters in non-statutory determinations

The committee requests the minister's more detailed advice as to a why it is considered that determinations made under subclauses 291(7) and 324(2) are not legislative instruments (and therefore not subject to disallowance).

The determinations made by the Secretary under subclauses 291(7) and 324(2) set out the training and qualifications necessary for authorised officers. The determinations relate to administrative Departmental policy that will facilitate the requirement for authorised officers to have the training and qualifications necessary to perform the functions and exercise the powers set out in their instrument of authorisation. The determinations are analogous to employment documents that set out the prerequisites for a person seeking employment in a particular position or job.

The determinations relate to individual persons or classes of persons and do not address the appointment of persons to public offices or committees, which may be appropriate to be available to the public and subject to parliamentary oversight. For these reasons, I believe that the instruments should not be treated as legislative instruments that are subject to disallowance.

Request at 1.135 – Reversal of evidential burden of proof

The committee requests the minister's detailed justification as to the appropriateness of including the matters specified in paragraph 307(2)(a) and subclauses 308(2) and (5) as offence-specific defences. The committee considers it may be appropriate if these clauses were amended to provide that these matters form elements of the relevant offences, and seeks the minister's advice in relation to this.

Subclause 307(1) of the Bill provides that it is an offence for a person who has been issued with an identity card to fail to return the card within 14 days after ceasing to be an authorised officer, approved auditor or any other person who performs functions or duties or exercises powers under the Act and is prescribed by the rules. Paragraph 307(2)(a) provides an exception to this offence if the authorised officer's authorisation is suspended.

Subclause 296(5) of the Bill provides that, if a person's authorisation as an authorised officer is suspended, the person is taken not to be an authorised officer during the period of suspension. The intent of including paragraph 307(2)(a) was to clarify that an authorised officer who has been suspended does not commit an offence if they fail to return their identity card. This recognises that, in some instances, a suspension of a person's authorisation will be revoked and the person will continue to be an authorised officer.

My Department will be able to establish whether a person's authorisation as an authorised officer was suspended, and therefore whether he or she was required to return their identity card. This accords with subsection 13.3(4) of the Criminal Code, which provides that the defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court. In practice, my Department would not institute proceedings in circumstances where the authorisation was suspended. The exception is enlivened when the authorisation is suspended and not whether the defendant can establish they had been given or received a notice of suspension.

Subclause 308(1) provides that the occupier of a registered establishment must not provide goods to an authorised officer. Subclause 308(2) provides that this prohibition does not apply if the Secretary has given approval in writing for the occupier to provide the goods and services to the authorised officer. In addition, subclause 308(4), provides that an authorised officer must not receive goods or services from the occupier of a registered establishment. Subclause 308(5) provides that this prohibition does not apply if the Secretary has approved receipt of the goods by the authorised officer.

Whether the occupier of the registered establishment was given a written notice of approval is peculiarly within the knowledge of the occupier as the occupier will have received the notice and have access to it within the records of the registered establishment. Similarly, the authorised officer will have personal knowledge of the whether he or she was given a written notice of approval to receive the goods and services from the occupier of a registered establishment and the authorised officer will have access to that document within their records. It would be significantly more difficult and costly for the prosecution to prove that written approval had not been given to the occupier, or that written approval had not been given to the authorised officer.

Request at 1.139 – Broad delegation of administrative powers: to 'persons assisting'

The committee therefore requests the minister's advice as to why it is necessary to confer coercive powers on 'persons assisting' an authorised officer and the appropriateness of amending the bill to require that any person assisting an authorised person have specified skills, training or experience (including in the use of force).

The Bill proposes to allow an authorised person to be assisted by other persons in exercising certain powers or performing certain functions or duties under the Regulatory Powers Act. In addition, an authorised officer may be assisted by other persons in relation to entry to adjacent premises, entry to premises without a warrant or consent, and the exercise of powers in emergency situations. The person assisting may enter premises and exercise the powers available to authorised officers in these circumstances, in accordance with any direction from an authorised officer. A person assisting an authorised officer may also use such force against things as is necessary and reasonable when entering premises and executing warrants.

It is necessary to confer coercive powers on a person assisting an authorised person or authorised officer for the following reasons:

- no other authorised person or authorised officer may be available to assist;
- the premises that are subject to monitoring or investigation may be large;
- there may be a large number of documents or material that needs to be reviewed;
- there may be a large number of things that need to be searched, or inspected, examined or sampled;
- the person assisting may be more familiar with the premises, or have particular skills or knowledge that would enable the authorised person or authorised officer to effectively exercise their powers and perform their functions or duties;
- things may be heavy or difficult to move without assistance.

It would not be appropriate to amend the Bill to specify the expertise or training that persons assisting are required to possess. Allowing a person assisting to exercise coercive powers will support the authorised officer in the exercise of their powers to monitor and investigate compliance with the Bill. Persons assisting will need to have different expertise and training, which will vary depending on the circumstances, such as the purpose of the entry to premises (such as for monitoring or investigation purposes), the nature of the premises or things, and the anticipated needs of the authorised officer in exercising their powers under the Bill. For example, a person assisting may need to be a specialist in operating electronic equipment, a person with scientific knowledge of the goods that are the subject of the exercise of powers, a person with knowledge of the business operations of the premises, or a person who is trained to review financial records. The expertise or training required will be determined based on administrative policy, which will ensure flexibility to different circumstances.

An administrative approach to determining expertise and training requirements for persons assisting is consistent with both the *Export Control Act 1982* and the compliance and enforcement powers provided for in the *Biosecurity Act 2015* (see sections 482(8) 485(8), 505, 515).

Request at 1.146 – Use of force

The committee therefore seeks the minister's detailed advice as to:

- **the circumstances in which it is envisaged it may be necessary to allow the use of force against things during the execution of monitoring, investigation, and adjacent premises warrants, when entering premises to conduct offence related searches and seizures, and when stopping, detaining and searching a conveyance;**
- **the appropriateness of amending the bill to, at a minimum, require that authorised officers and persons assisting have appropriate skills, training or experience in the exercise of use of force powers;**
- **what safeguards, if any, will be implemented to ensure these powers are used appropriately; and**
- **why it is necessary to allow persons assisting an authorised person to use force against things.**

Whether the use of force is appropriate will depend on what is necessary and reasonable in the particular circumstances. For example, it may be necessary and reasonable to move a thing in order to access another thing on the premises when conducting a search. It may be necessary and reasonable to open a thing (such as a box or container) or remove packaging on goods in order to conduct a search or to inspect, examine or sample a thing. It may also be reasonable and necessary to use force to gain entry to premises under a warrant if the occupier has refused access and there are urgent and serious circumstances which justify immediate entry (such as where evidential material will be destroyed).

The effectiveness of, and confidence in, the export control regime depends on the capacity and capability of persons performing functions and exercising powers under the Bill. Therefore, the Bill will enable the rules to make provision in relation to the training requirements for authorised officers who exercise coercive powers. Relevant skills, training or experience will be taken into account before a person is authorised under the Bill.

Subclause 324(1) provides that third party authorised officers will not be able to exercise coercive powers, including use of force, under the Bill. For all other authorised officers, subclause 324(2) of the Bill provides that the Secretary must determine, in writing, training and qualification requirements for authorised officers in relation to the performance of functions or duties and the exercise of powers under Chapter 10 of the Bill (compliance and enforcement) or the Regulatory Powers Act. As the use of force relates to the performance of functions or duties and the exercise of powers under Chapter 10 of the Bill, the power to determine training and qualification requirements may include determining training or qualification requirements on the exercise of use of force powers.

In addition to training and qualification requirements for the use of force, my Department will ensure that use of force powers are used appropriately through other safeguards such as administrative policies and instructional material for persons assisting. As requirements for particular skills, training and qualifications, in relation to the exercise of coercive powers including the use of force, evolve and change over time, I do not believe that it is appropriate for these to be listed in the Bill.

It is necessary to allow a person assisting an authorised person or authorised officer to use force against things for the following reasons:

- no other authorised person or authorised officer may be available to assist;
- there may be a large number of things on the premises that need to be searched;
- things may be heavy or difficult to move without assistance.

Allowing a person assisting to use force as is reasonable and necessary in the circumstances will support the authorised person or authorised officer in the exercise of their powers to monitor and investigate compliance with the Bill. In addition, all APS employees in my Department are subject to the APS Code of Conduct as well as other key performance indicators in performing these, as well as any other, functions or exercising powers under the Bill.

Request at 1.154 – Exclusion of merits review

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

- **what decisions under the bill have been excluded from merits review and are not included in subclause 381(1) and the reasons for this exclusion in each case;**
- **why it is appropriate that decisions made under clauses 54 and 132 are excluded from merits review; and**
- **why it is not appropriate to allow merits review of decisions made under clause 67, subject to exemptions with regard to perishable items.**

The objective of merits review is to ensure administrative decisions are made according to law and the best decisions that could have been made on the basis of the relevant facts. It is directed to ensuring fair treatment of all persons affected by a decision and improving the quality and consistency of primary decision-making.

Subclause 381(1) of the Bill sets out decisions that are reviewable decisions under the Bill. Attachment B provides a list of decisions that are not reviewable based on the following reasons:

- Where the decision is in favour of the person affected by the decision. For example, a decision by the Secretary that specified conditions that are prescribed by the rules are not conditions for the accreditation of the property.
- Where the decision is procedural as opposed to substantive. For example, a decision not to allow a longer period in which to make an application for renewal of an accreditation.
- Where the decision is procedural (such as a notice of a proposed decision) and there are urgent or serious circumstances which justify reducing procedural fairness obligations. For example, a decision not to provide the manager of an accredited property with an opportunity to provide submissions on a proposed variation to the accreditation where the grounds for the variation are serious or urgent. In urgent or serious circumstances, the Secretary requires the ability to act quickly in order to protect the integrity of the export control regime. The substantive decision is a reviewable decision, which allows the person affected by the decision to seek review of the decision at that point. For example, the decision to vary the accreditation is a reviewable decision.
- Where the decision is mandatory and the decision-maker does not have discretion whether or not to make the decision. For example, the Secretary must suspend an accreditation of a property upon request by the manager of the property.

- Where the decision is made upon request of the person affected by the decision. It is assumed that the person affected by the decision in these situations would not wish to have the decision reviewed because it is at their request.
- Where the decision sets objective criteria that will apply to a specified group of people under the Bill, such as authorised officers. For example, the decision to determine training requirements for a person to be an authorised officer.
- Where the decision is not made by the Secretary (or a delegate or subdelegate of the Secretary). For example, a decision by an authorised officer or the Minister. The merits review regime is intended to apply to the Secretary only. Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* remains available for a person affected by a decision made by a person other than the Secretary to seek review of the decision.
- Where internal review would unnecessarily add to the administrative burden in administering the Bill, or be contrary to the purpose of the provision. For example, a decision not to carry out activities where a person has not paid the cost-recovery charge that is due and payable.
- Where the decision is integral to maintaining the integrity of the export control regime. For example, the power to require an audit. It is important that these decisions can be made on a timely basis to support the exercise of powers and the performance of functions under the Bill.

There are also policies that relate to specific regulatory tools, powers or functions in the Bill. For example, some decisions in relation to export permits are not reviewable decisions. Export permits are high-volume decisions which are made about perishable goods. As such, it is important that the decision is not delayed or prolonged due to internal review. Furthermore, decisions in relation to export permits have the potential to harm Australia's trading relationships with other countries. An export permit is the final regulatory tool that the Secretary can use to permit, or prevent, the export before the goods are permitted to depart Australia. As such, it is a matter of national interest that decisions about export permits are not subject to internal review.

Decisions in relation to the authorisation of a person as an authorised officer (other than a third party authorised officer) are generally not reviewable under the Bill. Decisions relating to a person who is a third party authorised officer are reviewable. However, a decision relating to an officer or employee of the Commonwealth or of a State or Territory who is an authorised officer is generally not reviewable under the Bill. These decisions are not reviewable on the basis that these persons are appointment as an authorised officer as part of their employment duties in the Commonwealth or State or Territory government. These persons do not have a personal interest in their authorisation and so do not require the ability to seek review of a decision relating to their authorisation. Similarly, decisions in relation to the delegation of a function or power should not be subject to internal review because it does not affect the interests of a member of the public.

Clause 54 provides that on receiving an application for an exemption under clause 53 of the Bill, the Secretary must decide to grant or refuse to grant the exemption. A decision made under this clause is not a reviewable decision as decisions regarding exemptions are essentially about maintaining international confidence in Australia's food and agricultural exports in the interests of a whole export industry. The Bill does not prevent a person from making a new application for an exemption in relation to the same relevant goods.

Clause 132 enables the Secretary to give the occupier of a registered establishment a written direction to cease carrying out one or more kinds of export operations in relation to particular prescribed goods, or a kind of prescribed goods, covered by the registration, if the Secretary reasonably suspects one of the circumstances provided for in subclause 132(1). The circumstances in which the Secretary can direct the occupier of a registered establishment to cease export operations are limited and reflect conduct that could compromise the integrity of the Australian export control regime. An example of the circumstances in which a written direction may be issued would be where a condition of the registration has been contravened or it is likely that a condition has been contravened. Another example is where the occupier has not complied or is likely not to comply with a requirement of the Bill. In these circumstances, I believe that, given the urgent requirement to give such a direction, it is appropriate that it is not subject to merits review, as this could compromise market access and importing countries' reliance on a robust regulatory framework.

Clause 67 provides that an issuing body, on receiving an application for a government certificate, must decide to issue the certificate or refuse to issue the certificate. The circumstances for refusing to issue a certificate may arise for a range of technical and administrative reasons. Subclause 67(2) enables the issuing body to make a written request that the applicant give the issuing body further specified information or documents for the purposes of making a decision in relation to the application. The Bill does not prevent a person from making a new application for a certificate in relation to the same relevant goods.

Subclause 67(5) provides that if the issuing body decides not to grant a government certificate, the issuing body must notify the applicant in writing. This ensures that an applicant is aware of the outcome of their application. As the Committee notes, a decision made under clause 67 is not a reviewable decision. This is because decisions regarding government certificates represent one of the final decisions to enable goods to be imported into the importing country once all other requirements and conditions have been met. Such decisions are essentially about maintaining international confidence in Australia's agricultural exports in the interests of a whole export industry, or part of that industry, and ensuring that agricultural exports achieve a consistent standard. Further, government certificates are high-volume decisions and often made in relation to perishable items. Given the specific timeframes that an exporter may be operating under, providing for the review of a decision made under clause 67 would not be practical.

