The Hon David Littleproud MP

Minister for Agriculture and Northern Australia
Deputy Leader of the Nationals
Federal Member for Maranoa

Ref: MC22-001000

22 FEB 2022

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

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

Dear Chair

I am writing in response to the committee's request (Scrutiny Digest 1/22, 1.7) for more detailed advice on why it is considered necessary and appropriate to amend the *Plant Health Australia (Plant Industries) Funding Act 2002* (the PHA Act) to provide that relevant Plant Industry Members will no longer need to be declared by legislative instrument under the *Primary Industries (Excise) Levies Act 1999* or the *Primary Industries (Customs) Charges Act 1999* (the Primary Industries legislation).

At present the Primary Industries legislation is unnecessarily linked to the PHA Act through the combined use of the designated bodies declarations made under the Primary Industries legislation. The primary purpose of the designated bodies declarations is to ensure the Minister must consider a designated body's representations prior to making recommendations to the Governor-General regarding regulations that effect levy changes that will apply to specified plant products.

In its current form, the PHA Act uses the designated bodies declarations as a means of identifying which Plant Industry Member represents a plant product on which a levy or charge is imposed. This can create a situation where a designated body declaration under the Primary Industry legislation is amended solely for purposes under the PHA Act. The purpose of these amendments is to simply delink this process and provide for a process within the PHA Act itself.

To become a Plant Health Australia member, an applicant body would be required to demonstrate that it represents the plant products ("crops") identified in its application. If the applicant body was successful, its representation of the plant product would be noted in the formal record and the Secretary of the department would make an instrument under the PHA Act determining it to be a relevant Plant Industry Member.

I note the changes would not impact in any way the ability of an industry body to seek designated body status for other levy-related purpose under the Primary Industries legislation. For additional clarity, I note these amendments do not impact on the nature or rate of levies or charges being applied.

Thank you for writing on this matter.

Yours sincerely

DAVID LITTLEPROUD MP

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-002934

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

Dear Senator,

I refer to the Scrutiny Digest 17 of 2021 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) regarding the Financial Accountability Regime Bill 2021 and the Financial Sector Reform (Hayne Royal Commission Response) Bill 2021.

In relation to the Financial Accountability Regime Bill 2021 the Committee has requested advice as to:

Issue 1: exemption powers of the Financial Accountability Regime

- why it is considered necessary and appropriate to provide the minister with a broad power to provide exemptions to the Financial Accountability Regime under clause 16;
- whether the bill can be amended to include guidance on the exercise of the power in clause 16 on the face of the primary legislation, noting the potential for a broad, unconstrained exemption power to undermine the Financial Accountability Regime;

Issue 2: arrangement for administration of the Financial Accountability Regime between APRA and ASIC

- whether the bill can be amended to provide that an arrangement entered into under clause 37 of the bill is required to be tabled in each House of the Parliament;
- why it is considered necessary and appropriate to leave details relating to provisions that must be included within a clause 37 arrangement to delegated legislation;
- why it is considered necessary and appropriate to include no-invalidity clauses in subclauses 36(2), 37(5), and 38(4) of the bill;

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

Issue 3: liability

- why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to certain secrecy determinations;
- why it is considered necessary and appropriate to confer immunity from civil and criminal liability on certain persons under clauses 101 and 102 of the bill; and

Issue 4: incorporation by reference

- why it is considered necessary and appropriate to incorporate documents as in force or existing from time to time, noting that such an approach may mean that future changes to an incorporated document could operate to change the circumstances when an accountable entity meets the enhanced notification threshold without any involvement from Parliament.

In relation to the Financial Sector Reform (Hayne Royal Commission Response) Bill 2021 the Committee has requested advice as to why it is proposed to use offence specific defences (which reverse the evidential burden of proof) in relation to the secrecy provisions in the bill.

The Financial Accountability Regime Bill:

Issue 1: Exemption powers of the Financial Accountability Regime

The power to exempt an accountable entity or a class of accountable entities from the Financial Accountability Regime under clause 16 of the bill is required to ensure the regime applies appropriately to the regulated industries and to avoid any potential unintended consequences from the application of the regime.

The Financial Accountability Regime is based on the existing Banking Executive Accountability Regime (BEAR) and will apply to the banking, general insurance, life insurance, private health insurance and superannuation industries. The regime is designed to improve the transparency and accountability of the decision making by directors and senior executives in these industries due to the important role these financial services industries play in the Australian economy.

Similar to the BEAR, the power to exempt entities from the Financial Accountability Regime ensures that the regime can operate flexibly and be appropriately targeted. There may be instances where the Financial Accountability Regime may act as a barrier to entry for some small new entrants and the ability to exempt entities or classes of entities from the regime under clause 16 of the Bill may facilitate competition in the market. An exemption for classes of accountable entities is a legislative instrument and is therefore subject to Parliamentary disallowance.

The exemption power is broadly framed to avoid constraining relevant considerations. It is preferable that the Minister be granted a broad exemption power due to the diversity of industries regulated by the Financial Accountability Regime, and the complexity and unforeseen nature of the issues the exemption power is seeking to address.

