The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-002537

3 FEB 2021

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

Dear Chair Helen

I refer to your correspondence of 29 January 2021 concerning the Australian Immunisation Register Amendment (Reporting) Bill 2020 (Bill).

The amendments to the *Australian Immunisation Register Act 2015* (Act) create a requirement for recognised vaccination providers to report to the Australian Immunisation Register (AIR) information relating to vaccinations they administer and vaccines they are notified about that were administered outside Australia.

The delegated legislation design will allow for the Australian Government to respond dynamically in relation to a number of vaccination reporting matters such as specifying the types of vaccines to which mandatory reporting applies. The legislative design allows Government to quickly respond to the development of vaccinations, which are necessary to protect the Australian public. As shown in the current pandemic, swift responsiveness is crucial in the matters of vaccinations.

The delegated legislation design allows the Government to manage the practical implementation of mandatory reporting to the AIR through a staged implementation. This is required to allow vaccination providers and software developers time to ensure they have the systems in place to meet their obligations under the new legislative arrangements.

The rules will specify the reporting period. Flexibility in determining the period for reporting will ensure that compliance activities can be undertaken that take into account the circumstances of particular vaccination providers. The Government will work in consultation with stakeholders to ensure that the reporting period is appropriate and proportionate. Where the Government requires a change in the reporting period the delegated legislation design will provide for a quick and effective resolution.

The legislative design goes to the ability of the Commonwealth to respond quickly and effectively on matters that affect the health and wellbeing of all Australians. It is considered appropriate that these matters be dealt with in delegated legislation as they relate to operational matters such as process and procedures. It is normal process for these types of matters to be dealt with in delegated legislation.

By way of background, current legislative arrangements in the Act, approved by Parliament, allow the Minister to make rules prescribing matters required or permitted by the Act.

The Government has undertaken consultation on the arrangements under the Act. This includes engagement with key stakeholders from the sector on the details of the Bill and what is proposed for delegated legislation. Further, communications and guidance are being prepared to be issued across the sector, which will include details on these matters. As such, the Government does not consider it necessary to amend the Bill to include high-level guidance on these matters. As noted in the explanatory memorandum, these arrangements are intended to be broad to enable appropriate flexibility and adaption to circumstances.

Thank you for writing on this matter.

Yours sincerely

Greg Hunt

The Hon Stuart Robert MP
Minister for the National Disability Insurance Scheme
Minister for Government Services

Ref: MS21-000144

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

Dear Senator Polley

I am writing in response to the Senate Scrutiny of Bills Committee's (the Committee) request for advice on the Data Availability and Transparency Bill 2020 (the Bill), as set out in its *Scrutiny Digest 1 of 2021*.

The Committee sought advice in relation to the Bill's approach to privacy protection, penalties, significant matters in delegated legislation, broad delegation of monitoring and investigatory powers, and the reversal of evidential burden of proof.

I enclose my response to the matters raised by the Committee in the Scrutiny Digest.

Yours sincerely

Stuart Robert

Response to the Senate Standing Committee for the Scrutiny of Bills - Scrutiny Digest 1 of 2021
Data Availability and Transparency Bill 2020

General comment

In 2018, the Australian Government committed to reform the way it shares public sector data. Reforms are necessary to realise the benefits of greater data availability and use identified by a Productivity Commission inquiry, supporting economic and research opportunities and the Government's vision for streamlined and efficient service delivery.

The *Data Availability and Transparency Bill* (the Bill) is central to these reforms, establishing an alternate pathway for the sharing of Commonwealth government data. The Bill authorises Commonwealth data custodians to share data with accredited entities for specific purposes in the public interest, with safeguards in place to mitigate risk. Modernising the approach to sharing public sector data will empower government to deliver effective services and better-informed policy, and support research and development.

While the Bill supports sharing of a wide range of Government data, such as environmental or business data, particular attention was given to the potential for sharing personal information during its development. The Bill deliberately leverages and operates alongside existing legislation, such as the *Privacy Act 1988* and the *Regulatory Powers (Standard Provisions) Act 2014*. To minimise duplication and overlap, the Bill also draws upon existing frameworks for matters such as ethics approvals and complaints.

The Bill takes a principles-based approach to data sharing, providing parties with the flexibility to tailor sharing arrangements to manage risks on a case-by-case basis, and ensuring the scheme can respond to evolving technologies and community expectations. To ensure efficient and adaptable administration of the scheme, key concepts are included in the Bill, with more detailed requirements and procedures addressed in delegated legislation or guidelines that entities must have regard to when operating under the scheme.[1]

Privacy

1.17 Given the potential impact on an individual's right to privacy as a result of the use and disclosure of personal information under the proposed data sharing scheme, the committee requests the minister's advice as to whether the bill can be amended to:

- *include a public interest test which prioritises privacy interests in decision-making under the scheme;*
- *provide guidance on the face the bill about the circumstances in which it will be 'unreasonable or impracticable' to seek an individual's consent for sharing their personal information;*
- *require that, where possible, data that includes personal information is shared in a de-identified way;*
- *clarify the scope of the permitted data sharing purposes, and include guidance on the face of the bill about precluded purposes; and*
- *provide minimum standards for ethics approvals for private entities seeking to use data that includes personal information.*

[1] See clause 27.