Request at 1.157 – Limitation on merits review

The committee seeks the minister's detailed advice as to:

- **why it is considered it would be burdensome to allow any person whose interests are affected by a reviewable decision made under the bill to seek merits review of that decision; and**
- **why any such burden outweighs the need to allow persons who have been adversely affected by a government decision to seek merits review of that decision.**

The Bill provides internal review mechanisms as well as applications to the Administrative Appeal Tribunal (AAT). Reviewable decisions are specified in clause 381 of the Bill. Subclause 385(2) of the Bill specifies that such applications may only be made by, or on behalf of, the 'relevant person' for the decision review. This has the effect of narrowing section 27(1) of the *Administrative Appeals Tribunal Act 1975*, which would otherwise allow an application for review to be made by any person whose 'interests are affected by a decision'.

It is appropriate to limit persons who can seek review to relevant persons, as there is a prohibitively large number of people who could potentially claim that their interests were affected by a reviewable decision. This is primarily due to the extensive supply chain and number of people potentially involved in, or affected by, the export of a single consignment of goods; from primary producer through to purchaser. For example, a decision to refuse to revoke the registration of an establishment may affect a person who can no longer transport the goods produced by that establishment, or, in turn, purchase those goods for export. It would be burdensome to allow any member of the public who is affected by the decision (because, for example, they can no longer purchase goods) to apply for review of the decision.

This burden outweighs the need to allow any person whose interests have been affected by a decision to apply for review. By restricting applications to relevant persons in relation to reviewable decisions, the Bill aims to prevent the review process from becoming inefficient, and the regulatory processes under the Bill from becoming ineffective through delays resulting from review applications.

Request at 1.164 – Presumption of innocence: certificate constitutes prima facie evidence

The committee therefore seeks the minister's detailed advice as to whether each of the matters that may be specified in an analyst's certificate will be formal or technical matters of fact that are not likely to be in dispute and would be difficult to prove under the normal evidential rules. The committee's understanding of the provision would be enhanced if a separate justification were provided in respect of each of the matters set out in paragraphs 414(1)(a) to (h).

Clause 414 facilitates the provision of expert and non-expert *prima facie* evidence in relation to allegation of contraventions of the Act. An analyst appointed for the purposes of the Act is able to present evidence about goods or any other thing by means of a written certificate prepared by the analyst and dealing with any one or more of the things mentioned in paragraphs 414(1)(a)-(h). Each paragraph relates to a circumstance that may be relevant to the receipt, identification, retention, and testing or analysis of the goods or other thing by the analyst. In relation to any particular goods or thing received by an analyst, some of the matters listed in subclause 414(1) will be relevant while others may not.

Paragraphs 414(1)(a)-(d) relate to the receipt of the goods or other thing by the analyst. They provide for the analyst to include in the certificate information about who delivered the goods and what their nature and condition was on delivery.

Paragraphs 414(1)(e)-(g) relate to the process of testing or analysis carried out by the analyst on the goods or other thing. They provide for the analyst to include in the certificate information about when the testing was carried out, what kind of testing or analysis was done and the results of the testing or analysis.

Paragraph 414(h) relates to how the goods or other thing were dealt with after the testing or analysis was completed. It provides for the analyst to include in the certificate information about whether any part of the goods or other thing remained following the testing process and, if so, to whom the analyst gave it and any action taken to keep the remaining goods secured.

A certificate prepared under clause 414 is in the nature of a report by an expert analyst on a testing or analysis procedure and as a result contains a record of formal and technical matters. The intention of the provision is to provide a mechanism for an analyst to make a formal report on tests or analysis and to have it admitted in evidence. The certificate will include formal matters such as information about the condition of the goods, the time of testing and the disposition of any remainder.

It is appropriate that these matters are dealt with in the certificate as they are generally non-controversial. While clause 415 provides that a certificate given under clause 414 is *prima facie* evidence of the matters in the certificate and the correctness of the results of the analysis, it also provides for the opinion of the analyst on technical matters relating to the results of the testing or analysis to be tested through cross examination and rebutted by the defendant.

Request at 1.171 – Broad delegation of administrative powers

The committee considers that clause 428, as currently drafted, may create uncertainty as to the exercise of powers and functions under the bill through third parties (agents) who are neither the repositories of such powers and functions nor their delegates. The committee therefore seeks the minister's advice as to:

- **whether proposed clause 428 is intended to allow persons authorised to exercise functions and powers to act through agents; and**
- **if so, the circumstances in which it is envisaged powers and functions under the bill would be exercised through agents, including examples of the agents (or types of agents) through which those functions and powers might be exercised.**

Clause 428 provides that, if a person has the power or is required under the Bill to do a thing, that person will be taken to have done the thing if they cause another person to do that thing on their behalf. It also provides that if a person has the power or is required under the Bill to cause or direct a thing to be done, that person is taken to have caused or directed the thing to be done if the person does the thing himself or herself. It is not a delegable power and does not shift the responsibility to the person who actually performs the function.

This provision is intended to facilitate the exercise of functions or powers under the Bill, where necessary and appropriate. For example, where an authorised person may not have the skills or expertise required to complete a particular task, it may be necessary to engage a suitably qualified person to assist. As the Committee notes, the Explanatory Memorandum uses the example of ensuring that identity cards are valid when the manufacture and distribution was undertaken by a third party. Another example may be where a door in a registered establishment is required to be opened by an authorised officer and the authorised officer needs to a locksmith to open it.

Clause 428 is drafted in similar terms as section 639 of the *Biosecurity Act 2015* and ensures it is clear who is responsible and accountable for using powers under the Bill.

Request at 1.177 – Immunity from civil liability

The committee requests the minister's advice as to why it is considered appropriate to provide the Commonwealth with civil immunity, such that affected persons would have their right to bring an action against the Commonwealth to enforce their legal rights limited to situations where a lack of good faith is shown.

Clause 430 will provide that persons performing functions or exercising powers under the Bill will have protection from civil proceedings. Immunity from civil liability where good faith is shown is necessary to maintain the integrity of the regulatory framework. Protection from civil proceedings does not extend to criminal offences, for example theft or intentional destruction of documents or property.

I believe it is appropriate that protected persons, as defined in subclause 430(4) of the Bill, and the Commonwealth as a whole, when acting in good faith under the Bill, should be protected from civil proceedings. This is designed to ensure that the exercise of powers and the performance of functions under the Bill by the Commonwealth and appropriately qualified and trained persons, are not unduly impeded so as to compromise the sound operation of the export control regime.

Request at 1.184 – Consultation prior to making delegated legislation

Given that much of the detail regarding the requirements for the export of goods from Australia is to be set out in the rules, the committee requests the minister's advice as to:

- **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); and**
- **why it is appropriate for these significant matters to be included in rules rather than regulations.**

This Bill is the result of a comprehensive review of the legislation currently regulating goods exported from Australian territory. The review was triggered by legislative instruments within the existing export regulation framework being due to sunset (cease to be law) on 1 April 2020 in accordance with the requirements of the *Legislation Act 2003*. As part of the review, my Department undertook comprehensive consultation with a broad range of stakeholders, including industry and producer representatives and State and Territory counterparts. As part of that review process, my Department committed to continuing engagement with stakeholders throughout the development of the rules, including any future changes in response to changing conditions.

Rules made under the Bill will be prepared in consultation with stakeholders in affected sectors consistent with my Department's current program of wide ranging consultations. It would be inconsistent with the objective of putting in place a flexible and responsive regulatory framework for specific consultation obligations to be included in the Bill.

In reviewing the existing legislative framework it was agreed by most consultation participants that greater flexibility would benefit farmers and exporters by allowing government and industry to be more responsive to ongoing changes in technology. Importantly, greater flexibility in the legislative framework will allow regulatory tools to respond more rapidly to the changing requirements of trading partners.

In the context of complex and rapidly changing export markets, it is clear that the benefits of including detailed regulatory requirements in rules rather than regulations outweigh any concerns. It has also been common practise over a number of years for Acts to provide for the making of instruments rather than regulations. Under the *Legislation Act 2003* all disallowable legislative instruments are subject to parliamentary scrutiny.

While the Bill allows the Secretary of my Department to make rules about a range of important details, there will continue to be sufficient parliamentary oversight of export regulation. The rules will be legislative instruments subject to parliamentary scrutiny, disallowance and sunsetting in accordance with the *Legislation Act 2003*. In addition, the Bill provides the Minister with strong oversight of export regulation through the power to direct the Secretary's rule-making power.

Request at 1.191 – Incorporation of external material into the law

The committee requests the minister's advice as to whether the documents described in paragraphs 432(3)(c) and (g) will be made freely available to all persons interested in the law and why it is necessary to apply the documents listed under subsection 432(3) as in force or existing from time to time, rather than when the instrument is first made.

It is intended that whenever documents described in paragraphs 432(3)(c) and (g) are applied, adopted or incorporated by the rules, these documents will be publicly available either on my Department's website or through a link on that website to where the documents may be found on the website of the relevant authority or body.

The purpose of the provisions in subclause 432(3) is to ensure rules can be made to apply various standards to Australian exports. Were the documents listed under subclause 432(3) to be applied as in force when the instrument is first made, the effect would be that the rules and the standards they apply would be out of date as soon as the responsible authority or body made changes.

Our key trading partners place a great deal of importance on robust legislation to support export certification. Considerable work has been done in an ongoing process of international harmonisation of standards for export of a wide range of agricultural and food products. While the rules could in theory be amended each time one of the documents referred to in subclause 432(3) is updated, there would in practice always be a delay. This could mean Australia is unable to deal with a breach of an overseas country requirement arising from non-compliance with a recent amendment to one of the documents. The cost of this gap in our regulatory controls could be very high in terms of a loss of confidence amongst our trading partners in our export control regime.

Attachment A

List of powers that are subdelegable under the Export Control Bill 2017

In relation to accredited properties:

- power to approve (clause 79), renew (clause 84), vary at the request of a manager (clause 87), vary on the Secretary's own initiative (clause 90), suspend at the request of a manager (clause 92), suspend on the Secretary's own initiative in relation to one or more kinds of export operations, prescribed goods and places (clause 94), suspension on the Secretary's own initiative in relation to all kinds of export operations and all kinds of prescribed goods (clause 95), vary the period of suspension (clause 97), revoke a suspension (clause 98), revoke at the request of a manager (clause 101), revoke on the Secretary's own initiative (clause 102) an accredited property

In relation to registered establishments:

- power to approve (clause 112), renew (clause 117), vary at the request of an occupier (clause 120), vary on the Secretary's own initiative (clause 123), suspend at the request of an occupier (clause 125), suspend on the Secretary's own initiative in relation to one or more kinds of export operations and one or more kinds of prescribed goods (clause 127), suspend on the Secretary's own initiative in relation to all kinds of export operations and all kinds of prescribed goods (clause 128), vary the period of suspension (clause 130), revoke a suspension (clause 131), revoke at the request of an occupier (clause 137), revoke on the Secretary's own initiative (clause 138) a registered establishment.

In relation to approved arrangements:

- power to approve (clause 151), renew (clause 156), vary at the request of a holder (clause 161), vary on the Secretary's own initiative (clause 165), suspend at the request of a holder (clause 169), suspend on the Secretary's own initiative (clause 171), vary the period of a suspension (clause 174), revoke a suspension (clause 175), revoke at the request of a holder (clause 178), revoke on the Secretary's own initiative (clause 179) an approved arrangement.

In relation to export licences:

- power to grant (clause 191), renew (clause 196), vary at the request of a holder (clause 199), vary on the Secretary's own initiative (clause 201), suspend at the request of a holder (clause 203), suspend on the Secretary's own initiative (clause 205), vary the period of a suspension (clause 208), revoke a suspension (clause 209), revoke at the request of the holder (clause 211), revoke on the Secretary's own initiative (clause 212) an export licence.

In relation to export permits:

- power to issue (clause 225), vary at the request of a holder (clause 229), vary on the Secretary's own initiative (clause 229), suspend (clause 231) or revoke an export permit (clause 233)

- For the purposes of making a decision in relation to an application for an export permit, the Secretary may: request further information or documents relating to the application, require an audit of export operations, require an assessment of goods, request a written statement from the applicant, take or analyse samples of the goods or from equipment or other things relating to the application (or arrange another person to do so) or anything else prescribed by the rules (clause 241).

Other subdelegable powers

- to grant an exemption, request further information or documents relating to application for exemption (clause 54), vary the conditions of exemption (clause 58), revoke an exemption (clause 59)
- to issue an identity card (clause 206(1))
- require an assessment of goods to be carried out if an export permit for a kind of prescribed goods is in force (clause 234)
- give written approval to alter or interfere with a trade description (clause 250)
- to require an audit to be conducted (clauses 266, 267)
- approve a person to conduct audits (clause 273) or to be an approved assessor (clause 281)
- to approve a person or each person in a specified class of persons, to carry out assessments of goods (clause 281)
- to arrange for the use, under the Secretary's control, of computer programs for making decisions (clause 286)

- to determine, in writing, training and qualification requirements for authorised officers (clause 291)
- approve manner of application to be a third party authorised officer and to authorise a person to be a third party authorised officer(clause 291(3))
- to authorise a person to be an authorised officer (clause 291) or vary, suspend or revoke authorisation (clauses 295, 296, 297)
- to request notification of certain events by suspended third party authorised officer (clause 299)
- to give approval, in writing, for the occupier of a registered establishment to provide goods or services to an authorised officer (clause 308(2))
- to approve a program of export operations (clause 311(2))
- direct an authorised officer to carry out certain export operations in approved export program (clause 313)
- direct an authorised officer to monitor or review export operations in approved export programs (clause 314)
- powers as chief executive for the purpose of Part 3 of the Regulatory Powers Act (investigation powers) (clause 329(2)(e))
- authorised applicant for civil penalties, an infringement officer and relevant chief executive for the purpose of Part 5 of the Regulatory Powers Act (infringement notices) (clause 359 (2))
- authorised person for Part 6 of the RPA (enforceable undertakings) (clause 362 (2))
- authorised person for Part 7 of the RPA (enforceable undertakings) (clause 364 (2))
- to determine whether a person is a fit and proper person (clause 372)
- approve the manner for making application and forms (clause 377)
- review reviewable decisions personally or cause the reviewable decision to be reviewed by an internal reviewer (clause 383)
- affirm or vary a reviewable decision or set aside the reviewable decision and make a decision as he or she thinks appropriate (clause 383)
- refuse to carry out activities where a person is liable to pay a charge that is due and payable (clause 398)
- to authorise a person to use protected information for a secondary permissible purpose or disclose to a specified person, or to a specified class of persons, protected information for a secondary permissible purpose that is specified in the authorisation (clause 390)
- to remit or refund the whole or part of a cost recovery charge that is payable, or that has been paid, to the Commonwealth if the Secretary is satisfied there are circumstances that justify doing so (clause 405)
- appoint an analyst (clause 413)
- cause forfeited goods to be sold, destroyed or otherwise disposed of (clause 416) or goods seized in certain circumstances (clause 418)
- approving payment of compensation (clause 419)
- report to Parliament about export of livestock (clause 424).

