The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-010626

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

23 MAY 2018

Dear Senator Polley Helen

Thank you for your letter of 10 May 2018 regarding the Senate Scrutiny of Bills Committee's consideration of the Australian Institute of Health and Welfare Amendment Bill 2018 in the Scrutiny Digest 5 of 2018.

The Committee sought further clarification on the delegation powers of the Chief Executive Officer (CEO) of the Australian Institute of Health and Welfare (the Institute) and to whom these powers or functions can be delegated. I note that the Committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee expressed a preference for delegates to be confined to holders of nominated offices or to members of the Senior Executive Service (SES).

The broad delegation powers of the CEO have been in place since 1987. The Institute is a relatively small agency with a staff profile that is limited to a small number of SES officers. Many of the day-to-day activities may not need to be performed by SES staff. The broad delegation powers allow the CEO to exercise judgement in allocating functions or powers to staff, which is critical to maintaining the efficient and effective running of the Institute.

The CEO's functions and powers extend to delegating matters including approval of contracts, data release and publications to staff with appropriate skills and qualifications. For example, officers below SES level have a delegation to approve low-value financial commitments, travel expenses and other minor purchases.

There are safeguards to ensure that appropriate delegations are in place, with the CEO reporting to the Institute's Board. The Board has appointed an Audit and Finance Committee, which provides advice on the Institute's compliance regime and assurance program. The Committee obtains assurance from the internal auditors, who are appointed by the Board, to ensure that internal controls are operating properly. Tests carried out by the internal auditors include checking that delegates appointed by the CEO are using their delegation correctly. This level of oversight by the Board provides the necessary safeguards to ensure that the CEO's delegations are appropriate.

Thank you for writing on this matter.

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

MINISTER FOR INDIGENOUS AFFAIRS

Reference: MS18-002136

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

Dear Senator Polley

I refer to the Scrutiny Digest 5 of 2018 on the subject of the Aboriginal and Torres Strait Islander Land and Sea Future Fund Bill 2018 (ATSILSFF Bill).

I note that setting the investment mandate for the ATSILFF is a responsibility of the Minister for Finance and the Treasurer, in consultation with me. Several aspects of the ATSILSFF Bill are modelled on the enabling legislation for the other Funds invested and administered by the Future Fund Board of Guardians (the Board).

I have copied this letter to the Finance Minister and the Treasurer, given their responsibilities in relation to the Board and the Funds invested by the Board.

ATSILSFF investment mandate exemption from disallowance and sunsetting

The ATISILSFF investment mandate is a direction by Ministers to a body and is, therefore, exempt from disallowance under sub-item 9(2), and sunsetting under sub-item 11(3), of the *Legislation (Exemption and other Matters) Regulation 2015*.

The Government considers this approach is appropriate as it is consistent with arrangements in place for investment mandate directions for the other Funds invested by the Board. This approach provides certainty to the Board in investing the Funds for which it is responsible.

The ATSILSFF Bill provides adequate scrutiny of the investment mandate. The ATSILSFF Bill requires that prior to issuing the ATSILSFF investment mandate, the responsible Ministers must consult both the Minister for Indigenous Affairs (s 32(7) refers) and the Board (s 35(1) refers). If the Board chooses to make a submission regarding the draft investment mandate, this submission must be tabled in both houses of Parliament (s 35(2) refers). This requirement ensures that Parliament is kept informed of any concerns raised by the Board.

The ATSILSFF investment mandate will be informed by independent expert advice, including advice on setting an appropriate benchmark rate of return to meet the policy objectives within the current market conditions.

The Government considers that it is appropriate that the ATSILSFF investment mandate is exempt from sunsetting as the process for setting the investment mandate has been designed to ensure the mandate remains relevant over the long term. The same approach has been taken for the other Funds managed by the Board (e.g. see s 39(7) of the *Medical Research Future Fund Act 2015*).

No requirement to table report

The ATSILSFF Bill follows the arrangement adopted in the *DisabilityCare Australia Fund Act 2013* and the *Medical Research Future Fund Act 2015*. Both contain a requirement for a review of the operation of the Acts to be undertaken but do not require the results of the review to be made public or tabled in the Parliament. The *Future Fund Act 2006* and the *Nation-building Funds Act 2008* do not contain a requirement for a review of the operation of the Acts to be conducted.

I note that there is nothing preventing the responsible Ministers tabling the report of the review in the Parliament.

NIGEL SCULLION

14/6/2018

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

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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CANBERRA ACT 2600

Dear Senator

Thank you for your email on behalf of the Senate Scrutiny of Bills Committee (the Committee) dated 10 May 2018, drawing my attention to the Committee's *Scrutiny Digest No. 5 of 2018* which seeks further advice on the following legislation:

- Corporations Amendment (Asia Region Funds Passport) Bill 2018; and
- Treasury Laws Amendment (2018 Measures No. 4) Bill 2018.

I appreciate the Committee's consideration of these Bills. My responses in relation to each of the Bills are attached at Attachments A and B respectively.

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

Kelly O'Dwyer

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ATTACHMENT A

Corporations Amendment (Asia Region Funds Passport) Bill 2018

The Committee has sought advice on the following:

- the reversal of the evidential burden of proof in proposed subsections 1213L(2) and 1213M(6);
- the strict liability offences which create custodial penalties in proposed subsections 314A(9), 319(1A), 321(1A) and 322(2); and
- the delegation of legislative powers in proposed part 8A.8, proposed section 1216L and proposed section 1216K.

Proposed subsection 1213L(2): Reversal of the evidential burden

Committee's question:

The committee requests the minister's detailed justification for the reversal of the evidential burden of proof in proposed subsection 1213L(2), having regard to the relevant principles as set out in the *Guide to Framing Commonwealth Offences* (the Guide).

Response:

Proposed section 1213L prohibits a person from requesting or using a copy of the register of members of a notified foreign passport fund to contact or send material to members. Proposed subsection 1213L(2) provides that a person does not contravene this prohibition if the person can show that the use or disclosure is relevant to the member's interests in the fund or the use or disclosure is approved by the fund operator. This is an 'offence-specific defence' which reverses the evidential burden of proof. A contravention of this provision carries a penalty of 60 penalty units for a corporation.

The Guide notes that offence-specific defences may be appropriate where the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish it.[1]

The Guide also states that it may be justifiable to reverse a burden of proof if:

- the matter in question is not central to the question of culpability for the offence;
- the offence carries a relatively low penalty; or

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[1] Guide, [4.3.1].

- the conduct proscribed by the offence poses a grave danger to public health or safety.[2]

There are several factors which justify a reversal of the burden of proof in relation to proposed section 1213L.

Firstly, the alternative framing (which does not reverse the evidence burden) would require ASIC to establish that the use or disclosure was not relevant to the member's interests in the fund or was not approved by the fund's operator. This evidence may be difficult for ASIC to obtain given that the fund operator is not an Australian entity or located in Australia.

The Guide notes that such difficulties are generally not a sound justification for reversing the burden of proof because '[i]f an element of the offence is difficult for the prosecution to prove, [reversing the burden]...may place the defendant in a position in which he or she would also find it difficult.'[3] However, in the context of proposed section 1213L, it should be easily within the capacity of the person to produce information (for example, a documentary record) confirming how the proposed use or disclosure was considered in the interests of members or the fund operator's approval of the release.

Secondly, proposed subsection 1213L(4) does not reverse the legal burden of proof. Nor does it reverse the evidential burden of proof for the central question in establishing the offence, namely, whether the third party used or disclosed members' private information to send them unsolicited material.

Finally, it should be noted that the offence-specific defence in proposed subsection 1213L(2) is modelled on other sections in the *Corporations Act 2001* (the Corporations Act), including the offence-specific defence to section 177 (misusing the information in the members' register for a company or registered scheme). It is desirable for the enforceability (and resulting deterrent effect) of the proposed subsection 1213L(2) to be equally as strong as its corresponding provisions which apply to Australian companies, registered schemes and disclosing entities.

We released the Bill for public consultation from 20 December 2017 to 25 January 2018 and from 19 February to 5 March 2018. Stakeholders did not raise any concerns about the reversal of the evidential burden in this proposed provision or proposed subsection 1213M(6) (discussed in further detail below).

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[2] Guide, [4.3.1].
[3] Guide, [4.3.1].

Proposed subsection 1213M(6): Reversal of the evidential burden

Committee's question:

The committee requests the minister's detailed justification for the reversal of the evidential burden of proof in proposed subsection 1213M(6), having regard to the relevant principles as set out in the Guide.

Response:

Proposed subsection 1213M(1) requires the operator of a notified foreign passport fund to give the fund's Australian members a copy of any report that it prepares under the fund's home economy laws and gives to the fund's members in that economy without charge. Proposed subsection 1213M(6) creates an exception to this offence where the operator is required under another provision of the Corporations Act to lodge the report with ASIC or to give the report to the fund's Australian members. As this is framed as an exception, the operator bears an evidential burden under subsection 13.3(3) of the *Criminal Code Act 1995*.

Placing the evidential burden on the operator does not create added hardship for the defendant. The defendant can easily discharge the burden by pointing to the other provision in the Corporations Act which requires the defendant to lodge the report or provide it to members.

The alternative framing (which does not reverse the evidential burden) would have been to include, as part of the offence, a requirement that there are no provisions in the Corporations Act which require the operator to lodge the report or provide the report to its Australian members. This alternative framing would not have provided any significant advantages to a defendant because ASIC could discharge the burden by simply alleging that there were no such provisions in the Corporations Act. The evidential burden would then shift anyway to the defendant to prove that such a provision existed.

Finally, it should be noted that an exception (as opposed to an offence-specific defence) does not put a defendant at a procedural disadvantage because the defendant does not need to wait until the defence case is called before leading evidence of the exception.[4]

Proposed subsections 314A(9), 319(1A), 321(1A) and 322(2): Strict liability offences creating custodial penalties

Committee's Question:

[T]he committee requests the minister's more detailed justification for the application of strict liability to the offences created or extended by items 91, 98, 101, and 105, which attract penalties of between three months' and one years' imprisonment.

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[4] See the ALRC Report 112 at [7.6].

Response:

Items 91, 98, 101 and 105 of the Bill extend existing strict liability offences in the Corporations Act to operators of notified foreign passport funds. While item 91 creates new section 314A, concerning annual financial reporting by notified foreign passport funds to Australian members, this is based on existing section 314, concerning annual financial reporting by companies, registered schemes and disclosing entities, and the penalty is the same as the penalty for section 314.

Operators of notified foreign passport funds must be bodies corporate (see the eligibility requirements for operators in Part 3 of the Passport Rules contained in Annex 3 of the Memorandum of Cooperation (MOC)[5]). In practice, bodies corporate cannot serve a term of imprisonment. Nevertheless, it is appreciated that expanding an offence which carries a term of imprisonment to operators may result in convictions carrying additional social stigma.