General comments – Interactions between the Bill and the Privacy Act 1988

The Bill has been developed using a privacy-by-design approach to identify, minimise and mitigate privacy impacts wherever possible. Two independent Privacy Impact Assessments (PIAs) were undertaken to identify strengths and weaknesses in the early policy positions and planned legislative framework, and the draft Bill itself.

The Bill works with the *Privacy Act 1988* to protect the personal information of individuals shared under the scheme. The Bill relies on the 'required or authorised by law' exception to Australian Privacy Principles (APP) 3 and 6 to allow personal information to be collected, used and disclosed under the scheme. In leveraging these exceptions, the Bill strikes an important balance — acknowledging the legitimate interests of entities in carrying out their functions or activities and balancing these interests with the protection of individual privacy. In this instance the functions and activities support government to deliver effective policy, service delivery and support research and development.

Australian Government agencies responsible for decisions under the Bill are also subject to the *Privacy Code (Australian Government Agencies – Governance) APP Code 2017* ('Privacy Code'). This includes a requirement that data custodians (as APP agencies) must conduct PIAs for 'high privacy risk projects'.[2]

The Bill includes a range of 'privacy-positive' measures to protect the personal information of individuals, informed by consultation with the community and advice from privacy experts such as the Office of the Australian Information Commissioner (OAIC). These measures include:

- a privacy coverage model that ensures all entities have privacy obligations equivalent to the *Privacy Act 1988* (clause 28). APP entities continue to have obligations under the APPs, including governance, privacy policies, and data security, and the Notifiable Data Breaches scheme.
- permitting data sharing for three purposes in the public interest, while precluding sharing for purposes such as surveillance or monitoring of individuals (clause 15).
- a requirement to seek consent for the sharing of personal information, unless it is unreasonable or impracticable to do so (paragraph 16(2)(c)).
- a requirement to observe applicable ethics processes (subclause 16(2)(b))
- a data minimisation requirement, which includes minimising the sharing of personal information to the extent possible (paragraph 16(8)(b)).

Of the three permitted purposes, generally only government service delivery will require the sharing of personal information about individuals. By comparison, government policies and programs, and research and development will ordinarily involve the sharing of aggregate data to support decisions about cohorts of people or the Australian community as a whole.[3]

[2] The Bill does not prevent data custodians from requiring privacy impact assessments for projects beneath this threshold.
[3] See subclause 16(8) of the Bill.

Whether the Bill can be amended to:

- *clarify the scope of the permitted data sharing purposes*
- *include a public interest test which prioritises privacy interests*
- *provide guidance on unreasonable or impracticable*

The Bill's permitted purposes[4] are informed by extensive consultation and were considered as part of the two PIAs. The permitted purposes are government service delivery, informing government policy and programs; and research and development. The permitted purposes are intentionally broad to facilitate a wide range of projects using government data, with some reasonable, necessary and proportionate limitations in the form of precluded purposes. While the Minister may prescribe additional precluded purposes in Rules to circumscribe the scheme, any expansions to the permitted purposes must be passed by Parliament.

The Bill precludes sharing for certain enforcement related purposes, such as law enforcement investigations and operations, and for national security purposes.[5] While these activities are legitimate functions of government, they require specific oversight and redress mechanisms that are better dealt with through dedicated legislation. Existing legislation governing these activities, including offences and penalties, will continue to operate alongside the Bill.

Once a project is determined to be for a permitted purpose, further consideration of the appropriateness of the project occurs through application of the Project Principle.[6] This principle requires consideration of the public interest, consent, applicable ethics processes, and use of an Accredited Data Service Provider (ADSP). The data sharing agreement for a project must set out how the data sharing principles are to be applied, and must specifically include a description of how the public interest is served by the sharing.[7] These details will then be made available by the Commissioner on a public register of data sharing agreements.[8]

Consistent with other laws, the Bill and its Explanatory Memorandum do not define the public interest to ensure the Bill can adapt to changing community expectations.[9] The question of whether a project can reasonably be expected to serve the public interest must be made on a project-by-project basis, weighing the range of factors for and against sharing.

In a similar manner, entities must consider the Bill's consent requirements on a project-by-project basis. The Bill's approach to consent builds upon the *Privacy Act 1988*, requiring consent for any sharing of personal information, unless it is unreasonable or impracticable to seek consent. The Bill's standard of consent is that set by the *Privacy Act 1988* and the language of 'unreasonable or impracticable' is drawn from section 16A of that Act. As noted in the Explanatory Memorandum, these terms should be interpreted using relevant guidance on consent made by the Australian Information Commissioner (AIC).

[4] See subclause 15(1).
[5] See subclause 15(2).
[6] See subclause 16(1).
[7] See subclause 19(7)(a).
[8] See subclause 130.
[9] See the *Freedom of Information Act 1982* (Cth) and the *Privacy Act 1988*.