Attachment B

List of decisions that are not reviewable under the Export Control Bill 2017

The following decisions are not reviewable decisions under the Bill (based on the policy rationale provided in the response to the request at 1.154):

Exemptions

- To approve the manner and form in which an application for an exemption must be made (paragraphs 53(3)(a) and (b))
- To not allow an application to be made within a different period (subparagraph 53(3)(f)(ii));
- To not grant an exemption or to grant an exemption subject to conditions (subsection 54(1));
- To vary the conditions of an exemption (subclause 58(1));
- To revoke an exemption (subclause 59(1));

Government certificate

- To approve the manner in which an application for a government certificate must be made, including by approving a form (paragraphs 65(2)(a) and (b));
- To issue, or refuse to issue, a government certificate (subclause 67(1));
- To request an applicant to give the issuing body further specific information or documents relevant to an application (clause 67(2));
- To do certain things for the purpose of making a decision in relation to an application for a government certificate, including requesting further information, requiring an audit of export operations, requesting consent to enter premises, etc (clause 68);
- To revoke a government certificate if satisfied of certain matters (subclause 75(1));

Accredited properties

- To decide which conditions prescribed by the rules are not to apply to the accreditation of the property (subclause 80(1));
- To allow a longer period in which to make an application for renewal of an accreditation (paragraph 83(4)(b));
- To decide which conditions prescribed by the rules are not to apply to the accreditation of a property that has been renewed (paragraph 85(b));
- To vary the accreditation so that it remains in force indefinitely (subparagraph 90(1)(d)(ii));
- To not request the manager of the accredited property to provide a submission before a proposed decision to vary the accreditation where the grounds for the proposed variation are serious and urgent (subclause 90(5));
- To suspend the accreditation of a property on request by the manager of the property (subclause 92(5));
- To not request the manager of the accredited property to provide a submission before a proposed decision to suspend the accreditation where the grounds for the proposed suspension are serious and urgent (subclause 94(4));
- If the Secretary suspends the accreditation of a property, to refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the relevant Commonwealth liability has been paid (subclause 95(3));
- To reduce the period of suspension of an accredited property (clause 97(2));
- To revoke the suspension of the accreditation of a property (clause 98);
- To revoke the accreditation of a property upon request by the manager of the property (subclause 101(3));
- to not request the manager of the accredited property to provide a submission before a proposed decision to revoke the accreditation where the grounds for revocation are serious and urgent (clause 102(4));
- If the Secretary revokes the accreditation of a property, to refuse to carry out, or direct a person not to carry out, specified activities in relation to the debtor until the relevant Commonwealth liability has been paid (clause 103(2));

Registered establishments

- To decide that certain conditions prescribed by the rules are not to apply to the registration of an establishment (paragraph 113(1)(b));
- To allow a longer period in which to make an application to renew the registration of an establishment (paragraph 116(4)(b));
- To decide which conditions prescribed by the rules are not to apply to the registration of an establishment that has been renewed (paragraph 118(b));

- To vary the registration so that it remains in force indefinitely (subparagraph 123(1)(d)(ii));
- To not request the occupier of the registered establishment to provide a submission before a proposed decision to vary the accreditation where the grounds for the proposed variation are serious and urgent (subclause 123(5));
- To suspend the registration of an establishment on request by the occupier of the registered establishment (subclause 125(5));
- To not request the occupier of the registered establishment to provide a submission before a proposed decision to suspend the registration where the grounds for the proposed suspension are serious and urgent (subclause 127(4));
- If the Secretary suspends the registration of an establishment, to refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the relevant Commonwealth liability has been paid (subclause 128(3));
- To reduce the period of suspension of the registration of an establishment (clause 130(2));
- To revoke the suspension of the registration of an establishment (clause 131);
- To revoke a direction given to the occupier of a registered establishment if the reasons for the direction no longer exist (subclause 134(1));
- To revoke the registration of an establishment upon request by the occupier of the registered establishment (subclause 137(3));
- to not request the occupier of the registered establishment to provide a submission before a proposed decision to revoke the registration where the grounds for revocation are serious and urgent (clause 138(4));
- If the Secretary revokes the registration of an establishment, to refuse to carry out, or direct a person not to carry out, specified activities in relation to the debtor until the relevant Commonwealth liability has been paid (clause 139(2));
- the Secretary may direct the occupier of the registered establishment to take specified action (subclause 142(2));

Approved arrangements

- To decide which conditions prescribed by the rules are not to apply to an approved arrangement (paragraph 152(1)(b));
- To allow a longer period in which to make an application for renewal of an approved arrangement (paragraph 155(4)(b));
- To decide which conditions prescribed by the rules are not to apply to an approved arrangement that has been renewed (paragraph 157(1)(b));
- To vary the export licence so that it remains in force indefinitely (subparagraph 165(1)(d)(i));
- To not request the holder of the approved arrangement to provide a submission before a proposed decision to vary the approved arrangement where the grounds for the proposed variation are serious and urgent (subclause 165(5));
- To suspend the approved arrangement on request by the holder of the approved arrangement (subclause 169(5));
- To not request the holder of an approved arrangement to provide a submission before a proposed decision to suspend the approved arrangement where the grounds for the proposed suspension are serious and urgent (subclause 172(4));
- If the Secretary suspends an approved arrangement, to refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the relevant Commonwealth liability has been paid (subclause 174(3));
- To reduce the period of suspension of an approved arrangement (subclause 174(2));
- To revoke the suspension of an export licence (clause 175);
- To revoke an approved arrangement upon request by the holder of the approved arrangement (subclause 178(3));
- to not request the holder of an approved arrangement to provide a submission before a proposed decision to revoke the approved arrangement where the grounds for revocation are serious and urgent (clause 179(4));
- If the Secretary revokes an approved arrangement, to refuse to carry out, or direct a person not to carry out, specified activities in relation to the debtor until the relevant Commonwealth liability has been paid (clause 180(2));
- To give written directions to the holder of an approved arrangement to take specified action (subclause 183(2));

Export licences

- To decide which conditions prescribed by the rules are not to apply to an export licence (paragraph 192(1)(b));
- To allow a longer period in which to make an application for renewal of an export licence (paragraph 195(4)(b));
- To decide which conditions prescribed by the rules are not to apply to an export licence that has been renewed (paragraph 197(1)(b));
- To vary the export licence so that it remains in force indefinitely (subparagraph 201(1)(d)(i));
- To not request the holder of the export licence to provide a submission before a proposed decision to vary the licence where the grounds for the proposed variation are serious and urgent (subclause 201(5));
- To suspend the export licence on request by the holder of the licence (subclause 203(5));
- To not request the holder of an export licence to provide a submission before a proposed decision to suspend the licence where the grounds for the proposed suspension are serious and urgent (subclause 205(4));
- If the Secretary suspends an export licence, to refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the relevant Commonwealth liability has been paid (subclause 206(3));
- To reduce the period of suspension of an export licence (subclause 208(2));
- To revoke the suspension of an export licence (clause 209);
- To revoke an export licence upon request by the holder of the export licence (subclause 211(3));
- to not request the holder of an export licence to provide a submission before a proposed decision to revoke the licence where the grounds for revocation are serious and urgent (clause 212(4));
- If the Secretary revokes an export licence, to refuse to carry out, or direct a person not to carry out, specified activities in relation to the debtor until the relevant Commonwealth liability has been paid (clause 213(2));
- To give written directions to the holder of an export licence to do or refrain from doing certain things (subclause 216(2))

Export permits

- to issue, or refuse to issue, an export permit for a kind of prescribed goods (subclause 225(1));
- To vary, or refuse, to vary, an export permit or conditions of an export permit (subclause 229(1));
- To suspend an export permit if the Secretary reasonably believes that circumstances prescribed by the rules exist (subclause 231(1));
- To revoke the suspension of an export permit (subclause 231(3));
- To revoke an export permit if the Secretary reasonably believes certain matters exist (subclause 233(1));
- To require an assessment of goods to be carried out if the Secretary reasonably believes certain matters exist (subclause 234(2));
- To approve the manner in which an application for an export permit, or to vary an export permit, must be made, including approving a form for making the application (paragraphs 239(1)(a), (b));
- To accept information or documents previously given as satisfying requirements to give information or documents for an application (subclause 239(2));
- To do certain things for the purpose of making a decision in relation to an application to which Part 5 applies, including requesting further information, requiring an audit of export operations, requesting consent to enter certain premises, etc (clause 241);

Notices of intention to export

- To approve the manner in which a notice of intention is given and the form of a notice of intention (paragraphs 243(1)(a) and (b));

Trade description

- To give written approval for a person other than an authorised officer to alter or interfere with a trade description applied to prescribed goods (paragraph 250(1)(c));

Tariff rate quota systems

- To give written directions to be complied with by a particular person or body relating to tariff rate quotas for the export of goods (subclause 264(3));

Audits

- To require an audit to be conducted in relation to certain export operations (subclause 266(1));

- To require an audit to be conducted in relation to the performance of functions and the exercise of powers under the Act by certain persons, or compliance by those persons with the conditions applying to the performance or exercise of those functions and powers (subclause 267(1));
- To approve, in writing, a person, or each person in a class of persons, to be an auditor for the purposes of the Act (subclause 273(1));

Approved assessors

- To approve, in writing, a person, or each person in a class of persons, to be an assessor for the purposes of the Act (subclause 281(1));

Powers of the Secretary

- To require, by notice in writing, a person to give the Secretary any information, or produce any documents, referred to in the notice that relate to any prescribed goods that have been, or are intended to be, exported (subclause 285(1));
- To arrange for the use, under the Secretary's control, of computer programs for making certain decisions under the Act (subclause 286(1));
- To delegate any or all functions or powers to an SES employee, or acting SES employee, in the Department (subclause 288(1));
- To give directions to a delegate relating to the performance of functions or the exercise of powers by the delegate (subclause 288(5));

Authorised officers

- To authorise, or refuse to authorise, a person who is an officer or employee of a Commonwealth body, or an officer or employee of a State or Territory body, to be an authorised officer (subclause 291(1));
- To approve a manner for a person to apply to be a third party authorised officer (subclause 291(3));
- To determine, in writing, training and qualification requirements for authorised officers (subclause 291(7));
- To enter into an arrangement with a State or Territory body for their officers or employees to be authorised as authorised officers (subclause 294(1));
- To vary the functions and powers that a person (other than a third party authorised officer) may exercise as an authorised officer or the period of effect of the authorisation (paragraph 295(1)(a));
- To vary the conditions to which the authorisation of a person (other than a third party authorised officer) is subject (paragraph 295(1)(b));
- To vary the period of effect of the authorisation of a person (other than a third party authorised officer) (paragraph 295(1)(c));
- To specify a period of effect of the authorisation of a person (other than a third party authorised officer) (paragraph 295(1)(d));
- To suspend the authorisation of a person ((other than a third party authorised officer) as an authorised officer (subclause 296(1));
- To vary the period of suspension of an authorisation of a person ((other than a third party authorised officer) as an authorised officer (subclause 296(4));
- To revoke a suspension of a person's authorisation as an authorised officer (subclause 296(6));
- To revoke the authorisation of a person (other than a third party authorised officer) as an authorised officer (subclause 297(1));
- To request, in writing, a third party authorised officer whose authorisation has been suspended to notify the Secretary within 14 days of any notifiable event that has occurred, or that no notifiable event has occurred, since the person's authorisation was suspended (subclause 299(2));
- To give a direction to an authorised officer about the performance of their functions or the exercise of their powers (subclause 301(2));
- [Commonwealth authorised officer] to give a direction to a third party authorised officer, or a class of third party authorised officers, about the performance of their functions or the exercise of their powers (subclause 301(3));
- [A State or Territory authorised officer, or a third party officer] to charge a fee in relation to things done in the performance of their functions or the performance of their powers under the Act (subclause 303(1));
- Authorised officer] to give a direction to a person (or an agent of that person) to provide reasonable assistance to the authorised officer in performing a function or exercising a power under the Act in relation to goods (subclause 304(1));

- [Authorised officer] to give a direction to the manager of an accredited property, the occupier of a registered establishment, the holder of an approved arrangement, or the holder of an export licence, to take specified action within a specified period to deal with the ground on the basis of which the direction is given (subclause 305(1));
- [Authorised officer] to give a direction to a person who gave a notice of intention to export a consignment of, the holder of an export permit for, or the applicant for an export permit for, a kind of prescribed goods, to take specified action within a specified period to deal with the ground on the basis of which the direction is given (subclause 305(1));
- To issue an identity card (subclause 306(1));
- To approve the form for an identity card (subclause 306(2));

Approved export programs

- To approve, in writing, a program of export operations to be carried out by an accredited veterinarian or authorised officer (subclause 311(2));
- To direct an authorised officer to carry out some or all of the export operations in an approved export program (subclause 313(1));
- To direct an authorised officer to monitor or review, in or outside Australian territory, the carrying out of export operations by accredited veterinarians and by persons who export eligible live animals or eligible animal reproductive material (subclause 314(1));

Compliance and enforcement

- To determine, in writing, training and qualification requirements for authorised officers in relation to the performance of functions or duties and the exercise of powers under this Chapter or the Regulatory Powers Act (subclause 324(2));

Reviewable decisions

- To allow a longer period to make an application for a review of a reviewable decision (subparagraph 383(2)(c)(ii);
- To review the reviewable decision personally or cause the reviewable decision to be reviewed by another person (subclause 383(3));
- To affirm, vary or set aside the reviewable decision, and, if the decision is set aside, make such other decision as he or she thinks appropriate (subclause 383(4));
- To require further information from a person who has applied for review (subclause 384(1));
- To refuse to consider an application until further information is given (subclause 384(2));

Confidentiality of information

- To authorise, in writing, a person to use protected information or to disclose protected information, for a secondary permissible purpose as specified in the authorisation (subclause 390(1));
- To authorise, in writing, a person to use certain other protected information (including sensitive information) or to disclose that protected information, for a secondary permissible purpose as specified in the authorisation (subclause 391(2));

Cost recovery

- Power of the Minister to give a written direction to ensure cost-recovery charges are notionally payable by the Commonwealth (subclause 402(1));
- To remit or refund the whole or part of a cost-recovery charge, either on his or her own initiative, or on written application by a person (clause 405(1));
- To refuse to carry out, or direct a person not to carry out, specified activities or kinds of activities in relation to the debtor under the Act until the cost-recovery charge has been paid (clause 406);

Miscellaneous

- To cause goods that have been forfeited by order of the court to be sold, destroyed or otherwise disposed of (subclause 416(3));
- To cause goods that have been seized by an authorised officer under Chapter 10 of the Regulatory Powers Act and are not able to be stored in a way that preserve them, to be destroyed or otherwise disposed of (clause 418);
- To approve the payment of a reasonable amount of compensation in respect of goods that are damaged or destroyed under the Act (subclause 419(1));
- To approve a form for claims for compensation (subclause 420(4)(a)).