The explanatory material accompanying the Bill noted that:

> *Several of the strict liability offences that are extended to operators of notified foreign passport funds by the new law do not comply with the Guide because they...impose a term of imprisonment.... [Extending these offences] is necessary because it is important that the deterrent effect in each circumstance is no less strong than it is for Australian companies, registered schemes and disclosing entities. For this reason equivalent penalties have been imposed for these offences.*[6]

The Committee, in its comments on the Bill, accepted that achieving consistency between the treatment of an Australian passport fund and a notified foreign passport fund is a legitimate objective. However, the Committee stated that it 'considers it would be possible to achieve consistency by making all penalties (that is, those proposed to be imposed on foreign passport funds and those that already apply to Australian entities under the Corporations Act) consistent with the Guide'.[7]

Currently, there are a number of other strict liability offences in the Corporations Act which impose a term of imprisonment and are inconsistent with the Guide. A comprehensive review of all the penalties in the Corporations Act has been undertaken as part of a review by the ASIC Enforcement Review Taskforce (the Taskforce). The Taskforce recommended that imprisonment be removed as a possible sanction for strict liability offences in recommendation 36[8] and the Government agreed to this

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[5] Australia, as a signatory to the Memorandum of Cooperation for the Asia Region Funds Passport, is required to implement the Passport Rules contained in Annex 3 of the Memorandum of Cooperation. Section 1211 of Schedule 1, Item 1 of the Bill allows the Minister to make, by legislative instrument, Passport Rules for Australia that are substantially the same as the Passport Rules set out in Annex 3 of the Memorandum of Cooperation.

[6] Explanatory Memorandum for the Bill, Statement of Compatibility, p. 157.

[7] Scrutiny Digest 5/18, p. 17.

[8] The ASIC Enforcement Review Taskforce Report is available at: https://treasury.gov.au/review/asic-enforcement-review/r2018-282438/.

recommendation on 28 April 2016.[9] Recommendation 36 is one of the recommendations that is being prioritised and the custodial penalties for all strict liabilities in the Corporations Act (including those in proposed subsections 314A(9), 319(1A), 321(1A) and 322(2) and the provisions on which they are modelled) will be removed as part of that work. The Government considers that implementing Recommendation 36 comprehensively across the Corporations Act is preferable to dealing with individual penalties on an ad hoc basis. This will ensure there is a consistent approach to updating the penalty regime for entities that are regulated under the Corporations Act.

Broad delegation of legislative powers – Policy rationale and guidance on its exercise

Committee's Question:

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

- **the justification for why it is proposed to allow delegated legislation to modify and exempt entities from the operation of primary and delegated legislation; and**
- **whether it would be appropriate to amend the bill to insert (at least high-level) guidance concerning the exercise of these powers.**

Response:

The Explanatory Memorandum provides an explanation of the rationale for each exemption, modification and variation power, and these have been reproduced in the Committee's report.[10] For example page 120 of the Explanatory Memorandum justifies proposed Part 8A.8 as follows:

> *[The exemption and modification powers in Part 8A.8] allow ASIC to provide administrative relief in circumstances where the strict operation of the Corporations Act produces unintended or unforeseen results that are not consistent with the policy intention for the Passport, including the intention of the MOC. Issues may arise that were not contemplated at the time of drafting because the Passport is a new regime, the funds industry is undergoing rapid innovation, and many foreign passport funds are structured differently to MISs [managed investment schemes] or use arrangements that are not available in Australia. In this context, it is appropriate for ASIC to be able to provide relief where the issues to be*

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[9] The Government's response is available at: https://treasury.gov.au/publication/p2018-282438/. See also the press release at: http://sjm.ministers.treasury.gov.au/media-release/boosting-penalties-to-protect-australian-consumers-from-corporate-and-financial-misconduct/.

[10] See pages 117-118 of the Explanatory Memorandum in relation proposed Part 8A.8, page 120 in relation to proposed section 1216L and page 121 in relation to proposed section 1216K.

addressed are too individual and specific to justify addressing them by legislative means.

The exemption and modification powers in the new law are subject to the usual safeguards, including administrative review by the AAT, judicial review and consideration in appropriate circumstances by the Commonwealth Ombudsman.

In the Asia Region Funds Passport (ARFP) context, the failure to grant timely relief in a circumstance where the law produces an unintended result could cause significant harm to Australian investors, damage Australia's international standing, or lead to other participating economies taking action against Australia under the MOC. The exemption, modification and variation powers are designed to allow for prompt action, while still ensuring that there is a degree of scrutiny (for example, regulations are tabled in Parliament and subject to disallowance and ASIC's decisions are subject to merits review under Part 9.4A).

The Committee has questioned whether it would be appropriate to amend the Bill to insert guidance concerning the exercise of the new powers.

Some guidance on AISC's exercise of the powers, more generally, already exists. ASIC has developed, in Regulatory Guide 51, high-level principles for using its exemption and modification powers. These principles include that ASIC, when considering applications for relief, will:

- only grant relief in new policy applications where there is a net regulatory benefit, or any regulatory detriment is minimal and is outweighed by the commercial benefit;
- seek to achieve two broad objectives – consistency and definite principles; and
- refrain from granting retrospective relief.

As a practical matter, the exemption, modification and variation powers in the Bill would also need to be exercised in conformity with the MOC signed by all participating economies. For example, if an exemption, modification or variation diverged from the MOC and the common understanding of the other participating economies, another participating economy could initiate the process for resolving differences under paragraph 8 of the MOC. A failure to resolve a difference could lead to other participating economies refusing to recognise Australian Passport Funds.

Any further guidance in the Bill would necessarily need to be very general and high-level – and hence be of limited practical utility – because it is not possible to envisage the specific situations where the exemption, modification and variation powers may be used. This is because the ARFP is a new regime which is yet to commence. Further, foreign passport funds use different structures and arrangements to Australian funds and aspects of Australia's corporation law may become ambiguous or difficult to apply in the context of these different structures and may produce unintended outcomes. The structures and arrangements used by foreign passport funds are also expected to undergo continuing change as the funds industry is subject to rapid innovation, other participating countries may change their domestic laws (eg to create new structures for funds), and new countries may join the ARFP scheme.

Broad delegation of legislative powers – Consultation requirements

Committee's Question:

The committee requests the minister's more detailed advice concerning:

- **the type of consultation that it is envisaged will be conducted prior to the making of delegated legislation; and**
- **whether specific consultation obligations can be included in the bill, with compliance with those obligations a condition of relevant instruments' validity.**

Response:

Regulations which exempt, modify or vary the corporations law must comply with the consultation requirements in the *Corporations Agreement 2002* (Corporations Agreement). Under clause 507 of the Corporations Agreement, four weeks public consultation is required for amendments that alter subject-matters covered by new Chapter 8A unless the states and territories consent to a shortened consultation period.

As the Committee notes, there are also more limited consultation requirements in section 17 of the *Legislation Act 2003*. These require rule-makers to undertake any consultation that is considered by the rule-maker to be appropriate and reasonably practicable to undertake. A failure to comply with these requirements does not affect the validity or enforceability of the legislative instrument (section 19).

The MOC also requires Australia to consult with other participating countries. Most significantly, paragraph 4(1)(e) of Annex 4 of the MOC requires the Passport regulators in the other participating economies to be consulted on any exemption or modification.

The Committee's first question related to the type of consultation that may be conducted prior to the exercise of the exemption, modification and variation powers. In addition to complying with the consultation requirements outlined above, it is envisaged that in some circumstances rule-makers may also wish to hold roundtables with key stakeholders or conduct follow-up conversations with stakeholders who made submissions during the public consultation period.

The Committee's second question relates to whether specific consultation obligations could be included in the Bill. It would be difficult to set precise consultation requirements which are appropriate in all situations as the appropriate length and nature of the consultation will depend on:

- the complexity and length of the exemption or modification;
- the urgency of exercising the power;
- the number of parties that are likely to be affected by the exemption or modification (and whether their identity is known); and
- whether the exemption or modification implements a decision made by the Joint Committee and whether failing to implement the decision in Australia would be

likely to result in other countries refusing to recognise Australia as a participating economy.

Including additional consultation requirements beyond those contained in the Corporations Agreement, the *Legislation Act 2003* and the MOC could inappropriately constrain the exercise of the powers and prevent prompt action being undertaken to protect Australian investors or preserve Australia's international competitiveness. It is also difficult to justify imposing constraints in the ARFP context when there are no constraints on the exercise of the exemption, modification and variation powers in Chapter 5C (which applies to registered schemes).

ATTACHMENT B

Treasury Laws Amendment (2018 Measures No. 4) Bill 2018

The Committee has sought advice on the following:

- further justification for the proposed strict liability offences, particularly the imposition of the 12 months imprisonment, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*;
- further justification for making a failure to comply with an education direction an offence of absolute liability subject to a maximum penalty of up to 12 months imprisonment, with reference to the principles set out in the *Guide to Framing Commonwealth Offences*;
- explanation of the use of the offence-specific defence (which reverses the evidential burden of proof) to the offence of making false or misleading statements to a taxation officer;
- explanation as to why there are no limits on the road user charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the Bill; and
- explanation as to why the Commissioner's failure to notify a taxpayer of a decision to refuse to admit certain evidence in proceedings on review or appeal, will not affect the validity of the decision, particularly in light of the potential effect on a taxpayer's opportunity to present their case.

Strict liability offences

Committee's question:

The committee requests a detailed justification from the minister for the proposed strict liability offences, particularly the imposition of the 12 months imprisonment, with reference to the principles set out in the *Guide to Framing Commonwealth Offences* (the Guide).

Response:

Offence for failing to comply with a direction to pay superannuation guarantee charge

Schedule 1 to the Bill applies strict liability to the proposed offence for failing to comply with a direction to pay a superannuation guarantee charge which is subject to a maximum penalty of 50 penalty units or imprisonment for up to 12 months.

This is justified on the basis that the direction to pay will only apply to a narrow subset of employers with serious contraventions of their obligations to pay superannuation guarantee liabilities as required by law and whose actions are consistent with an ongoing and intentional disregard of those obligations. Such behaviour undermines the integrity of the superannuation system and unlike other debts owed to the

Commonwealth, the ultimate beneficiaries of the superannuation guarantee payments are individuals.

Employers who dispute the amount of the debt are given full protection from committing an offence for not complying with a direction to pay until after the dispute is resolved.

It is the Government's view that the physical elements of the proposed offence provide the appropriate basis for determining when a person has committed an offence. That is, the fact that an employer (who has failed to pay the underlying superannuation guarantee liability) has been served a notice for the direction to pay that liability and yet still fails to comply cannot be justified. The direction to pay is only intended to be applied to employers who have the capability to pay but have consistently refused to pay. Those who are not capable of paying will be covered by the applicable defence, provided they have taken reasonable steps to try to discharge the liability.

With respect to the substance of the proposed penalties, these have been deliberately set to send the strongest possible signal that appropriately reflects the severity of the behaviour.

In setting these penalties, specific regard was also had to the principle articulated at Chapter 3.1.2 in the Guide that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. As noted by the Committee, the proposed penalties are comparable to those that apply in respect of similar prohibited behaviours, such as the existing penalties for the failure to comply with certain tax requirements under a taxation law under section 8C of the *Taxation Administration Act 1953*. These penalties are provided for by section 8E and apply different penalties to first, second, and third or subsequent offences. An employer who commits a first offence is liable to a fine of up to 20 penalty units; a second offence attracts a fine of up to 40 penalty units; and a third or subsequent offence attracts a fine of up to 50 penalty units and/or imprisonment of 12 months.