Issue 2: Administration of the Financial Accountability Regime between ASIC and APRA

The Financial Accountability Regime is to be jointly administered by ASIC and APRA. This will ensure the Regime is enforced from both a prudential perspective and a conduct and consumer outcomes-based perspective. This means it is important that both ASIC and APRA co-ordinate their administration of the Financial Accountability Regime to ensure the regime is administered effectively. To this end, the bill requires ASIC and APRA to enter into an arrangement outlining

their approach to the administration of the regime (see clause 37 of the bill). The Minister may make rules which require certain matters to be included in the arrangement (see clause 37(2)).

Arrangement for administration – prescription by Minister's rules

It is necessary to prescribe details of the Regulators' administrative arrangement in delegated legislation as such instruments provide accountability and legal certainty while being more adaptable than legislation.

Many obligations of the Financial Accountability Regime are principles-based to cater for the diverse industries and entities being regulated. As such, it will be crucial for regulated entities to understand how the Regulators intend to monitor and enforce regime requirements. It is therefore appropriate for the Minister to be able to require the Regulators' arrangement to contain information on particular matters to provide certainty and visibility of their regulatory approach.

Prescribing these matters in delegated legislation rather than the primary law ensures the Regulators have more flexibility to refine their approach to ensure their administration is efficient and fit for purpose, and may adapt their enforcement approach to different industries over time. Further, while the Regulators' arrangement must be published online, allowing Minister rules tabled before Parliament to prescribe particular matters for the arrangement brings an additional layer of public accountability to the approach taken to enforcing the Financial Accountability Regime.

Tabling in Parliament

It is appropriate for the Regulators' arrangement to be available to the public and to Parliament in the interests of transparency and accountability. To this end, the arrangement must be published on both ASIC and APRA's website (see clause 37) – and any Minister rules made in relation to matters to be included in the arrangement, or determining the arrangement, must be tabled in Parliament to bring the additional layer of scrutiny associated with executive involvement. As the current publication requirement serves the dual purpose of accountability and making the arrangement readily available to all, the bill does not require the basic arrangement be tabled before Parliament.

No-invalidity clauses

The Bill contains no invalidity clauses that state:

- a power exercised by ASIC under the regime is not invalid because ASIC exercises the power in relation to an entity regulated by APRA (see clause 36(2));
- a power exercised by ASIC or APRA under the regime is not invalid because APRA and ASIC fail to enter into an agreement for administration of the Regime (see clause 37(5)); and
- a power exercised by ASIC or APRA under the regime is not invalid because ASIC and APRA fail to agree on the exercise of the power (see clause 38(4)).

These no-invalidity clauses are necessary to provide certainty to regulated entities regarding the performance or exercise of a function or power under the Financial Accountability Regime.

The enforcement powers of the Financial Accountability Regime are designed to combat serious regulatory issues such as prudential risk to the Australian financial system or significant and systemic consumer harms. As such, the exercise of these powers can cause significant disruption to the business activities of regulated entities. In particular, exercise of the powers under the regime could require businesses to take significant and difficult to reverse actions such as restructuring

their business, terminating the employment of a senior executive or director, or reallocating the responsibilities of their senior executives and directors (see clause 42 and 65 of the bill). This means it is essential industry has certainty around the process and exercise of the powers under the Financial Accountability Regime.

This need for certainty means a Regulator's failure to comply with certain procedural matters should not result in the invalidity of the regulatory action. An exercise of a power by ASIC in relation to an entity regulated by APRA (clause 36), a failure to have an agreement for administration in place (clause 37), or a failure to reach formal agreement on the exercise of a power (clause 38) should not compromise the enforcement of the Regime. For example, if ASIC disqualified a person from being an accountable person under clause 42 due to a significant breach of accountability obligations that resulted in consumer harm, and that disqualification was inadvertently invalid due to ASIC and APRA failing to enter an agreement, the person would be able to continue to act and could continue to cause significant harm to consumers.

The no-invalidity clauses are appropriate as they are designed to meet this valid purpose (regulatory certainty) and form part of a balanced regulatory framework which includes redress mechanisms available if there is an objection to the regulatory action. The bill expressly provides for merits review of decisions made under the regime by the Administrative Appeals Tribunal (see clause 96). Further, judicial review of an exercise of power or performance of function by APRA or ASIC will be available – unless on the grounds of jurisdictional error solely in relation to one Regulator not having the other's agreement to act (clause 38), or their arrangement for administration not being in place or available on their website (clause 37).

Issue 3: Liability

Reversal of burden of proof in offence-specific defences in clause 68 of the bill

Clause 68 of the Bill contains an offence for disclosure of information that reveals a direction covered by a secrecy determination was given by the Regulator, except where the disclosure was authorised by specified clauses of the bill or is required by a court or tribunal. As noted in the explanatory memorandum at paragraph 1.208, the offence does not apply where the information was already lawfully in the public domain, or was disclosed to a legal representative in order to seek advice or to another person who is also subject to relevant secrecy arrangements for the purpose of another exception (clauses 69, 71, and 75). It is also not an offence where the disclosure was in accordance with the *Australian Prudential Regulation Authority Act 1998*, the *Australian Securities and Investments Commission Act 2001*, a determination of the Regulator, or the Minister rules of the Financial Accountability Regime (clauses 70 and 72-74).

Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. Consistent with this, the defendant bears an evidential burden of proof to exercise the offence-specific defence in subclause 68(3) of the bill.

This approach is justified as relevant information for matters in subsection 68(3) would be within the knowledge and control of the defendant. The prosecution and defendant could both be expected to have ready access to information and records to establish the exceptions for publicly available information or disclosure authorised by law or instrument of the regime. However, the defendant would be best positioned to provide information establishing disclosure was to a legal representative for the purpose of seeking legal advice, or to another person for the purpose of one of the exceptions. Such evidence is peculiarly within the defendant's knowledge and control, and could be difficult or costly in terms of time and resources for the prosecution to establish. As such,

consistent with the *Guide to framing Commonwealth offences*, an evidential burden to establish matters within subsection 68(3) has been placed on the defendant.

Placing the evidential burden of proof on the defendant is also justified as it aligns with the approach taken in other similar frameworks. For example, it is consistent with the treatment of other protected information collected under prudential frameworks which is held by APRA including information collected under the predecessor regime to the Financial Accountability Regime, the Banking Executive Accountability Regime under Part IIAA of the *Banking Act 1959* (see section 56 of the *Australian Prudential Regulation Authority Act 1998*). Similarly, an evidential burden of proof exists in relation to the other prudential frameworks which interact with the regime including a matter raised under section 11CI of the *Banking Act 1959,* section 109A of the *Insurance Act 1973*, section 231A of the *Life Insurance Act 1995*. Consistency of approach across this complex legal framework is important to support understanding and application of the law.

Good faith defences

The bill provides protection from liability where:

- a person exercises or performs their powers, functions, or duties under the Financial Accountability Regime in good faith (clause 101); or
- certain persons regulated by the Financial Accountability Regime act in good faith for the purpose of (or in relation to) complying with a direction given by the Regulator under the Bill or a condition on a notice of a reviewable decision issued by the Regulator given to the accountable entity (clause 102).

Those provisions do not limit the operation of each other, or of like provisions in the *Australian Prudential Regulation Authority Act 1998* and *Australian Securities and Investments Commission Act 2001*, which protect officers of APRA and ASIC carrying out their duties in good faith.

Limitation of civil and criminal liability in these circumstances is necessary and appropriate to support compliance with the regime and minimise prudential risk as directed by the Regulator.

The protection in clause 102 is necessary, for example, to allow an accountable entity and its senior management (or other relevant persons) to promptly and fully comply with a direction given by the Regulator to address prudential risks or non-compliance with obligations. The need to mitigate such risks, which could impact the broader economy, takes precedence over lesser risks such as the possibility of the person breaching another applicable framework in complying with the direction. This protection complements protections already available for officers and staff of the Regulators, for instance those involved in issuing the direction and monitoring its implementation.

The protection in clause 101 supports this approach to protecting persons acting to reduce prudential risk, as it extends the protection from liability to persons not formally employed by a regulator but who may be involved in carrying out the direction.

Clauses 101 and 102 also support compliance with the regime more broadly by concentrating enforcement on intentional and malicious contraventions of the bill, rather than inadvertent breaches which may arise during a genuine attempt to comply with the regime.

Issue 4: Incorporation by reference

Clause 31 sets out core and enhanced notification obligations under the Regime, where the threshold for an entity having enhanced obligations is set in Minister rules. Clause 31(5) provides

an incorporation by reference power, so Minister rules which prescribe how to determine when an entity meets the enhanced notification threshold can apply, incorporate, or adapt contents of non-legislative material. Importantly, the power is limited to incorporation of material published on a website maintained by the Regulator to ensure only credible, relevant material may be incorporated.

The incorporation power allows the Minister rules to pick up and align with existing standards or guidance such as those issued by APRA. This material is freely available on its website, as it sets out the regulator's expectations for best practice compliance and accountability.

The power does not extend to modifying incorporated material. This means a change to the incorporated material at source will carry through to the requirements set by the rules.
This approach is important to ensure there is consistent content and requirements across Regime materials, to minimise confusion and support compliance with requirements.

Financial Sector Reform (Hayne Royal Commission Response Bill 2021:

The bill amends the secrecy regime contained in the *Australian Prudential Regulation Authority Act 1998* and the *Australian Securities and Investments Commission Act 2001* to include information collected under the Financial Accountability Regime. Both Acts contain pre-existing secrecy regimes which make it a breach of the statute or a criminal offence for an individual who has been employed by ASIC or APRA to disclose information they received in the course of their duties, unless certain exemptions apply. Generally, the defendant, who is the individual who discloses the information, is under an evidential burden to raise a relevant exemption (see section 56 of the *Australian Prudential Regulation Authority Act 1998*).

The relevant exemptions inserted for the Financial Accountability Regime are exemptions where:

- the disclosure is of information on the register to an accountable entity under 56(7G);
- the disclosure is of personal information on the register to the person to whom the information relates under 56(7H);
- the disclosure relates to whether a regulator has disqualified an individual under the regime under 56(7J); and
- the disclosure is the sharing of information between APRA and ASIC under 56(7K) or 56(7L).