Response to the Senate Standing Committee for the Scrutiny of Bills

Scrutiny Digest No. 1 of 2018

Foreign Influence Transparency Scheme Bill 2017

Reversal of evidential burden of proof: offence-specific defences

Committee comment

1.221 The committee requests the Attorney-General's detailed justification as to the appropriateness of including each of the specified matters as an offence-specific defence, by reference to the principles set out in the *Guide to Framing Commonwealth Offences.*

1.222 The committee also seeks the Attorney-General's advice as to the appropriateness of amending the bill to provide that the relevant matters are included as an element of the offence or that, despite section 13.3 of the *Criminal Code*, a defendant does not bear the burden of proof in relying on the offence-specific defences.

Response

The committee notes that offence-specific defences interfere with the common law duty of the prosecution to prove all elements of an offence. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) acknowledges that offence-specific defences are appropriate in certain circumstances. This includes where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[1] The Guide also states that offence-specific defences can be more readily justified if:

- the matter in question is not central to the question of culpability for the offence
- the offence carries a relatively low penalty, or
- the conduct proscribed by the offences poses a grave danger to public health or safety.[2]

The committee notes that the Foreign Influence Transparency Scheme Bill 2017 (the Bill) establishes offence-specific defences in sections 59 and 60 and in relation to section 58.

Section 58: Failure to fulfil responsibilities under the scheme

Section 58 is a strict liability offence for 'failure to fulfil responsibilities under the scheme'. The offence at section 58 applies where a person fails to fulfil the requirements set out at section 34 in relation to reporting material changes in circumstances. Subsection 34(5) provides a person does not need to report material changes in circumstances if the information has been included in a notice given under section 36 or section 37 of the Bill, which impose particular reporting requirements during voting periods. Consistent with the note under subsection 34(5), the defendant bears an evidential burden in relation to these matters.

Imposing an evidential burden on the defendant is consistent with principles set out in the Guide. The Guide states a defendant will usually bear an evidential burden for defences, which can include 'words of exception, exemption, excuse, qualification or justification.'[3] The Guide also highlights that imposing an evidential burden does not displace the prosecutor's burden, but merely defers it.[4]

[1] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, page 50.
[2] Ibid.
[3] Ibid, page 51.
[4] Ibid.

Imposing an evidential burden on the defendant is appropriate because the matters set out at subsection 34(5) are matters that are peculiarly within the knowledge of the defendant. An example is as follows:

> Person A is registered with the Scheme with relation to activities undertaken on behalf of Foreign Government B. A voting period begins for a federal election and Person A provides the Secretary with a notice under section 36, advising that he or she will undertake a new registrable activity of distributing information and materials on behalf of Foreign Government B. The Secretary subsequently contacts Person A when it is discovered that he or she is also managing a social media campaign for Foreign Government B and states that Person A should have reported this in accordance with section 34, 'reporting material changes in circumstances.'
>
> In response, Person A advises that this had been reported as part of the notice provided to the Secretary under section 36, in which it was described, at a high-level, as 'distributing information and materials.' The way in which Person A conceives of and describes his or her registrable activities is peculiarly within the mind of Person A. Person A is best placed to demonstrate that he or she has not contravened section 34 and has in fact already provided the information in question, as per section 36. This information is peculiarly within the mind of the Person A, and aligns with the principles in the Guide that support the establishment of offence-specific defences.

Section 59: Failure to comply with notice requiring information

The committee also notes that the offence at section 59 for 'failure to comply with notice requiring information' contains an offence-specific defence at subsection 59(2). It is a defence to the offence at subsection 59(1) if the person:

(a) fails to comply with the notice because he or she did not provide the information or a document within the applicable period
(b) took all reasonable steps to provide the information or document with that period, and
(c) provides the information or document as soon as practicable after the end of that period.

This defence is consistent with the principles set out in the Guide. The notions of 'reasonable steps' in paragraph 59(2)(b) and 'as soon as practicable' in paragraph 59(2)(c) rely on assessments of the unique circumstances of the defendant. For example, in relation to 'reasonable steps', a person who does not have access to the internet will take different steps to provide the information or document to a person that does, and an assessment of whether those steps are reasonable would be different in each of those scenarios. In relation to 'as soon as practicable', a person who is very unwell may not be able to provide the information or document for an extended period of time, while a fit and healthy person may be able to provide the information or document much sooner. An assessment of whether that time period is 'as soon as practicable' would be different in each of those scenarios.

It would be significantly more difficult and costly for prosecution to go behind the individual circumstances of a defendant to understand what does and does not constitute reasonable steps, and to prove this beyond reasonable doubt as an element of an offence. This information is peculiarly within the mind of the defendant and therefore aligns with the principles set out in the Guide that supports the establishment of offence-specific defences. For example, if a person was unwell and unable to meet the applicable timeframe, they will be able to point to evidence of this very easily, whereas the Commonwealth would not necessarily be able to even identify that the person was unwell, let alone to know that this was the reason why they had failed to meet the applicable timeframe. It would be significantly more difficult and costly for prosecution to go behind the individual circumstances of a defendant to understand whether the person took all reasonable steps to provide the information or document within the applicable period, and whether the person provides the information or document as soon as practicable.

Section 60: False or misleading information or documents

The committee further notes that the offence at section 60 relating to 'false or misleading information or documents' contains offence-specific defences at subsections 60(2) – 60(6).

The defences at subsection 60(2) and 60(3) apply where the information or document, provided in accordance with section 45 or 46, is not false or misleading in a material particular or does not omit any matter without which the information is misleading in a material particular. Whether something is false or misleading in a material particular is peculiarly within the mind of the defendant because only the registrant will know the nature of their activities and how they align with the direction or wishes of the foreign principal. An example is as follows:

> Person X is engaged by Foreign Business Y to undertake parliamentary lobbying and communications activities on its behalf. Person X completes and submits a registration under the scheme but omits information about some of the activities he or she will undertake on behalf of Foreign Business Y. The Secretary gives Person X a notice under section 46 of the Act requesting further information and documents about Person X's relationship with Foreign Business Y, including the nature of activities undertaken on behalf of Foreign Business Y. Person X receives the notice and responds by providing information about the parliamentary lobbying activities he or she is undertaking on behalf of Foreign Business Y, but omits information about distributing communications materials on behalf of Foreign Business Y, which has the effect of making the information provided misleading. However, Person X knows that the information omitted relates to activity that is exempt under the Scheme because of the news media exemption at section 28 because the communications materials are distributed solely for the purposes of reporting news.

In this example, it is Person X's unique and peculiar knowledge of its registrable arrangement with Foreign Business Y that makes Person X best-placed to raise the defence at subsection 60(3). Person X will be able to point to evidence that shows the omission does not render the information misleading in a material particular, because the information omitted is exempt under section 28 of the Bill. This information is peculiarly within the mind of Person X and is consistent with the principles set out in the Guide relating to offence-specific defences. The Commonwealth may not have the unique knowledge and expertise to make this assessment.

The defences at subsection 60(4) – 60(5) are consistent with the defence to the equivalent Criminal Code offence at section 137.1, relating to giving false or misleading information. Subsection 137.1(5) of the Criminal Code provides an offence-specific defence where 'the second person did not take reasonable steps to inform the first person of the existence of the offence against subsection (1)'.

Similarly, the defence at subsection 60(6) is consistent with the defence to the equivalent Criminal Code offence at section 137.2 relating to producing false or misleading documents. Subsection 137.2(3) of the Criminal Code provides an offence-specific defence where a person produces a signed written statement stating that the document is false or misleading and setting out the material particular in which the document is false or misleading.

The defence at subsection 137.1(5) of the Criminal Code was included in response to a recommendation by the Standing Committee on Legal and Constitutional Affairs in its advisory report of the inquiry into the Criminal Code Amendments (Theft Fraud, Bribery and Related Offences) Bill 1999. This defence was suggested as a measure that would limit the offence at section 137.1 of false and misleading information, while ensuring the offence remained robust and able to meet its policy objective.

Significant matters in delegated legislation

Committee comment

1.230 The committee's view is that significant matters, such as the disclosure of information about a foreign principal (with non-compliance as an offence) and the purposes for which Scheme information can be communicated, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.231 In this regard, the committee requests the Attorney-General's detailed advice as to:

- why it is considered necessary and appropriate to leave these significant aspects of the Scheme to delegated legislation; and
- why it is appropriate to include these matters in rules rather than regulations; and
- with respect to table 4 of subclause 53(1):
    - what circumstances it is envisaged it may be necessary to expand the purposes for which Scheme information can be communicated; and
    - the appropriateness of amending the bill so as to require the minister to consider any comments made by the Information Commissioner prior to making any rules.

Response

The committee's report raises concerns that the Bill contains a number of provisions that allow particular matters to be set out in delegated legislation. The committee draws attention to:

- subsection 38(2) which sets out a range of matters that may be prescribed by rules that will guide the specifics of disclosures required by subsection 38(1), and
- subsection 53(1) which provides that the Secretary may communicate Scheme information for a purpose, and to a person, prescribed by the rules.

Section 38 – disclosure in communications activity

Achieving the Scheme's transparency objective requires that disclosures be made in communications activity so that Australian decision-makers and the public can make informed assessments about the forms and sources of foreign influence that may be represented in particular information and materials. The provision for matters to be prescribed in rules under subsection 38(2) seeks to provide flexibility about particular matters relating to disclosures in communications activity. Examples of the types of matters that might be prescribed by rules in accordance with subsection 38(2) could include:

- the specific words that must be included in disclosures,
- the font size of written disclosures,
- the placement of written disclosures,
- the length of time for which television disclosures must be displayed, and
- any accessibility requirements.

Matters such as these are detailed and technical and not appropriate for inclusion in the primary Act.

Prescription in delegated legislation is also necessary because of the changing nature of matters that will be prescribed in accordance with subsection 38(2). It will be necessary for the rules relating to disclosures to keep abreast of changes in communications technologies and methods, and of community expectations about the transparency of communications activity. It is appropriate that the matters specified at subsection 38(2) be prescribed by rules so that they are responsive and adaptive to these changes.

Section 53 – Authorisation – other purposes

Subsection 53(1) allows the Secretary to communicate Scheme information for any of the listed purposes. These purposes are:

- to an enforcement body for the purpose of an enforcement related activity (within the meaning of the *Privacy Act 1988*)
- to a department, agency or authority of the Commonwealth, a stater or a territory or an Australian police force for:
    - the protection of public revenue, or
    - the protection of security within the meaning of the *Australian Security Intelligence Organisation Act 1979*.

In addition to these purposes, Scheme information will be able to be shared with a person prescribed by the rules for a purpose prescribed by the rules. This provision is appropriate and necessary so that Scheme information can be communicated in circumstances that were not foreshadowed at the time of establishment of the Scheme. As noted in paragraph 107 of the Explanatory Memorandum, it is possible that there may be additional purposes for which Scheme information may need to be disclosed once the Scheme is established. It is intended that any additional purposes and/or persons would be kept narrow and that any request for scheme information would need to justify how the information relates to the purpose as prescribed in the rules.

An example of when a rule under Item 4 of subsection 53(1) might be made could be where a Commonwealth agency identifies a need to access Scheme information in order to carry out their functions. Depending on the information sought and the purpose for seeking that information, it might fall outside the criteria for sharing Scheme information as set out at Items 1-3 of subsection 53(1). In such a situation, the Commonwealth agency might make a request that it be prescribed as an agency with which the Secretary may share Scheme information, to support the agency in fulfilling its functions. The Minister may then consider making a rule in accordance with Item 4 of subsection 53(1). This would only be done in consultation with the Information Commissioner, as required by subsection 53(2) of the Bill.

Any rules made in accordance with subsection 38(2) or 53(1) will be legislative instruments under the *Legislation Act 2003* and would be subject to the normal disallowance processes under that Act. Any rules will also comply with the *Privacy Act 1988*, and will be guided by the Australian Privacy Principles. The Minister would consult with and consider the views of the Information Commissioner and relevant stakeholders in the development of rules, as is required under subsection 53(2) for rules made under Item 4 of the table in subsection 53(1). The legislation does not specify that the Minister must consider any comments of the Information Commissioner because the term 'consult' at subsection 53(2) implicitly encompasses both seeking and considering the views of the Information Commissioner.

It is considered appropriate that these matters be dealt with in 'rules' rather than 'regulations'. The Office of Parliamentary Counsel takes as its starting point the principle 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'.[5] Further guidance is provided on the material that should be included in regulations rather than other instruments. These matters include offence provisions. Paragraph 71(2)(a) of the Bill specifically prevents rules from creating an offence or civil penalty.

The Bill's approach of using rules to prescribe the matters mentioned in subclause 38(2), as well as various other matters, has a number of advantages, including:

- facilitating the use of a single type of legislative instrument 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;
- simplifying the language and structure of the provisions in the Bill that provide the authority for the legislative instruments; and
- shortening the Bill.

[5] Office of Parliamentary Counsel, *Drafting Direction No. 3.8: Subordinate Legislation*, 2017, page 3.

Importantly, the rules will be subject to a level of parliamentary scrutiny identical to that of regulations. Section 71 of the Bill makes it clear that the rules are a legislative instrument for the purposes of the *Legislation Act 2003*. Under sections 38 and 39 of that Act, all legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within six 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*).

Significant penalties

Committee comment

1.240 It is not apparent to the committee that the penalties in proposed section 57 of the bill are appropriate by reference to the comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences.*

1.241 The committee therefore seeks the Attorney-General's detailed advice as to the justification for the significant custodial penalties proposed by clause 57, in the context of the breadth of the requirement to register under the scheme. In particular the committee seeks the Attorney-General's advice as to specific examples of applicable penalties for comparable offences in other Commonwealth legislation.

Response

The maximum penalties proposed in section 57 of the Bill have been set in accordance with the principles set out in the Guide, including that:

- penalties have a single maximum penalty that is adequate to deter and punish a worst case offence, and
- penalties are set consistent with penalties for existing offences of a similar kind or of a similar level of seriousness.[6]

The penalties in section 57 contain single maximum penalties consistent with the Guide and are adequate to respond to the 'worst case' conduct that is punishable under section 57. The penalties in section 57 are intended to address the most serious of conduct, intentionally committed in contravention of requirements under the Scheme, and recognise the high level of culpability of the offender.

In setting the penalties for the offences in section 57 of the Bill, consideration was given to the level of harm to Australia and Australia's political and governmental processes that may result from a person or entity failing to apply for, or maintain, registration under the scheme. As an example, significant adverse consequences meriting a substantial term of imprisonment could flow from a deliberate failure to register an arrangement with a foreign principal to undertake public relations and communications activities on their behalf. An arrangement stipulating that the activities are to commence when a federal election is called, and to target a vulnerable sector of the community in marginal electorates where it is likely that voters will change their vote if influenced by the activities, could have an appreciable impact on the outcome of a democratic process. A seven year penalty is appropriate when the person knows they are required to register but does not do so and undertakes the activities. Failure to register deprives the public of the opportunity to know the foreign influence being brought to bear in respect of their vote in the federal election. The maximum penalties in section 57 seek to deter such serious conduct.