The Bill's holistic approach ensures privacy interests are appropriately balanced with the public interest in a project, and does not assume that one must prevail at the expense of the other. In this regard, the Bill is in step with the objects of the *Privacy Act 1988*, which specifically recognise the need to balance the protection of the privacy of individuals with entities' interests in carrying out their functions and activities.[10]

To support entities in their decision-making, the Bill empowers the Commissioner to issue codes of practice on how aspects of the scheme are to be applied and complied with. As legislative instruments, the purpose and legal status of data codes are similar to registered APP codes under sections 26B and 26C of the *Privacy Act 1988*.

The Commissioner may also release guidelines on any aspect of the data sharing scheme, such as the data sharing purposes and principles, to support data scheme entities in their application. Use of guidelines to provide clarity on the Bill's requirements is consistent with OAIC's model for ensuring compliance with the *Privacy Act 1988*.[11] Data scheme entities must have regard to such guidelines when operating under the scheme, and the Commissioner may issue directions to address non-compliance.[12] These guidelines will work with the Bill's privacy coverage model and data sharing principles to minimise the risk of interpretations that may trespass on privacy.

While I consider the level of detail to be included in these codes and guidelines is inappropriate for primary legislation, I acknowledge the importance of striking the balance between flexibility and Parliamentary scrutiny.

I note the Commissioner's power to issue guidelines is discretionary, though there is an implicit expectation that the Commissioner will do so to support entities to comply with the requirements of the scheme. Should the Committee consider this matter to be material, I am open to giving consideration to amendments to the Bill to require that the Commissioner *must* issue guidelines on certain matters, including application of the Data Sharing Principles, in consultation with relevant entities.

Where possible, personal information is shared in a de-identified way

Under the Data Principle, data custodians must only share data that is reasonably necessary for the relevant data sharing purpose.[13] This data minimisation requirement is complemented by a further requirement to minimise the sharing of personal information as far as possible without compromising the data sharing purpose.[14] The Data Principle as worded avoids the term 'de-identified' to ensure the Bill remains technology-neutral.

Provide minimum standards for ethics approvals for private entities seeking to use data that includes personal information.

The Bill allows for private sector entities to participate in the scheme, subject to accreditation and privacy coverage. This acknowledges that sharing data with commercial entities can greatly benefit the public when it is done safely, for the right purposes and with effective oversight.

[10] *Privacy Act 1988* s 2A(b).
[11] See *Privacy Act 1988* s 28.
[12] See clause 27 of the Bill.
[13] See paragraph 16(8)(a) of the Bill.
[14] See paragraph 16(8)(b).

I note the Committee's specific concerns about private sector participation in the scheme. Paragraph 16(2)(b) of the Bill requires data scheme entities to observe any applicable ethics processes. This includes observance of established ethics approval or review processes, and seeking independent advice on the ethical implications of sharing as appropriate. The Bill leverages existing frameworks to ensure projects and research in specific fields meet accepted ethical standards. This requirement imposes a minimum standard for ethics approvals for all data scheme entities, irrespective of sector.

As an added safeguard, data custodians will be able to require ethics processes under the Project Principle in circumstances where no ethics processes would ordinarily apply. Other elements of the Project Principle (such as consent) and the privacy impact assessment requirements under the *Privacy Code* provide further safeguards for projects involving personal information.

A final element of the Bill's design is the requirement to make data sharing agreements public,[15] a measure supported by the second independent PIA on the draft Bill.[16] Making transparent the factors taken into account by data custodians when making sharing decisions is an important check and balance. Such transparency places an onus on data custodians to make sharing decisions on the basis of guidelines issued by the Commissioner.

Review and complaints mechanisms

1.23 The committee therefore requests the Minister's advice as to why individuals whose privacy interests may be affected by the data sharing scheme should not have access to merits review and the dedicated complaints process established in Division 1 of Part 5.3.

The Bill's review and complaints mechanisms are scheme-specific to supplement existing redress mechanisms and reduce duplication and overlap. Part 5.3 of the Bill provides detailed requirements for the making of complaints, which may be supplemented by data codes that deal with the management and internal handling of complaints, and set additional requirements not inconsistent with the Bill.[17]

Individuals with concerns about the data sharing scheme will have access to existing complaints and administrative review processes. For example, the existing complaints mechanism under the *Privacy Act 1988* will be available for complaints relating to data scheme entities' handling of personal information.[18] The Bill includes provisions to allow for the transfer of matters and information between regulators, and I make some further comments on these regulatory cooperation mechanisms below.

In addition to investigating complaints from data scheme entities, the Commissioner may also conduct own-motion investigations into potential breaches in response to a 'tip-off' from the public or media.

As a final point, I note that the Bill includes several privacy-positive measures to minimise the sharing of personal information and promote individual control over its use. As described above, sharing of personal information will generally only be reasonably necessary for the purposes of government

[15] See clause 130.
[16] Information Integrity Solutions, *Privacy Impact Assessment – Draft Data Availability and Transparency Bill 2020* (6 September 2020) p. 66.
[17] See Part 5.3 and paragraphs 126(2)(c)-(d).
[18] Individuals will also be able to complain to their State or Territory privacy regulator, if the complaint relates to an accredited entity that is a State or Territory government authority.

service delivery, as the other policies, programs and research ordinarily have a population or cohort-level focus.