The exemptions are for the most part replications of pre-existing exemptions under the Banking Executive Accountability Regime under Part IIAA of the *Banking Act 1959*, with the addition of the information sharing exemption. This approach ensures continuity of the regimes.

Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. Consistent with this, the defendant bears an evidential burden of proof to exercise the offence-specific defence in the proposed subsections 56(7G) to (7L) of the *Australian Prudential Regulation Authority Act 1998*. This approach is justified as the information subject to the provisions would be peculiarly within the knowledge and control of the defendant, and to preserve the integrity of the Financial Accountability Regime.

The Financial Accountability Regime requires accountable entities in the banking, insurance and superannuation industries to disclose highly sensitive and confidential information in relation to their businesses to APRA and ASIC (see clause 31 of the bill). This information could include information about the internal affairs and structures of the business, lines of accountability between the businesses most senior executives and directors, or information about the wrongdoing of the businesses senior executives and directors that has given rise to prudential risks which could affect the broader Australian economy. This means it is essential for the efficacy of the Financial Accountability Regime that individuals employed by APRA and ASIC who receive information under the regime are subject to strict controls in relation to their treatment of this information.

An individual employed by APRA and ASIC who discloses information obtained under the Financial Accountability Regime, in a situation which could potentially breach their secrecy obligations, is in the best position to assess what exemptions might apply to their conduct.

It is reasonable to place the evidential burden upon an individual in this circumstance to raise a relevant exemption from the secrecy regime. The situation surrounding the disclosure would be peculiarly within the person's own knowledge and control as they would be aware of the information they disclosed, and the recipient, and the manner and purpose for which it was disclosed. In contrast, requiring the prosecution to eliminate all possible exemptions beyond reasonable doubt could be difficult and costly in terms of time and resources, and could undermine the effectiveness of the secrecy regime which is essential to the functioning of the regime. As such, consistent with the *Guide to framing Commonwealth offences*, an evidential burden has been placed on the defendant in the proposed subsections 56(7G) to (7L) of the *Australian Prudential Regulation Authority Act 1998*.

Placing the evidential burden of proof on the defendant is also justified as it aligns with the approach taken in other similar frameworks. For example, it is consistent with the treatment of other protected information collected by APRA under the predecessor regime to the Financial Accountability Regime, the Banking Executive Accountability Regime under Part IIAA of the *Banking Act 1959* (see section 56 of the *Australian Prudential Regulation Authority Act 1998*). Similarly, an evidential burden of proof exists in relation to the other prudential frameworks which interact with the regime including a matter raised under section 11CI of the *Banking Act 1959,* section 109A of the *Insurance Act 1973*, section 231A of the *Life Insurance Act 1995*. Consistency of approach across this complex legal framework is important to support understanding and application of the law.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

15 /02 /2022

The Hon Greg Hunt MP
Minister for Health and Aged Care

Ref No: MC21-039265

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

08 JAN 2022

Dear Chair Helen

I refer to correspondence of 26 November 2021 on behalf of the Senate Scrutiny of Bills Committee (Committee) concerning the Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021 (Bill).

The Committee has requested that I clarify why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in Item 34 of Schedule 1 to the Bill, which inserts proposed section 105AA.

The Attorney-General's Department's A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide) suggests that a matter should only be included in an offence-specific defence, as opposed to being specified as an element of the offence, where:

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

In this case, the proposed offence-specific defence is appropriate as it relates to matters peculiarly within the knowledge of the defendant. Proposed subsection 105AA(1) provides that it is a strict liability offence for an individual under review who is not a practitioner to fail to appear at a hearing of a Professional Services Review (PSR) Committee, or to appear at a hearing but refuse or fail to give evidence or to answer questions.

Proposed subsection 105AA(2) provides a defence (offence-specific defence) to this offence in circumstances where the defendant has notified the PSR Committee of a medical condition prior to the hearing; complied with reasonable requirements to undergo a medical examination to determine the existence and extent of the medical condition; and the results of the medical examination indicate the defendant has a medical condition preventing them from appearing or from giving evidence or answering questions.

There will be situations where the defendant is the only person who knows whether they have completely met the criteria for the offence-specific defence and who is able to access relevant documents relating to the matters of the offence-specific defence.

Although the prosecution is likely to have knowledge of one aspect of the offence-specific defence, that is, whether the defendant notified the PSR Committee as required, information relating to the medical condition of the defendant and the results of any medical examination(s) would not be available to the prosecution in all cases.

Details as to the existence and extent of a medical condition would therefore be matters peculiarly within the knowledge of the defendant. Conversely, it would be difficult for the prosecution to prove, in all cases, that the defendant did not have a medical condition preventing them from appearing at a hearing or giving evidence as required.

In the instance where a defendant notifies the PSR Committee that they have a medical condition preventing them from appearing at a hearing and then does not provide any evidence that they have undergone a medical examination, the defendant would be the only person with any evidence of a medical examination and the results of the examination. If the defendant is then prosecuted under subsection 105AA(1), it would only be the defendant that holds the evidence necessary to successfully raise the offence-specific defence in subsection 105AA(2).

