The Hon Tony Burke MP
Minister for Home Affairs
Minister for Immigration and Multicultural Affairs
Minister for Cyber Security
Minister for the Arts
Leader of the House

Ref No: MC24-022811

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
Suite 1.111
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CANBERRA ACT 2600

scrutiny.sen@aph.gov.au

Dear Chair

Thank you for the correspondence of 15 August 2024 from the Secretary of the Senate Standing Committee for the Scrutiny of Bills, concerning the Committee's consideration of the Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024.

I appreciate the time the Committee has taken to consider the Bill. My response to the matters raised by the Committee in its Scrutiny Digest 9 of 2024 is provided at Attachment A.

I trust this information is of assistance to the Committee in its further consideration of the Bill.

Yours sincerely

TONY BURKE

22 / 8 / 2024

Attachment A

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

Scrutiny Digest 9 of 2024

Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024

The Senate Standing Committee for the Scrutiny of Bills (the Committee) has requested advice from the Minister for Home Affairs in relation to the Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024 (the Bill). The Committee's initial scrutiny of the Bill is set out in *Scrutiny Digest 9 of 2024* (pp. 2-7).

General remarks

The Customs Amendment (Strengthening and Modernising Licensing and Other Measures) Bill 2024 (the Bill) amends the *Customs Act 1901* (Customs Act) to modernise and strengthen the customs licensing regime and makes amendments to streamline administrative processes including digitisation of forms. The customs licensing regime encompasses depot, warehouse and customs broker's licences. The Bill also amends the *AusCheck Act 2007* to support these reforms by allowing for the disclosure of security identity card information to an officer of Customs for the purposes of the Customs Act.

The Bill is part of the Government's Simplified Trade System (STS) agenda which aims to deliver a simpler, more effective and sustainable cross-border trade environment that will ensure Australia remains a globally competitive trading nation. The STS reforms are designed to roll out progressive benefits for business and government, with regulatory reform the first step toward investment in larger digital reforms.

In conjunction with amendments to modernise and streamline aspects of the licence administration, the amendments in the Bill strengthen the eligibility to hold a licence and maintain a licence that ensures the integrity of goods under customs control and the applicant is adequately able to report, store and move goods under customs control in line with the obligations of a licence.

Responses to the Committee's specific questions

Why subsection 77N(10) of the *Customs Act 1901*, which currently makes it a condition for licence holders to permit authorised officers to enter and search premises is insufficient, and whether consideration was given to amending this provision (rather than allowing a general right of warrantless entry at any time)

As part of the cross-border regulatory framework, the Australian Border Force (ABF) maintains a customs licensing regime to regulate licensed customs brokers, depots and warehouses to support managing the risks associated with the unlawful movement of goods. Licence holders play critical roles in the supply chain and provide key services to facilitate trade in and out of Australia.

Licence holders are granted the licence to conduct activities that require compliance with obligations to prevent harmful substances or goods from entering the Australian community and ensure the revenue owed to Commonwealth is paid. Authorisation to enter a customs place where the ABF must uphold the Customs Act by conducting monitoring compliance or targeted intervention is paramount to the ABF's broader capability and functions.

Generally, where access is required a collaborative approach is taken where permission is sought from the holder of the licence beforehand. In instances where there is non-compliance or refusal to comply with a compliance request, the ABF can escalate its response proportionately.

Subsection 77N(10) of the Customs Act is one of the conditions imposed on all depot licences. Subsection 77N(10) is limited to the review and inspection of documents. It does not include the power to inspect goods under customs control in the depot or to inspect the depot to ensure that it complies with other conditions imposed on the depot licence under the Customs Act.

If an authorised officer has reasonable grounds to believe there are commercial documents in the depot that relate to goods in the depot, the licence holder must permit the authorised officer to enter the depot to access and inspect the commercial records.

Subsection 77N(11) of the Act permits the licence holder to refuse access to the depot unless the authorised officer produces written evidence that the person making the request is an authorised officer. If the licensee is not at the depot it may not be possible to ask the licensee for permission to enter the depot. Where a licence holder asserts that there are no commercial documents at the depot it may be difficult to establish that the officer had reasonable grounds to believe commercial documents are in the depot. The licence holder's assertion might occur in an effort to forestall the ABF entering the depot.

Subsection 77N(10) would not be the most relevant part of the Customs Act to amend in relation to the entry and access into the licensed place. Rather, subsection 77N(6) could be amended to include a provision to account for and describe the ABF's legislative authority to enter and access the licensed place. However, this would still not account for the circumstance where the holder of the licence might refuse the ABF's request, potentially in order to shield non-compliant or criminal behaviours.

Why seeking a warrant would be impractical (noting the bill could provide no requirement for prior notification to be given regarding the warrant)

The power to monitor goods under customs control is crucial to the protection of the revenue and control of prohibited imports. Assessing compliance against licence obligations and ensuring the security of the goods or locating goods subject to customs control are not matters for which a warrant could be obtained but are critical to regulating the supply chain and protecting it from criminal infiltration or opportunistic offending.

The ABF requires powers to be able to gain access and examine goods in a timely manner due to the complexity and speed of supply chain operations. The powers of entry and access to goods under customs control enable the ABF to exercise a range of other authorised powers within the Customs Act such as the seizure of the goods. Once goods under customs control are released for home consumption the ABF has limited to no jurisdiction over the goods.

Proposed subsection 77ZAA only allows for officers of the ABF to access the clearly defined licensed place or Customs controlled area defined by the granted customs depot licence. If entry or access is required for other places, a warrant would be required for entry, access and searching of non-Customs controlled areas of the premises.

What safeguards would apply if a collector were to enter premises without consent and without a warrant, including oversight of the officer's actions and reporting requirements

Where operational planning identifies a potential need to deploy with ABF equipment and/or body armour, ABF operational risk management practices, policies and procedures must be considered and used to assess and mitigate identified risks in accordance with the ABF Operational Risk Management Framework.

The ABF Operational Safety Order 2021 (the Order) sets out the ABF operational safety and use of force practice, reporting, training, assessment, qualification and administration requirements. It also gives effect to the policy of the ABF for the use of necessary and reasonable force and its implementation.

An ABF Employee would need to attend and successfully complete a Basic Operational Safety Training Course in order to be qualified in use of force and to be issued with a Use of Force Permit.

New section 77ZAA aligns the powers between depots and warehouses as it mirrors current Section 91 of the Customs Act which provides for an identical entry and search power but in respect of warehouse premises. Extending the same power to depots ensures that this is no gap in coverage and that all licensed places are comprehensively covered. Goods subject to customs control and that require duties and taxes paid before being released into the general public are located in both depots and warehouses. It is very common for goods to arrive at a depot before being moved to a warehouse. The application of existing section 91 to the depot environment provides consistency and supports the ABF's capability to ensure compliance and protect the revenue.

In what circumstances is it envisaged that an officer would need to use force to enter premises

The ABF encounters situations where the licence holder is not present to allow access to the licensed place. In this circumstance, the officer of the ABF will exhaust all available options to seek permission to enter the place which can include obtaining consent from the licence holder, requesting the licence holder to attend the place to allow access or request the licence holder to facilitate access i.e. licence holder engages with landlord or on-site security. In most cases, the holder of the licence will either provide consent or facilitate the access remotely.

It is envisaged that an officer would need to use force to enter premises where the holder of the licence refuses permission/consent to enter the licensed place. Refusal of entry may reflect criminal behaviour, or intentions to tamper or interfere with goods subject to customs control prior to any ABF intervention.

The use of force power in proposed section 77ZAA would only be exercised when the officer of the ABF has exhausted all other options and where the officer has evidence or a concern that goods under customs control must be secured to ensure compliance with Customs legislation or for the purposes of protecting the revenue owed to the Commonwealth. As also noted in the Bill's explanatory memorandum, denial of entry would frustrate the regulation of an activity with tremendous potential for adverse consequences within Australia's supply chain, affecting national security and the Commonwealth revenue. The language of the provision makes it clear that only the force necessary to gain access and enter particular premises is authorised.