The penalty of up to 12 months imprisonment for the proposed offence is justified on the basis that the offence relates to continuous failures to pay the superannuation guarantee liability. The penalty is comparable to the highest third and subsequent tiered penalty that currently applies to offences under section 8C.

It is the Government's view that the settings for the proposed penalties are appropriate and necessary to maintain a consistent message that continuously failing to comply with superannuation and taxation obligations is unacceptable.

Offence for failing to comply with a Court order to provide security

Schedule 5 to the Bill applies strict liability to the proposed offence for failing to comply with a Court order to provide the security which is subject to a maximum penalty of 50 penalty units or imprisonment for up to 12 months.

This is justified on the basis that this addresses instances of non-compliance with the security deposit rules which predominantly arise where the value of the security deposit (which reflects the value of the tax related liability) exceeds the existing penalty for failing to provide the security deposit. These taxpayers have already committed an offence under the tax law for failing to comply with the existing security deposit

requirement. Therefore the taxpayers who fail to comply with a Court order risk committing a criminal offence resulting in criminal penalties. These consequences provide appropriate incentives to ensure compliance with the Court order and reflect the seriousness of a failure to comply.

It is the Government's view that the physical elements of the proposed offence provide the appropriate basis for determining when a person has committed an offence. That is, the fact that a taxpayer has been issued with an order by the Federal Court to provide the security and yet still fails to comply cannot be justified. A taxpayer does not commit an offence if they are not capable of complying with the Court order.

With respect to the substance of the proposed penalties, these have been specifically set to send the strongest possible signal that appropriately reflects the severity of the behaviour of disregarding a Court order.

In setting these penalties, specific regard was also had to the principle articulated at Chapter 3.1.2 in the Guide that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. As noted by the Committee, the proposed penalties are comparable to those that apply in respect of similar prohibited behaviours, such as the existing penalties for refusing to comply with other Court orders under sections 8G and 8H of the *Taxation Administration Act 1953*.

The penalty of up to 12 months imprisonment for the proposed offence is justified on the basis that applying the same consequences in respect of security deposits ensures a consistent outcome between the two sets of rules and is appropriate as they both deal with failures to comply with Court orders.

It is the Government's view that the settings for the proposed penalties are appropriate and necessary to maintain a consistent message that refusing to comply with a Court order is unacceptable.

Absolute liability offences

Committee's Question:

The committee requests the minister's detailed justification with reference to the principles set out in the Guide to Framing Commonwealth Offences, for making a failure to comply with an education direction an offence of absolute liability subject to a maximum penalty of up to 12 months imprisonment.

Response:

Schedule 1 to the Bill applies absolute liability to the proposed offence for failing to comply with an education direction. The offence has been inserted into the existing framework in section 8C of the *Taxation Administration Act 1953* and the tiered penalties in section 8E. The penalty of 12 months imprisonment will only arise on a third or subsequent offence and can only be applied if the employer has been convicted of two previous offences under section 8C.

The proposed offence is justified on the basis that the measure provides the Commissioner with additional tools to enforce compliance with the existing obligations in respect of the superannuation guarantee. The additional penalties that can apply under

the education direction provide additional incentives to employers to ensure that they are fully compliant with their existing superannuation guarantee obligations. Employer non-compliance with superannuation obligations undermines the integrity of the superannuation system and unlike other debts owed to the Commonwealth, the ultimate beneficiaries of the superannuation guarantee payments are individuals.

It is the Government's view that the physical elements of the proposed offence provide the appropriate basis for determining when a person has committed an offence. That is, the fact that an employer who fails to comply with the direction to attend the specified education course and provide evidence to the Commissioner cannot be justified. An employer will be covered by the applicable defence contained in subsection 8C(1B) of the *Taxation Administration Act 1953* which provides that an offence does not occur if an employer is not capable of complying with the education direction.

In setting these penalties, specific regard was also had to the principle articulated at Chapter 3.1.2 in the *Guide to Framing Commonwealth Offences* that there should be consistent penalties for existing offences of a similar kind or of a similar seriousness. As noted by the Committee, the proposed penalties are comparable and specifically align to those that apply in respect of similar prohibited behaviours, such as the existing penalties for the failure to comply with certain tax requirements under a taxation law under section 8C of the *Taxation Administration Act 1953*. The penalty appropriately reflects the severity of the behaviour by imposing heavier penalties for subsequent offences.

It is the Government's view that the settings for the proposed penalties are appropriate and necessary to maintain a consistent message that continuously failing to comply with superannuation and taxation obligations is unacceptable.

Reversal of evidential burden of proof

Committee's Question:

The committee requests the minister's advice as to why it is proposed to use offence-specific defence (which reverses the evidential burden of proof) to the offence of making false or misleading statements to a taxation officer.

Response:

In Schedule 4 to the Bill, the defence ensures that superannuation funds will not be subject to offences of making false or misleading statements if they provide a correct statement in the approved form and within the required period. The superannuation fund has the burden of proof of establishing that the defence is available to them.

The defence is framed as an offence-specific defence, which means that the evidential burden for proving that the defendant (being the superannuation fund) has made a member information statement and makes a further statement to correct the original member information statement to the Commissioner is placed on the defendant. This approach is justified on the basis that the defendant would be best placed to know if they made an error in the statement and the actions the defendant is taking to correct a member information statement are peculiarly within the knowledge of the defendant. It would be significantly more difficult and costly for the prosecution to disprove these actions than for the defendant to establish them.

Charges in delegated legislation

Committee's question:

The committee requests the minister's advice as to why there are no limits on the road user charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and/or a maximum charge can be specifically included in the Bill

Response:

Limit on the road user charge

The Committee has sought information with regards to the absence of an obvious limit on the road user charge specified in primary legislation.

The Australian Government levies fuel excise and duties at various rates set in the Schedule to the *Excise Tariff Act 1921*. Fuel tax credits provide a rebate to businesses for the tax that is embedded in the price of fuel used for certain business activities, effectively removing or reducing the amount of fuel tax on business inputs. The road user charge then reduces the amount of fuel tax credit that is claimable for fuel used on-road in a heavy vehicle.

The amount of the road user charge is effectively limited to the rate of fuel tax credits applying to the relevant fuel. Where the road user charge exceeds the fuel tax credit rate, there is no liability for the excess.

Guidance in relation to the method of calculation of the charge and/or maximum charge

The Committee has sought further information about whether guidance in relation to the method of calculation of the charge and/or maximum charge can be specifically included in the Bill.

It would not be appropriate to provide guidance on the method of calculation of the road user charge due to the current framework which involves a cooperative Council of Australian Government (COAG) process.

Under the current framework, the road user charge is determined by the Transport Minister in consultation with Cabinet. In practice, the Transport Minister's determinations follow agreements by transport ministers of the States and Territories at the COAG Transport and Infrastructure Council, informed by advice from the National Transport Commission.

Commonwealth, State and Territory governments have agreed to pursue heavy vehicle road reform. As part of that reform, options are being explored with the States and Territories that may involve amendments to the current framework for the heavy vehicle road user charge.

No-invalidity clause

Committee's question:

The committee requests the minister's advice as to why the Commissioner's failure to notify a taxpayer of a decision to refuse to admit certain evidence in proceedings on review or appeal, will not affect the validity of the decision, particularly in light of the potential effect on a taxpayer's opportunity to present their case.

Response:

Schedule 8 to the Bill includes amendments rewriting provisions regarding offshore information notices from the *Income Tax Assessment Act 1936* into Schedule 1 to the *Taxation Administration Act 1953*. Consistent with the current law, the rewritten provisions provide that the Commissioner's failure to notify a taxpayer of a decision to refuse to admit certain evidence in proceedings on review or appeal, will not affect the validity of the decision.

This aspect of the offshore information notice provisions has not changed and is therefore not dealt with in the explanatory memorandum for the Bill. Information about the original provisions may be found in the explanatory memorandum for the Taxation Laws Amendment (Foreign Income) Bill 1990.

THE HON KAREN ANDREWS MP
ASSISTANT MINISTER FOR VOCATIONAL EDUCATION AND SKILLS

Our Ref MB18-000224

29 MAY 2018

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

Dear Chair

Thank you for the correspondence on 10 May 2018 on behalf of the Standing Committee for the Scrutiny of Bills Committee (the committee) in relation to the Education and Other Legislation (VET Student Loan Debt Separation) Bill 2018 (the bill).

The committee has requested a justification for the application of an offence of absolute liability to a failure to comply with the requirement of proposed section 23ED of the bill. This results from the proposed application of Part III of the *Taxation Administration Act 1953* (the Tax Administration Act) to proposed section 23ED. The committee has also requested an explanation as to why it would not be appropriate to modify the application of Part III of the Tax Administration Act to make the offence one of strict liability.

Under the measures in the bill, the Commissioner of Taxation (the Commissioner) will have the general administration of a number of provisions proposed to be inserted in the bill.

The relevant offence is refusing or failing, as and when required, to provide information or a document to the Commissioner. The Tax Administration Act contains the relevant machinery provisions and treats this offence as one of absolute liability. The absolute liability applies only to this particular element. That is, not providing the required information. This is considered appropriate because to do otherwise would undermine the deterrence factor, which in turn is important to support self-regulation and integrity in the tax system. Not requiring fault significantly enhances the effectiveness of this deterrent by ensuring people take some care to understand and comply with their obligations.

Deterring people from failing to notify the Commissioner is of vital importance to the effective administration of the tax system, in particular in the context of the self-assessment system. In this particular situation, failure to notify the Commissioner in a timely manner would undermine the effectiveness of the framework and the policy regarding the VET Student Loans program, once it is administratively separated from the Higher Education Loan Program (HELP).

Additionally, early judicial commentary prior to the enactment of subsection 8C(1A) of the Tax Administration Act (in *Ambrose v Edmonds Wilson* (1988) 19 ATR 1217, 88 ATC 4173) noted that the offence in Part III of the Tax Administration Act necessarily implies that a defence of honest and reasonable mistake is excluded, and is therefore an offence of absolute liability. It was noted that this is "necessary for the operation of the legislation which in turn is seen by the legislature to be for the good of the general populace."

It should be noted that the Tax Administration Act includes a specific defence to the extent that the person is not capable of complying (refer to subsection 8C(1B) of the Tax Administration Act). In these circumstances, this specific defence is more appropriate than the mistake of fact defence under section 9.2 of the Schedule to the *Criminal Code Act 1995* (the Criminal Code), so that making the offence one of strict liability rather than absolute liability would not assist.

This follows from the nature of the offence, as there cannot be a mistaken belief about the facts relating to the physical elements of the offence. If there were a mistake, it would have regard to the application of the requirement to provide the information, however such a mistake or ignorance of the requirement does not prevent criminal responsibility (section 9.3 of the Schedule to the Criminal Code).

I also note that the operation of proposed sections 23ED and 23FE does not represent a substantive change from the existing arrangements for VET student loan debts. Similar provisions are already contained in the *Higher Education Support Act 2003* (HESA) and apply to VET student loans debtors. This is by virtue of VET student loan debts currently being HELP debts administered under HESA.