Similarly, proposed subsection 105AA(4) provides that it is a strict liability offence for a body corporate to fail to cause an executive officer to appear at a hearing, give evidence at a hearing, or to answer questions at a hearing. The offence carries a maximum penalty of 150 penalty units.

Proposed subsection 105AA(5) provides an exception (offence-specific defence) to this offence, if the body has only one executive officer, and the person has notified the PSR Committee that he or she has a medical condition which prevents him or her from appearing, giving evidence or answering questions. In this case, as body corporate is a sole director company, details of the medical condition of the sole executive officer would also be peculiarly within the knowledge of the defendant.

These offence-specific defences address specific stakeholder concerns in providing a medical exemption that mirrors the application of subsection 104(5) as this is a situation not completely covered by existing defences in the *Criminal Code Act 1995* (Criminal Code).

As noted by the Committee, proposed subsections 105AA(2) and 105AA(5) do not impose a legal burden of proof upon a defendant as it is not expressed to do so (see section 13.4 of the Criminal Code). This is in line with the principle in the Guide and the default position in section 13.3 of the Criminal Code.

I trust this addresses the Committee's concerns in relation to this issue.

I thank the Committee for its consideration of the legislation.

Yours sincerely

Greg Hunt

THE HON KAREN ANDREWS MP
MINISTER FOR HOME AFFAIRS

Ref No: IS22-000001

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

Dear Chair

I refer to the Committee's request, dated 8 February 2022, for further information on the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021.

My response is enclosed for the Committee's consideration.

Yours sincerely

KAREN ANDREWS

21 / 2 / 2022

RESPONSE TO THE SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS SCRUTINY DIGEST 1 OF 2022
NATIONAL SECURITY LEGISLATION AMENDMENT (COMPREHENSIVE REVIEW AND OTHER MEASURES NO. 1) BILL 2021

This is a response to issues that the Senate Standing Committee for the Scrutiny of Bills raised in relation to the National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021 (the **Bill**) in its Scrutiny Digest 1 of 2022.

Broad delegation of administrative powers

1.23 The committee therefore requests the minister's advice as to whether the bill can be amended to either:

- **limit the ability to delegate powers, functions or duties under proposed section 9D (relating to emergency authorisations) to staff members of the senior executive service (or equivalent) and above; or**
- **limit the scope of the powers, functions and duties under proposed section 9D that can be delegated to a staff member.**

Schedule 1 amends the *Intelligence Services Act 2001* (**IS Act**) to permit the Australian Secret Intelligence Service (**ASIS**), Australian Signals Directorate (**ASD**) and Australian Geospatial-Intelligence Organisation (**AGO**) (together, the **IS Act agencies**) to produce intelligence on an Australian person, without first obtaining ministerial authorisation, in circumstances where there is an imminent risk to the person's safety overseas, and only in the very narrow situation where it is reasonable to believe that the person would consent to the IS Act agencies taking action. This allows for swift action to be taken in situations of imminent risk to an Australian person's safety overseas, such as a kidnapping or hostage situation.

In emergency circumstances, time is of the essence. The ministerial authorisation process, even including the existing emergency authorisation provisions, can constitute a significant and unacceptable delay. Operational experience has demonstrated that the current emergency authorisation provisions in sections 9A, 9B and 9C of the IS Act do not support expeditious action by the relevant agencies where an Australian person's life may depend on immediate action. In particular, under the current framework, if an agency head considers it necessary or desirable to undertake an activity or series of activities, they must be satisfied that relevant Ministers are not available before giving an authorisation. In time-critical situations, the extra time involved in satisfying this requirement can put Australians at risk.

The ability to delegate powers, functions or duties under proposed section 9D

There is a strong operational need for this power to be devolved. The new emergency authorisation is for the limited scenario in which an immediate or near-immediate response is required. Introducing any delay into the authorisation process would defeat the purpose of the new authorisation and potentially put Australians at further risk. Crucially, the new authorisation is only for the very narrow scenario where it is reasonable to believe that the person would consent to the production of intelligence on themselves, if they were able to do so.

Overseas staff operate in different time zones, with differing levels of seniority. Contacting the agency head for approval could cause undue delay and result in lost opportunities to prevent or lessen harm or risk to an Australian person's safety. Officers in the field are often best placed to assess the immediacy of the threat, and the best way to gather intelligence to assist the Australian person whose safety is at risk.

In practice, decisions would usually be made by the most senior officer in the relevant location. However, the level of these officers can differ between different locations. The delegation ensures it is possible for suitable individuals in the relevant location and time zone to make decisions if required.

There are a number of further safeguards in the Bill permitting a reassessment of whether the authorisation was appropriate. For example:

- the agency head must cancel the authorisation if it is determined the risk is not significant
- the Minister must be notified within 48 hours and must consider whether to cancel the authorisation, and may cancel the authorisation at any time thereafter, and
- delegates must comply with any written directions given by the agency head under the delegation.

Further, in the unlikely circumstances where no senior officer can be located, the operational need for approval by a junior officer to immediately act in potentially life or death situations, coupled with the strong safeguards and the need for fast consideration by the agency head and Minister, outweighs any limited risks posed by junior staff using this power.