[6] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, page 40.

Consideration was also given to the penalties for offences that support the United States' (US) equivalent scheme, established under the *Foreign Agents Registration Act 1938.* Section 951 of the US Code (agents of foreign governments) attracts a maximum penalty of ten years imprisonment.

The US offence applies where a person acts as an agent of a foreign government in the US without prior notification to the Attorney-General, other than a diplomatic or consular officer. The types of activities that constitute 'acting as an agent of a foreign government' are not defined except that they must be undertaken at 'the direction or control of a foreign government or official'. The US offence requires that a person intentionally acts on behalf of a foreign principal without prior notification and could apply to the same activities that are considered registrable activities in sections 20 – 23 of the Bill. The offence at section 57 applies where a person deliberately fails to register under the Scheme and goes on to engage in registrable activities. This conduct is equivalent to acting as a foreign agent and would constitute an offence under section 951 of the US Code.

Absolute liability offences

Committee comment

1.248 The committee requests a detailed justification from the Attorney-General for the application of absolute liability to an element of the offence under clause 61 with reference to the principles set out in the *Guide to Framing Commonwealth Offences.*

Response

Subsection 61(2) applies absolute liability to the element of the offence in paragraph 61(1)(a), that a registrant is required to keep records under section 40 of the Scheme. The Guide sets out the circumstances in which absolute liability can be applied to a particular physical element of an offence. Absolute liability may be applied where:

> requiring proof of fault of the particular element to which strict or absolute liability applies would undermine deterrence, and there are legitimate grounds for penalising persons lacking 'fault' in respect of that element. In the case of absolute liability, there should also be legitimate grounds for penalising a person who made a reasonable mistake of fact in respect of that element.[7]

If absolute liability did not apply to paragraph 61(1)(a), recklessness would be the default fault element. Requiring proof of this fault element is unnecessary given the fault elements attached to paragraphs 61(1)(b), 61(1)(c) and 61(1)(d), which state:

> (b) the person (whether or not the registrant) does an act, or omits to do an act; and
>
> (c) the person does the act, or omits to do the act, with the intention of avoiding or defeating the object of this Act or an element of the scheme; and
>
> (d) the act or omission results in:
>
> (i) damage to, or the destruction of a scheme record; or
>
> (ii) the concealment of a scheme record; or
>
> (iii) the registrant being prevented from keeping scheme records.

It is not necessary for the person to have 'fault' for paragraph 61(1)(a) because the person's culpability must otherwise be clearly established for the remaining elements of the offence. This is particularly the case for paragraph 61(1)(c), which carries the fault element of 'intent'. To establish the offence, prosecution must prove this intention beyond a reasonable doubt.

[7] Ibid, at page 23.

It is also not appropriate that a defendant be able to avail themselves of the defence of reasonable and honest mistake of fact for this element of the offence at section 61. Applying strict liability to this element of the offence would undermine the deterrent effect of the offence.

Broad delegation of administrative powers

Committee comment

1.253 The committee requests the Attorney-General's detailed advice as to why it is considered necessary to allow for the delegation of any or all of the secretary's functions or powers to Executive Level 2 employees, and the appropriateness of amending the bill so as to, at a minimum, limit the delegation of coercive information gathering powers and the communication of scheme information to Senior Executive Service employees.

Response

As the committee notes, section 67 would allow the delegation of powers granted to the Secretary under the Bill to Senior Executive Service (SES) employees of the department, or to Australian Public Service employees of the department in an Executive Level 2 or equivalent position. The purpose of this delegation is to provide flexibility and timeliness in dealing with matters within the department, to ensure the Scheme is administered efficiently.

The application of the delegation power extends only to SES employees and/or APS officers at the Executive level 2 level to ensure that the powers and functions of the Act are only exercisable by senior officers with experience and judgement in matters of public administration.

It is not practical or feasible to require the Secretary to personally exercise the powers and functions of the Scheme. This would be counterproductive and would lead to delays in processing matters under the Scheme. Section 67(2) provides that the delegate must comply with any written directions of the Secretary when performing delegated functions or exercising delegated powers under the Act. This ensures the delegates are undertaking duties directly at the request of the Secretary, in compliance with the Secretary's directions and consistent with the objective of the Scheme in ensuring its efficient administration. Delegation to the level of Executive Level 2 employees is consistent with delegations in comparable pieces of Commonwealth legislation, for example the *AusCheck Act 2007*.

The committee enquires whether Government would amend the Bill to limit the delegation of powers to SES employees, at least with relation to coercive powers and the communication of scheme information. The Government considers that this would be an appropriate amendment that ensures that information-gathering powers are limited only to more senior officers within the department.

Response to the Senate Standing Committee for the Scrutiny of Bills

Scrutiny Digest No. 1 of 2018

Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017

Charges in delegated legislation

Committee comment

1.258 The committee requests the Attorney-General's advice as to why there are no limits on the charge specified in primary legislation and whether guidance is relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the bill.

Response

A statutory limit for charges for applications for registration and renewal of registration under the Foreign Influence Transparency Scheme (the Scheme) is not specified in the Foreign Influence Transparency Scheme (Charges Imposition) Bill 2017 (the Bill) to provide for flexibility in the operation of the Scheme and because the amount to be charged will be subject to established principles, oversight and scrutiny.

The calculation of charges will be in accordance with the Australian Government's decision to partially cost recover the Scheme, and will adhere to the Australian Government Cost Recovery Guidelines (the Guidelines).[8] Under the Guidelines, each cost recovered activity must ensure that there is an alignment between the expense incurred and income generated through charges for that activity.

The Guidelines also require that Government entities consult with the Department of Finance to develop a Cost Recovery Impact Statement (CRIS). The CRIS must be:

- certified by the accountable authority of the entity
- approved by the responsible minister, and
- agreed for release by the Finance Minister, if the cost recovery risk rating is 'high'.[9]

The Guidelines further require regular reporting on cost recovery, requiring an entity to report on cost recovery at both the aggregate level in the entity's annual financial statements, in accordance with the financial reporting rules, and at the cost recovered activity level on the entity's website as part of the CRIS.[10]

Additionally, the CRIS must be made publicly available before any charging activity begins. This means that the method of calculation of the charges will be publicly available in advance of any charging regime being implemented.

The Australian Government's decision to partially, rather than fully, cost recover reflects the Government's commitment to upholding the transparency objective of the Scheme by ensuring registration and compliance is not discouraged by prohibitive fees. The Government has stated that

[8] Australian Government Department of Finance, *Australian Government Cost Recovery Guidelines: Resource Management Guide No. 304,* Third edition, 2014.
[9] Ibid, page 16.
[10] Ibid, page 50.

the amount that will be charged in connection with the Scheme will be less than fees charged under the United States (US) equivalent *Foreign Agents Registration Act* (FARA). The fees under FARA are set at approximately US$305 for the initial filing and then for each mandatory six-monthly supplemental statement.

The committee's report characterises the charges in the Bill as taxation, and states at paragraph 1.256 that '[o]ne of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise). The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax.'

The approach taken in subsection 6(2) of the Bill is consistent with guidance from the Office of Parliamentary Counsel that the imposition of taxes should be included in regulations rather than another type of legislation.[11] Regulations are subject to parliamentary oversight, including disallowance processes. Parliament therefore has the ability to oversee the charges and play a role in setting the tax.

Subsection 6(2) allows the amount of charges to remain responsive and adaptive to circumstances not foreseen at the time of the establishment of the Scheme. This could include with relation to the estimated number of registrants, and the estimated cost to administer the Scheme. Charges established by regulations in accordance with subsection (6)(a) will be legislative instruments under the *Legislation Act 2003* and would be subject to the normal disallowance processes.

The committee has also enquired whether the Bill could be amended to include guidance on the method of calculation of the charge and/or the maximum charge. Government is open to considering amendments to the Bill to establish a maximum charge.

[11] Office of Parliamentary Counsel, *Drafting Direction No. 3.8: Subordinate Legislation*, 2017, page 3.

PARLIAMENT OF AUSTRALIA • HOUSE OF REPRESENTATIVES

PAUL FLETCHER MP

Federal Member for Bradfield

Minister for Urban Infrastructure and Cities

PDR ID: MB18-000350

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

Dear Senator Polley

Response to Senate Scrutiny Committee – Road Vehicle Standards Bills

I thank the Senate Standing Committee for the Scrutiny of Bills for its email of 15 February 2018, seeking my advice on a number of matters related to the Road Vehicle Standards Bill 2018, Road Vehicle Standards Charges (Imposition – Customs) Bill 2018, Road Vehicle Standards Charges (Imposition – Excise) Bill 2018 and the Road Vehicle Standards Charges Imposition (Imposition – General) Bill 2018 (Charging Bills).

I have attached my response to the matters raised by the Committee regarding the Road Vehicle Standards Bill 2018 (Attachment A) and the related Charging Bills (Attachment B).

I have also emailed a copy of this letter and its attachments to the Scrutiny of Bills Committee Secretariat.

I trust this information supports the Committee in finalising its consideration of the Bill.

Yours sincerely,

Paul Fletcher

2 / 3 /2018

Level 2, 280 Pacific Highway, Lindfield NSW 2070 • T 02 9465 3950 • F 02 9465 3999
P O Box 6022 Parliament House, Canberra ACT 2600 • T 02 6277 7790 • F 02 6245 4396
paul.fletcher.mp@aph.gov.au • www.paulfletcher.com.au

Attachment A

Response to Senate Standing Committee for Scrutiny of Bills:

Road Vehicle Standards Bill 2018

Broad delegation of legislative power

The Senate Standing Committee for Scrutiny of Bills (the Committee) has raised concerns about the broad power delegated to the Secretary of the Department of Infrastructure, Regional Development and Cities (the Department) to determine the scope of road vehicles and road vehicle components that will be subject to the regulatory scheme set out in the Bill. Subclause 6(5) of the Bill allows the Secretary, by legislative instrument, to determine whether a class of vehicle is or is not a road vehicle for the purposes of the Bill. Similarly, subclause 7(3) allows the Secretary to determine by legislative instrument that a class of component is, or is not, a road vehicle component for the purposes of the Bill.

A core issue that arises when regulating road vehicles and their components is the variety and complexity of vehicles that people may seek to use on roads. The Bill provides a definition of road vehicles that makes it clear whether the vast majority of vehicles provided in Australia are, or are not, road vehicles. However, given the breadth and complexity of devices that can be used for the purposes of transportation, the intention of these provisions is to allow the assessment of vehicles that fall into the 'grey area' – where a vehicle may have some road going features and some features which are not. This will be especially required in the rapidly changing context of the vehicle industry that sees, for example, personal transportation devices such as self-balancing scooters entering the market.

These provisions provide for an objective assessment that will apply broadly, rather than requiring individual suppliers or importers to apply under the Bill to obtain a case-by-case assessment. They add on-going clarity to the legislation for potential current and future vehicle import applicants.

The Committee has indicated its view that significant matters such as range of vehicles and components that are to be subject to the legislative scheme should be determined by primary legislation, unless there is a sound justification for use of delegated legislation. If the scope of the definition of road vehicle or road vehicle component could be determined only through the Bill itself, this could pose a significant risk to public safety, given the practicalities and timeframes involved in developing amendments to primary legislation. Decisions around vehicles falling into this 'grey area' must be made relatively quickly and by a person with relevant technical expertise, to ensure vehicles entering Australia and being used on public roads fall within the scope of the Bill, and therefore are required to meet safety, security, and environmental standards.

Section 5B of the *Motor Vehicle Standards Act 1989* currently permits the Minister to make determinations in relation to what is not a road vehicle. The instruments made under section 5B (and those that would be made under clauses 6(5) and 7(3)) are highly technical instruments, requiring detailed technical explanation. Detailed technical matters are more appropriately contained in legislative instruments. The expertise to develop technical instruments rests with the Secretary who, through the Department, has the appropriate technical knowledge to develop, and be responsible for, these instruments.

For example, a power-assisted bicycle might be introduced to the Australian market without being regulated by the Bill. However, the bicycle may have road going features, such as power, speed, indicators etc., that indicate that the vehicle is designed for use on public roads and should therefore be regulated by the Bill.

The Secretary, using the expertise of engineers employed by the Department and in consultation with stakeholders, will be able to make a legislative instrument determining that these bicycles are road vehicles, and therefore must meet minimum safety, environmental and anti-theft standards. This provides the Government with the ability to swiftly address issues that will emerge in relation to road vehicles, ensuring the objectives of the Bill can be achieved on an ongoing basis within a rapidly changing industry.

In addition to being able to make decisions about vehicles that should be characterised as road vehicles or road vehicle components, it is important that the Secretary is able to make decisions about vehicles that should not be characterised as road vehicles or road vehicle components. This is particularly the case where the breadth of the definition of road vehicle unintentionally captures vehicles and it would be inappropriate for them to be regulated by the Bill. An example of this was motorised personal mobility devices such as electric wheelchairs. Improvements in these devices such as increased motor power, meant that such devices unintentionally fell within the definition of road vehicles in the Motor Vehicle Standards Act. In this case, the Minister was able to determine under section 5B that these vehicles were not road vehicles, ensuring people with disability were able to access personal mobility devices without requiring these to meet unnecessary national road vehicle standards.

It should also be noted that the determinations will be legislative instruments and therefore subject to scrutiny from the Senate Standing Committee on Regulations and Ordinances, and also subject to disallowance by Parliament. The Secretary must also make determinations that are consistent with the objectives of the Bill, providing a set of principles that must be considered in making these determinations. It is not expected that these instruments will be made often – there have been two during the operation of the Motor Vehicle Standards Act – however when they are made, they are in direct response to an immediate problem faced in the regulation of road vehicles.

For the above reasons it is appropriate that the Bill allows the Secretary to determine, by legislative instrument, what is and is not a road vehicle. Legislative instruments made by the Secretary strike an appropriate balance between the core considerations that must go into these decisions: the requirement for quick decisions; the detailed technical knowledge required; and the need for parliamentary scrutiny of these decisions.

Broad discretionary power

The Committee has sought advice in relation to subclauses 6(6) and 7(4) of the Bill, which seek to allow the Secretary to determine, by notifiable instrument, that an individual vehicle or component is, or is not, a road vehicle.

These powers are required due to the complexity of the automotive regulatory environment. As outlined in the response to subclauses 6(5) and 7(3), there is often a ‘grey area’ between whether a vehicle should be considered a road vehicle or not a road vehicle. However, there

is an additional level of complexity when modified vehicles are considered. Individual vehicles can easily be modified in a way that changes the nature of the vehicle and therefore how it should be regulated. It is these modified vehicles that are most likely to require determinations on an individual basis.