Whether training will be provided to any officer exercising these proposed powers in relation to the use of force; and

Officers who perform method of entry functions in the course of their duties are supported by a risk based approach outlined in a pre-operation risk assessment and isolated to certain work areas through on the job training.

The Basic Operational Safety Training Course (BOST) is the ABF's use of force qualification, although it does not cover forced entry capability. ABF Employees must successfully complete BOST to be issued with a Use of Force Permit. Use of force qualified ABF Employees must maintain competence in all aspects of BOST and successfully complete a BOST Recertification Course annually to maintain their use of force operational safety qualification (unless approved otherwise).

Why is there no requirement that a licence holder be notified after a search has occurred.

The ABF will use various powers to seek licence holder compliance with Customs legislation obligations when attending a licensed place and will announce their presence and request permission to enter the place. The licence holder will be given the opportunity to provide consent, permit entry and seek confirmation of the credentials of the ABF officers.

THE HON TANYA PLIBERSEK MP
MINISTER FOR THE ENVIRONMENT AND WATER

MS24-001193

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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Dear Chair

I refer to correspondence of 4 July 2024 from the Acting Committee Secretary on the Senate Standing Committee for Scrutiny of Bills (the Committee) request seeking further information regarding the Nature Positive (Environment Protection Australia) Bill 2024, Nature Positive (Environment Information Australia) Bill 2024 and Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024, as set out in Scrutiny Digest 8 of 2024.

I have carefully considered the Committee's request for further information on the particular issues arising from the bills. I am satisfied that the approach taken in these bills would ensure that:

- it is appropriate that certain instruments are not legislative instruments;
- immunity from civil liability in specific circumstances is justified; and
- concerns on the availability of independent merits review are addressed.

My detailed response is in the Attachment.

I thank the Committee for the opportunity to respond.

Yours sincerely

TANYA PLIBERSEK

Enc Attachment – Response to the Senate Scrutiny of Bills Committee

13·8·24

ATTACHMENT: RESPONSE TO SENATE STANDING COMMITTEE FOR SCRUTINY OF BILLS SCRUTINY DIGEST 8 of 2024

Nature Positive (Environment Protection Australia) Bill 2024
Nature Positive (Environment Information Australia) Bill 2024
Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024

Instruments not subject to an appropriate level of parliamentary oversight

Committee comments:

The Committee requests the Minister's advice as to why it is considered necessary and appropriate to specify that instruments made under subclause 54(1) of the Nature Positive (Environment Protection Australia) Bill 2024 (the EPA Bill) are not legislative instruments (including why it is considered that the instruments are not legislative in character).

Response:

Subclause 54(1) of the EPA Bill provides that the Chief Executive Officer (the CEO) may, by written instrument, establish an advisory group. Subclause 54(9) then clarifies that such an instrument is not a legislative instrument.

An instrument to establish an advisory group would not determine the law or alter the content of the law. This is because an instrument establishing a group with the ability to advise on matters relating to legislation would not, in itself, make, or give content to, or affect the content of, any laws. In other words, the instrument would simply establish an advisory group and the mere establishment of an advisory group would not have bearing on the application or content of law. For this reason, an instrument to establish an advisory group should not be considered legislative in character.

It would also not be appropriate for these instruments to be legislative instruments because they would deal with administrative matters relating to the establishment of an advisory group. The instruments would not create any rights, obligations or privileges, nor have any other characteristics commonly found in legislative instruments.

On that basis, it is appropriate that instruments made under subclause 54(1) would not be legislative instruments.

Immunity from civil liability

Committee comments:

The Committee requests the Minister's advice as to:

- what circumstances would necessitate Environment Information Australia relying on the immunity from civil liability provided by clause 50 of the Nature Positive (Environment Information Australia) Bill 2024 (the EIA Bill); and
- what recourse is available for an affected individual other than by demonstrating a lack of good faith by the Head, staff assisting the Head or persons engaged by the Secretary.

Response:

Clause 50 of the EIA Bill provides that the Head of Environment Information Australia (the Head), the staff assisting the Head, and persons engaged by the Secretary, are not liable to actions or proceedings for damages for, or in relation to, an act or matter done in good faith (or omitted to be done) in the performance of their functions or exercise of their powers.

In accordance with clause 11 of the EIA Bill, the Head would be responsible for providing information and data to a range of stakeholders and the public. The Head's role in providing information and data creates the potential for civil proceedings seeking damages. This may include instances where a person or entity alleges that harm has been caused by the unauthorised disclosure of protected information, in relation to breaches of copyright or other intellectual property rights, or breaches of confidence or defamation.

Civil claims could also arise if a person relied on information (or the absence of information) provided by EIA in good faith to their detriment. For example, in the context of the Head providing a public portal of information, a proponent conducting due diligence on a location for a potential project may rely on EIA data to determine whether the site is suitable. Were the data to be incorrect or incomplete, or insufficient guidance provided as to its reliability or appropriate use, and the project to incur cost or delays as a result, the proponent may seek to commence proceedings to recover their losses against the Head or persons assisting the Head.

It is important that high quality environmental information and data can be made available to inform better policy, project, investment and regulatory decision-making. However, without protection from civil liability, individuals may be reluctant to be appointed to roles within EIA for fear of being held personally liable for acts or omissions relating to their performance of functions or exercise of powers, even if they act in good faith.

Acts or omissions that are not performed by the Head (or other relevant person) in good faith (such as those performed with malice or fraudulently) would not be provided immunity from civil liability. This is considered appropriate as powers, duties and functions under legislation must be exercised in good faith for a proper purpose. In addition, clause 50 would not protect the relevant persons from criminal proceedings. An affected individual could also make a complaint to the Commonwealth Ombudsman.

Accordingly, it is considered necessary and appropriate to confer immunity from liability for damages on the persons listed in clause 50 where they have performed functions or exercised powers in good faith.

Availability of independent merits review

Committee comments:

The Committee seeks the Minister's advice as to whether independent review of the Minister's decision to not revoke an environment protection order under proposed subsection 474D(2) of the Nature Positive (Environment Law Amendments and Transitional Provisions) Bill 2024 (the Amendment Bill) can be made available.

Response:

Proposed subsection 474D(2) (as outlined in item 2 of Schedule 11 to the Amendment Bill) would provide that the Minister must revoke an environment protection order if the Minister reasonably believes that the order is no longer necessary for any of the purposes for which it was issued.

Merits review would not be appropriate in these circumstances because subsection 474D(2) is a mandatory decision that arises where there is a statutory obligation to act in a certain way upon occurrence of a specified set of circumstances. In this case, if the Minister reasonably believes that the environment protection order is no longer necessary, the Minister must revoke the order; that is, the revocation would be mandatory. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraph 3.8 of *What decisions should be subject to merits review?*).

Furthermore, if the Minister reasonably believed that the environment protection order was still necessary, it would mean the urgent circumstances in which the order was issued was ongoing. Therefore, it would be necessary and appropriate to exclude merits review in this case due to the urgency of the circumstances, and the possibility of serious damage to the environment that may be caused by the person's actions. The combination of these factors would mean that it would be likely that the decision's effect would be spent by the time of review. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraph 4.50 of *What decisions should be subject to merits review?*).

THE HON JIM CHALMERS MP
TREASURER

Ref: MC24-013408
Wednesday 28 August 2024

Senator Dean Smith
Chair
Senate Scrutiny of Bills Committee
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scrutiny.sen@aph.gov.au

Dear Senator Smith

Thank you for your correspondence of 15 August 2024 concerning the Future Made in Australia (Omnibus Amendments No. 1) Bill 2024.

I have attached a detailed response to the matters raise by the Committee for the Scrutiny of Bills in the Committee's *Scrutiny Digest 9 of 2024*.

I trust that the information attached provides further context about the drafting of the Bill and assists with the Committee's deliberations.

I have copied this letter to the Minister for Climate Change and Energy who has policy responsibility for the amendments to *Australian Renewable Energy Agency Act 2011*.

Thank you again for your letter.