The scope of the delegation

It is also appropriate for the scope of the delegation to include all or any powers, functions or duties of the agency head under this section. The other obligations that may be delegated – for example, requirements to notify the responsible Minister and Inspector-General of Intelligence and Security (**IGIS**) – ensure that the responsible Minister maintains visibility and that the IGIS can properly exercise its oversight function. Requiring these obligations to only be fulfilled by the agency head personally could have the counter-productive effect of delaying provision to the responsible Minister and IGIS of the information and documentation to which they are legally entitled. Similarly, limiting a delegate's ability to cancel an authorisation under subsection 9D(12) could result in an authorisation continuing for longer than necessary, if the relevant agency-head was not immediately available.

The IGIS will have an important oversight role for agencies' use of this emergency authorisation, including whether the agencies act legally and with propriety, comply with ministerial guidelines and directives, and respect human rights. Under proposed subsection 9D(8) of Schedule 1, the IGIS is required to consider whether the agency head has complied with the requirements of section 9D, prepare a compliance report for the responsible Minister each time this power is exercised and provide the Committee with a copy of the conclusions to this report.

Fundamentally, the proposed emergency authorisation provisions are for the protection and benefit of individual Australians and can only be used in very narrow circumstances – to collect intelligence on an Australian who is at imminent risk of harm overseas, and where that Australian is likely to want, and indeed expect, the Government to take every action to assist them. It is therefore appropriate that the ability to delegate this power is reflective of the operational reality.

Tabling of documents

1.44 The committee therefore requests the minister's advice as to whether the bill can be amended to provide that the privacy rules published online under proposed subsections 15(5) and 41C(6) are also tabled in the Parliament.

Schedule 10 implements recommendations 12 and 189 of the Comprehensive Review. It requires the Defence Intelligence Organisation (**DIO**) to have legally binding privacy rules, requires ASIS, ASD, AGO and DIO to make their privacy rules publicly available (except for operationally sensitive information or information that would or might prejudice Australia's national security, foreign relations, or the performance of agency functions), and updates the Office of National Intelligence's (**ONI**) privacy rules provisions so that they only apply to intelligence about an Australian person under ONI's analytical functions. The purpose of the amendments is to ensure increased transparency and accountability by requiring the privacy rules to be publicly available and reviewable by the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**).

Under the reforms, the privacy rules will be subject to robust ministerial oversight. In each case, the privacy rules are made by the responsible Minister – ensuring the principle of ministerial accountability is engaged. In making the privacy rules, the relevant Minister must have regard to the need to ensure that the privacy of Australians is preserved as far as is consistent with the proper performance by the agencies of their functions.

The main argument in favour of tabling the privacy rules is to provide an opportunity for parliamentary scrutiny. This is a policy outcome that is already achieved by the Bill introducing a new function for the PJCIS to review each agency's privacy rules (see amended subsections 29(1) and 29(3) in Schedule 10). Review by the PJCIS provides openness, transparency and accountability and provides an avenue for members of the public to raise any concerns with respect to the privacy rules. PJCIS members have significant insight into the activities and functions of the intelligence agencies, and are well-placed to review agencies' privacy rules in a comprehensive manner that is cognisant of the unique operating environment of those agencies.

As the Bill already requires the privacy rules to be published (other than sensitive information) and subject to parliamentary committee oversight, a requirement to table the rules is unlikely to result in any additional transparency or scrutiny.

THE HON JOSH FRYDENBERG MP
TREASURER

Ref: MS21-002930

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

Dear Senator

I refer to the Scrutiny Digest 17 of 2021 from the Senate Standing Committee for the Scrutiny of Bills regarding the Offshore Petroleum (Laminaria and Corallina Decommissioning Cost Recovery Levy) Bill 2021 (the Bill).

The Committee sought my advice as to whether the Bill can be amended to clarify that an instrument made under subclause 7(2) or 8(2) will not take effect in circumstances where there is an unresolved motion to disallow the instrument at the end of the 15 sitting day disallowance period.

I can advise that it is not necessary to amend the Bill as requested. As section 12 of the Bill does not override, and is not intended to override, the usual operation of subsection 42(2) of the *Legislation Act 2003* (Legislation Act), this already achieves the outcome sought by the Committee. Further, section 44 of the Legislation Act already provides the circumstances in which section 42 of the Legislation Act does not apply and those circumstances are not satisfied by subclause 12 of the Bill.

The Bill states that an instrument made under subsection 7(2) or 8(2) will take effect on the day immediately after the last day upon which such a resolution *could* have been passed. This takes into account both the period for either House of Parliament to give a notice of a motion to disallow, and the period to resolve that motion.

In other words, an instrument will take affect after there is no longer a possibility that either House may pass a resolution to disallow the instrument or provision specified in the motion. For example, if a notice of a motion to disallow is placed on the instrument on the 15th sitting day, then the instrument will not commence until the day after that motion has been finally resolved unless the instrument or a provision is disallowed.