For example, someone may modify an individual non-road vehicle in such a way that it is unclear whether it becomes a road vehicle; perhaps it could be modified through the addition of features such as higher engine capacity, indicators, or road tyres, to an off-road motorcycle. The physical features of the individual vehicle may indicate that it should be regulated as a road vehicle, and thus will be subject to requiring a level of compliance with the national road vehicle standards.

In this circumstance, a tool enabling the Secretary to determine that the vehicle is a road vehicle ensures that the community is provided protection by capturing the vehicle under the Bill, meaning the national vehicle standards apply to that vehicle.

In addition, the inability to declare an individual vehicle or components as 'not a road vehicle or component' could impose significant burden on the community. For example someone may have modified a road vehicle in such a way that it is clearly no longer for public road use - therefore the community does not require that vehicle to be subject to the requirements imposed by the Bill. For example, an individual may have installed tracks on a road vehicle, instead of wheels and tyres because they want the vehicle to be used in off-road in snow tourism. Providing the Secretary with the power to notify that a specific vehicle is not a road vehicle facilitates the supply of individual specialist vehicles into Australia by ensuring that these types of special purpose non-road vehicles are not unduly hindered in their provision to the Australian market.

Delegates in the Department make thousands of decisions per year on the importation of individual vehicles (as opposed to classes of vehicles - around 17,000 applications per year). While many of these require decisions as to whether the vehicle is or is not a road vehicle, it is not envisaged that each of these will result in a notifiable instrument. Instead, it is envisaged that the determination-making power for individual vehicles will be used in complex cases where definitive advice is considered by the Secretary to be in the interests of meeting the objectives of the Bill. The objects of the Bill provide the high level principles that the Secretary needs to consider when making notifiable instruments.

The fact that the determination is by notifiable instrument ensures that, where a determination is made, it is published and publicly accessible (as required by the *Legislation Act 2003).* This provides greater public scrutiny of decisions, helps consumers understand the practical application of the legislation, and improves public transparency of complex decisions.

It is not proposed that determinations under clauses 6(6) and 7(4) about individual road vehicles be reviewable.

Incorporation of external material into law

The Committee notes concerns about the provisions of the Bill permitting instruments made under it to apply, adopt and incorporate matters contained in other instruments or writings as in force or existing from time to time. In particular, the Committee has concerns about the

possibility that incorporated material may not be freely and readily available to all those interested in the law.

The Government has a long-standing policy of harmonising Australia's vehicle standards with international best practice vehicle standards. The clauses of the Bill noted by the Committee continue the existing policy under 7A of the Motor Vehicle Standards Act, which allow the Minister to make National Road Vehicle Standards by incorporating international standards.

The National Road Vehicle Standards adopt or point to a variety of material, the overwhelming majority of which is publically available United Nations Regulations and other internationally agreed standards. Within the UN Regulations there are a number of minor technical standards referenced in turn. Many of these are also free to access, although some, like International Standards Organisation (ISO) Standards, are generally only available for purchase.

In addition to incorporating material into the National Road Vehicle Standards, technical standards are likely to be incorporated into other determinations made through the Rules (subclause 82(6)), consistent with the policy to harmonise with international standards.

Entities regulated by the Bill are likely to have their own access to standards or documents that are incorporated as part of their professional library, given the global use of such documents. Where the general public has an interest in the law the National Library of Australia has a collection of International, British, Canadian, German, Japanese New Zealand and United States Standards available for viewing. While not a complete collection, this provides significant access to these areas of the law.

The benefit of incorporating international standards is clear – regulation that is based on internationally agreed standards provides consumers with access to the safest vehicles from the global market at the lowest possible cost. It reduces the burden on manufacturers and provides an economic benefit to consumers. Imposing a different standard, on the basis it is freely and readily available to the public at large, may require departure from the internationally accepted best-practice encompassed within standard published by the United Nations.

The Government considers that the benefit gained from ensuring best-practice standards are adopted outweighs the minimal detriment caused by the standard potentially not being freely and readily available to persons who are interested, but not directly affected by, the law.

Reversal of Evidential Burden

The Committee has sought justification as to the appropriateness of reversing the evidential burden in offence specific defences.

The 'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers' provides that a matter should only be included in an offence-specific defence where:

- It is peculiarly within the knowledge of the defendant; and
- It would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Subclause 16(3) – Entry of non-compliant vehicles on the RAV

This clause prevents vehicles that do not meet the requirements of a Register of Approved Vehicles (RAV) entry pathway from being entered onto the RAV. Paragraphs 16(3)(a), (b), (c) and (d) provide a defence if the only reason that the vehicle did not comply with the entry pathway was due to the use of a non-compliant component represented by its supplier to be covered by a component type approval.

The precise details of the design and manufacture of the vehicle, and the procurement and use of components, is peculiarly within the knowledge of the type approval holder. It is a core requirement of type approvals that the type approval holders retain this information in 'supporting documentation', rather than provide this information to the Department to gain an approval. While the Department can access this information by requesting it, this is a costly and resource intensive exercise, requiring the Department to request a full outline of the design and manufacturing process and spend time to develop a detailed understanding of one type approval holder's production process.

The type approval holders, to whom this offence relates, should already have both the documentation, and a detailed understanding of their own processes. This means that in addition to the type approval holder being the specific holder of this knowledge, it is significantly more difficult and costly for the prosecution to disprove, rather than for the defendant to establish the matters in paragraphs (a), (c), and (d).

Clause 24 - Providing road vehicle for the first time in Australia vehicle not on RAV

Subclause 24(1) makes it an offence for a person to provide a road vehicle to another person in Australia for the first time, if the vehicle is not on the RAV.

Paragraph 24(3)(f) provides that subclause 24(1) does not apply 'in a circumstance set out in the Rules'. Under clause 48 of the proposed Rules, a circumstance for the purposes of paragraph 24(3)(f) of the Bill is where:

- A road vehicle is a vehicle to which an intergovernmental agreement applies; and
- The vehicle is provided in circumstances allow by the intergovernmental agreement.

Vehicles that are imported under intergovernmental agreements include speciality vehicles used in defence operations. It is peculiarly within the knowledge of the defendant that the vehicle is subject to an intergovernmental agreement. The Department, and at times, the Australian Government, does not provide these approvals and therefore does not have these records.

Subclause 24(4)(a) provides a defence if the person providing the vehicle holds a non-RAV entry import approval for vehicle. While the Department has access to records of non-RAV entry import approval holders, whether a specific vehicle relates to the non-RAV entry import approval is knowledge peculiarly within the knowledge of the defendant, as determining this requires access to the vehicle. The defendant has access to the vehicle, its sale and importation documents and would therefore be able to link the vehicle and non-RAV entry import approval. This makes it significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

Clause 32 – False or misleading information

Subclause 32(1) creates an offence for providing false or misleading information.

Subclause 32(2) creates a defence if the information or document is not false or misleading in a material particular. This places an evidential burden on the defendant in relation to proving that the information or documents were not false or misleading in a material particular (that is, they must point to evidence that the false or misleading information is inconsequential or not relevant to the matter at issue; if they do so, the prosecution must disprove this beyond reasonable doubt).

Given the objectives of the Bill to provide safe and secure vehicles, the provision of false or misleading information can have serious ramifications for achieving the legitimate outcomes of the Bill. For example, an applicant may mislead the Department about their engineering qualifications, saying that they are more qualified than they actually are. This false statement could have a material impact on vehicle safety and the Department may seek to prosecute. The applicant's real qualification, however, may actually meet the minimum expected threshold. The defendant could offer this as evidence that the misleading information they provided was inconsequential to the outcome. In situations such as this, the evidence of whether the matter is misleading in a material particular is peculiarly within the knowledge of the defendant and it is therefore appropriate for the defendant to bear the evidential burden.

The reversal of evidential burden in this offence is consistent with the *Criminal Code Act 1995* and other Commonwealth legislation that operates in a similar regulatory environment, such as the *Biosecurity Act 2015*.

Strict Liability Offence

The Committee has noted their concerns regarding strict liability applying to clause 38 of the Bill, which is subject to maximum penalty of 1,050 penalty units for an individual.

Clause 38 creates an offence of strict liability where a person refuses or fails to comply with a recall notice, or a person supplies to another person a road vehicle or road vehicle component to which a recall notice relates. Failing to comply with a recall notice is a significant contravention that goes to the core objectives of the Bill – to ensure that vehicles in Australia are safe, secure, and meet relevant environmental standards.

The use of strict liability for this offence is consistent with the principles relating to strict liability at 2.2.6 of the *'Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers'*, insofar as strict liability is required to ensure the integrity of a regulatory regime. The penalty unit amount, while far exceeding the maximum recommended penalty units, is also vital for ensuring the integrity of the regulatory regime.

Rectifying vehicles that are subject to a recall notice is an expensive exercise for regulated entities, but vital for ensuring community health and safety. The amount of a penalty, regardless of whether the supplier is an individual or corporation, must be set high enough that the supplier does not consider non–compliance with the recall notice to be a less expensive or more attractive option. Generally, high initial outlays by automotive industry suppliers will be required to comply with recall notices. In these circumstances, the upper

limit of 60 penalty units for strict liability offences is inadequate as a meaningful deterrent. Given the high value of road vehicles, the proposed 1,050 penalty units for individuals is necessary to ensure integrity in the regulatory regime.

It is worth noting that the likelihood of an individual committing this offence is very low. Vehicle suppliers most likely to be subject to recall notices are type approval holders. To obtain a type approval, an individual or body corporate must demonstrate control over the entire design and manufacturing process of a vehicle. An individual is unlikely to meet these requirements. In the event that an individual has the means and sophistication of design and manufacture to hold a type approval, then they have opted into regulation by the Bill and must be aware of their obligations under the legislation.

In addition, this strict liability offence, and the amount of the penalty units, is already applicable to individuals who are supplying consumer goods, such as road vehicles, under the existing Australian Consumer Law. This Bill is deliberately consistent with this requirement to ensure that there can be no way for suppliers to pressure the Government to issue recall notices under legislation with lower penalties.

Privilege against self-incrimination

The Committee has noted that clause 42 of the Bill provides for 'use immunity', that is, information given to the Department under a disclosure notice cannot be used as evidence against that individual. However, clause 42 does not provide for 'derivative use immunity'. This means that information that is obtained as a consequence of producing the original information can be used as evidence against the individual.

Including a derivative use immunity for this offence is not appropriate in the broader context of ensuring that the Bill is able to meet its objectives.

Firstly, the Bill, including clause 42, has been drafted to be consistent with the existing requirements of the *Australian Consumer Law*. This is designed to prevent suppliers of road vehicles 'legislation shopping' by pressuring regulators to use legislation with more lenient compliance tools.

Secondly, a disclosure notice is a tool to be used in situations where information about unsafe or non-compliant vehicles is not forthcoming from vehicle suppliers. These are situations that present an immediate risk of harm to the community. Any incentive to delay providing information is inconsistent with community safety. A derivative use immunity may provide an incentive to non-compliant suppliers to withhold information, then use the subsequent disclosure notice to 'confess' to other serious non-compliance. This is not appropriate in the context of the serious community harm that can be caused by any delay.

Thirdly, derivative use immunity may prevent the Department from sharing information with other Departments or State and Federal Police. This is because the other agency will also be bound by any derivative use immunity. In the event that the other agency wished to commence criminal or civil penalty proceedings against that person, it would not be able to make use of any evidence derived as a result of the originally received information. It would also face the additional evidentiary hurdle of establishing that no use was made of the shared information in obtaining the evidence to be relied upon in the prosecution. This is particularly

concerning as the Department will need to work in conjunction with the Australian Competition and Consumer Commission where information raises consumer protection issues.

Fourthly, the circumstances where an individual will be required to provide evidence are very limited. The suppliers most likely to be subject to disclosure notices are type approval holders. To obtain a type approval, an individual or body corporate must demonstrate control over the entire design and manufacturing process of a vehicle. It is very unlikely that an individual will be able to meet these requirements and therefore unlikely for an individual to be impacted by this clause.

Given costs imposed on the community by potential 'legislation shopping'; any incentives to delay providing information about unsafe vehicles; additional burdens imposed on the prosecution of non-compliant entities; and, the limited likelihood of individuals having to disclose information, the public benefit in the removal of the derivative use immunity outweighs the limited loss of personal liberty in this case.

Broad delegation of administrative powers (skills and training for inspector)

The Committee has requested the Minister's advice as to whether it would be appropriate to amend the bill to require that any person assisting an authorised officer have specified skills, training or experience.

People who may assist an inspector in monitoring and investigating include people within the Department, but also externally. Advances in technology with road vehicles mean that the Department must be able to use a wide range of people to assist in the monitoring and investigating of regulated entities. In complex investigations, the Department may have to procure the services of persons that are experts in specific fields. For example, the monitoring or investigation of emissions testing might involve the Department procuring an expert in the emission field to accompany an inspector in an investigation. In investigating an autonomous vehicle system, software engineers may be required. In addition to technical skillsets, the Department may also require, for example, translation and interpretation services.

To be prescriptive in the Bill as to who may assist an authorised officer, including being prescriptive of their specific skills, training and experience, would limit the ability of authorised persons to obtain the assistance of appropriately qualified persons and may jeopardise the monitoring and investigation outcomes intended under the Bill.

Limitation of Judicial Review

The Committee has sought the Minister's response on why a no-duty-to-consider clause is necessary where the Minister is made aware of facts that indicate that an adverse decision has been made as a result of a computer program not functioning correctly.

Subclause 63(1) of the Bill allows the Minister to substitute a decision where the initial decision was made by the operation of a computer program. The Minister may exercise this power if the computer program was not functioning correctly at a specific time or in relation to a specific outcome. The substituted decision could have been made under the same

provision of the Bill as the initial decision and the substituted decision is more favourable to the applicant.

The Government considers a discretionary power appropriate. A duty to consider clause could place an undue burden on the Minister if they were required to consider exercising the power in subclause 63(1) in respect of every decision made by the operation of a computer program under an arrangement made under clause 62(1), particularly where applicants may seek to abuse this provision with frivolous claims. It is anticipated that there will be minimal cases that will be referred to the Minister to consider exercising this power, and that the Minister would consider whether to exercise the power, where reasonably asked to do so.

Broad delegation of administrative powers (general)

The Committee sought a response as to why the Bill proposes to allow the rules to provide for the delegation of most of the Minister's, and all of the Secretary's powers and functions under the rules, or any instruments made under the rules, to any Australian Public Service (APS) employee.

The draft Road Vehicle Standards Rules require the Minister or Secretary to consider most applications from industry within 30 to 60 days. Applications that will be received include application for type approvals, testing facilities, entry onto the specialist and enthusiast register, authorised vehicle verifiers, model reports and individual concessional imports. This is expected to be in the order of 200,000 decisions per year. The applications vary greatly in complexity and there is significant administrative efficiency to be gained by allowing less complex or sensitive applications to be dealt with by a broader range of appropriately trained staff. As part of the extensive consultation process, industry has provided feedback that more timely processing of regulatory applications would bring greater operational flexibility and efficiency.