The purpose of the bill is to separate VET student loan debts from other forms of HELP debts, including from the broader debt reporting obligations to which the Tax Administration Act applies, and that are treated as absolute liability offences. The current proposal maintains the same offences that apply now, but under separate arrangements for VET student loan debts.

Specifically, proposed section 23FE is modelled on section 154-90 of HESA, which currently applies to VET student loan debts and was inserted by the *Education Legislation Amendment (Overseas Debt Recovery) Act 2015*.

The Explanatory Memorandum to this Act, explained that extending the application of Part III of the Tax Administration Act to failure to comply with section 154-18 of HESA (on which proposed section 23ED of the VSL Act is modelled), was intended to ensure that the Australian Taxation Office can administer the provisions in line with broader provisions for administering HELP and taxation arrangements. This administration included the capacity to apply a similar range of penalties as can be applied for tax purposes. Proposed section 23FE is included in the bill for the same reasons.

In summary, the application of an offence of absolute liability to a failure to comply with proposed section 23ED will simply continue the existing treatment applying to VET student loan debts and is consistent with the treatment of other forms of HELP debts. In doing so, it will provide the necessary deterrence, and significantly enhance the effectiveness of the enforcement regime relating to the administration of VET student loan debts.

I intend to table an addendum to the Explanatory Memorandum to the bill to address these issues and I will endeavour to ensure that information of this nature is presented more clearly in future explanatory material.

I thank the committee for its comments and I trust this information is of assistance.

Yours sincerely

Karen Andrews MP

TREASURER

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

Dear Chair

Thank you for the letter to my Office on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) dated 10 May 2018, drawing my attention to the Committee's *Scrutiny Digest No. 5 of 2018* which seeks further information about the National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018 and the Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018.

Please see **Attachment A** for details on the further advice sought by the Committee.

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

Yours sincerely

The Hon Scott Morrison MP
30 / 5 / 2018

Enc

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ATTACHMENT A

National Consumer Credit Protection Amendment (Mandatory Comprehensive Credit Reporting) Bill 2018

The Committee has asked for further advice on the elements of the mandatory comprehensive credit reporting (CCR) regime that will be included in regulations and the impact of these elements on a person's privacy.

The Committee has also asked for advice on the type of consultation that will take place on the regulations and whether the Bill should be amended to include a specific obligation to consult and that compliance with this obligation is a condition of the regulations being valid.

First, the Bill does not unduly trespass on the privacy of an individual. The Bill requires that certain credit providers participate in the existing voluntary system established by the *Privacy Amendment (Enhancing Privacy Protection) Act 2012*. The Bill does not establish a new or broader credit reporting system.

While the CCR regime will increase the volume of information in the credit reporting system, this was the volume that was anticipated would be in system as a result of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* and was contemplated when considering the impacts on an individual's privacy as part of the development of that Act. The Bill does not alter the information that can be shared.

The Bill does provide that certain elements of the CCR Regime will be included in regulations. The regulation making powers in the Bill may:

- exclude a kind of credit account for which credit information does not need to be supplied to a credit reporting body;
- restrict a credit reporting body from disclosing information it has received through the mandatory regime;
- set out the information that must be included in statements provided to the Treasurer by credit providers and credit reporting bodies after the initial bulk supplies;
- prescribe events when a credit provider must supply credit information to a credit reporting body;
- prescribe a kind of credit provider which is subject to the mandatory comprehensive credit reporting regime; and
- prescribe a credit reporting body which is an eligible credit reporting body and will therefore receive credit information through the mandatory regime.

My response focuses on those regulation making powers the Committee considers have the potential to impact a person's privacy. Namely:

- prescribe a kind of credit provider which is subject to the mandatory comprehensive credit reporting regime;
- prescribe a credit reporting body which is an eligible credit reporting body and will therefore receive credit information through the mandatory regime; and
- restrict a credit reporting body from disclosing information it has received through the mandatory regime.

At this stage the Government does not intend to prescribe additional credit providers who are subject to the CCR regime in regulations.

Rather than mandate that all credit providers participate in the CCR regime from 1 July 2017, the Government's policy requires Australia's four largest authorised deposit-taking institutions to participate. It is expected that the critical mass of information supplied by these credit providers will encourage other credit providers to voluntarily participate in the regime.

However, if this is not the case the Government may use the regulation making power to bring additional credit providers into the CCR regime. This will not impact on a person's privacy. These credit providers will, by definition, remain subject to the *Privacy Act 1988* and can already voluntarily share this information.

The possibility that additional credit providers may become subject to the mandatory regime necessitates that regulations prescribe conditions that a credit reporting body will meet in order to be an eligible credit reporting body for these credit providers.

The conditions may include whether the credit provider had a contract with a credit reporting body at a particular point in time. Prescribing conditions in the regulations enables the Government to consider who participants in the credit reporting system are at the time that the regime is extended to additional credit providers.

This approach does not weaken the protections included in the *Privacy Act 1988*. By definition, the credit reporting bodies will continue to remain subject to the rules in the privacy framework, including that contracts are in place which include certain requirements around security.

Finally, the Committee raised concerns about the regulation making power which places restrictions on how a credit reporting body may share the information it has received through the CCR regime, including information derived from this data. The Committee considers this may have significant implications on a person's privacy.

The Bill is clear that, except where a credit provider has concerns about a credit reporting body's data security, the Bill does not limit the operation of the *Privacy Act 1988* (see item 4, Schedule 1, section 133CZK). The CCR regime has been drafted to operate within the existing privacy framework and this provision seeks to put this beyond doubt.

The existing privacy framework places no requirement on a credit provider to supply credit information in order to access credit information. The proposed regulations will look to reflect the concept referred to in the sector as the 'principle of reciprocity'. This provides that to receive credit information from a credit reporting body the requesting credit provider must submit the same level of credit information to the credit reporting system. The principle of reciprocity will encourage non-mandated credit providers to contribute credit information.

The Australian Retail Credit Association, the peak organisation involved in the disclosure, exchange and application of credit reporting data has developed an industry standard for the collection and sharing of credit information. This is referred to as the Principles of Reciprocity and Data Exchange (PRDE).

The PRDE operates within the existing framework set out by the *Privacy Act 1988* and the Privacy Code and the limits imposed on the use and disclosure of credit information.

Feedback through consultation on the Bill indicated that those credit providers subject to the CCR regime wanted the same protections afforded by the PRDE to apply to the supply of their information. That is, where the credit provider was a signatory to the PRDE, a credit reporting body could only share that information with other PRDE signatories, or to the extent allowed by the PRDE.

The proposed regulations will refer to the PRDE. It is important that the Government has the flexibility to adapt how the 'principles of reciprocity' are set out in law should the approach set out in the industry standard change.

I do not consider it necessary for the making of the regulations to be conditional on meeting certain obligations with regards to consultation. The Government intends to consult on the draft regulations prior to submitting the regulations to the Executive Council. Officers in the Department of Treasury have already begun to discuss the content of the regulations with key stakeholders. Feedback to the Senate Economics Committee inquiry to the Bill was overwhelmingly positive about the approach the Government has taken to consultation on the development of the Bill.

Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018

The Committee has also sought more detailed advice on two matters relating to the Treasury Laws Amendment (Tax Integrity and Other Measures) Bill 2018 (the Tax Integrity Bill).

The first matter concerns the amendments to the small business CGT concessions in Schedule 2 to the Tax Integrity Bill, which is an integrity measure to ensure that the concessions are appropriately targeted to genuine small businesses with effect from 1 July 2017. The Committee has noted that these amendments apply retrospectively and requested more detailed advice about the number of individuals adversely affected by the retrospective application of the legislation, and extent of their detriment.

The Government announced in the 2017-18 Budget that it would amend the concessions "to ensure that the concessions can only be accessed in relation to assets used in a small business or ownership interests in a small business" with effect from 1 July 2017. This announcement ahead of the commencement of the amendments allowed taxpayers to take the proposed changes into account when considering applying the CGT small business concessions.

I am advised by the Australian Taxation Office (ATO) that detailed information about the number of adversely affected taxpayers and the extent of any adverse effects is not available. This is because the ATO has not yet received any tax return data for transactions in the 2017-18 income year, which this measure would affect.

Additionally, to be affected by this measure, taxpayers must access the CGT concessions in relation to specific types of assets (principally interests in large businesses). Tax returns include only limited information on taxpayers' use of the small business CGT concessions, which is not sufficient to identify taxpayers that would be affected by the 2017-18 Budget measure as they have accessed the concessions in relation to such an asset. For the ATO to identify instances where taxpayers have sought to access the concessions in ways that these amendments would prevent, further information would be required, such as from ATO compliance action.

The second matter is the amendments to the Venture Capital Limited Partnership and Early Stage Venture Capital Limited Partnership regimes (venture capital tax concessions) in Schedule 3 to the Tax Integrity Bill. These amendments ensure that venture capital investors can access the concessions for investment in FinTech businesses.

Among other things, these amendments allow for Innovation and Science Australia (ISA) to, on application, make a finding that an activity is a novel application of technology. The Committee has sought advice on why if ISA does not provide notice in writing of such a finding (or a decision not to make a finding), this does not result in the finding or decision being invalid. The Committee has also sought advice on how failure to provide such notice may affect the ability of the applicant to seek internal and Administrative Appeals Tribunal review of a refusal to make a finding.

Providing notice of a finding is an administrative matter that does not affect the substance of a decision. The consistent and longstanding approach for all findings by ISA and for reviewable decisions under the *Administrative Appeals Tribunal Act 1975* (AAT Act) generally is that a failure to comply with such an administrative requirement does not affect the validity of the underlying decision (see subsections 29-5(3) and 29-10(7) of the *Venture Capital Act 2002*, subsections 27C(4), 27K(4), 28F(5) and 30B(3) of the *Industry Research and Development Act 1986* and subsection 27A(3) of the AAT Act).

In the case of findings, this practice is generally to the benefit of the applicant – the existence of a finding provides certainty as to whether a venture capital fund is investing in an eligible business, and it would not be appropriate to defer or deny the effect of a decision because of a defective notification process.

I am also advised that there was close engagement with stakeholders in the development of this legislation and no concerns were raised about this matter.

In the event ISA does not provide notice of a decision not to make a finding, it would be expected that the applicant would follow up with ISA and ISA would rectify the error as soon as it came to their attention.

In the event ISA continued to not provide notice of the decision, the applicant would remain entitled to internal review of the decision and would have an unlimited period to apply for this review as a request for a review of a decision by ISA can be made until 21 days after notice of the decision is provided (see subsection 29-10(2) of the *Venture Capital Act 2002*). Should ISA continue to be non-responsive, it would be taken to confirm the decision after 60 days and the applicant could seek review by the Administrative Appeals Tribunal (see subsection 29-10(5) of the *Venture Capital Act 2002*).

It would also be open to the applicant to seek an order from the Federal Court compelling ISA to comply with its legislative obligation to provide a notice of the decision.

Senator the Hon Matthew Canavan

Minister for Resources and Northern Australia

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

22 MAY 2018

scrutiny.sen@aph.gov.au

Dear ~~Senator~~ Helen,

Thank you for your email of 10 May 2018 concerning comments made by the Senate Scrutiny of Bills Committee in its Scrutiny Digest No. 5 of 2018 on the recently introduced proposed legislation: Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018.