Once personal information enters the scheme, it must be validated or corrected by the individual before it can 'exit' the scheme and be used for other lawful purposes, for example pre-filling a form.[19] Together, the consent requirement (which may be triggered by the project) and the exit mechanism 'bookend' the scheme.

Individuals will have access to a range of other redress options to address concerns unrelated to privacy. For example, individuals will be able to seek judicial review through the courts and make complaints to integrity agencies such as the Commonwealth Ombudsman. Merits review of substantive decisions *based* on shared data that has exited the scheme (though validating data in a pre-filled form) may also be available, if provided for by the legislation under which the decision was made. These frameworks will have their ordinary operation, without being replicated in the Bill itself.

Commissioner awareness of privacy complaints made directly to Australian Information Commissioner

I note the Committee's concern that the Commissioner may not have adequate oversight of privacy complaints relating to the scheme, if those complaints are made directly to the Australian Information Commissioner (AIC) under the *Privacy Act 1988* (para 1.21).

The Bill includes mechanisms to facilitate regulatory cooperation and to notify the Commissioner of data breaches involving personal information:

- Data scheme entities that report a personal information breach to the AIC must also provide a copy to the Commissioner to allow for monitoring of systemic privacy breaches.[20]
- Further, where a privacy complaint is made directly to the Commissioner, the Commissioner may transfer the matter and related information to the AIC as the Commonwealth's dedicated privacy regulator.[21] The AIC will have reciprocal transfer powers under a proposed amendment to section 50 of the *Privacy Act 1988*.[22]

These aspects of the scheme have been designed in consultation with the Attorney-General's Department and the OAIC to avoid duplication and regulatory overlap, consistent with other laws that provide for transfers between regulators. I expect that the ONDC and OAIC will address specific requirements through a Memorandum of Understanding.

Significant penalties

1.29 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the justification for the maximum penalties imposed by clauses 14 and 104.

I note the Committee's comments about significant penalties in clauses 14 and 104 of the Bill and leave these matters to the attention of senators.

[19] See subclauses 21(1)-(2).
[20] See subclause 37(5).
[21] See clauses 107-108.
[22] See *Data Availability and Transparency (Consequential Amendments) Bill 2020* items 6-8.

Significant matters in delegated legislation

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

- *Why it is considered necessary and appropriate to leave procedures, requirements, and other matters relating to the accreditation of entities for the purposes of the data sharing scheme to delegated legislation;*
- *Whether the bill can be amended to include at least high level guidance regarding these matters on the face of the primary legislation.*

Part 6.4 of the Bill provides for three types of disallowable legislative instruments, which must be complied with by data scheme entities: Ministerial rules, regulations made by the Governor-General and data codes issued by the Commissioner.[23] This approach helps to ensure the scheme can adapt to emerging technologies and future needs over time, while allowing for oversight through the disallowance process.

Accreditation is an essential precondition for entities' participation in the data sharing scheme. In recognition of this, Part 5.2 of the Bill includes detailed provisions on matters such as criteria, applications and conditions of accreditation.[24] This Part also includes procedures for accreditation transfer, cancellation and suspension, and notice of accreditation decisions. Decisions of this nature are subject to merits review to promote procedural fairness, with some exceptions for foreign entities.[25] As these requirements and procedures go to the 'essence' of the legislative scheme, it is necessary and appropriate to include them in the primary legislation to allow for Parliamentary oversight.[26] This distinguishes the Bill from the recent Consumer Data Right, which delegates most of its accreditation framework to the *Competition and Consumer (Consumer Data Right) Rules 2020*.

As the Committee notes, clause 86 allows Rules to provide for procedures, requirements and any other matters relating to accreditation. This approach aligns with the Department of the Prime Minister and Cabinet's *Legislative Handbook*, which states that matters of detail and matters that may change frequently are best dealt with in delegated legislation to streamline the primary legislation.[27] At the time of writing, the Accreditation Rules will describe circumstances in which data custodians must use an accredited data service provider (ADSP), and specify documentation to support entities' claims against the accreditation criteria in clause 77.[28] This content is appropriate for Rules, as documents and circumstances for use of an ADSP are detailed and may change over time. These Rules will be subject to oversight through the disallowance process for legislative instruments.

For these reasons, I do not consider it necessary to include further guidance on accreditation matters on the face of the Bill. As the weight of accreditation framework is already located in Part 5.2, significant accreditation matters will not be left to delegated legislation. Where the Bill does provide for delegated legislation, it is aligned with standard drafting practices to balance legal certainty and flexibility.

[23] See clause 26 of the Bill.
[24] See also chapter 3, which sets out core obligations of data scheme entities, including accredited entities.
[25] See clause 118.
[26] Department of the Prime Minister and Cabinet, *Legislative Handbook*, 2017 para 1.10(j).
[27] Ibid paras 5.65-5.66. See also para 1.10(d).
[28] See clauses 29 and 87 of the Bill.