Allowing the rules to provide for the delegation of the Minister's and Secretary's powers to APS employees will not automatically grant lower level employees the authority to make decisions and nor would the rules actually permit such delegations. As in other Commonwealth agencies, the delegation of powers is managed through a Delegation Instrument. The Minister and Secretary would determine on a risk management basis the classes of persons who are to be delegated these powers. Accordingly, significant, complex or sensitive regulatory decisions - such as decisions to vary, suspend or terminate approvals – will remain with Senior Executive Service and Executive Level staff. Less complex regulatory decisions, for example to approve a concessional import approval, may be delegated to a small number of appropriately trained, APS level employees within the Department.

Administrative processes are also in place to ensure staff exercise delegations appropriately. The regulatory management system used by staff within the Vehicle Safety Standards branch of the Department has existing controls in place to ensure that only duly authorised persons can exercise a function or power. Delegates who exercise powers and functions under the Motor Vehicle Standards Act receive appropriate training and support to make effective and lawful decisions, including internal training courses specifically covering the exercise of

delegations. These processes and training courses will be updated to reflect the new regulatory regime under the Bill and will continue for all relevant staff.

The measures currently in place appropriately manage the proper exercise of power under a delegation.

Immunity from liability

The Committee sought reasons as to why it is appropriate for clause 81 to prevent certain legal proceedings being brought against the Commonwealth, the Minister, Secretary and Departmental employees.

Clause 81 of the Bill is a policy continuation of section 37 of the Motor Vehicle Standards Act. Under section 37 of the Motor Vehicle Standards Act, no action or other proceeding could lie against the Commonwealth in respect of any loss incurred or any damage suffered due to reliance on the following factors:

- an identification plate or a used import plate; or
- any test carried out under this Act or the regulations or a determination under this Act; or
- any express statement, or any statement or action implying, that a road vehicle or a vehicle component complied with a national standard.

Subclause 81(1) models the exemptions set out section 37 of the Motor Vehicle Standards Act, but updates these to provide for the modernised regulatory regime that the Bill introduces. For example, instead of a vehicle's key compliance information being placed on an identification plate or used import plate, it will be now entered onto the Registered of Approved Vehicles – a publically accessible online database. Under clause 16 of the Bill, it is a contravention to enter a non-compliant road vehicle onto the Register of Approved Vehicles.

The Department is unable to inspect each of the 1.2 million new vehicles and 30,000 used vehicles that enter the Australian market each year. The Department relies on approval holders, in particular type approval holders, to provide evidence that each road vehicle has conformity of production and is compliant with the national vehicle standards.

The Department has appropriately trained staff that consider and review the evidence provided, and who are required at all times to act in accordance with the Australian Public Service Code of Conduct. Nonetheless, it is possible that losses may be incurred because of reliance on, for example, approvals granted under the Act. This may occur because of fraud on the part of an approval holder. To make the Minister, the Secretary and Departmental employees criminally responsible or civilly liable for such loss, where persons involved in decisions have acted in good faith, would be detrimental and unfair. From an administrative perspective, this additional legal burden placed on the Department would significantly increase decision times and could result in the Department being more cautious and restrictive in relation to the approval of applications. This would be detrimental to not only consumers and the general public but to the greater automotive industry within Australia.

Clause 81 of the Bill does not prevent proceedings being brought against the listed persons if the listed persons did not act in good faith. The question of whether a person did or did not act in good faith is subject to judicial determination – likely to be decided in a preliminary stage of any proceeding. Clause 81 in the Bill prevents frivolous claims being brought against the Minister, Secretary and Departmental employees.

Review Rights

The Committee has raised concerns as to why the Bill does not set out which decisions will be subject to merits review before the Administrative Appeal Tribunal (AAT). The decision points in the legislation are contained in the Rules, therefore it is practical that the Rules also set out which decisions will be subject to merits review.

The Bill allows the Rules to set out which decisions can be subject to merit review, but does not require that decisions must be subject to merit review. This drafting ensures that when the Rules are made there are no foregone conclusions about the suitability of a decision for merits review. Instead, the drafting provides the Minister with the scope to consider the suitability of each decision point for merits review, taking into account the unique circumstances and requirements of the matter. This allows for a more nuanced and considered approach to merits review.

The Committee may wish to note that the draft Rules provide extensive rights to merit review by the AAT (see clause 219).

For the Committee's reference, the Exposure Draft of the Road Vehicle Standards Rules is available on the Department's website:
https://infrastructure.gov.au/vehicles/mv_standards_act/files/RVS_Rules_2017.pdf

Attachment B
Response to Senate Standing Committee for Scrutiny of Bills:
Road Vehicle Standards Charges (Imposition – Customs) Bill 2018
Road Vehicle Standards Charges (Imposition – Excise) Bill 2018
Road Vehicle Standards Charges Imposition (Imposition – General) Bill 2018

Charges in delegated legislation

The Committee has raised concerns as to why there are no limits on the specific charges in each of the three charging Bills. Additionally, the Committee seeks advice on whether the method of calculation of these charges and/or a maximum charge could be specifically included in each Bill.

Specifying the amount of a charge or the method for calculating the amount of a charge in regulations, as opposed to the Bill itself, ensures that there is appropriate flexibility to change the amount of a charge or the method for calculating the amount of a charge over time. This helps to avoid over or under recovery and will eliminate the need to amend primary legislation as cost recovery arrangements evolve because the efficiency of administering the new scheme improves.

The types of costs that the Charging Bill(s) will be used to recover are matters such as development of the national vehicle standards, a comprehensive compliance and enforcement system, and the establishment and maintenance of the regulatory framework for recalls. These are central activities for the Government to undertake to ensure the objectives of the Bill are being met and go to the core of a safe, secure, and environmentally friendly vehicle fleet.

These activities are dynamic rather than predictable in nature, reflecting the complexity and rapid change in the vehicle industry. For example, the issuing of a recall notice may occur on an urgent basis and can an affect wide range of approval holders. In such circumstances, the Department needs to be able to fund an adequate response, requiring cost recovery measures to be developed quickly and responsively. This is most effectively implemented by having charging points and amounts in legislative instruments, rather than being prescriptive in the Charging Bills. In such a circumstance, the charge would still need to be consistent with the Government's Cost Recovery Guidelines. The charge would be subject to Parliamentary scrutiny through the disallowance process.

As part of the Department of Infrastructure, Regional Development and Cities consultation process, a Draft Cost Recovery Implementation Statement (CRIS) has been released and submissions sought from industry stakeholders and the general public. The outcomes of this consultation process will inform the government's final decision on the fees and charges to apply under the proposed Road Vehicle Standards Bill. 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 application.

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.

The Department has undertaken to review the charging points made under future regulations twelve months after their commencement. The Department is also required, at a minimum, to conduct a periodic review of all existing and potential charging activities within its portfolio at least every five years. The review is to be in accordance with the published schedule of portfolio charging reviews updated by the Finance Minister from time to time, in consultation with the responsible Minister. The portfolio charging review report must be submitted to the responsible Minister, and a copy must be provided to the Finance Minister.

For these reasons, the Government does not believe a method of calculation to these charges and/or a maximum charge can be specifically included in each Bill.

THE HON PETER DUTTON MP
MINISTER FOR HOME AFFAIRS
MINISTER FOR IMMIGRATION AND BORDER PROTECTION

Ref No: MS18-000618

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

Dear Senator

I am writing in response to the issues raised by the Senate Standing Committee in its *Scrutiny Digest No. 1 of 2018* in relation to the Security of Critical Infrastructure Bill 2017 (the Bill). In particular, the Committee sought justification on the approach taken in clauses 27 and 46.

Clause 27, as drafted, provides me with the power to exempt certain entities from complying with some or all of the obligations to provide information to the Register of Critical Infrastructure Assets. The intent of this provision is to ensure the Bill does not impose an unnecessary burden on industry. In particular, it will enable an entity to be exempted from providing information required under the legislation. This would include where that information is otherwise available to government, either through open sources or other reporting mechanisms. Importantly, the provision does not enable me to increase the reporting obligations on an entity.

Clause 46 sets out exceptions to the offence of disclosing protected information and reverses the burden of proof for these exceptions. In this instance, the reversal is appropriate as the applicability of the exceptions are best known to the defendant and would be significantly more difficult for the prosecution to prove as an element of the offence. Importantly, the provision only shifts the evidential burden, and if an exception is raised, the legal burden still resides with the prosecution. This approach is consistent with the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

I will look to amend the explanatory memorandum to provide further guidance on the application of these provisions.

Thank you again for bringing these matters to my attention.

Yours sincerely

PETER DUTTON 27/02/18

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

Minister for Revenue and Financial Services
Minister for Women
Minister Assisting the Prime Minister for the Public Service
The Hon Kelly O'Dwyer MP

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

Dear Senator Helen

A representative of the Senate Scrutiny of Bills Committee wrote to my office on 8 and 15 February 2018 requesting a response from me in relation to the Scrutiny of Bills Committee reports tabled in its *Alert Digests Nos.1 and 2 of 2018*. The Committee has sought information concerning Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, Treasury Laws Amendment (2018 Measures No. 1) Bill 2018 and the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018.

The Committee inquired whether there may be any circumstances in which it is possible that taxpayers and other persons will be adversely affected by certain provisions within these Bills. Accordingly, the Government's response to the Committee's concerns is set out below.

Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

Disclosure of confidential information

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 creates tax law offences and broadens and clarifies the corporate offences of victimisation of whistleblowers and disclosure of information likely to reveal the identity of a whistleblower ("confidentiality offence"). The Bill also amends the *Corporations Act 2001* (Corporations Act) by creating civil penalty contraventions, in addition to these criminal offences.

The Bill expands the defence available to the existing corporate confidentiality offence by allowing the disclosure of information which is reasonably necessary for the purposes of investigating the reported misconduct. A similar tax law defence is created

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

by the Bill. The Committee has requested information about these defences and the evidential burden of proof that applies to them.

The proposed provisions support the policy of protecting whistleblowers from victimisation or other detriment, including where a person's identity is revealed as a whistleblower. However, the expanded corporate and tax law defence is intended to ensure entities are not inhibited from properly investigating internal disclosures of misconduct because of the risk that communications relating to the investigation could include information likely to lead to the identification of a whistleblower. The entity may use the defence where it does not identify the whistleblower by name and takes reasonable steps to reduce the risk of the whistleblower's identity being deduced from the information disclosed.

In consulting with regulatory agencies, it became clear that entities in some cases declined to investigate a whistleblower's disclosure to avoid committing an offence. This is because the current corporate law prohibits sharing of not only the whistleblower's identity, but also the information about the underlying actual or potential contravention/s of law reported by the whistleblower, irrespective of whether that information would reveal their identity or not.

The Bill addresses this problem by balancing the need to protect a whistleblower's identity with the need to allow an entity to investigate and remedy contraventions, provided it takes all reasonable steps to avoid inadvertently revealing the whistleblower's identity.

The expanded corporate defence recognises the necessity of revealing particular information to undertake an investigation, and that the reasonableness of steps taken to reduce the risk of disclosing a whistleblower's identity will depend on circumstances particular to the entity. These are matters peculiarly within the defendant entity's knowledge, and not available to the prosecution. For this reason, it is appropriate that the defendant entity bear the burden of adducing evidence about these matters to make out the defence and that this be implemented as an offence-specific defence rather than as an additional element of the offence.

New section 1317AAE of the Corporations Act adapts existing section 1317AE and reflects equivalent sections in the *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995* and *Superannuation Industry (Supervision) Act 1993*.

New section 14ZZW of the *Taxation Administration Act 1953* mirrors Corporations Act section 1317AAE.

Whistleblowing policies

The Bill imposes an obligation on larger companies to have a corporate whistleblowing policy to protect whistleblowers. The Australian Securities and Investments Commission (ASIC) may, by legislative instrument, make an order relieving specified regulated entities or classes of regulated entities from this obligation or from particular aspects of this obligation. The Committee has requested information about the appropriateness of ASIC being given such a class order power.

One of the key policy aims of the Bill is to encourage greater self-regulation by large companies and more whistleblowing within regulated entities, including through internally promoting whistleblowing protection.

This is achieved by requiring certain companies to have appropriate whistleblowing policies and the associated systems and procedures to facilitate, investigate, monitor and act on disclosures as well as monitoring internal responses to ensure whistleblowers are not victimised and that their identity is not revealed.

The requirement to have whistleblowing policies is confined to large and public listed entities to ensure the cost impact and compliance burden is minimised. It utilises the existing small proprietary company definition in section 45A of the Corporations Act, which is a fact based test based upon things such as staffing levels, asset value or turnover, as the dividing line between those entities that are not required to have a policy and those that are.

ASIC's class order power may be exercised to reduce the compliance burden on small companies in appropriate circumstances. These circumstances include where the compliance burden is too great given the scale of their operations or staffing levels, or where compliance is unnecessary because of the nature of their businesses. Smaller companies do not have the same economies of scale or resources as larger companies. For these reasons, the Government considered it appropriate to give ASIC an exemption power.

Given the range of corporate and business structures, the Bill permits ASIC a class order power to allow it to make class orders that strike a reasonable balance between promoting widespread self-regulation and protecting smaller entities from unnecessary regulation. These considerations will need to be assessed on a case by case basis. Additional rules or guidance are not appropriate as they may limit the utility of the class order powers, particularly in respect of unforeseen situations.

Treasury Laws Amendment (2018 Measures No. 1) Bill 2018

Schedule 5 to the Treasury Laws Amendment (2018 Measures No. 1) Bill 2018 requires purchasers of new residential premises and subdivisions of potential residential land to make a withholding payment of part of the purchase price on or before the day they first provide consideration (other than as a deposit) to the supplier.

- Suppliers of property to which a withholding obligation applies are required to provide a notice to the purchaser informing them of certain matters, including that the purchaser is required to make a payment.
- To ensure that the obligation does not apply in circumstances that are not intended, the Commissioner of Taxation is provided with a power to exempt classes of supplies from the withholding obligation, as well as the notice requirement.
- More detail is provided on each of these amendments in Appendix A.

Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018

Schedule 1 to the Treasury Laws Amendment (Black Economy Taskforce Measures No. 1) Bill 2018 creates a number of offences relating to the production, use, possession and distribution of electronic sales suppression tools.

- The proposed offences are offences of strict liability that can attract maximum penalties of between 500 and 5,000 penalty units (depending on the offence).
- Offence-specific defences are available to individuals who would otherwise commit an offence. These defences apply where the otherwise prohibited action in relation to an electronic sales suppression tool was taken to prevent or deter tax evasion.
- More detail is provided on each of these amendments in Appendix B.

I hope this information will be of assistance to the Committee.