Yours sincerely

The Hon Jim Chalmers MP

CC: Minister for Climate Change and Energy

Future Made in Australia (Omnibus Amendments No. 1) Bill 2024

In the Committee's Scrutiny Digest 9 of 2024, you sought my advice as to:

- why it is necessary and appropriate for any of the CEO's powers to be subdelegated to any 'senior member of staff' under proposed subsection 73(1) of the Bill;
- whether proposed section 61 of the Bill can be amended to include a definition of 'senior member of staff'; and
- whether proposed subsection 73(1) of the Bill can be amended to provide that the CEO's powers or functions can only be subdelegated where the CEO is satisfied that the subdelegate possesses the appropriate skills, qualifications or experience to exercise the powers or perform the functions.

The explanatory memorandum notes that the proposed amendments to the *Australian Renewable Energy Agency Act 2011* (ARENA Act) are designed "to enable the growth of the agency that will be required to implement its expanded responsibilities". Amongst the proposed amendments, allowing ARENA the right to employ addresses a significant barrier to ARENA being able to manage and grow a workforce needed to meet its statutory obligations, increased funding and broadened responsibilities. With the right to employ, ARENA's workforce is expected to evolve to a greater proportion of ARENA employees across the board, including in senior management positions.

The amendments propose complementary changes to ARENA's delegation arrangements, to ensure that the delegation framework can evolve as necessary alongside the likely evolution of ARENA's workforce.

The current delegation provisions only allow the CEO to subdelegate to ARENA's Chief Financial Officer, EL2 level Australian Public Service (APS) or Senior Executive Service (SES) level roles. Under the current workforce model, this equates to around 10 people in a growing workforce of around 150.

This has created a long-term shortage of delegates leading to considerable pressure in ARENA's operations, particularly in relation to contract management of ARENA funded projects (with at least 200 projects underway at any time). A majority of the CEO delegations relate to the contract management of ARENA funded projects. The proposed amendments would alleviate this challenge by enabling ARENA to have a sufficient number of delegates to ensure that it can carry out its functions efficiently.

It is also important to point out the significant increase in ARENA's operations over the past 18 months, which will continue to rise over coming years due to the grant of additional funding for ARENA to deliver significant Budget Measures. The latest Budget provided ARENA with an additional $7.1 billion of funding, and ARENA is charged with delivery of several significant programs under the Future Made in Australia agenda, including Hydrogen Headstart Round 2, Solar Sunshot and the Battery Breakthrough Initiative.

The new statutory employment power will better enable ARENA to meet the many challenges in its operations over coming years. While details of the new workforce model are yet to be finalised, ARENA employees will not be employed under the *Public Service Act 1999* (Cth) and therefore employees engaged under the proposed right to employ will not be members of the Australian Public Service (APS). As such it is important that the CEO delegation power is drafted in such a manner as accommodates the proposed ARENA workforce, similar to that of the Clean Energy Finance Corporation (CEFC).

On that basis, and noting the ongoing controls in place, it is necessary and appropriate for the CEO's powers to be able to be subdelegated to any 'senior member of staff'. It would not be appropriate to confine the delegation to 'holders of nominated offices or to members of the Senior Executive Service', as this would be inconsistent with ARENA's proposed new employment model under an amended section 61.

The intent of the proposed reference to 'senior member of staff' (as reflected in the explanatory memorandum) is to maintain the equivalent level of seniority in ARENA's future delegation arrangements as is currently the case – that is, that sub-delegations can only be made to 'senior' members of staff at the equivalent level of APS EL2 or above.

This would include both senior ARENA employees engaged under ARENA's future right to employ, and APS staff who continue to be seconded from ARENA's Portfolio Department or from another agency. As senior members of staff will not necessarily be employed under the APS Act, categories such as 'Senior Executive Service' (SES) or 'Executive level 2' (EL2) may not be applicable, and confining delegations to nominated offices could unduly constrain organisational structure that is yet to be determined.

Further, confining delegates to the holders of 'nominated offices' or to members of the SES would be more restrictive than the current legislative provision (which allows for EL2 level APS and above to be delegates). Further, it is not possible to list all nominated offices that the CEO could subdelegate to, as this would impact the flexibility for ARENA to evolve its business model and structure over time. Such an approach would restrict the number of available delegates and likely impede ARENA's operations and its ability to carry out its core functions.

The CEO delegations are, and will continue to be, subject to Board oversight and controls. The exercise of the CEO subdelegations will continue to be subject to the Board (as accountable authority) delegating various powers and functions to the CEO by way of a formal delegation instrument. The CEO subdelegations will in turn be made in accordance with a formal delegation instrument over which the Board exercises oversight. I consider this represents an important control that lowers risks that may arise due to the nature of the subdelegation power that is proposed.

For the same reasons as outlined above, including a definition of 'senior member of staff' in section 61 would risk unduly constraining the delegation power. Section 61 of the Bill was modelled on a similar provision in the *Clean Energy Finance Corporation Act 2012* (CEFC Act), which relevantly provides for a subdelegation by the CEO '*to a senior member of staff referred to in section 41*' (s.80). Section 41 of the CEFC Act in turn contains the power to employ, which is on identical terms to that proposed in the Bill. The CEFC Act does not contain a definition of 'senior member of staff'.

The explanatory memorandum to the Bill contains guidance as to the meaning of a 'senior member of staff,' and I do not consider it necessary to include a definition of 'senior member of staff' in the Bill. For the reasons outlined above, doing so would unduly confine the delegation power and risk frustrating the objectives of the Bill to allow ARENA to employ staff and delegate responsibilities in appropriate circumstances.

The Committee has also asked whether the legislation could include a requirement that the CEO is satisfied that the subdelegate possesses the appropriate skills, qualifications, or experience to exercise the powers or perform the functions. I do not consider any such provision to be necessary. The CEO, as a holder of public office, would be expected to exercise his or her power properly, which would include ensuring that any persons delegated powers or functions have the requisite skills, qualification and experience.

As noted above, the delegation provision is modelled on the CEFC Act, which does not contain such a provision. I have confidence that the ARENA CEO would not subdelegate to an individual without appropriate skills, qualifications or experience to exercise the powers or perform the functions.

The Hon Tony Burke MP
Minister for Home Affairs
Minister for Immigration and Multicultural Affairs
Minister for Cyber Security
Minister for the Arts
Leader of the House

Ref No: MC24-022513

Senator Dean Smith
Chair
Senate Standing Committee for the Scrutiny of Bills
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by email: scrutiny.sen@aph.gov.au

Dear ~~Chair~~ Dean

Thank you for your correspondence of 15 August 2024 concerning the Senate Standing Committee for the Scrutiny of Bills' consideration of the Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024.

I appreciate the time the Committee has taken to consider the Bill. My response to the matters raised by the Committee is provided at Attachment A. I have also copied this letter to the Assistant Minister for Immigration, the Hon Matt Thistlethwaite MP.

I trust this information is of assistance to the Committee in its further consideration of the Bill.

Yours sincerely

TONY BURKE

30 / 8 / 2024

ATTACHMENT A

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS
Scrutiny Digest 9 of 2024.

Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024

General comments

The Migration Amendment (Strengthening Sponsorship and Nomination Processes) Bill 2024 (the Bill) would amend the *Migration Act 1958* (Migration Act) to establish core elements of the legislative framework to support the introduction of the proposed Skills in Demand visa. The Skills in Demand visa was announced as part of the Government's Migration Strategy, released on 11 December 2023.

The amendments in the Bill lay the foundations for the Skills in Demand visa by setting minimum income thresholds for temporary skilled migrants in the Migration Act, and legislating the annual indexation of these income thresholds. The Bill would also streamline labour market testing and create a public register of approved work sponsors.

The amendments in the Bill would implement the Government's commitment to ensure that non-citizens nominated to work in Australia are less likely to be displacing an Australian worker and will be less vulnerable to exploitation by ensuring they receive fair remuneration. The Bill also contains measures that will help temporary skilled migrant workers find a new sponsor and provide a resource to check that a sponsoring employer is legitimate.