Broad delegation of investigatory powers

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

- *Why it is considered necessary and appropriate to allow any 'other person' to assist an authorised person in exercising monitoring and investigatory powers; and*
- *Whether the bill can be amended to require that any person assisting an authorised person have the knowledge and expertise appropriate to the function or power being carried out.*

The Bill establishes the National Data Commissioner as an independent statutory office holder to oversee the scheme as its regulator and champion. As regulator, the Commissioner has oversight of the scheme and is empowered to monitor, investigate, and enforce compliance with the Bill by data scheme entities. Part 5.5 of the Bill sets out the Commissioner's regulatory and enforcement powers. This Part provides for a range of mechanisms to deter and address non-compliance, allowing the Commissioner to take a graduated approach to enforcement.

Subclauses 109(4) and 110(3) of the Bill allow the Commissioner (as an authorised person) to receive assistance from 'other persons' in the exercise of monitoring and investigation powers. This clause invokes s 23(1) of the *Regulatory Powers (Standard Provisions) Act 2014* ('*RPA*') and aligns with the Office of Parliamentary Counsel's Drafting Direction No. 3.5A. The standard suite of RPA provisions is an accepted baseline of powers required for an effective monitoring, investigation or enforcement regulatory regime, while providing adequate safeguards and protecting important common law privileges.[29] The Bill adopts this standard approach to the exercise of regulatory powers to promote an efficient, flexible and accountable approach to regulation.

The Explanatory Memorandum for clauses 109 and 110 refers to the staffing provisions in the Bill.[30] The Bill's staffing provisions ensure that 'other persons' at the Commissioner's disposal will have the appropriate knowledge, training and expertise in the exercise and performance of investigatory powers and functions.[31] APS employees made available to the Commissioner must have the skills, qualifications or experience necessary to assist the Commissioner, while contractors and consultants may be specifically engaged in order to assist with the performance or exercise of the Commissioner's functions or powers.

Subsections 23(2)-(4) of the RPA ensure monitoring and investigatory powers are exercised accountably. Persons assisting must act under the direction of the Commissioner as authorised person and any valid actions of the person assisting will be taken to be those of the Commissioner. As persons employed or engaged by an APS Department, assisting individuals will be further subject to standard accountability measures such as the APS Code of Conduct (for staff), Commonwealth Procurement Rules (for contractors), security clearances and other pre-employment screening procedures.

For these reasons, the Bill and RPA already give effect to the suggested drafting changes to clauses 109 and 110.

[29] Replacement Explanatory Memorandum, Regulatory Powers (Standard Provisions) Bill 2014, p. 2
[30] Explanatory Memorandum, Data Availability and Transparency Bill 2020, paras 555 and 560.
[31] See clauses 47-49 of the Bill.

Reversal of evidential burden of proof

1.40 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences [p50-52].

For data sharing to be authorised under the Bill, data custodians must only share data with accredited users, either directly or through an ADSP. Accreditation is not limited to Australian entities to encourage international cooperation on projects in the public interest, with appropriate controls in place such as ASIO security assessments.[32]

Section 136 of the Bill provides a set of provisions for extended geographical jurisdiction, drawn from section 15.2 of the *Criminal Code Act 1995*. Subclauses 136(2) and (3) provide offence-specific defences for foreign entities if they are not an Australian entity, the conduct occurred wholly in a foreign country and the conduct is lawful in the foreign jurisdiction in which it occurred.

As described in subclause 136(4), a person that seeks to rely on these defences bears an evidential burden. It is appropriate for the defendant to bear the evidential burden in these circumstances because evidence to establish whether:

- the relevant conduct occurred wholly in a foreign country (but not on board an Australian aircraft or ship); and
- the defendant is not an Australian entity (as defined in clause 9 of the Bill).

is best able to be adduced by, and within the knowledge of, the defendant. Evidence that suggests the reasonable possibility that the conduct in question was lawful in the foreign country is also best raised by the defendant, as the defendant would have knowledge of that foreign jurisdiction, and it would be significantly more difficult or costly for Australian-based prosecutors to bear this burden.

I am willing to consider an addendum to the Bill's Explanatory Memorandum at an appropriate time that incorporates the explanation above.

[32] See *Data Availability and Transparency (Consequential Amendments) Bill 2020* items 3-4.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000138

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

Dear Senator Polley

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Financial Sector Reform (Hayne Royal Commission Response No. 2) Bill 2020 (the Bill).

In that letter, you sought my advice as to:

- the justification for the significant maximum penalty that may be imposed for failing to comply with proposed section 962X(1), including whether this level of penalty is comparable to similar offences in Commonwealth legislation;
- why it is considered necessary and appropriate to leave the scope of record keeping obligations which are subject to significant penalties to delegated legislated; and
- whether the Bill can be amended to include at least high-level guidance regarding the scope and type of records that must be kept on the face of the primary legislation.

Issue 1: Maximum penalty that may be imposed for failing to comply with proposed subsection 962X(1).

Subsection 962X(1) requires financial service providers that receive fees ('fee recipients') to keep records sufficient to ascertain their compliance with the obligations in Division 3 of Part 7.7A in relation to ongoing fee arrangements. A failure to do so attracts a maximum penalty of up to 5 years' imprisonment and/or a fine of up to 600 penalty units for an individual (or 6,000 penalty units for a corporation) (calculated in accordance with the existing rules regarding penalties in sections 1311B and 1311C of the *Corporations Act 2001* (Corporations Act)).