Yours sincerely

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APPENDIX A

TREASURY LAWS AMENDMENT (2018 MEASURES NO. 1) BILL 2018

Reference	Committee's request	Comments on potential adverse effects from retrospective application
1.147	The Committee seeks the Minister's more detailed justification as to why it is proposed to allow the Commissioner of Taxation to determine, by legislative instrument, that the withholding obligation does not apply to certain kinds of supply.	As noted in the explanatory memorandum to the Bill, the inclusion of the power to allow the Commissioner of Taxation to determine, by legislative instrument, that the withholding obligation under the Bill does not apply to certain kinds of supply, is to avoid any unintended consequences that may arise from imposing a withholding obligation. The legislative instrument will not affect whether GST is payable in relation to the supply. Broadly, the withholding obligation in the Bill is designed to align with when GST is attributed on the supply and is therefore payable. The general rule for this under the GST law provides that, other than when accounting on a cash basis, that GST payable is attributed to the earliest tax period when either consideration for the supply is first provided, or the tax period which an invoice is provided. However, the Commissioner of Taxation may vary this in certain cases by legislative instrument. The types of supplies to which the withholding obligation applies are new residential premises, or subdivisions of potential residential land. These are types of supplies that in all cases will be governed by State or Territory (State) laws regulating property and land releases. In some cases, this makes the relevant State the supplier of the new residential premises. As State governments may change these laws and policies over time, it is appropriate that there is some flexibility in the legislation so that the withholding obligation does not apply inappropriately as these rules change.

Reference	Committee's request	Comments on potential adverse effects from retrospective application
		An example of such a scheme is the ACT Land Rent Scheme, where a Land Rent Release is granted by a government entity over vacant land for 99 years. An annual land rent amount is calculated on the unimproved value of the land at a particular percentage. A lessee under a Land Rent Lease is required to construct a house on the land within two years of the lease being granted. *A New Tax System (Goods and Services Tax) (Particular Attribution Rules Where Total Consideration Not Known) Determination (No. 1) 2000* applies to these supplies, and requires that the supplier attribute GST on each instalment, rather than the tax period in which consideration is first provided. Application of a withholding obligation which would require the whole of the GST payable on the supply across a 99 year lease (where the payment amount may vary) would produce an inappropriate outcome. Therefore it is appropriate to allow the Commissioner of Taxation a broad power to exempt certain classes of supplies. The determination in each case will also be a legislative instrument, which will be subject to disallowance under section 42 of the *Legislation Act 2003*, so Parliament will be involved in determining whether exemption from the withholding obligation for the class of supply is appropriate.

Reference	Committee's request	Comments on potential adverse effects from retrospective application
1.148	The Committee also seeks the Minister's advice as to the appropriateness of amending the Bill to insert (at least high-level) guidance concerning the making of a determination under proposed subsection 14-250(3).	For the reasons I have set out in my earlier response, I do not think that it is necessary to limit or provide additional legislative guidance about the circumstances in which a legislative instrument can be made. The purpose of the power is to deal with unintended consequences of the application of a withholding obligation, which may arise from a number of sources and will be highly-specific to the circumstances of the supply, such as whether: • there are relevant State laws which affect the supply; • the Commissioner of Taxation has made specific attribution rules to deal with the supply; or • there are contracts of sale that set out that consideration is to be provided other than as a lump sum cash payment (such as where it is provided as non-monetary consideration, or there are a significant number of instalment payments) and it would be inappropriate to apply the withholding obligation in those circumstances. These instruments are subject to disallowance, so Parliament will have the opportunity to determine whether it is appropriate that the type of supply is excluded. Given the reasons why a legislative instrument will be made will be highly-specific to the circumstances of the supply, it is appropriate that the Commissioner of Taxation exercise the power to exempt certain classes of supply in line with this purpose.

APPENDIX B

TREASURY LAWS AMENDMENT (BLACK ECONOMY TASKFORCE MEASURES NO. 1) BILL 2018

Paragraph	Committee's request	Response
1.177	A more detailed justification for the application of strict liability to offences attracting penalties of between 500 and 5,000 penalty units.	As noted in the explanatory memorandum to the Bill, the application of strict liability to the proposed offences is justified on the basis that, with the exception of the activities covered by the applicable defences, electronic sales suppression tools can only be used to facilitate systematic fraud and tax evasion. Given that there is no legitimate use of an electronic sales suppression tool, it is the Government's view that the physical elements of the proposed offences provide the appropriate basis for determining when a person has committed an offence. That is, the fact of production, distribution, use or possession of an electronic sales suppression tool is of itself unable to be justified (other than in the circumstances covered by the applicable defences). I also note the Committee raised specific concerns about the potential for the proposed offence for possession to apply in circumstances of 'inadvertent' possession of an electronic sales suppression tool. In developing the proposed offence for possession, careful consideration was given to this issue and it was determined that the general defence for honest mistake of fact provided appropriate protection to persons who unwittingly came into possession of such a tool, as well as in respect of the other actions covered by the proposed offences (the availability of this defence is noted at paragraphs 1.52, 1.66 and 1.76 of the explanatory memorandum). As such, if a person inadvertently acquired an electronic sales suppression tool but genuinely believed that it did not have that function, the person would not commit an offence.

Paragraph	Committee's request	Response
		With respect to the amount of the proposed penalties, these amounts have been specifically set to send the strongest possible signal, short of imprisonment, that appropriately reflects the severity of the behaviour related to systematic fraud and evasion. In the case of the maximum penalty for production and supply related offences of 5,000 penalty units, the upper limit reflects that the activity related to the offence can involve systematic and commercial scale operations that are specifically designed to profit from the facilitation of fraud and tax evasion. The maximum amount of the penalty is appropriate given the magnitude of the revenue at risk from the commercial manufacture and distribution of electronic sales suppression software. The maximum penalties for the proposed offences for use and possession have been intentionally scaled down. This reflects that those offences do not apply to wholesale production and distribution but nevertheless involve actions in respect of tools that have no legitimate function. In setting the amounts of these penalties, specific regard was also had to the principle articulated at Chapter 3.1.2 in the *Guide to Framing Commonwealth Offences* that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. As noted by the Committee, the proposed penalties are comparable to those that apply in respect of similar prohibited behaviours, such as the penalties for the promoters of tax exploitation schemes and breaches of certain directors' duties. It is the Government's view that the settings for the proposed penalties are appropriate and necessary to maintain a consistent message that schemes and tools that are specifically designed to promote or facilitate systematic fraud and tax evasion are unacceptable.

Paragraph	Committee's request	Response
1.184	A more detailed justification for making the question of whether a person is acting to prevent or deter tax evasion, or to enforce a taxation law, an offence-specific defence.	As the Committee notes, the statement in the explanatory memorandum to the Bill about a defendant being 'best placed' to raise evidence about a matter does not equate to an explanation about the matter being 'peculiarly' within their knowledge. In many cases, a person will not only be best placed to raise evidence, but will also be able to provide information about their purpose for undertaking otherwise prohibited actions in respect of an electronic sales suppression tool that is peculiarly within their knowledge. This is because the purpose for which many actions that a person may take in respect of an electronic sales suppression tool will only be able to be identified after the intended purpose has been fulfilled. It will therefore be extremely difficult for the prosecution to establish the intended purpose that an individual had in respect of a particular action that they took, whereas it will be comparatively simple for the person to lead evidence about the reasons for which the action was undertaken. For example, it will be relatively easy for a person who develops an electronic sales suppression tool for research rather than commercial purposes to evidence the way in which they intended their research to be used. While it is recognised that similar issues are unlikely to apply in respect of law enforcement officers carrying out their duties, it is expected that there will also be no ambiguity about whether a defence is applicable in such cases. Requiring an accused to raise evidence about the purpose for which they took the otherwise prohibited action in respect of an electronic sales suppression tool also makes clear the expectation that persons must exercise extreme care and diligence in taking otherwise prohibited actions in respect of such tools.

Paragraph	Committee's request	Response
1.185	Advice as to the appropriateness of amending the Bill to provide that whether a person is acting to prevent or deter tax evasion, or enforce a taxation law, to be an element of the proposed offences (rather than an offence-specific defence).	While I do not consider that incorporating the relevant matters as an element of the proposed offences would be unequivocally inappropriate, based on the above reasons, it is my view that the current approach that utilises an offence-specific defence is the most appropriate course of action.

TREASURER

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

Dear Senator

Thank you for your letter on behalf of the Senate Standing committee for Scrutiny of Bills Committee of 15 February 2018. The Government's responses to the matters raised by the Committee are set out below.

You have sought more details on why the proposed amendments to subsections 926B(5) and 110(4) in Schedule 1 enable the regulations to confer on ASIC a power to make decisions relating to how particular exemptions start and cease to apply and whether a decision of this nature would be a legislative instrument and therefore subject to parliamentary scrutiny.

- The regulation making power will allow ASIC to minimise risks and protect consumer interests by empowering ASIC to make decisions regarding how the exemption starts or ceases to apply. The regulations will be subject to disallowance and therefore be subject to parliament scrutiny. Decisions made by ASIC under the regulations would not be a legislative instrument, but would be subject to merits review by the Administrative Appeals Tribunal. Further details on these amendments are provided in Attachment 1.

You have also sought more detailed advice on why the proposed amendments to section 102R in Schedule 2 would apply retrospectively and whether this would cause detriment to any individual.

- The retrospective application of this measure is required to avoid any risk that managed investment trusts that have invested in venture capital following amendments made in 2016 may be subject to highly disadvantageous tax treatment. I am advised that it only affects tax outcomes for these entities and so is wholly beneficial to all affected entities. Further details on these amendments are provided in Attachment 2.

I trust this information will be of assistance to the Committee.

The Hon Scott Morrison MP
12 / 3 / 2018

Enc

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

TREASURY LAWS AMENDMENT (2018 MEASURES NO. 2) BILL 2018: SCHEDULE 1

Paragraph 1.161 - A more detailed justification for enabling the regulations to confer on ASIC a broad power to make decisions relating to how particular exemptions start and cease to apply.

Subsections 926B(5) and 110(4) have been included in the Bill to allow ASIC to respond to detected non-compliance with an imposed condition and to act to protect consumer interests from undesirable behaviour. The regulatory sandbox regime encourages innovation by allowing eligible entities to test certain financial and credit services without an Australian financial services licence (AFSL) or Australian credit licence (ACL) where they meet the conditions set out in the regulations.

A regulation power already exists in the law and the Bill amends this power to enable the regulations to prescribe conditional exemptions. The regulation making power will allow appropriate conditions to be prescribed and allow for those conditions to be adjusted, providing the flexibility needed to respond to changes in the market. ASIC will be empowered to determine whether the conditions required for the exemption have been met and the exemption should start. ASIC will also be empowered to determine whether the conditions required for the exemption are no longer being met such that the exemption should cease to be provided.

These provisions in item 2 and item 5 in the Bill are informed by the existing powers under section 926A of the *Corporations Act 2001* which empower ASIC to exempt and modify provisions of the Act, either unconditionally or subject to conditions. The Bill provides an analogous power for ASIC to make decisions on how the exemption starts or ceases to apply. This will let ASIC respond to non-compliance and manage risks to protect consumer interests, while at the same time ensuring the regulatory sandbox regime operates effectively, remains fit for purpose and evolves with the growing market.

The regulations prescribing that ASIC may make decisions regarding how the exemption starts or ceases to apply will be subject to disallowance and therefore have an appropriate level of parliamentary scrutiny. The regulations would also prescribe the conditions for the exemption, against which ASIC can make decisions regarding how the exemption starts or ceases to apply.

ASIC decision about how the exemption starts

Providers accessing the regulatory sandbox must meet certain conditions which will be prescribed in the regulations. ASIC can prevent a provider from accessing and using the exemption if ASIC deems the provider does not meet the conditions set out in the regulations. The draft regulations, which were released for public consultation in October 2017 simultaneously with the exposure draft of the Bill, set out that providers will need to have appropriate procedures in place, such as establishing and maintaining internal dispute resolution procedures and adequate compensation arrangements that comply with the standards and requirements in the Act. Having appropriate procedures and safeguards for compensation ensures protections of consumer interests are maintained. If ASIC deems a provider not to have appropriate procedures in place, ASIC can prevent the provider from accessing and using the exemption.

ASIC decision about how the exemption ceases

If ASIC finds a provider to be non-compliant with any of the conditions set out in the regulations, it can intervene and cancel the exemption immediately. The conditions set out in the regulations will ensure consumer interests are protected by providing certain obligations that the provider must meet while the provider is offering financial services in the regulatory sandbox.

The draft regulations, released for public consultation in October 2017 simultaneously with the exposure draft of the Bill, set out such conditions including meeting best interest (Part 7.7A of the Act) and client money (Part 7.8 of the Act) obligations and providing a statement of advice (Part 7.7 of the Act) in accordance with the obligations of licensees under the Act. The conditions for the exemption, also intend to provide for investment exposure limits to provide a cap on the total amount that can be invested with the provider.

If the provider breaches certain conditions set out in the draft regulations, ASIC will have the ability to intervene and cancel a provider's exemption. For other conditions, if breached by a provider, the draft regulations will provide that the provider's ability to rely on the exemption will automatically cease.

Paragraph 1.162 - Advice as to whether a decision of this nature would be a legislative instrument, and would therefore be subject to parliamentary scrutiny.

The regulations prescribing that ASIC may make decisions regarding how the exemption starts or ceases to apply will be subject to disallowance and therefore have an appropriate level of parliamentary scrutiny. The regulations would also prescribe the conditions for the exemption, against which ASIC can make decisions regarding how the exemption starts or ceases to apply. Decisions made by ASIC under the regulations would not be a legislative instrument. However, any decisions made by ASIC under the regulations, and within the framework and conditions of the regulations, would be subject to merits review by the Administrative Appeals Tribunal. This provides appropriate review rights to entities that disagree with decisions ASIC makes under the regulations.

TREASURY LAWS AMENDMENT (2018 MEASURES NO. 2) BILL 2018: SCHEDULE 2

Paragraph 1.167 - More detailed advice as to why the amendment proposed by item 18 of Schedule 2 to the Bill is intended to apply retrospectively from the 2016-17 income year, and whether this will cause detriment to any individual.

The amendments address an omission in amendments made by the *Tax Laws Amendment (Tax Incentives for Innovation) Act 2016* that were intended to allow managed investment trusts to make certain venture capital investments without ceasing to be a managed investment trust.

The effect of the omission is that, without the amendments proposed in this Bill, it is possible a trust that made such an investment may either be a public trading trust rather than a managed investment trust or be both a managed investment trust and a public trading trust.

This would be wholly disadvantageous for such a trust and would result in the trust losing the tax benefits normally associated with being a managed investment trust (such as the ability to elect to treat all gains on capital account, which is highly valued by trusts and investors).

The amendments will not affect tax outcomes for any entities that do not intend to be managed investment trusts.

Given this, the proposed amendments are wholly beneficial to affected entities. Their retrospective application is necessary to avoid potentially significant adverse consequences for any affected trusts.