Current section 140GB of the Migration Act provides for the Minister's power to approve nominations. Section 140GB of the Act also provides that a nomination may be made by a person who is or who has applied to be an approved work sponsor; or a party to negotiations for a work agreement. Subsection 140GB(2) provides that the Minister must approve an approved sponsor's nomination if amongst other things, the prescribed criteria are satisfied.

Proposed paragraphs 140GB(2)(c), (d) and (e) would establish new criteria in relation to income threshold requirements that must be satisfied when seeking to nominate an occupation in the Specialist Skills, Core Skills or Essential Skills streams of the proposed Skills in Demand visa.

The income thresholds for the three streams of the Skills in Demand visa would generally be provided for under proposed subsection 140GB(2A), or for the Essential Skills stream, in regulations made for the purposes of subparagraph 140GB(2A)(c)(i). Proposed subparagraph 140GB(2A)(c)(ii) also provides appropriate

flexibility for the income threshold for the Essential Skills stream to be dealt with in writing as part of an agreement between the Minister and an employer, comparable to a labour agreement. As such, proposed subsection 140GB(2B) would provide that the Minister may specify an amount as the income threshold for the Essential Skills stream in a written agreement for the purposes of subparagraph 140GB(2A)(ii). This is, in effect, an administrative matter settled as part of the detail of the agreement reached between the Minister and the employer. It is not legislative in character, with proposed subsection 140GB(6) making this clear.

The development of the Essential Skills stream is an area of future reform, and consultation with stakeholders is ongoing. It is appropriate for arrangements for the proposed annual indexation of the income threshold for the Essential Skills stream to be determined as part of amendments to the Migration Regulations, or specified in writing in each agreement between the Minister and the employer.

Responses to the Committee's specific questions

Instruments not subject to an appropriate level of parliamentary oversight

Why is it considered necessary and appropriate that instruments made under proposed subsection 140GB(2B) are not legislative instruments

In the Government's Migration Strategy, the Government made a commitment to regulate migration for lower paid workers with skills that are essential to Australia's workforce. This is supported by proposed paragraph 140GB(2A)(c) of the Migration Act, which provides for the income threshold for the Essential Skills stream of the Skills in Demand visa. The purpose of paragraph 140GB(2A)(c), together with subsection 140GB(2B), is to provide that the income threshold for the proposed Essential Skills stream of the Skills in Demand visa would need to be either:

- worked out in accordance with the Migration Regulations; or
- specified by the Minister in writing.

Together with subpagraph 140GB(2A)(c)(ii), proposed subsection 140GB(2B) of the Migration Act would operate to support the development of an agreement between the Minister and an employer, with the income threshold specified as part of the work agreement between the Minister and the employer. By providing for this amount to be specified in writing by the Minister, it ensures certainty and consistency for any visa applicants applying for a Skills in Demand visa on the basis of sponsorship by the employer(s) covered by the agreement.

This approach recognises that wages and conditions in various sectors may be less than the temporary skilled migration income threshold. Currently, when an employer wants to gain access to a temporary skilled migrant where the income threshold is below the temporary skilled migration income threshold, they do so by entering into a labour agreement.

Proposed subparagraph 140GB(2A)(c)(i) would support amendments to the *Migration Regulations 1994* to prescribe an income threshold for lower paid workers in the Essential Skills stream with skills that are essential to Australia's workforce. If regulations are made for the purposes of subparagraph 140GB(2A)(c)(i), these regulations would be a disallowable legislative instrument for the purposes of the *Legislation Act 2003*, and subject to parliamentary scrutiny.

Of note, the amount worked out in accordance with regulations made for subparagraph 140GB(2A)(c)(i) does not apply in circumstances where the Minister has specified an amount in writing under proposed subsection 140GB(2B) – that is, where there is a written agreement between the Minister and an employer.

The intention of proposed subsection 140GB(2B) is to provide the Minister with an administrative power to specify an income threshold with proposed employers of visa applicants seeking to satisfy the criteria in the Essential Skills stream for grant of a Skills in Demand visa. The income threshold specified by the Minister would be specified in writing in the work or labour agreement that is entered into with the employer, who is in Australia and who is authorised to recruit or employ persons in Australia. Such an agreement would be a written agreement, as agreed between the parties in relation to all prospective visa applicants to be covered by the agreement, and not a legislative instrument. The intention is that the income threshold would be considered and determined flexibly to ensure the income threshold for these applicants is appropriate and in accordance with an agreement between the employer and the Minister, like what is currently in place for the aged care industry.

Whether the bill can be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight

Regulations made for the purposes of proposed subparagraph 140GB(2A)(c)(i) would be a disallowable legislative instrument. This is appropriate as this subparagraph provides for the method by which an amount may be worked out generally for the purposes of determining the income threshold for the Essential Skills stream. This subparagraph determines the content of the law on this matter, and is therefore appropriately dealt with in a legislative instrument. Where an amount is specified under proposed subsection 140GB(2B) for the purposes of subparagraph 140GB(2A)(c)(ii), this provides for the amount agreed to between the Minister and an employer as the income threshold in a work or labour agreement to be specified in writing as part of the agreement (ie. not a legislative instrument).

THE HON DR ANDREW LEIGH MP

ASSISTANT MINISTER FOR COMPETITION, CHARITIES AND TREASURY
ASSISTANT MINISTER FOR EMPLOYMENT

Ref: MC24-013455
3 September 2024

Senator Dean Smith
Chair
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Dear Senator Smith

Thank you for your correspondence of 15 August 2024, concerning the Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024.

I have attached a detailed response to the matters raised by the Senate Committee for the Scrutiny of Bills in the Committee's *Scrutiny Digest 9 of 2024*.

I trust that the information attached provides further context about the drafting of the bill and assists with the Committee's deliberations.

Thank you again for your letter.

Yours sincerely

The Hon Andrew Leigh MP

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Parliament House Canberra ACT 2600 Australia

Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024

Significant matters in delegated legislation

In the Committee's *Scrutiny Digest 9 of 2024*, you sought my advice as to:

- why it is necessary and appropriate for the meaning of IIR Top-up Tax, Domestic Top-up Tax and UTPR Top-up Tax, and therefore effectively the rate of taxation, is to be left to delegated legislation; and
- whether any guidance can be provided in the explanatory materials as to what the anticipated starting rate of each of these three tax amounts would be, or, how it is anticipated the amounts would be calculated.

The proposed starting point for the imposition of Australia's global and domestic minimum taxes is provided in the Taxation (Multinational—Global and Domestic Minimum Tax) Bill 2024 (the Assessment Bill), which provides that tax is payable by entities with a 'top-up tax amount'. Whilst the definition of top-up tax is proposed to be prescribed in delegated legislation, the imposition and liability to top-up tax is in the primary law.

It is necessary and appropriate for the meaning of IIR, UTPR and Domestic top-up taxes to be defined in delegated legislation to ensure that any changes determined at the OECD level can be incorporated efficiently and appropriately, whilst still maintaining an appropriate level of Parliamentary oversight.

The Assessment Bill will ensure that Multinational Enterprise Groups (MNE Groups) within scope of the GloBE Rules are paying at least 15 per cent minimum effective tax rate (ETR) in every jurisdiction where they operate. If the MNE Group's ETR in the jurisdiction is less than 15 per cent, as mentioned in paragraph 2.5 of the Explanatory Memorandum, then top-up tax will be imposed to bring the MNE Group's ETR up to 15 per cent.

The computations for an ETR are necessary to be in delegated legislation due to the reliance on accounting information, which may be subject to further refinements at the OECD level. The minimum rate of taxation has been well established in the official Pillar-Two documents and throughout the explanatory materials. Therefore, additional guidance in the explanatory memorandum on these matters is not required.