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

Finally, I note that as the Bill does not reference or override the operation of section 42 of the Legislation Act, which is a provision of general application across the entire Commonwealth statute book, it would be inappropriate to explain the function of those provisions of the Legislation Act in the explanatory memorandum to this Bill.

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

Yours sincerely

THE HON JOSH FRYDENBERG MP

2 / 3 / 2022

ATTACHMENT A: RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS SCRUTINY DIGEST 1 of 2022
OZONE PROTECTION AND SYNTHETIC GREENHOUSE GAS MANAGEMENT AMENDMENT (MISCELLANEOUS MEASURES) BILL 2021

Significant matters in delegated legislation

Committee comments:

1.55 The committee requests the minister's detailed justification as to:

- **why it is considered necessary and appropriate to leave the prescription of permitted uses of HCFCs for the purposes of offence and civil penalty provisions to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.**

Response:

Allowing the regulations to prescribe the permitted uses of hydrochlorofluorocarbon (HCFC) for the purposes of the offence and civil penalty provision in proposed subsection 45C(1) is necessary and appropriate to ensure Australia's compliance with its international obligations whilst minimising regulatory burden as far as possible.

Production and import of HCFC is in the last stage of a global phase out in developed countries under the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol). The last stage from 2020 to 2029 allows a very small quantity of HCFC to be imported for a small number of prescribed circumstances agreed by the Montreal Protocol. Furthermore, the Montreal Protocol may also allow for additional essential uses if there are no practical alternative substances for that use and the use is essential for purposes such as public or industry safety, medical, veterinary or defence uses. As the global phase out progresses and changes in technology result in fewer essential uses for HCFC, the uses allowed under the Montreal Protocol are expected to be further refined in the future and it is important that Australia's laws are aligned to such changes in a timely way.

Allowing the regulations to prescribe allowed uses for HCFC that was manufactured or imported on or after 1 January 2020 provides the necessary flexibility in the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act) to respond in a timely way to changes in Australia's international obligations and to ensure that the regulatory burden to industry is minimised so far as possible. Importantly, this would ensure Australia's continued and ongoing compliance with its international obligations and would also minimise the adverse impacts of HCFC on human health and the environment.

As the regulations would be required to adapt to changing circumstances domestically and internationally, providing high level guidance in the Act could hamper the ability to align with international requirements. For example, it could hamper the ability to address unforeseen advances in technology. Further, any regulations made to prescribe permitted uses of HCFC would be subject to the usual parliamentary scrutiny and disallowance processes. I therefore consider that it is not appropriate to include further high-level guidance in the bill regarding this matter.

Incorporation of external material as in force from time to time

Committee comments:

1.66 The committee requests the minister's advice as to whether standards and any other documents incorporated into the regulations will be made freely available to all persons interested in the law.

Response:

Proposed subsection 45A(4) would allow the regulations to incorporate an instrument or other writing as in force or existing from time to time. As outlined in the Explanatory Memorandum to the bill, the purpose of this amendment is to allow regulations concerning the end use of scheduled substances to incorporate documents, such as standards or qualifications, and to enable those documents to be regularly updated so that they are the most up-to-date and appropriate qualifications and standards for any particular end use.

It is envisaged that the standards that would be incorporated by the regulations would generally be official Australia and New Zealand industry standards which would be readily available via Standards Australia. While Standards Australia is not freely accessible, it is expected that standards that are incorporated would be industry best practice and would already be widely used by industry. Therefore, it can be reasonably expected that those who would be regulated by any such regulations would already have access to any incorporated standards to carry out their business or meet their professional obligations.

No-invalidity clause

Committee comments:

1.70 As the explanatory materials do not adequately address this issue, the committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsection 65Y(3) and proposed subsection 65ZB(3) of the bill.

Response:

Proposed subsections 65Y(3) and 65ZB(3) would provide that a failure to provide a written notice of decision would not affect the validity of the original reviewable decision. The proposed provisions are based on, and would replace, existing subsection 67(2) of the Act which already provides that a failure to comply with the notice requirements does not affect the validity of the relevant decision. The proposed new subsections 65Y(3) and 65ZB(3) does not broaden this provision, but rather seeks to re-draft the existing provision to allow for more clarity and for it to apply it consistently across the Act including to newly introduced provisions.

The purpose of proposed subsections 65Y(3) and 65ZB(3) is to provide the necessary certainty for both industry and the Commonwealth as to whether a licence is in force and covers a particular import, manufacture or export. This is particularly the case where, for example, a decision has been made to refuse to grant a licence or refuse to renew a licence. In these instances, it is important that current practices are maintained and that industry has sufficient certainty over the decision to reduce any further regulatory burden and to minimise any possibility of non-compliance.

It is important that decisions relating to non-compliance with the licensing conditions by licence holders, for example, are made in a timely way and with sufficient certainty. This enables an effective response to manage and mitigate any harm that may result from the non-compliance to Australia's environmental and human health, Australia's continued compliance with its international obligations and its international relations. Proposed 65Y(3) and 65ZB(3) would provide the necessary regulatory certainty that is required to deal with these situations.