You requested a response from me by 30 May 2018 in relation to particular aspects of the proposed legislation and its human rights compatibility.

My detailed response addressing the Senate Committee's concerns is attached.

Yours sincerely

Matthew Canavan

Encl. (1)

Response to Scrutiny Digest No. 5 of 2018 of the Senate Scrutiny of Bills Committee in relation to comments on the Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018

Regulatory Context

The task of regulators of the offshore resources industry is difficult given the remote location and high hazard nature of the industry's key operations. For this reason, providing effective and comprehensive compliance and enforcement tools to the regulator is vital in order to deliver human health and safety and environmental protection outcomes. Furthermore and of relevance in consideration of a human rights protection context, it is regulation pertaining, by and large, to large multinational companies as opposed to individuals. The companies who participate in this industry are well resourced, sophisticated and voluntarily engaging in activities for profit.

Offence Specific Defences

The Offshore Petroleum and Greenhouse Gas Storage Amendment (Miscellaneous Amendments) Bill 2018 (the Bill) contains a number of offence provisions which have corresponding offence specific defences:

- it is a defence to the offence of breaching a direction given by NOPSEMA, if the defendant proves that they took all reasonable steps to comply with the direction (the breach of directions defence); and
- it is a defence to the offence of refusing or failing to do anything required by a 'well integrity law' if the defendant proves that it was not practicable to do that thing because of an emergency prevailing at the relevant time (the well integrity defence).

These defences operate as optional exceptions to the criminal responsibility regime established under the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (the Act). Both of these defences are already substantively contained in the Act:

- Breach of Directions Defence: The inclusion of the breach of directions defence in the current Bill represents an expansion of an existing defence (section 584 of the Act) to reflect new measures in the Bill relating to the transfer of regulatory responsibility for greenhouse gas operations from the Minister to NOPSEMA.
- Well Integrity Defence: The inclusion of the well integrity defence is a mirrored application to a well integrity law of an existing defence for a failure to comply with OHS (clause 92 of Schedule 3) and environmental management laws (clause 18 of Schedule 2A). This is in connection with the measure in the Bill to create a new Schedule 2B to provide a complete and comprehensive suite of compliance powers relating to the well integrity function, which was transferred to NOPSEMA in 2011.

[T]he committee requests the minister's advice as to why it is proposed to reverse the legal burden of proof in the instances described above, including why it is not considered sufficient to reverse the evidential, rather than the legal, burden of proof.

Human Rights Objectives

The Act, in part, establishes a regulatory framework for the management of remote and high hazard industry activities associated with offshore resources exploration and production. These activities, if not conducted properly, have the potential to result in serious injury or death and/or extraordinary

environmental harm. The robustness of the regulatory regime, including an effective compliance and enforcement framework, is critical to achieving this objective. The objective of both the breach of directions defence and the well integrity defence assist in achieving the objective of ensuring the safety of persons in the industry as well as the protection of the environment. As such, the regulatory regime positively engages with the right to life, and helps to protect other human rights which would be negatively affected by significant environmental damage.

Effectiveness

A direction issued by NOPSEMA is an enforcement tool designed to achieve a very particular outcome, to direct the industry participant to either do or refrain from doing something in order to deliver OHS, environmental management or well integrity outcomes. Directions are not used frequently – they are used in extraordinary circumstances, usually to deal with a specific emergent risk that the regulations do not adequately cover, and their application and use is taken very seriously. The defence in connection with the offence of non-compliance with a direction allows an optional exception; it is an opportunity for the defendant to prove that they took all reasonable steps to comply with the direction. As a result, the measure is effective in achieving the objectives of the Act.

Well integrity laws relate specifically to the regulatory oversight of the structural integrity of wells, the management of which is seen as posing the greatest risk to both OHS and the environment. A failure in well integrity can result in the death of workers and widespread damage to the environment, such as that recently seen in the Gulf of Mexico with the explosion of the Macondo rig. Strict compliance with these laws is deemed critical and a central tenet of the offshore regime. However, this defence acknowledges and provides for an exception to strict compliance in emergency circumstances. As a result, the measure is effective in achieving the objectives of the Act.

Reasonable and Proportionate

Both of these defences are not related to issues essential to culpability, but instead provide exceptions or an excuse for the conduct. In addition, both defences relate to the serious potential consequences of non-compliance (as outlined above – risks of serious injury or death and/or major environmental consequences). Conduct resulting in the offence would, in most circumstances, take place at a remote location and without the ability for the regulator to immediately or even quickly gain access in order to ascertain the facts directly relating to these defences. As a result, the facts and information directly relevant to the defence is entirely within the defendant's knowledge; only the defendant, with their particular knowledge of, and involvement in, the circumstances happening in the event of the failure to comply with the direction, or during a well integrity emergency, is able to prove the requisite and exception-based matters of reasonable steps or practicable actions.

Both defences are likely to be used by companies with significant resources, who are more than capable of shouldering the legal burden if they wish to claim a defence. The industry is highly regulated and companies involved have chosen to voluntarily participate in this regulated environment on a for profit basis. In addition, in relation to the breach of directions defence, the penalties are generally 100 penalty units and do not involve imprisonment.

As a result, both measures contain a limitation that is both reasonable and proportionate to the achievement of the relevant objective. It is also the least rights restrictive approach while still balancing the ability of the measures to effectively achieve their objective.

Merely Reversing Evidential Burden is Insufficient

Allowing for a reversal of the evidential burden of proof only would create internal inconsistencies in the Act and its established treatment of offences and defences. It is essential to avoid any perception by the offshore petroleum and greenhouse gas storage industries that the Commonwealth is 'soft' on compliance. Defences should be available only to those who have genuinely done everything in their power to avert the occurrence of an adverse event and can demonstrate that they have done so.

To provide the ability of a defendant to simply point to evidence that suggests a reasonable possibility that reasonable steps were taken to comply with a direction or that compliance with well integrity laws was not practicable in the face of an emergency would result in the regulator being unable to successfully and meaningfully take enforcement action in the case of an offence being committed, and this would undermine the legitimate objective in question.

In the aftermath of an event where one or more workers may have suffered serious injury or may have died, or where significant environmental damage may have occurred, it is appropriate that a titleholder should have to demonstrate, on the balance of probabilities, that the titleholder took all available action to prevent the occurrence, rather than merely to meet the evidential burden relating to the possibility of having done so.

Due to the remote occurrence of the regulated activities, the regulator is not able to, at the relevant time, independently assess and verify what is reasonable or practicable in the event of non-compliance. Accordingly, the defence would almost always succeed without the real ability of the prosecution to contest its veracity. The relevant facts are entirely within the defendant's knowledge and not at all within the regulator's knowledge. This puts the regulator at a significant disadvantage when attempting to establish the chain of causation of an adverse event and to meet a legal burden of proof that a defence cannot be relied upon. This would ultimately lead to suboptimal outcomes for OHS of offshore workers and protection of the marine environment.

The Hon. David Littleproud MP

Minister for Agriculture and Water Resources
Federal Member for Maranoa

Ref: MC18-006072

31 MAY 2018

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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CANBERRA ACT 2600

Dear Senator Polley

The Senate Scrutiny of Bills Committee (Committee) has requested further information about measures in the Primary Industries Levies and Charges Collection Amendment Bill 2018. The enclosure sets out my detailed response to the questions raised by the Committee.

I thank the Committee for their consideration of the Bill.

Yours sincerely

DAVID LITTLEPROUD MP

Enc.

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

RESPONSE TO SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS—SCRUTINY DIGEST 5 OF 2018 (PRIMARY INDUSTRIES LEVIES AND CHARGES COLLECTION AMENDMENT BILL 2018)

Request at 1.100 – Significant matters in delegated legislation

The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the minister's detailed advice as to:

- why it is considered necessary and appropriate to leave to delegated legislation the determination of acts which, when performed, will make a person liable to collect a levy or charge;
- the type of consultation that it is envisaged will be conducted prior to the making of such a determination; and
- whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Why it is considered necessary and appropriate to leave to delegated legislation the determination of acts which, when performed, will make a person liable to collect a levy or charge?

Item 5 of the Primary Industries Levies and Charges Collection Amendment Bill 2018 (the Bill) proposes to insert section 7A into the *Primary Industries Levies and Charges Collection Act 1991* (the Act). This section will enable the Secretary to, by legislative instrument, determine that certain acts in relation to collection products, would make an intermediary liable to collect and report levies and charges. This aligns with other administrative roles that the Secretary performs under the Act to support the efficient collection of levies and levy information, which include:

- entering into collection agreements with states, territories and other organisations
- granting exemptions, refunds and remissions to Australian producers, and
- determining the collection of production or processing details.

I consider this item to be necessary and appropriate to ensure that the levies and charges legislative framework can readily respond to innovation throughout the supply chain.

Since the Act was introduced in 1991, levies and charges have been collected on behalf of Australian producers at the most efficient point in the supply chain. As Australia is a high-cost agricultural producer, participants in rural industries have continued to innovate how their produce are bought and sold to remain competitive in the global market. Understandably, these innovations, new business types and modern ways of buying and selling agricultural produce do not clearly fit within the legislative framework created in 1991.

Australian producers continue to be liable for levy and charge under the Act, however, the intermediaries they now deal with were not contemplated in 1991. Those intermediaries may therefore not be clearly described in the legislation, or aware of the requirement to collect levy and submit levy returns on the Australian producer's behalf. Without the proposed amendments to the Act, Australian producers will face additional red-tape, as they will have to submit their own returns. This will mean that as new business practices continue to emerge, collection and reporting of levies and charges will become less efficient and cost effective for industry, given that the cost of collecting levies on behalf of industry is recovered by the Department of Agriculture and Water Resources (the department). Delegated legislation is necessary to allow the collection mechanisms, which are unique to each industry, to be agile to realise the benefits of increased efficiency and reduced cost recovery charges.

As it is difficult to predict the future buying and selling practices of Australian producers, I consider the ability to respond rapidly will minimise the administrative burden placed on Australian producers and future-proof the regulation of levied industries. These amendments are vital to this efficiency and would continue to support the profitability and competitiveness of Australian producers.

The type of consultation that it is envisaged will be conducted prior to the making of such a determination

For many years, levies and charges have been imposed at the request of primary industries following industry wide consultation and agreement. The Government's role, through the department, is to support industries' implementation of an effective collection system for industry at a minimum cost.

As part of consultation process that is required to achieve this, I consider that it would be appropriate for the department to draw upon existing consultation frameworks, for example the *Levy Principles and Guidelines* (the LPGs). The LPGs were first developed in 1997 to help industry bodies prepare a sound case for the introduction of a levy or charge or a change to an existing levy or charge, to be considered by industry participants.

Consultation with Australian producers and intermediaries is a key part of the levy system and is embedded in the LPGs. When an industry proposes to introduce a levy or charge, it must consult with all existing and potential levy payers to establish industry support of the levy or charge. This includes consultation with affected individuals or organisations classified as 'intermediaries' under the Act that would be required to collect the levy or charge.

As part of the consultation process for the purposes of a section 7A determination, industry will be expected to advise stakeholders on how the proposal is efficient, practical and imposes the smallest administrative burden on the least number of people or organisations. It is envisaged that intermediaries will be engaged to provide input into the proposals, plan for potential changes to their processes and/or systems and raise issues that affect the efficient collection of the levy.