Incorporation of external materials as existing from time to time

You also sought my advice as to:

- whether the GloBE Rules, the Commentary, Agreed Administrative Guidance, Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two) published by the OECD on 20 December 2022 are freely and publicly available; and
- whether the accompanying explanatory statement to any relevant rules will provide for the manner of access and use of the GloBE Rules, the Commentary, Agreed Administrative Guidance, *Safe Harbours and Penalty Relief: Global Anti-Base Erosion Rules (Pillar Two)* published by the OECD on 20 December 2022; and
- the type of documents that it is envisaged may be applied, adopted or incorporated by reference under paragraph 31(1)(a), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time in addition to as in existence when an instrument is first made.

All documents relating to the Two-Pillar Solution are freely and publicly available on the OECD website, as indicated in paragraph 2.76 of the Explanatory Memorandum in relation to

Agreed Administrative Guidance and any other official documents. This extends to the GloBE Rules, Commentary and revised Commentary, Safe Harbours and Penalty Relief and the GloBE Information Return.

It is intended that any explanatory materials related to any delegated legislation will explain the manner of access to the official Pillar Two documents released by the OECD. The intended use of the OECD documents is to be consistent to ensure qualified status for Australia can be achieved.

Section 31 of the Assessment Bill is intended to ensure that additional documents released by the OECD that do not fall under the heading of Agreed Administrative Guidance can also be incorporated. This is because we cannot anticipate future documents that the OECD may release with respect to Pillar Two. The types of documents intended to be captured are expected to be freely and publicly available on the OECD website and limited to OECD approved documents that impact qualification status for Australia. It is necessary and appropriate to apply these documents both at the time they are made and from time to time to ensure that Australia's qualification status is not jeopardised. For example, this may be a result of a new GloBE Information Return document being released by the OECD, but an Instrument has not yet been made.

Broad delegation of administrative powers

You also sought my advice as to:

- why it is considered necessary and appropriate for clause 30 to allow for the delegation of all functions or powers under the bill (other than the power to make delegated legislation); and
- which persons, classes or persons or entities it is intended that the delegation power under clause 30 will be exercised in relation to, including whether such persons or entities will be required to possess any relevant skills, training or experience to exercise these powers or functions; and
- whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

As noted in paragraph 2.78 of the Explanatory memorandum, only SES employees within the ATO or the Department of Treasury are delegated powers or functions under the Assessment Bill. The role of an SES employee is provided for under section 35 of the *Public Service Act 1999*, where it is expected that SES will have the appropriate skills or experience to exercise any delegated functions or powers.

Any delegations made to SES employees within the ATO must be consistent with the general delegation provision in section 8 of the *Taxation Administration Act 1953*, which provides that the Commissioner may delegate powers or functions under a taxation law. This is further reinforced as appropriate given that the Assessment Bill is a taxation law, as explained in paragraph 3.3 of the Explanatory Memorandum.

Given the novelty of the global and domestic minimum tax law and the reliance on the OECD's policy, it is not appropriate to provide guidance on what functions and powers may need to be delegated. Further, providing guidance could be interpreted to limit the application of the Model Rules and could adversely impact consistency with the OECD Model Rules.

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The Hon Jason Clare MP
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Reference: MC24-008253

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

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

Dear Chair

Thank you for your correspondence of 22 August 2024 in relation to the Better and Fairer Schools (Information Management) Bill 2024.

As requested by the Committee, please find enclosed the responses to questions raised in the Scrutiny Digest 10 of 2024.

I trust this information is of assistance.

JASON CLARE

9 / 7 / 2024

Encl. Responses to the Committee's questions in relation to the Better and Fairer Schools (Information Management) Bill 2024

Better and Fairer Schools (Information Management) Bill 2024

Responses to questions raised by the Senate Standing Committee for the Scrutiny of Bills

August 2024

Question/request for information	Response
Why it is necessary and appropriate to expand the student identifier scheme to all primary and secondary students, including a detailed explanation of the purpose of the extension of the scheme?	The extension of the national system of unique student identifiers (USI) to school students is a national policy initiative under the National School Reform Agreement (NSRA). In agreeing to progress this initiative, First and Education Ministers have acknowledged the role a unique identifier can play in improving understanding of student progression and the national education evidence base. The proposed amendments complement the existing operation of the *Student Identifiers Act 2014* (Cth) (SI Act), allowing for the assignment of USIs to all school students at both the primary and secondary school levels. This means students will have a USI throughout their entire education and training journey. In 2009, the Council of Australian Governments (COAG) recognised the importance of improving data collections across all education sectors, and the vital role of a national student identifier. Extending the USI to the schools sector will provide opportunities to enhance a student's learning journey and support high-quality, policy-relevant evidence on students' progress and pathways, which will in turn support education outcomes through better informed policy and investment decisions. A Schools USI has been supported by a number of significant reviews including the Review to Achieve Educational Excellence in Australian Schools (2018), the Productivity Commission Inquiry into the Education Evidence Base (2017), the Education Council's STEM Partnerships Forum (2018) and the more recent Review to Inform and Better and Fairer Education System. All of these reviews recommended the implementation of a national USI for the schools sector. These reports made the case that a USI is needed to: • drive consistency in the collection of data that enables student growth to be measured, improving the design of teaching interventions • maximise learning growth, supporting individual student learning needs through ready access to student records

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	• underpin innovation and continuous improvement in Australia's education systems • improve our understanding of student pathways into school and beyond • track individual student performance, enhancing the national evidence base and improving system-level insights on teaching interventions • organise and better connect the national evidence base, improving capacity for evidence-based interventions. Education Ministers agreed that the first use of the Schools USI will be as a data element within the Student Data Transfer Protocol (SDTP). The Schools USI will contribute to this information exchange scheme, supporting the robust and timely transfer of information when a student moves between schools and systems. The SDTP was a key element in the response of governments to recommendations of the 2017 Royal Commission into Institutional Responses to Child Sexual Abuse.
Whether all entities who will be involved with collecting, storing and disclosing relevant student identifier data will be covered by the Australian Privacy Principles, and the privacy protections that will apply to any non-government entities involved in the collection and storage of data?	**Application of the Australian Privacy Principles** The *Privacy Act 1988* (Cth) (Privacy Act), including relevantly the Australian Privacy Principles (APPs) regulate the handling of personal information by APP entities. The Bill does not limit or otherwise diminish the existing obligations under the Privacy Act. Key entities that may be involved with collecting, storing or disclosing student identifiers, schools identifiers and school identity management information include the Student Identifiers Registrar (Registrar), the Office of the Student Identifiers Registrar (OSIR), State and Territory public bodies such as the relevant education authority in each State and Territory, government schools and non-government schools. Of those, the following entities are generally APP entities and as such are required to comply with the APPs when they handle personal information: the Registrar, the OSIR, non-government schools and other non-government education providers. In addition, Australian Government agencies are also APP entities. The following entities are not APP entities, and as such are not required by the Privacy Act to comply with the APPs: State and Territory public bodies and government schools. The protections and obligations provided by State and Territory legislation applies to these entities.

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	The Department of Education is currently consulting with the States and Territories through their education authorities to develop and establish a Data Governance Framework for schools identifiers. The Data Governance Framework will be established and agreed by Education Ministers before schools identifiers are assigned to any students. One of the matters to be included in the Data Governance Framework is a commitment for all States and Territories to handle student identifiers, schools identifiers and school identity management information in accordance with the APPs. **Protected Information** The Bill prescribes that student identifiers, schools identifiers and individuals' school identity management information are protected information under the *Student Identifiers Act* (the Act). The Bill amends the Act to impose strict legislative restrictions on the handling of protected information. This includes: • Requiring the Registrar, and any other entity that keeps such a record of protected information, to protect such a record from misuse, interference and loss, and from unauthorised access, modification or disclosure. • Prohibiting an entity (who is not the individual to whom the information relates) from collecting using or disclosing protected information where that action is not authorised by Division 5 of the Act. • Prohibiting an entity (who is not the individual to whom the information relates) from collecting using or disclosing protected information where that action is not authorised by Division 5 of the Act. Division 5 is restrictive about the authorised purposes that apply to the handling of protected information. Contravention of these obligations is an interference with privacy under the Privacy Act, and may be the subject of a complaint to, and investigation by the Information Commissioner. **Section 55A of the Bill** Section 55A of the Bill limits the application of sections 16, 17 and 23 of the Act (as amended under the Bill) to exclude public bodies of a State or Territory. The provisions will not apply to those bodies unless at the request of the relevant Minister of that State or Territory responsible for school education matters,