The inclusion of this new obligation is part of the law implementing recommendation 2.1 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which addresses significant problems that were identified with clients being charged for services that were not provided (particularly in relation to ongoing fee arrangements). To address these issues, the new law imposes a range of obligations on fee recipients – including in relation to the information provided to a client about the services provided under an ongoing fee arrangement and the frequency with which clients must opt-in to such arrangements.

The new obligation to keep sufficient compliance records is integral to the legal framework in addressing the problems identified with ongoing fee arrangements. This is because it ensures that Australian Securities and Investments Commission (ASIC) has access to all relevant information when undertaking compliance and enforcement work. A contravention of this obligation is the only contravention in the new law regulating ongoing fee arrangements that gives rise to a potential criminal offence, highlighting its importance to the overall integrity of the regime.

Additionally, this penalty is in line with penalties for breaching other record keeping provisions, including the requirement to keep financial records in subsection 988A(1) of the Corporations Act.

Issue 2: Scope of records subject to the record keeping obligations able to be specified in delegated legislation.

Subsection 962X(1) of the Bill provides that the regulations may specify records that the fee recipient must keep as part of the obligation to keep records of their compliance with the ongoing fee arrangement rules. The financial advice industry is dynamic and it is not possible to foresee how the industry will change in the future, particularly its business operations. Delegated legislation is necessary to be used in this situation because it provides the flexibility to change record keeping requirements in line with emerging industry practices.

Issue 3: Inclusion of at least high-level guidance regarding the scope and type of records that must be kept on the face of the primary legislation.

The power to specify records that a fee recipient must keep is limited to records which relate to fee recipients' compliance with the ongoing fee arrangement obligations. It would not be appropriate to include any extra guidance on what records can be specified as this could inadvertently limit the kinds of records that can be specified in the future. This could ultimately hinder the ability of ASIC to effectively regulate fee recipients by restricting their ability to access all documents which relate to fee recipients' compliance with their obligations.

For these reasons outlined above, I consider that the penalties and the regulation-making powers in the Bill are necessary and appropriate.

Yours sincerely

THE HON JOSH FRYDENBERG MP

10 / 2 /2021

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

MS20-001189/MC20-038323

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

Dear Senator Polley

I am writing in response to the Senate Scrutiny of Bills Committee's (the Committee) request for advice on the National Emergency Declaration Bill 2020 and the National Emergency Declaration (Consequential Amendments) Bill 2020, as set out in its *Scrutiny Digest 18 of 2020.*

The Committee sought advice on a range of matters, including the exemption from disallowance, significant matters in delegated legislation, the power to enable delegated legislation to modify primary legislation, and significant matters in non-disallowable instruments.

I have enclosed additional information in response to the matters raised by the Committee, which I hope will be of assistance.

Yours sincerely

The Hon Christian Porter MP
Attorney-General
Minister for Industrial Relations
Leader of the House

Encl. Response to the Senate Standing Committee for the Scrutiny of Bills *Scrutiny Digest 18 of 2020.*

Response to Senate Standing Committee on the Scrutiny of Bills
Scrutiny Digest 18 of 2020

The Senate Standing Committee on the Scrutiny of Bills (the Committee) requests the Attorney-General's advice in relation to a number of matters in the National Emergency Declaration Bill 2020 (NED Bill) and the National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill) (at paragraphs [1.29], [1.38], [1.45], [1.50], [1.51], [1.56] and [1.75]).

The Senate Standing Committee on Legal and Constitutional Affairs is to conduct a review of the *National Emergency Declaration Act 2020* (NED Act) by 30 June 2021 which will provide an opportunity to consider further the matters raised by this Committee, in particular where the Committee has asked whether further amendments should be made.

In relation to the Committee's requests for more detailed advice, the following is provided.

National Emergency Declaration Bill 2020 (NED Bill)

Broad discretionary power

The Committee requested more detailed advice as to why it is necessary and appropriate to provide the executive with a broad power to declare a national emergency in circumstances where key terms in the bill are undefined (at paragraph [1.29]).

The NED Bill does not define key terms, such as 'emergency' and 'Commonwealth interest' (clause 10), to ensure the framework supports an 'all hazards' approach. This is necessary and appropriate so as not to limit the circumstances in which a declaration can be made to certain types or kinds of defined emergencies. For instance, the unpredictable nature of the COVID-19 pandemic has demonstrated the importance of such flexibility to ensure that the framework will apply to emergencies that are beyond our current thinking and experience. The term 'emergency' should be read in conjunction with the definition of 'nationally significant harm'. If an emergency has caused, is causing or is likely to cause harm that rises to the level of national significance, that emergency may be the subject of a national emergency declaration, regardless of the cause of the emergency.

The Revised Explanatory Memorandum to the NED Bill provides guidance on what constitutes an 'emergency' for the purpose of the framework. For example, the types of emergencies that may be subject of a declaration include:

- major natural disasters – such as bushfires that spread across multiple jurisdictions, or a geomagnetic storm that causes extensive disruption or damage to electricity and communication networks
- communicable disease outbreaks that pose a major threat to the health and life of Australians
- large-scale cyber incidents or terrorist attacks, and
- major chemical, biological or radiological incidents.