I am confident that individuals and organisations affected by a determination under section 7A will be consulted in a manner that leverages off proven and existing best practice as indicated above. While Australian producers are liable for the levies and charges, it is essential that intermediaries support the collection and reporting mechanisms in consideration of the shared goals along the value chain.

Whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument)

Section 17 of the *Legislation Act 2003* (the Legislation Act) prescribes the consultation obligations of the rule-maker before making legislative instruments, which includes being satisfied that consultation has taken place and that it is appropriate regardless of its form. Paragraph 6(1)(c) of the Legislation Act defines the rule-maker for an instrument made by a person other than the Governor–General as a person currently authorised to make the instrument. For the purposes of the proposed section 7A of the Act, the rule-maker is the Secretary.

I consider that expanding consultation obligations beyond the requirements of section 17 of the Legislation Act and existing practice will reduce the ability of the Secretary to respond effectively to innovations without adding a clear benefit. In addition, to do so would add complexity and would not align with the LPGs that, in my view, provide an established, satisfactory consultation framework for the administration of levies and charges.

The department actively gathers and welcomes industry intelligence to inform its understanding of emerging intermediaries that provide alternative points of levy collection. I am satisfied that the proposed consultation with affected people in line with section 17 of the Legislation Act and a Secretary's determination will result in the most efficient and cost-effective outcome for industry.

In addition, I draw the committee's attention to the fact that legislative instruments made by the Secretary for the purposes of section 7A of the Act are subject to parliamentary scrutiny.

Request at 1.101 – Significant matters in non-statutory guidelines

The committee also requests the minister's advice as to why the bill does not positively require the minister to issue guidelines with respect to the secretary's power to determine additional acts for which a person will be liable to collect a levy or charge, and why it is considered appropriate to state that these guidelines will not be legislative instruments (and therefore not subject to any parliamentary scrutiny).

The proposed subsection 7A(3) of the Act provides that the Minister may, by written instrument, issue guidelines to which the Secretary must have regard under subsection 7A(2) of the Act. Proposed subsection 7A(4) of the Act provides that guidelines made under subsection 7A(3) of the Act are not legislative instruments. While the proposed guidelines are not subject to disallowance, any legislative instruments made by the Secretary under subsection 7A(1) of the Act are subject to parliamentary scrutiny.

This amendment is designed to allow Australian producers to meet their levy obligations while taking advantage of new mechanisms to get their produce to market. Section 7A of the Act would allow the Secretary to make the levy system responsive to new and unforeseen trading mechanisms. As it is difficult to predict future practices of Australian producers, it would be appropriate to support the Secretary in the early stages to use his or her discretion on a case-by-case basis to establish a baseline and develop a sound basis for the guidelines. The Secretary's determination will follow consultation with affected parties and are subject to disallowance, I consider it premature to issue guidelines.

I consider that the proposed guidelines in subsection 7A(3) of the Act should not have legislative character because the material in the guidelines will not determine or alter the content of the law or create or affect a privilege, interest or right. The guidelines would be specific operational guidance material, designed to assist the Secretary to make a legislative instrument that determines which acts are those of intermediaries.

The proposed section 7A of the Act will promote clarity for stakeholders by allowing the Secretary to specify which acts, when performed in relation to a collection product, would make a person liable to report and collect levy on behalf of Australian producers.

As the guidelines proposed by subsection 7A(3) of the Act will not be legislative instruments, those guidelines will not attract the application of the disallowance provisions of the Legislation Act. However any decision made in accordance with those guidelines will be subject to those provisions. The established and robust consultation processes which will precede a determination, and the parliamentary scrutiny which will follow, provide proper oversight of the administrative process proposed.

Further, as proposed in subsection 7A(5) of the Act, the Minister having made any such guidelines relating to the determination of acts of intermediaries, must cause the guidelines issued under subsection 7A(3) of the Act to be published on the department's public website, which is accessible to all interested stakeholders.

The Hon Greg Hunt MP
Minister for Health

Ref No: MC18-010628

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

21 MAY 2018

Dear Senator Polley Helen

I refer to your letter of 10 May 2018 on behalf of the Senate Scrutiny of Bills Committee (the Committee), drawing my attention to the Committee's *Scrutiny Digest No. 5* of 2018 and seeking further information about the *Private Health Insurance Legislation Amendment Bill 2018* (the Bill), particularly in relation to the powers of the Private Health Insurance Ombudsman (PHIO). I offer the following information for the Committee's consideration.

1. **Why it is considered necessary to allow the Private Health Insurance Ombudsman to enter premises and inspect documents without consent or warrant?**

These powers are designed to strengthen the PHIO's powers and functions to assist people who have made a complaint to the PHIO.

As part of resolving a complaint, the PHIO typically attempts to access records relevant to the complaint from the respondent. In almost all cases, respondents voluntarily provide full records to the PHIO in order to investigate complaints. However, there are some instances where upon further investigation, additional records such as phone calls, letters and emails have been overlooked by respondents when providing responses to the PHIO.

The PHIO has an existing power under section 20ZE to issue a notice compelling a respondent to give the PHIO information relevant to investigating a complaint. Notwithstanding this power, the Government considers that the ability of PHIO to resolve consumer complaints would be strengthened by the power to enter places occupied by private health insurers and private health insurance brokers and inspect documents or other records.

By having the power to access the respondent's records directly within their premises, the PHIO's investigating officers are able to verify evidence that the respondent has provided to the PHIO. The Government considers that this power could be used by the PHIO to provide assurance to complainants that they have verified the accuracy of information provided by the respondent. The PHIO can also use this power when conducting an investigation on his or her own initiative.

Respondents have consistently provided access to the PHIO investigating officers to verify the accuracy of information and this is expected to continue. It is expected that the PHIO would provide respondents with at least 48 hours' notice of exercising the power of entry.

This new power is not expected to be used, but addresses the theoretical possibility that a respondent may not voluntarily consent to the PHIO entering their premises.

Given that the PHIO is not a regulator and the Government considers that it is not appropriate to apply the *Regulatory Powers (Standard Provisions) Act 2014* the powers will only be used by the PHIO in an instance when consent is not forthcoming, noting that this has not occurred.

The purpose of entry in these circumstances is not to obtain evidence to support a criminal or civil prosecution; the intention is to confirm information provided by a consumer and to enable the PHIO to make non-binding recommendations, having received comprehensive information from both parties.

These are exceptional circumstances as the private health insurers have a disproportionate amount of power in the relationship with consumers. These measures will potentially increase consumer confidence in the actions of the insurer.

It is important to note that as part of the annual reporting arrangements, the PHIO is currently required to provide the Attorney-General with a report to table in Parliament. This report is prepared under section 46 of the *Public Governance, Performance and Accountability Act 2013* and section 63 of the *Public Service Act 1999*. The content of these reports provides Parliament with visibility of the use of the PHIO's inspection powers.

I propose to provide further explanation of these powers in an Addendum to the Explanatory Memorandum.

2. Justification for the reversal of the evidential burden of proof in proposed section 20ZIA that explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

The *Guide to Framing Commonwealth Offences* acknowledges that it is appropriate to reverse the onus of proof and place a burden on the defendant in certain circumstances. This includes where a matter is peculiarly within the knowledge of the defendant and where it would be significantly more difficult and costly for the prosecution to disprove the matter than for the defendant to establish the matter.

The offence provision provided by subsection 20ZIA(4) is a common provision in relation to identity cards. Subsection 20ZIA(4) provides that a person commits an offence of strict liability if the person ceases to be a member of staff mentioned in section 31 or ceases to be a person to whom the PHIO has delegated its powers under section 34 in relation to section 20SA or 20TA, and the person does not return their identity card to the PHIO within 14 days of so ceasing. Subsection (5) provides that subsection (4) does not apply if the identity card was lost or destroyed.

Under proposed section 20ZIA, it is up to the defendant in a prosecution to provide evidence that the identify card was lost or destroyed (and that the exception under subsection (5) applies), as she or he will be the only person with knowledge of those circumstances. It is unreasonable for the prosecution to prove that the card was not lost or destroyed.

The prosecution will still be required to prove each element of the offence beyond a reasonable doubt before a defence can be raised by the defendant. Further, if the defendant discharges an evidential burden, the prosecution will also be required to disprove these matters beyond reasonable doubt, consistent with section 13.1 of the Criminal Code.

3. **Why it is considered necessary to allow for the delegation of the PHIO's functions or powers, including powers of entry and inspection, to any person, including persons outside the APS?**
   and
4. **The appropriateness of amending the bill to require that the PHIO be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated.**

I note the Committee's concern in relation to the delegation of administrative powers to a relatively large class of persons. Currently, under sub-section 34(2C), the Commonwealth Ombudsman can delegate all powers or functions under the *Ombudsman Act 1976*, except those contained in section 20R and 20V, to any member of staff.

With respect to specific circumstances in which it is envisaged it may be necessary to delegate powers or functions to persons outside the Australian Public Service, it is expected that in practice the Ombudsman would only authorise people with appropriate attributes, qualifications, qualities and relevant experience. Some complaints that are brought to the PHIO can be complex in nature and may require a subject matter expert to assist with investigations.

As the inspection and audit function is new, it is not entirely clear what the necessary staffing level will be. The proposed amendment will enable the PHIO to ensure the function is staffed at the appropriate level, and provides flexibility to reduce staffing levels if there is limited need to use the inspections power. This is prudent business practice and supports the effective and efficient use of agency resources to meet operational requirements.

Prior to the commencement of the new functions, the PHIO will have in place procedures that will ensure that only those people with appropriate qualifications and experience, and relevant training, are delegated key functions associated with the PHIO.

The Committee has asked whether Government would amend the Bill to require that the PHIO be satisfied that persons performing delegated functions and exercising powers have the expertise appropriate to the function or power delegated. As this is not an entirely new power for the Ombudsman, I am satisfied that, in light of the above safeguards, the power will be used within the parameters of the Bill.

Thank you for considering the Bill and for raising these matters. I appreciate the opportunity to provide additional information to the Committee.

29 MAY 2018

ASSISTANT MINISTER TO THE TREASURER

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

Dear Senator Polley

A representative of the Senate Scrutiny of Bills Committee wrote to my office on 10 May 2018 requesting a response from me in relation to issues raised in *Digest No.5 of 2018* regarding Schedule 6 to the Treasury Laws Amendment (Australian Consumer Law Review) Bill 2018 (the Bill).

I would like to thank you for the opportunity to provide further information in relation to Schedule 6.

As set out in the Explanatory Memorandum to the Bill, the *Competition and Consumer Act 2010* (CCA) contains a power to compel information about product safety from *suppliers*. Schedule 6 seeks to extend this power so that this information can be compelled from *third parties*.

This recognises that the Australian Competition and Consumer Commission (ACCC) requires effective powers to obtain timely and complete information about product safety, which could be used for example to decide whether to initiate recall action, to ascertain the location of defective goods or to accurately inform consumers about safety risks. Schedule 6 seeks to allow the ACCC to obtain information of the same type as the power currently allows, but from third party sources.

The limitation of the current power (to suppliers) does not accord with the modernisation of manufacturing and distribution arrangements. The raw material and data relating to the safety of consumer goods or product related services is often held by test laboratories or safety consultants rather than the suppliers themselves.