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	and the Australian Government Minister for Education makes a declaration that those provisions do apply to those public bodies. The Department of Education is currently consulting with States and Territories with a view to seeking agreement to sections 16, 17 and 23 of the Act (as amended under the Act) applying to their public bodies. **State and Territory privacy legislation** Existing State and Territory privacy legislation will apply to the handling of student identifiers, schools identifiers and individuals' school identity management information by State or Territory public bodies. Relevant State and Territory public bodies already collect and handle significant volumes of personal information about school students in their administration and provision of education. As such each jurisdiction already has in place privacy protections that apply to the handling of personal information. Each State and Territory, except South Australia and Western Australia, has its own privacy legislation which applies to the handling of personal information. Although South Australia and Western Australia do not have specific privacy legislation, they do have privacy principles. In addition, Western Australia currently has a privacy bill before its parliament. Each of the States and Territories have a regulator / commissioner who is able to handle complaints about breaches of privacy in their jurisdiction.
The type of information about students that is required to obtain a student identifier and the information that will be linked to the student identifier of primary and high school students, who will keep this data, how long it will be retained for, and who will have access to it?	The Bill establishes the concept of a 'schools identifier' distinct from a 'student identifier' in acknowledgment of the different operating model and data set agreed by Education Ministers in extending USIs to the school education sector. Education authorities (rather than individuals) will make a request to the Student Identifiers Registrar to assign a schools identifier and education authorities will maintain the 'school identity management information' linked to the schools identifier. Education Ministers agreed this model for schools identifiers in acknowledgment that students as young as 5 years old will receive an identifier. The details attached to the identifier will need to be maintained over the course of schooling in line with enrolment arrangements (e.g. updating school/enrolment status).

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	The school identity management information will be specified in the regulations and will consist of the minimum data set agreed by Education Ministers to support a base level of data integrity and data matching requirements for the creation of a schools identifier, and will only include data elements already collected and used by education authorities for school enrolment purposes. **Information that will be linked** The school identity management information will be linked to an individual's schools identifier. If an individual has a student identifier, the school identity management information will be linked to their student identifier. **Who will retain this data** The schools identifier and school identity management information will be held by the Registrar. It will also be held by the relevant school or education authority, noting that this information is already collected and used by education systems across Australia for the purposes of school enrolment. **How long this data will be retained** The Bill does not specify the period for which schools identifiers and school identity management information must be retained. Education authorities collect this information as part of enrolment and student transfer purposes and will provide this information to the Registrar to maintain the accuracy of the information in the Student Identifiers Registry (for example, updating enrolment status and the AGEID) for the period an individual is enrolled in school education. If a student enrols in vocational education and training or higher education, the Bill allows an individual to 'validate' the identifier by providing additional personal information subject to document verification as required by the Registrar per current arrangements for the creation of a student identifier. Existing legislation, for example the *Archives Act 1983* (Cth), would apply to the retention of this information. **Who can access this data**

Question/request for information	Response
	This information is protected information under the Bill. Access to this information is restricted as provided by Divisions 5 and 6 of Part 2 of the Act (as amended by the Bill). The Australian Government Department of Education, in consultation with the States and Territories and non-government education authorities, is developing a Data Governance Framework that will establish detailed protocols and expectations for how the data will be handled. The Data Governance Framework will be established and agreed by Education Ministers before schools identifiers are assigned to any students
Whether school students who do not want to be assigned a student identifier may opt out of the scheme, and if not, why not?	The Bill does not create a requirement for education systems (or individuals) to request assignment of schools identifiers. As part of the National School Reform Agreement, Education Ministers agreed to implement unique student identifiers for all school students as a national policy initiative. Education Ministers agreed this national initiative in acknowledgment of the benefits that extending the national system of unique student identifiers can provide to individuals and education systems. Implementation of agreed national policy initiatives is a condition of funding under sections 22 and 77 of the *Australian Education Act 2013* (Cth). The Australian Government is working with all jurisdictions and non-government education authorities in considering local arrangements for implementation, including any required 'opt-out' arrangements and implications for the national system. Options may include the ability for parents and carer on behalf of their child to 'opt out' of receiving an identifier, or the potential for parents and carers to be able to 'opt-in' or 'opt-out' of specific uses of schools identifiers as Ministers consider and agree future uses.
Whether consultation on expanding the student identifier scheme to all primary and secondary students was undertaken outside of government, and if not, why not?	Introduction of a USI for school students has been informed by multiple reviews and research over many years drawing on consultation with stakeholders both within and beyond government. In 2016, the Productivity Commission Inquiry Report on the National Education Evidence Base also drew on public consultation in considering opportunities to improve Australia's evidence-based education capability and to embed evidence-based decision making in education policies, programs and teaching practices. The Inquiry report noted that 'the introduction of a nationally consistent system of unique student identifiers would offer significant benefits to schools, teachers and families as well as

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	supporting data linkage for education research purposes.' (Productivity Commission 2016, National Education Evidence Base, p.11). In July 2017, the Review to Achieve Educational Excellence in Australian Schools was established to provide advice on how to improve student achievement and school performance. The Review Panel consulted with a broad range of stakeholders and experts, and received nearly 300 submissions from teachers, principals, professional associations, teachers unions, parents and carers, school systems, state and territory governments, researchers, universities, community organisations, and business and industry. Among the Review Panel's recommendations was recommendation 22 to 'accelerate the introduction of a national Unique Student Identifier for all students to be used throughout schooling'. The Review Panel noted that 'the lack of a national USI for schooling contrasts with vocational education and training and higher education, where frameworks for nationally consistent, enduring unique student identifiers are already in place. Many submissions to the Review recommended addressing this gap by introducing a USI and collecting longitudinal student data.' (*Through Growth to Achievement: The Report of The Review to Achieve Educational Excellence in Australian Schools (2018)*, p.102). In 2017, the STEM Partnerships Forum was established by the (then) Education Council to facilitate a strategic approach to school-industry partnerships to develop the engagement, aspiration, capability and attainment of students in science, engineering, technology and mathematics (STEM). The Forum consulted with around 150 diverse stakeholder groups and received 53 written submissions. The STEM Partnerships Forum report put forward 10 recommendations, including recommendation 9, that 'Education Council should prioritise and accelerate the introduction by 2020 of a national lifelong Unique Student Identifier to enable a more sophisticated analysis and understanding of student pathways and progress in Australia'. In 2023, the Expert Panel of the Review to Inform a Better and Fairer Education System also consulted widely with a range of stakeholders including teachers, school leaders and support staff, education unions, national education agencies, non-government sector school stakeholders, parents, carers, youth bodies, groups representing those experiencing disadvantage and other key stakeholder groups. The Expert Panel highlighted that the development of the USI should be accelerated and broadened to better support children who are moving between schools, jurisdictions and systems, and to support transitions post-school. The Expert Panel suggested that the USI should also be expanded to enable a clearer picture to be gained of each student's education journey. The Expert Panel recommended that

Question/request for information	Response
	'governments, school systems and approved authorities implement the Unique Student Identifier as a matter of urgency to enable links to student-level data on progress and performance to show student education and transition pathways, including linking early childhood through to higher education/vocational education and training, to commence from 2027' (Recommendation 5B). In addition to the above processes, specific research with community members has also been undertaken to inform the development of unique student identifiers for school students. In 2019, following commencement of the National School Reform Agreement, the Australian Government Department of Education commissioned a research organisation to consult with parents, teachers, school leaders and administrators, as well as representative bodies of parents and school staff, and education researchers on their perceptions of the opportunities, risks, and design and implementation considerations for a national schooling USI. In July 2021, the Australian Government commissioned further research including interviews and a large nationally representative survey (with more than 1000 responses) with parents of school aged children, to draw out attitudes and expectations towards privacy, sharing of personal information, and general trust levels with government, schools, and other providers. Lastly, in 2023 the New South Wales (NSW) Department of Education commissioned research for NSW schools to understand the perspectives of 'end users' of a Schools-USI and the experience of parents and carers in sharing information about them and their child in an educational context.
Whether a privacy impact assessment was undertaken in relation to the scheme's expansion to all primary and secondary students, and, if so, what that assessment revealed?	In 2023, the Australian Government Department of Education commissioned the Australian Government Solicitor to undertake a privacy impact assessment (PIA) to inform expansion of the system of unique student identifiers to school students. The PIA report was completed in May 2024. The overall conclusion of the PIA was that while the implementation of the project will impact on the privacy of individuals through the collection, use and disclosure of their personal information, the project has the potential to deliver considerable benefits to the community through improved education outcomes. Further, that the privacy impacts identified in the PIA could be minimised if appropriate steps were taken to implement the measures recommended in the PIA.