Senator the Hon Michaelia Cash
Attorney-General
Minister for Industrial Relations
Deputy Leader of the Government in the Senate

Reference: MC22-002598

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

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

Dear Chair

I write in response to the observations of the Senate Standing Committee for the Scrutiny of Bills (the Committee) on the Religious Discrimination Bill 2021 and the Religious Discrimination (Consequential Amendments) Bill 2021 in *Scrutiny Digest 11 of 2022*.

I have considered the issues raised by the Committee and provide the enclosed advice.

I note that, since my previous response to the Committee's observations in *Scrutiny Digest 18 of 2021*, the Government has considered the recommendations of the Parliamentary Joint Committee on Human Rights and the Senate Legal and Constitutional Affairs Legislation Committee, which both delivered their reports on the legislative package on 4 February 2022. In light of these reports, the Government moved amendments to the legislative package that may be of interest to the Committee.

I thank the Committee for its attention to these matters. I trust this information is of assistance.

Yours sincerely

Senator the Hon Michaelia Cash
22 / 02 / 2022

Encl. *Substantive Response to Scrutiny of Bills Committee*

Perth
44 Outram Street, West Perth WA 6005
Ph 08 9226 2000

Canberra
Parliament House, Canberra ACT 2600
Ph 02 6277 7300

Attachment A

Response to issues raised by the Senate Standing Committee for the Scrutiny of Bills in Scrutiny Digest 11 of 2022

Religious Discrimination Bill 2021
Religious Discrimination (Consequential Amendments) Bill 2021

Significant matters in delegated legislation—publicly available policies

I note the Committee has recommended further explanatory material on the requirements for publicly available polices be included.

The Government has now moved amendments to the Religious Discrimination Bill 2021 to provide further clarity regarding what is required to be included in a publicly available policy. The requirements are based upon the suggested approach by the Religious Freedom Review (for example, in paragraph 1.250 of the Report) and the requirements set out in paragraph 11(1)(b). These amendments to subclauses 7(6), 9(3), 9(5), 40(2), and 40(5) provide that a policy must:

- outline the religious body's position in relation to particular religious beliefs or activities; and
- explain how that position is or will be enforced; and
- be publicly available, including at the time employment opportunities with the religious body become available.

This ensures the requirements for publicly available policies are consistent throughout the Bill. However, as clause 40 relates to accommodation, rather than employment, it is not necessary to include the requirement specifying that the policy be available at the time employment opportunities become available.

This implements recommendation 8 of the Committee's inquiry report on the Religious Discrimination Bill 2021 and related bills, with one minor variation. With the inclusion of these requirements, sufficient detail about these policies is now included in the Bill. Accordingly, the Government amendments also removed the provisions permitting the Minister to determine requirements for a publicly available policy (being former subclauses 7(7), 9(7), 40(3) and 40(6)).

Significant matters in delegated legislation—overriding state or territory laws in relation to employment by religious educational institutions

I note my advice in response to *Scrutiny Digest 18 of 2021* set out the Government's position in relation to this issue.

Further, I note that the Government moved minor amendments to the drafting of clauses 11 and 12 to more clearly engage section 109 of the Constitution to override relevant State and Territory laws.

Significant matters in delegated legislation—general exception for acts done in direct compliance with certain Commonwealth, state and territory laws

I note my advice in response to *Scrutiny Digest 18 of 2021* set out the Government's position in relation to this issue.

Broad discretionary power

Further to my advice in response to *Scrutiny Digest 18 of 2021*, the Government has moved amendments to increase transparency around the making of temporary exemptions by the Australian Human Rights Commission, and to remove the Minister's power to vary or revoke a temporary exemption. This will be done through the inclusion of a new clause 44A, and amendments to existing clauses 47 and 48.

As noted by the Committee, under clause 44 of the Bill, the Commission is currently able to grant temporary exemptions from the prohibition on discrimination on the grounds of religious belief or activity under the Bill. New clause 44A will require the Commission, after making a decision on an application for a temporary exemption, to publish a notice on its website specifying its reasons, findings, relevant evidence, and noting that the Commission's decision is subject to review through the Administrative Appeals Tribunal. This new subclause is consistent with the Commission's existing notice requirements in making temporary exemptions under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992* and the *Sex Discrimination Act 1984*, and will ensure transparency of the Commission's decisions and allow for appropriate public scrutiny.

Additionally, clause 47 had provided that either the Commission or the Minister may vary or revoke a temporary exemption granted by the Commission under clause 44. The Government has now moved an amendment that will remove the Minister's power to revoke or vary a temporary exemption granted by the Commission, consistent with the approach under existing Commonwealth anti-discrimination law.

These amendments also implement recommendations 4 and 6 of the report of the Parliamentary Joint Committee on Human Rights inquiry on the Religious Discrimination Bill 2021 and related bills, tabled on 4 February 2022.

Broad delegation of administrative power

I note my advice in response to *Scrutiny Digest 18 of 2021* set out the Government's position in relation to this issue.

Immunity from civil liability

I note my advice in response to *Scrutiny Digest 18 of 2021* set out the Government's position in relation to this issue.

Reversal of the evidential burden of proof

I note my advice in response to *Scrutiny Digest 18 of 2021* set out the Government's position in relation to this issue.