Further, the current power does not allow the ACCC to obtain information from consumers injured by a consumer good, and who may be subject to a confidentiality agreement as part of a settlement agreement (which prevents them voluntarily providing the information). The result is that unsafe products remain on the market for longer, putting the Australian public at undue risk of death, serious injury or illness.

As the Committee has noted, the existing provision (section 133D) abrogates the common law privilege against self-incrimination, but a limited use immunity is provided for individuals at subsection 133E(2). No derivative use immunity applies. The provision as amended by Schedule 6 would retain these characteristics.

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The Committee has sought a more detailed justification for the expansion of the classes of persons who may be affected by the abrogation of the privilege against self-incrimination, and in particular the appropriateness of not providing a derivative use immunity.

Privilege against self-incrimination

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) recognises that it may be appropriate to override the privilege against self-incrimination where its use could seriously undermine the effectiveness of a regulatory scheme and prevent the collection of evidence; however, the public benefit to be derived from overriding the privilege must outweigh the loss to the individual.

Schedule 6 recognises the importance of obtaining timely and complete information about product safety risks, including in circumstances where the recipient of a disclosure notice might otherwise claim the privilege against self-incrimination. For example, where a test laboratory holds information disclosing problems with a product it tested, this could present a safety risk to a potentially very large number of consumers, whether or not the laboratory itself contravened the law (e.g. by issuing fraudulent compliance certificates).

I acknowledge that Schedule 6 would allow information obtained from the recipient of a disclosure notice to be used to investigate and take action against *another person*. This is an appropriate outcome because the question of whether the notice recipient could self-incriminate is irrelevant to the rights of that other person. As already indicated, notice recipients who are individuals are protected by the limited use immunity at subsection 133E(2).

Derivative use immunity

Further, consistent with other information-gathering powers in the CCA, it is not appropriate for the Bill to include a derivative use immunity. As noted in the Guide, more circumscribed immunities have been accepted for legislation governing the ACCC (e.g. section 155), and other agencies who regulate the activities of bodies corporate but exercise information-gathering powers against natural persons. These limited immunities have been accepted due to the particular difficulties of corporate regulation.

I acknowledge the information obtained from a notice recipient protected by the limited use immunity at subsection 133E(2) could be used to obtain further information which could in turn be used against the original notice recipient. This is an appropriate outcome because it represents an acceptable balance between the rights of the notice recipient and the public interest in pursuing misconduct related to product safety.

Importantly, derivative use immunity does not presently attach to comparable provisions in the CCA. There is no compelling reason for section 133D, as proposed to be amended by the Bill, to depart from the treatment of the CCA's information-gathering powers in this respect.

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

Yours sincerely

The Hon Michael Sukkar MP

THE HON MELISSA PRICE MP
ASSISTANT MINISTER FOR THE ENVIRONMENT

MC18-006140

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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31 MAY 2018

Dear Senator ~~Polley~~ Helen,

Thank you for your letter of 10 May 2018 regarding the Senate Scrutiny of Bills Committee consideration of the Underwater Cultural Heritage Bill 2018 (the Bill) in its Report 4 of 2018.

I am pleased to have the opportunity to address the issues raised by the Committee, and have attached the response to the report as requested in your letter.

Thank you for raising this matter.

Yours sincerely

MELISSA PRICE

CC: The Hon Josh Frydenberg MP

Enc

UNDERWATER CULTURAL HERITAGE BILL 2018 (the Bill)

Reply to issues raised by the
Senate Standing Committee for the Scrutiny of Bills

Significant matters in delegated legislation - broad discretionary power

Paragraph 1.170: *The committee therefore requests the minister's advice as to:*

(a) *why at least high-level criteria relating to the assessment of heritage significance and the granting of permits relating to protected underwater cultural heritage cannot be included in the primary legislation; and*

It is appropriate for the criteria relating to the assessment of heritage significance to be included in the rules because of the subjective nature of heritage values assessment and its connection with evolving cultural attitudes in the community. This will provide flexibility for amendments to the criteria to be made if required.

The degree to which the community places value on particular heritage fluctuates over time. These changes in community attitudes can necessitate changes to the detailed heritage assessment guidance that in turn may also impact the effectiveness of the criteria, which may require modification.

Similar to the heritage criteria, the purpose of providing rules to guide the granting or varying permits is to allow more detailed guidance to be provided that deals effectively with the varying circumstances of permit applications. Like the assessment of heritage values, there is a degree of subjectivity in the decisions e.g. what constitutes an adverse impact in a particular case.

Including the heritage assessment criteria and permit guidance in the rules provide flexibility to revise them to reflect policy needs. For example, it may be appropriate to amend the criteria or guidance may also need to be revised from time to time to align with Commonwealth, State or Territory planning and heritage policies or changing environmental conditions. This is especially important where underwater cultural heritage regulated by the Bill is located in areas that are solely within the jurisdiction of State or Territory planning processes.

Additionally, the rules which will contain the heritage assessment criteria and specifying matters relating to the granting and variation of permits will be subject to public and Parliamentary scrutiny, and would be disallowable under the *Legislation Act 2003* (the **Legislation Act**). As such, the rules will be subject to public and Parliamentary scrutiny, including scrutiny by the Senate Standing Committee on Regulations and Ordinances. Consequently, there will be sufficient political and practical oversight of the heritage criteria and matters relating to permits.

(b) *why there is no positive requirement that the rules must prescribe criteria relating to assessing heritage significance and specify matters relating to the granting or variation of permits.*

Although the Bill does not contain a positive requirement, it is intended that the Rules will prescribe criteria relating to assessing heritage significance and specifying matters relating to the granting or variation of permits. However, the Committee's concerns are acknowledged and consideration will be given to the inclusion of a positive requirement in the Bill's amendments.

Strict liability offences

Paragraph 1.176: *The committee requests a detailed justification from the minister for each proposed strict liability offence in clauses 27 to 39 of the bill, with reference to the principles set out in the Guide to Framing Commonwealth Offences.*

The inclusion of strict liability for the offences in the Bill (detailed in the table below) is consistent with the following principles outlined in the Guide to Framing Commonwealth Offences.

- The offences are not punishable by imprisonment, and the offences are punishable by a fine of up to 60 penalty units for an individual (300 for a body corporate). This means that persons who commit a strict liability offence under the Bill will not be subject to unduly harsh or unfair penalties.
- The punishment of offences not involving fault will reduce the cost of pursuing offences which will enhance the effectiveness of the enforcement regime and deter certain conduct.
- There are legitimate grounds for penalising non-compliance when the person should be, or is, aware of their obligations. In practice, the Bill regulates a specific community, which includes scuba divers; private persons in legal possession of shipwreck relics; dealers in antiques or second hand goods; numismatists and companies involved with commercial marine activities. Due to their exposure to the regulation of protected underwater cultural heritage, these individuals and companies could reasonably identify whether their conduct would constitute an offence.
- The Bill allows for infringement notices to be issued for strict liability offences to help ensure that individuals are not punished disproportionately to the severity of an offence, and provides an alternative where a criminal conviction may have significant impact on their career or business.

The defence of mistake of fact is available for strict liability offences (sections 6.1 and 9.2 of the Criminal Code) and the existence of strict liability does not make any other defence unavailable (subsection 6.1(3) of the Criminal Code).

UCH Bill Clause	Justification for applying strict liability
Proposed subsection 27(6) - Failure to notify Minister of transfer of permit	• A permit places the person on notice to guard against the possibility of any contravention. Permits will contain information on statutory requirements and impose conditions that must be met. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section 28(3) - Breach of permit condition	• A permit places the person on notice to guard against the possibility of any contravention. Permits will contain information on statutory requirements and impose conditions that must be met. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section 29(5) - Prohibited conduct within protected zone without a permit	• Strict control over incursions into protected zones by vessels and persons is necessary to ensure the integrity of the regulatory regime and protection of underwater cultural heritage. Protected zones may prohibit entry without a permit and this fact is clearly communicated on hydrographic charts used for marine navigation in Australia. There are

	also public safety concerns as some protected zones contain unexploded ordinance. • The existence of protected zones has been made aware to both the general public and specific stakeholders through the application of the existing *Historic Shipwrecks Act 1976*, so there is a reasonable expectation that persons operating in the marine environment should have knowledge of these regulations. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section 30(5) - Conduct with an adverse impact on protected UCH without a permit	• The control of adverse impacts by vessels and persons is necessary to ensure the integrity of the regulatory regime and protection of underwater cultural heritage. The type and severity of impacts can vary greatly and could involve low level but cumulative impacts that may be ignored by the public. Therefore, the ability to enforce the requirement in a simple manner will enhance regulatory effectiveness. • The principle of enjoying but not damaging, destroying or interfering with underwater cultural heritage has been widely communicated to both the general public and specific stakeholders through the application of the existing *Historic Shipwrecks Act 1976*, so there is a reasonable expectation that persons interacting with underwater cultural heritage should have knowledge of its regulation. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section 31(5) - Possession of protected UCH without a permit	• The offence of illegal possession of shipwrecks has been widely communicated to both the general public and specific stakeholders through the application of the existing *Historic Shipwrecks Act 1976*, so there is a reasonable expectation that persons interacting with underwater cultural heritage should have knowledge of this regulation. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section 32(4) - Supply and offers to supply protected UCH without a permit	• Regulatory control over the movement and location of protected underwater cultural heritage is necessary to ensure the integrity of the regulatory regime and protection of underwater cultural heritage. The severity of this statutory requirement is low and may be ignored by the public. Therefore, the ability to enforce the requirement in a simple manner will enhance regulatory effectiveness. • This regulation has been widely communicated to both the general public and specific stakeholders through the application of the existing *Historic Shipwrecks Act 1976*, so there is a reasonable expectation that persons interacting with underwater cultural heritage should have knowledge of this regulation. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section 33(4) - Advertising to sell UCH without including permit number	• A permit places a person on notice to guard against the possibility of any contravention. • The punishment of the offences not involving fault is likely to significantly enhance the effectiveness of the enforcement regime in deterring this conduct. The severity of this statutory requirement is low and may tend to be ignored by the public. Therefore, the ability to enforce the requirement in a simple manner will enhance regulatory effectiveness.

	• The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section Subclause 34(4) - Importing protected UCH without a permit	• It is a well-established practice that the transfer of cultural heritage objects between countries is subject to regulations, conventions, restrictions and importation requirements. It is therefore reasonable to expect that persons wishing to export and import cultural objects should have or seek knowledge about its regulation and be aware of the penalties for non-compliance. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section 35(4) - Exporting UCH without a permit	• It is a well-established practice that the transfer of cultural heritage objects between countries is subject to regulations, conventions, restrictions and importation requirements. It is therefore reasonable to expect that persons wishing to export and import cultural objects should have or seek knowledge about its regulation and be aware of the penalties for non-compliance. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section 36(4) - Importing UCH of a foreign country without a permit	• It is a well-established practice that the transfer of cultural heritage objects between countries is subject to regulations, conventions, restrictions and importation requirements. It is therefore reasonable to expect that persons wishing to export and import cultural objects should have or seek knowledge about its regulation and be aware of the penalties for non-compliance. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section Subclause 37(5) - Failing to produce a permit	• A permit places a person on notice to guard against the possibility of any contravention. Permits will contain information on statutory requirements and impose conditions that must be met. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section Subclause 38(6) - Failure to respond to a notice from Minister	• The failure of a person to respond to a notice is a pre-condition of the offence. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.
Proposed section 39(7) - Failure to comply with Ministerial direction	• The failure of a person to comply with directions in the notice is a pre-condition of the offence. • The penalty does not include imprisonment and the fine does not exceed 60 penalty units for an individual.