Question/request for information	Response
	The PIA made a number of recommendations to minimise and mitigate the possible privacy impacts of the project and to ensure compliance with the Privacy Act. The recommendations fell into the categories of transparency measures, data handling, data quality, identifiers, access and correction requests, and guidance. The Department of Education has responded to each of the recommendations, in the development of this Bill and associated implementation arrangements.
Whether protected information provided for the purposes of school education research will be de-identified, and if not, why not?	Education Ministers are establishing a Schools USI Data Governance Framework that will specify the requirements that must be met for protected information to be released by the Registrar for research purposes. The framework will operate as an important safeguard requiring the agreement of all Education Ministers. The framework will be established and agreed by Education Ministers before schools identifiers are assigned to any students. It is anticipated that any protected information released for national research purposes would be de-identified.
Why it is necessary and appropriate that the education ministerial council or another body prescribed by the regulations are able to determine the requirements to be met before the Registrar is authorised to use or disclose protected information, rather than providing those requirements in primary legislation or, at a minimum, disallowable delegated legislation?	The Schools USI is a National Policy Initiative under the National School Reform Agreement (2019-2024) and will be a National Enabling Initiative under the Better and Fairer Schools Agreement (2025-2034). Under these intergovernmental agreements, the Education Ministers Meeting is responsible for overseeing implementation of the Agreement and the Commonwealth and jurisdictions commit to working together through the Education Ministers Meeting in their implementation. Implementation of the National Policy Initiatives as outlined in Schedule B of the National School Reform Agreement is a condition of Commonwealth funding to states and territories under section 22 of the Act. A similar provision will apply to the National Enabling Initiatives. Implementation and timing of milestones of National Policy Initiatives/ National Enabling Initiatives is subject to Education Ministers Meeting considering and agreeing the cost and cost sharing arrangements, scope and governance of each initiative, acknowledging the different local contexts and starting points of each jurisdiction. Education Ministerial Council refers to the forum consisting of the Commonwealth, State and Territory Ministers responsible for Education. For consistency in legislative drafting, the definition of Education Ministerial Council reflects the definition of Ministerial Council in the Act, including reference to 'another body prescribed by the regulations'. This wording has been included to ensure that decision-making in

The Hon Jason Clare MP
Minister for Education

Reference: MC24-008253

Senator Dean Smith
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By email: scrutiny.sen@aph.gov.au

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I trust this information is of assistance.

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Whether all entities who will be involved with collecting, storing and disclosing relevant student identifier data will be covered by the Australian Privacy Principles, and the privacy protections that will apply to any non-government entities involved in the collection and storage of data?	**Application of the Australian Privacy Principles** The *Privacy Act 1988* (Cth) (Privacy Act), including relevantly the Australian Privacy Principles (APPs) regulate the handling of personal information by APP entities. The Bill does not limit or otherwise diminish the existing obligations under the Privacy Act. Key entities that may be involved with collecting, storing or disclosing student identifiers, schools identifiers and school identity management information include the Student Identifiers Registrar (Registrar), the Office of the Student Identifiers Registrar (OSIR), State and Territory public bodies such as the relevant education authority in each State and Territory, government schools and non-government schools. Of those, the following entities are generally APP entities and as such are required to comply with the APPs when they handle personal information: the Registrar, the OSIR, non-government schools and other non-government education providers. In addition, Australian Government agencies are also APP entities. The following entities are not APP entities, and as such are not required by the Privacy Act to comply with the APPs: State and Territory public bodies and government schools. The protections and obligations provided by State and Territory legislation applies to these entities.

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Question/request for information	Response
	This information is protected information under the Bill. Access to this information is restricted as provided by Divisions 5 and 6 of Part 2 of the Act (as amended by the Bill). The Australian Government Department of Education, in consultation with the States and Territories and non-government education authorities, is developing a Data Governance Framework that will establish detailed protocols and expectations for how the data will be handled. The Data Governance Framework will be established and agreed by Education Ministers before schools identifiers are assigned to any students
Whether school students who do not want to be assigned a student identifier may opt out of the scheme, and if not, why not?	The Bill does not create a requirement for education systems (or individuals) to request assignment of schools identifiers. As part of the National School Reform Agreement, Education Ministers agreed to implement unique student identifiers for all school students as a national policy initiative. Education Ministers agreed this national initiative in acknowledgment of the benefits that extending the national system of unique student identifiers can provide to individuals and education systems. Implementation of agreed national policy initiatives is a condition of funding under sections 22 and 77 of the *Australian Education Act 2013* (Cth). The Australian Government is working with all jurisdictions and non-government education authorities in considering local arrangements for implementation, including any required 'opt-out' arrangements and implications for the national system. Options may include the ability for parents and carer on behalf of their child to 'opt out' of receiving an identifier, or the potential for parents and carers to be able to 'opt-in' or 'opt-out' of specific uses of schools identifiers as Ministers consider and agree future uses.
Whether consultation on expanding the student identifier scheme to all primary and secondary students was undertaken outside of government, and if not, why not?	Introduction of a USI for school students has been informed by multiple reviews and research over many years drawing on consultation with stakeholders both within and beyond government. In 2016, the Productivity Commission Inquiry Report on the National Education Evidence Base also drew on public consultation in considering opportunities to improve Australia's evidence-based education capability and to embed evidence-based decision making in education policies, programs and teaching practices. The Inquiry report noted that 'the introduction of a nationally consistent system of unique student identifiers would offer significant benefits to schools, teachers and families as well as

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	supporting data linkage for education research purposes.' (Productivity Commission 2016, National Education Evidence Base, p.11). In July 2017, the Review to Achieve Educational Excellence in Australian Schools was established to provide advice on how to improve student achievement and school performance. The Review Panel consulted with a broad range of stakeholders and experts, and received nearly 300 submissions from teachers, principals, professional associations, teachers unions, parents and carers, school systems, state and territory governments, researchers, universities, community organisations, and business and industry. Among the Review Panel's recommendations was recommendation 22 to 'accelerate the introduction of a national Unique Student Identifier for all students to be used throughout schooling'. The Review Panel noted that 'the lack of a national USI for schooling contrasts with vocational education and training and higher education, where frameworks for nationally consistent, enduring unique student identifiers are already in place. Many submissions to the Review recommended addressing this gap by introducing a USI and collecting longitudinal student data.' (*Through Growth to Achievement: The Report of The Review to Achieve Educational Excellence in Australian Schools (2018)*, p.102). In 2017, the STEM Partnerships Forum was established by the (then) Education Council to facilitate a strategic approach to school-industry partnerships to develop the engagement, aspiration, capability and attainment of students in science, engineering, technology and mathematics (STEM). The Forum consulted with around 150 diverse stakeholder groups and received 53 written submissions. The STEM Partnerships Forum report put forward 10 recommendations, including recommendation 9, that 'Education Council should prioritise and accelerate the introduction by 2020 of a national lifelong Unique Student Identifier to enable a more sophisticated analysis and understanding of student pathways and progress in Australia'. In 2023, the Expert Panel of the Review to Inform a Better and Fairer Education System also consulted widely with a range of stakeholders including teachers, school leaders and support staff, education unions, national education agencies, non-government sector school stakeholders, parents, carers, youth bodies, groups representing those experiencing disadvantage and other key stakeholder groups. The Expert Panel highlighted that the development of the USI should be accelerated and broadened to better support children who are moving between schools, jurisdictions and systems, and to support transitions post-school. The Expert Panel suggested that the USI should also be expanded to enable a clearer picture to be gained of each student's education journey. The Expert Panel recommended that