The Bill does not define 'Commonwealth interests', as this term is intended to reflect the full extent of the Commonwealth's constitutional interests and power. As such, it would not be appropriate to include a definitive list. This position is supported by the Senate Foreign

Affairs, Defence and Trade Legislation Committee's Report into the Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000. In that Report, the Committee rejected submissions that the concept 'Commonwealth interests' should be defined, noting its scope is extensive and would be difficult to exhaustively define.[1] Consistent with this position, it is not appropriate to include a definition of 'Commonwealth interest'. As the Committee notes, the Explanatory Memorandum provides guidance on the interpretation of this concept.

Although the Bill includes terms that are necessarily undefined, the threshold to make a declaration is appropriately high. This is because the framework is not intended to be used to respond to emergencies to which states and territories have the capacity to respond. To satisfy the threshold to make a declaration, the emergency must cause, or be likely to cause, nationally significant harm or damage to:

- the life or health of an individual, or group of individuals, animals or plants
- the environment
- property, including infrastructure, or
- disruption to an essential service.

Exemption from disallowance

The Committee requested more detailed advice as to why it is considered necessary and appropriate for national emergency declarations and variations to extend a national emergency declaration to be exempt from disallowance (at paragraph [1.38]).

Although disallowance of an instrument does not invalidate actions taken under the instrument prior to the time of disallowance, the prospect of a declaration being disallowed would undermine the key objective of the NED Bill—to provide a clear, certain and unambiguous signal about the significance and severity of an emergency event. If the status of the declaration were to change following a successful motion to disallow, this could suggest (potentially erroneously) that the emergency no longer exists. While it is accepted that the rate of successful disallowance motions are low, the possibility of disallowance cannot be unequivocally discounted.

The disallowance of the declaration or a variation may have inequitable flow-on effects, particularly in relation to the power for Ministers to substitute, suspend or modify 'red tape' requirements in legislation they administer (clause 15). Such determinations continue in force only while a national emergency declaration (to which the determinations relate) is in force; that is, once a national emergency declaration ceases to be in force, so too does the determination (subparagraph 15(7)(b)(iii)). If a motion to disallow a national emergency declaration were successful, it may produce inequitable outcomes among those for whom it was intended to have beneficial application. For instance, it may produce a situation in which a benefit or streamlined process is available to those who apply one day, while those who apply the next day will be ineligible due to intervening disallowance of the underlying national emergency declaration. Similarly, where a national emergency declaration provides a basis for imposing or suspending obligations or liabilities, the arbitrary timing of a successful

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[1] Senate Standing Committee on Foreign Affairs and Trade, *Defence Legislation Amendment (Aid to Civilian Authorities) Bill 2000* (Inquiry, 16 August 2000) p. 13 [1.59].

disallowance motion could create inappropriate variations in the law that is applicable at particular points in time, leading to differential treatment of individuals without warning.

The Committee noted that arguments against making emergency-related delegated legislation disallowable must be balanced with the need to ensure adequate checks and balances on the limitation of the personal rights and liberties of individuals who may be subject to such delegated legislation. In recognition of this, the framework will be subject to a rigorous scheme of reviews, to ensure that it is proportionate and remains appropriate to respond to emergencies of national significance. The Senate Standing Committee on Legal and Constitutional Affairs will immediately review the framework after the NED Act commences, and report to the Senate by 30 June 2021, and is to undertake a statutory review of the Act five years after its commencement. In addition, the Minister responsible for administering the relevant national emergency law must report on the exercise of the powers or the performance of the functions if a national emergency declaration is made and powers are exercised or functions are performed under a national emergency law for the purposes of the declaration (subclause 17(2)). Together these review requirements will ensure that the framework remains appropriate, adapted and responsive to Parliament and the community's expectations.

While there is no limit to the number of extensions that can be made to the period that a national emergency declaration is in force, each extension is limited to a period of up to three months and must meet the high threshold to make a national emergency declaration.

Significant matters in delegated legislation

The Committee requested more detailed advice as to why it is considered necessary and appropriate to leave the specification of additional kinds of information that must not be included in a report on the exercise of powers and functions during a national emergency to delegated legislation (at paragraph [1.56]).

Paragraph 17(6)(c) provides that the Minister can prevent certain information from being required to be provided in a report under subclause 17(2) via the regulation-making power in paragraph 19(a). The inclusion of this paragraph is appropriate and necessary to provide flexibility to enable the framework to reflect tabling exemptions in legislation that contains national emergency laws, particularly where those tabling exemptions would protect sensitive information from being divulged in reporting. The ability for further tabling exemptions to be added is necessary and appropriate to ensure that the NED Bill keeps pace and can be appropriately adapted to reflect existing and new tabling exemptions that may be relevant in other legislation in a responsive manner.