Reversal of evidential burden of proof

Paragraph 1.183: *As the explanatory materials do not directly address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in these instances. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.*

As the Committee has identified, some provisions of the Bill contain offence-specific defences. Offence-specific defences reverse the evidential burden by requiring a defendant, rather than the prosecution, to raise evidence about a matter.

The Guide identifies that it may be appropriate for legislation to create offence-specific defences where the facts in question are peculiarly within the knowledge of the defendant, and where it would be difficult, burdensome or costly for the prosecution to raise evidence about a matter. The creation of offence-specific defences in a number of provisions of the Bill is appropriate because the defences concern matters which are peculiarly within the knowledge of the defendant, such as whether the defendant engaged in prohibited conduct in a protected zone for the purposes of saving human life, preventing serious environmental harm or securing the safety of an endangered vessel. Additionally, the matters relevant to the offence-specific defences in the Bill are matters about which should be able to easily and inexpensively present evidence.

UCH Bill Clause	Justification for reversal of evidential burden of proof
Proposed section 29(2) - Prohibited conduct within protected zone	• Defendants have peculiar knowledge about the details of their conduct, and whether the conduct was engaged in in accordance with a permit. As the offence concerns conduct that takes place in the marine environment, this could be a difficult matter for the prosecution to raise evidence about. • In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence, as they would have peculiar knowledge of their reasons for undertaking prohibited conduct in a protected zone, and of the specific conduct they engaged in while in that protected zone.
Proposed section 29(3) - Prohibited conduct within protected zone	• Defendants have peculiar knowledge about the details of their conduct, and whether they engaged in their conduct for the purposes of saving human life, dealing with an emergency involving a serious threat to the environment, or securing the safety of a vessel endangered by weather or navigational. These would be difficult matters for the prosecution to raise evidence about, given that the conduct would have occurred in the marine environment, • In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence, as they would have peculiar knowledge of their reasons for undertaking prohibited conduct in a protected zone, and of the specific conduct they engaged in while in that protected zone.
Proposed section 30(3) - Conduct with an adverse impact on protected UCH	• Defendants have peculiar knowledge of the details of their conduct in the marine environment, and whether that conduct was engaged in in accordance with the terms of a permit. This may be a difficult matter for the prosecution to raise evidence about, especially in cases where the conduct has occurred in relation to protected underwater cultural heritage that is outside Australian waters. • In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.
Proposed section 31(2) - Possession of protected UCH without a permit	• It would be difficult for the prosecution to raise evidence that a person having possession of protected underwater cultural heritage without a permit, especially in cases where events have occurred, or the person resides, outside Australian jurisdiction. • In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.
Proposed section 31(3) - Possession of protected UCH unless authorised by a permit	• It would be difficult for the prosecution to raise evidence that a person is not or is not part of, is an authority of or is acting on behalf of the Commonwealth, State or Territory Government.

	• In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.
Proposed section 32(2) - Supply and offers to supply protected UCH without a permit	• It would be difficult for the prosecution to raise evidence that a person having supplied protected underwater cultural heritage a permit. • In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.
Proposed section 35(2) - Exporting UCH without a permit	• It would be difficult for the prosecution to raise evidence that a person exporting protected underwater cultural heritage without a permit, especially in cases where the person resides, outside Australian jurisdiction. • In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.
Proposed section 36(2) - Importing UCH of a foreign country without a permit	• It would be difficult for the prosecution to raise evidence that a person imported protected underwater cultural heritage without a permit, especially in cases where events have occurred, or the person resides, outside Australian jurisdiction. • In this case, the defendant is best placed to raise evidence about the matters concerned by the offence-specific defence.

Broad scope of offence provision

Paragraph 1.186: *The committee requests the minister's advice as to how a person who finds an article in Australian waters will know whether that article is one of 'underwater cultural heritage' that 'appears to be of an archaeological character'. Further the committee requests the minister's advice as to how the general public will be notified of their obligations under clause 40 to notify the minister within 21 days if they find such an article.*

The requirement to report the discovery of shipwrecks or other under types of underwater cultural heritage is an essential component of the regulatory regime to be established by the Bill. The obligation to report articles of underwater cultural heritage helps persons recognise that in-situ cultural heritage in the marine environment has the potential to be protected underwater cultural heritage. Without the obligation to report, discoveries of underwater cultural heritage may not be reported and subject to adverse impact.

In practice, a limited community of people with technical expertise in diving or marine survey are likely to discover and report discovery of in-situ cultural material in the marine environment. Generally, these individuals and companies have sufficient training and education to identify cultural heritage. In shallower waters, people who find underwater cultural heritage, such as a wrecked vessel or aircraft, would be able to recognise that it is of an archaeological character based on it the level of deterioration or the extent that it has become part of the marine environment, for instance, the amount of coral cover and deposition of sand. In other cases, the underwater cultural heritage may be detected as anomalies by electronic remote sensing devices. A person in this case may not be aware of the specific nature of the material but would have a clear understanding that it is cultural in nature and should be reported. This is the case with commercial marine surveying and study where the report of the discovery is provided through the supply of remote sensing data that can be subsequently interpreted.

The public will be provided with detailed guidelines to help identify discoveries that may require notification under the Bill. This guidance will be prepared and published following enactment of the Bill. Detailed public information will also continue to be provided via the Australian Government Department of the Environment and Energy website.

Broad delegation of administrative power

Paragraph 1.188: *The committee therefore requests the minister's advice as to why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised person and whether it would be appropriate to amend the bill to require that any person assisting an authorised person have the expertise appropriate to the function or power being carried out.*

Under the monitoring and investigative powers provided for under clauses 41 and 42 of the Bill, authorised persons may be assisted by other persons in exercising powers or performing functions under Parts 2 and 3 of the *Regulatory Powers Act 2014* (**Regulatory Powers Act**). Sections 23 and 53 of the Regulatory Powers Act set out he powers, functions and duties of a person assisting an authorised person.

It may be necessary when undertaking certain monitoring or investigations to have other persons assisting an authorised person or persons, because:

- the other person may possess particular expertise, knowledge or skills which may be required to enable the authorised person to perform their functions or duties under the Bill;
- the assistance of another person is needed to carry out functions and duties, and there may be no other authorised person available to assist;
- the area to be investigated or monitored is large, or things or articles to be moved are heavy or difficult to move safely.

It would not be appropriate to amend the Bill to specify the expertise of persons assisting an authorised officer because of the diverse nature of expertise that may be required. In the context of underwater cultural heritage investigations, persons assisting the authorised person might include those with specific typological knowledge of underwater cultural heritage, or in some actual cases, bomb disposal experts dealing with potentially unexploded ordinance collected by the public etc. As such, it would not be possible to specify expertise or qualifications that would cover every investigative scenario.

While the Committee's point that it is important that authorised persons have appropriate knowledge and expertise is acknowledged, it is considered that there are already adequate safeguards to ensure that persons assisting authorised persons do so in an appropriate manner and that they are appropriately qualified.

Sections 23 and 53 of the Regulatory Powers Act provide for matters in relation to other persons assisting authorised persons, and will apply to the Act by virtue of proposed sections 41 and 42 of the Bill. In particular, sections 23 and 53 of the Regulatory Powers Act state that an authorised person may only be assisted by other persons if that assistance is necessary and reasonable. When determining whether it is necessary and reasonable for an authorised officer to be assisted by other persons, it is intended that regard will be had to whether the other person has the expertise appropriate to the function or power being carried out.

Additionally, under sections 23 and 53 of the Regulatory Powers Act, persons assisting an authorised person must do so in accordance with a direction given by the authorised person. Consequently, persons assisting an authorised person to perform monitoring or investigation functions under the Bill will always be subject to the direction and supervision of authorised persons. Authorised persons for must be appointed as inspectors by the Secretary under proposed section 60 of the Bill.

Proposed section 60(3) provides that the Secretary may only appoint a person as an inspector if the Secretary is satisfied that the person has the knowledge or experience necessary to carry out his or her functions under the Bill. This means that inspectors will always have knowledge and experience necessary to provide directions to persons assisting to ensure that persons assisting exercise their powers and perform their duties in an appropriate manner. This will help to ensure that persons assisting correctly follow procedures and handle evidence appropriately.

Additionally, if needed, the Secretary is able to direct inspectors under proposed section 60(3) of the Bill to only avail themselves of the assistance of persons assisting where the inspector is satisfied that the person assisting is appropriately qualified or has the appropriate knowledge or expertise. Were the Secretary to give a direction of this nature in writing, it would be a legislative instrument (section 60(4)).

Forfeiture

Paragraph 1.192: *As the explanatory materials do not address this issue, the committee requests the minister's advice as to why the proposed forfeiture provision does not incorporate safeguards consistent with the Proceeds of Crime Act 2002 to protect the interests of innocent third parties. The committee's consideration of the appropriateness of a new forfeiture provision is assisted if it explicitly addresses relevant principles as set out in the Guide to Framing Commonwealth Offences.*

Proposed section 47 of the Bill only allows for forfeiture to be determined by the court upon conviction for an offence or proved contravention of a civil penalty. No third party has the ability to possess protected underwater cultural heritage without a permit, which means a person who has purchased underwater cultural heritage with no permit or who received a false permit cannot be considered an 'innocent' third party under the Bill.

Any application for court ordered forfeiture will focus on the protecting Australia's unique underwater cultural heritage. The Bill safeguards the interests of third parties by allowing a court to determine forfeiture. For this reason no additional public safeguards are considered necessary.

Incorporation of external material into the law

Paragraph 1.197: *Noting the above comments, the committee requests the minister's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subclause 61(4), 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, rather than when the rules are first made.*

The protection of underwater cultural heritage is a matter of international concern and there may be international guidelines and conventions that will need to be incorporated into the rules in the future. An examples of these guidelines and conventions include the Annex rules to the UNESCO 2001 *Convention on the Protection of the Underwater Cultural Heritage* For this reason, the Bill must demonstrate contrary intention to section 14(2) of the Legislation Act to provide sufficient flexibility to incorporate external material into the law if necessary.

It is practically necessary to apply incorporated material as in force or existing from time to time. The types of documents that may be incorporated in the rules would be authoritative conventions and international guidelines. Any changes to these documents would need to be incorporated from time to time to ensure regulated persons clearly understand their obligations under the rules. It is intended that any external material incorporated into the rules will be made freely available.

As the rules incorporating external documents will be a disallowable instrument. Additionally, under section 41 of the Legislation Act, a House of the Parliament may, at any time while the rules are subject to disallowance, require any document incorporated by reference in the rules to be made available for inspection by that House. Accordingly, there will be an appropriate level of Parliamentary oversight and scrutiny of any documents incorporated in the rules in future.