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	'governments, school systems and approved authorities implement the Unique Student Identifier as a matter of urgency to enable links to student-level data on progress and performance to show student education and transition pathways, including linking early childhood through to higher education/vocational education and training, to commence from 2027' (Recommendation 5B). In addition to the above processes, specific research with community members has also been undertaken to inform the development of unique student identifiers for school students. In 2019, following commencement of the National School Reform Agreement, the Australian Government Department of Education commissioned a research organisation to consult with parents, teachers, school leaders and administrators, as well as representative bodies of parents and school staff, and education researchers on their perceptions of the opportunities, risks, and design and implementation considerations for a national schooling USI. In July 2021, the Australian Government commissioned further research including interviews and a large nationally representative survey (with more than 1000 responses) with parents of school aged children, to draw out attitudes and expectations towards privacy, sharing of personal information, and general trust levels with government, schools, and other providers. Lastly, in 2023 the New South Wales (NSW) Department of Education commissioned research for NSW schools to understand the perspectives of 'end users' of a Schools-USI and the experience of parents and carers in sharing information about them and their child in an educational context.
Whether a privacy impact assessment was undertaken in relation to the scheme's expansion to all primary and secondary students, and, if so, what that assessment revealed?	In 2023, the Australian Government Department of Education commissioned the Australian Government Solicitor to undertake a privacy impact assessment (PIA) to inform expansion of the system of unique student identifiers to school students. The PIA report was completed in May 2024. The overall conclusion of the PIA was that while the implementation of the project will impact on the privacy of individuals through the collection, use and disclosure of their personal information, the project has the potential to deliver considerable benefits to the community through improved education outcomes. Further, that the privacy impacts identified in the PIA could be minimised if appropriate steps were taken to implement the measures recommended in the PIA.

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	The PIA made a number of recommendations to minimise and mitigate the possible privacy impacts of the project and to ensure compliance with the Privacy Act. The recommendations fell into the categories of transparency measures, data handling, data quality, identifiers, access and correction requests, and guidance. The Department of Education has responded to each of the recommendations, in the development of this Bill and associated implementation arrangements.
Whether protected information provided for the purposes of school education research will be de-identified, and if not, why not?	Education Ministers are establishing a Schools USI Data Governance Framework that will specify the requirements that must be met for protected information to be released by the Registrar for research purposes. The framework will operate as an important safeguard requiring the agreement of all Education Ministers. The framework will be established and agreed by Education Ministers before schools identifiers are assigned to any students. It is anticipated that any protected information released for national research purposes would be de-identified.
Why it is necessary and appropriate that the education ministerial council or another body prescribed by the regulations are able to determine the requirements to be met before the Registrar is authorised to use or disclose protected information, rather than providing those requirements in primary legislation or, at a minimum, disallowable delegated legislation?	The Schools USI is a National Policy Initiative under the National School Reform Agreement (2019-2024) and will be a National Enabling Initiative under the Better and Fairer Schools Agreement (2025-2034). Under these intergovernmental agreements, the Education Ministers Meeting is responsible for overseeing implementation of the Agreement and the Commonwealth and jurisdictions commit to working together through the Education Ministers Meeting in their implementation. Implementation of the National Policy Initiatives as outlined in Schedule B of the National School Reform Agreement is a condition of Commonwealth funding to states and territories under section 22 of the Act. A similar provision will apply to the National Enabling Initiatives. Implementation and timing of milestones of National Policy Initiatives/ National Enabling Initiatives is subject to Education Ministers Meeting considering and agreeing the cost and cost sharing arrangements, scope and governance of each initiative, acknowledging the different local contexts and starting points of each jurisdiction. Education Ministerial Council refers to the forum consisting of the Commonwealth, State and Territory Ministers responsible for Education. For consistency in legislative drafting, the definition of Education Ministerial Council reflects the definition of Ministerial Council in the Act, including reference to 'another body prescribed by the regulations'. This wording has been included to ensure that decision-making in

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	relation to the Act can progress in the very improbable circumstance in which there was no forum of Education Ministerial Council.
Whether examples can be provided as to the type of requirements that must be met in order for protected information to be used or disclosed?	Education Ministers are establishing a Schools USI Data Governance Framework that will specify the requirements that must be met for protected information to be released by the Registrar for research purposes. The framework will operate as an important safeguard requiring the agreement of all Education Ministers. The framework will be established and agreed by Education Ministers before schools identifiers are assigned to any students.
Whether guidance can be provided as to when a research purpose will be sufficiently related to 'school education' so as to authorise the use or disclosure of protected information?	The Bill identifies that the Registrar is authorised to use or disclose protected information of an individual if the use or disclosure is for the purposes of research that relates to school education and meets the requirements specified by the Education Ministerial Council. The Education Ministerial Council consists of the Commonwealth, State and Territory Ministers responsible for school education; the Bill reflects this remit. Matters that relate to primary or secondary school education would reasonably fall within the scope of the responsibilities of the Education Ministers. Any use of schools identifiers, school identity management information and student identifiers for school education research purposes will require the agreement of Education Ministers.
Why it is necessary and appropriate for entities to be prescribed by the regulations as authorised to collect, use and disclose protected information, and guidance as to the type of entities it is proposed would be prescribed for such purposes?	The Bill provides authority to the key legal structures and entities that are expected to administer unique student identifiers in school education. There may be specific legal entities in the non-government school sector that are not approved authorities as defined under the *Australian Education Act 2013* (Cth) which could be used to support administration activities for schools, including the administration of the schools identifiers. The regulations will identify any such specific legal structures to be used in the administration of schools identifiers.
Why it is necessary and appropriate for the circumstances in which protected information may be collected, use or disclosed to be prescribed in the regulations?	Item 47 of the Bill would introduce the new section 18D. This section provides that an entity prescribed by the regulations is authorised to collect, use or disclose protected information of an individual if the collection, use or disclosure is for a purpose, or in circumstances: (a) Relating to school education; and (b) Prescribed by the regulations.

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	The Schools USI scheme is a joint initiative between the Commonwealth government and the State and Territory governments. Together, the Commonwealth and State and Territory Education Minister (the Education Ministers) are responsible for negotiating and agreeing on use cases for schools identifiers. In December 2022, the Education Ministers agreed to a single use case for the Schools USI scheme: to support the transfer of student information when individuals move between schools under the Student Data Transfer Protocol. The regulations will make provision for this agreed use under s 18D of the Act. It is necessary and appropriate for other future uses of the Schools USI scheme to be prescribed in the regulations under s 18D in reflection of the nature of the USI scheme as a joint initiative. Regulations under the Act for schools identifiers may only be made with agreement from the Education Ministerial Council. By prescribing future uses under the regulations, this ensures input from and scrutiny by the Education Ministers. Furthermore, it is not possible to pre-empt the future uses that Education Ministers will decide for the Schools USI scheme, nor would it be appropriate for the Commonwealth to bind the states and territories to future uses which they have not agreed to. Therefore, it is necessary that future uses be prescribed by the regulations for state and territory agreement and oversight.
Whether guidance can be provided as to the circumstances in which it is intended for protected information to be collected, used or disclosed by an entity prescribed by the regulations?	As noted above, the Schools USI scheme is a joint initiative between the Commonwealth government and the State and Territory governments. Together, the Commonwealth and State and Territory Education Minister (the Education Ministers) are responsible for negotiating and agreeing the purposes for which unique student identifiers in school education will be used. To date, Education Ministers have agreed a single use for schools identifiers, to support the transfer of student information when individuals move between schools under the Student Data Transfer Protocol. The regulations will make provision for this agreed use under s 18D of the Act.