National Emergency Declaration (Consequential Amendments) Bills 2020 (Consequential Amendments Bill)

Significant matters in non-disallowable instruments – privacy

The Committee requested more detailed advice as to why it is considered necessary and appropriate to leave the activation of provisions authorising the collection, use and disclosure of personal information to non-disallowable instruments which are not subject to parliamentary scrutiny (at paragraph [1.67]).

The amendments to the *Privacy Act 1988* (Privacy Act) import a new, simplified test to make an emergency declaration where the Governor-General has already declared a national emergency. Subclause 80J(2) of the Consequential Amendments Bill enables the Prime Minister or the Attorney-General to make a declaration under section 80J of the Privacy Act if a national emergency declaration is in force, and they are satisfied that the emergency to which the declaration relates is of such a kind that it is appropriate in the circumstances for Part VIA to apply. This is intended to streamline the process of making a declaration under the Privacy Act by removing the elements of the test that overlap with the test to make an emergency declaration under the Bill.

An emergency declaration made under existing section 80J of the Privacy Act is not a legislative instrument (subsection 80L(3) of the Privacy Act). The approach taken in establishing the framework in the NED Bill was to provide simplified, alternative tests where a national emergency declaration has been made, rather than modify other existing requirements in existing legislation. Consistent with existing subsection 80J of the Privacy Act, as a declaration made under subclause 80J(2) is not a legislative instrument by virtue of existing subsection 80L(3), it is therefore not subject to disallowance. This is appropriate and necessary to maintain the structure and policy underpinning the original declaration mechanism in the Privacy Act.

Significant matters in non-disallowable instruments (provisions akin to Henry VIII clause) Exclusion from tabling

The Committee requested advice as to why it is considered necessary and appropriate to include powers in the bill which allow non-legislative instruments to modify the operation of the *Therapeutic Goods Act 1989*, and why it is necessary and appropriate to provide that instruments made under proposed subparagraphs 18A(2A)(b)(i), 32CB(2A)(b)(i), and 41GS(2A)(b)(i) are not required to be tabled in the Parliament (at paragraph [1.86]).

Proposed subparagraphs 18A(2A)(b)(i), 32CB(2A)(b)(i), and 41GS(2A)(b)(i) provide for alternative tests to exempt certain therapeutic goods, biologicals and medical devices from certain requirements under the *Therapeutic Goods Act 1989*, so that the goods, biologicals or medical devices can be quickly stockpiled or made available urgently to deal with an emergency. The alternative tests streamline the requirement for the Minister to establish a possible future emergency or an actual emergency, where there is a national emergency declaration in force.

The approach taken in establishing the framework was to provide simplified, alternative tests where a national emergency declaration has been made, rather than modify other existing requirements in the legislation. In this regard, the proposed subparagraphs are appropriate and necessary to maintain the structure and policy underpinning the original tests and tabling exemptions.

The amendments are intended to enable the Minister to establish a possible future emergency or an actual emergency by reason of a national emergency declaration being made. Where a national emergency declaration is in force, the Minister is not required to satisfy themselves of other factual circumstances to establish a possible future emergency or an actual emergency. This is necessary and appropriate to enable the Minister to act decisively where a national emergency declaration is on foot and it is necessary to exempt specific therapeutic

goods, biologicals or medical devices from certain requirements so they can be stockpiled or made available without delay.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-000138

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

Dear Senator Polley

Thank you for your letter on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020 (the Bill).

In that letter, you sought my advice in relation to the matters provided below.

Issue 1: Mandating digital platforms participate in the Code.

In your letter, you expressed concerns that the Bill allows the relevant Minister to determine which digital platforms will be required to participate in the News Media and Digital Platforms Mandatory Bargaining Code (the Code) without the endorsement of the Parliament. You inquired whether the Bill can be amended to require positive approval of the Parliament before a platform is required to participate in the Code.

Section 52E of the Bill allows the relevant Minister to designate, via legislative instrument, which digital platforms are subject to the Code. The legislative instrument is subject to disallowance by either house of the Parliament. Designation by legislative instrument remains suitable in this instance as it provides the Parliament with sufficient and appropriate oversight of the designation process.

Issue 2: Regulation-making powers.

Your letter also noted the Committee's concerns at a number of powers in the Bill which allow for matters to be determined by delegated legislation.

The Bill allows a variety of minor and technical matters to be determined in delegated legislation such as in relation to deadlines for the arbitration process, record keeping obligations, costs of the arbitral panel and the updating of the list of relevant professional standards. This provides flexibility to ensure that the technical aspects of the Code can be expeditiously altered if necessary in the future to ensure the effectiveness and workability of the Code.

For these reasons, I consider that the regulation-making powers are appropriate and necessary.

Issue 3: Tabling of the review into the operation of the Code.

The Bill requires that a review of the operation of the Code be commenced within 12 months. The Committee has asked whether it would be appropriate to move amendments that require the review to be tabled in the Parliament.

I do not consider it necessary to amend the Bill to require the review of the operation of the Code be tabled in Parliament. The Bill requires that the review of the operation of the Code be made publicly available within 28 days of the Minister receiving the report. This will mean that members of the public and parliamentarians are both able to access the report.

Thank you for bringing your concerns to my attention.

Yours sincerely

THE HON JOSH FRYDENBERG MP

10 / 2 /2021