Senator the Hon Michaelia Cash
Minister for Small and Family Business, Skills and Vocational Education

Reference: MC18-005232

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

Dear Senator Polley

I am writing in response to the email of 18 October 2018 from Ms Anita Coles, Committee Secretary, on behalf of the Standing Committee for the Scrutiny of Bills, in relation to the *Higher Education Support Amendment (VET FEE-HELP Student Protection) Bill 2018* (the Bill).

The committee has requested advice on why it is necessary and appropriate to provide the detailed criteria which defines inappropriate conduct in the delegated legislation rather than placing it within the primary legislation.

The Bill provides the Secretary of the Department of Education and Training with the power to re-credit a student's VET FEE-HELP balance, where the student incurred a VET FEE-HELP debt through the inappropriate conduct of a VET provider, or the VET provider's agent. The nature of the inappropriate conduct that the Government is attempting to capture through this provision has partly been identified from the experiences of students who have contacted the department and the VET Student Loans Ombudsman (VSLO). It is expected that as more students come forward there will be additional circumstances identified that could be considered as 'inappropriate conduct' under this measure.

The diversity of students affected under VET FEE-HELP is outlined in the 2016 Australian National Audit report on the '*Administration of VET FEE-HELP*'. It noted that during the period the VET FEE-HELP scheme operated from 2009 until 31 December 2016, large numbers of students located all across Australia accessed the scheme. Students that inappropriately acquired VET FEE-HELP debts were not limited to any particular group of people, but included people from a wide range of ages, education levels, socio-economic, cultural, ethnic, and disability groups. All of which suggests that the department may not yet possess all pertinent information as to the full breadth and extent of the type of inappropriate behaviour of providers that has affected students.

To accommodate possible changes to the criteria as new evidence of poor provider conduct emerges, the Government believes it is necessary to specify the criteria in the *Higher Education Support (VET) Guideline 2015* (VET Guideline) to allow changes in a timely fashion so that students are not further disadvantaged.

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I note that the VET Guidelines currently also contain the criteria for remitting student VET FEE-HELP debt under the existing unacceptable conduct provisions in the legislation. The new inappropriate conduct criteria are intended to encapsulate, by reference, and go beyond the scope of the existing unacceptable conduct criteria for re-crediting a student's FEE-HELP balance. The VET Guideline also contains a range of related concepts that the new provisions are intended to rely upon.

For these reasons, as well as ease of access to the provisions by the public, I submit that the criteria for inappropriate conduct remain, as provided by the Bill, in the VET Guideline.

Yours sincerely

Senator the Hon Michaelia Cash

31 / 10 / 2018

29 OCT 2018

The Hon Stuart Robert MP
Assistant Treasurer

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

Dear Senator

Thank you for your Committee's correspondence of 18 October 2018 to the Treasurer's office. The Treasurer has asked me to respond to you. The Committee requested that a response to its comments, contained in the Committee's *Scrutiny Digest No. 12 of 2018,* on:

- the Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018; and
- the Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018.

I appreciate the Committee's consideration of these Bills. My response in relation to the Bills is provided at Attachment A.

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

Yours sincerely

Stuart Robert

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ATTACHMENT A

Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018

The decisions the Treasurer may make to provide the economic infrastructure facility exemption are intended to be excluded from **both** merits review and judicial review under the *Administrative Decision (Judicial Review) Act 1977* (ADJR Act). However, judicial review will be available under section 39B of the *Judiciary Act 1903*.

The Committee seeks advice in relation to providing justification for excluding judicial review under the ADJR Act in relation to decisions the Treasurer may make to provide the economic infrastructure facility exemption.

The power to make a decision to approve a facility specified in an application is contained in subsection 12-450(3) in Schedule 1 of the *Taxation Administration Act 1953*. In making the decision to approve the application, the Treasurer must be satisfied that the following criteria are met:

- the asset is an economic infrastructure facility;
- the estimated capital expenditure on the facility is $500 million or more;
- the facility has yet to be constructed, or the facility is an existing facility that will be substantially improved;
- the facility will significantly enhance the long-term productive capacity of the economy; and
- approving the facility is in the national interest.

As outlined in the Explanatory Memorandum to the Bill, in determining whether a facility will significantly enhance the long-term productive capacity of the economy, the Treasurer will generally consider whether:

- the economic benefits resulting from the facility outweighs, or will outweigh, the economic costs; and
- in the opinion of Infrastructure Australia, the facility is nationally significant infrastructure within the meaning of the *Infrastructure Australia Act 2008*.

The decisions are not suitable for judicial review under the ADJR Act because key factors that must be taken into account when making a decision include whether:

- the facility will significantly enhance the long-term productive capacity of the economy; and
- approving the facility is in the national interest.

Consideration of these factors involves complex questions of government policy that can have broad ranging implications for persons other than those immediately affected by the For example, when making a decision, the Treasurer must take into account a broad range of factors, including the national interest, the long-term productive capacity of the economy, Australian Government policies (including tax), impacts on the economy and the community.

In addition, the decisions relate to the management of the national economy, which do not directly affect the interests of individuals. In my view, it is appropriate that decisions with high political content in relation to the management of the national economy should not be subjected to merits review or judicial review under the *Administrative Decision (Judicial Review) Act 1977* (ADJR Act).

I note that in the *Federal Judicial Review in Australia* (the Review) by the Administrative Review Council (the Council), the Council considered that excluding decisions by the Finance Minister to issue money out of the Consolidated Revenue Fund from the ADJR Act was justified. This was on the basis that the decisions relate to the management of the national economy, do not directly affect the interests of individuals, and are likely to be most appropriately resolved in the High Court.

It is therefore not appropriate for decisions that have such high political content in relation to the management of the economy to be subject to merits review or judicial review under the ADJR Act. These decisions would likely be more appropriately resolved by the High Court. This is consistent with the principle stated in the Review.

Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018

The Committee seeks advice in relation to:

- the retrospectivity of the Government's reforms to the Research and Development Tax Incentive; and
- the appropriateness of Innovation and Science Australia (ISA) delegating its functions to public servants that are not members of the Senior Executive Service and whether amendments are required to ensure delegations are appropriate.

Retrospectivity of the Research and Development Tax Incentive reforms

The Government's reforms to the Research and Development Tax Incentive will better target the program, and improve its effectiveness, integrity and fiscal affordability.

The reforms were announced on 8 May 2018 as part of the 2018-19 Budget in response to the 2016 Review of the R&D Tax Incentive. The reforms generally apply to income years commencing on or after 1 July 2018. Affected taxpayers were aware of the reforms and the potential impact the reforms would have on the scope of the program from the date of the Budget announcement. An Exposure Draft of the legislation implementing the reforms was also released for public consultation prior to the 1 July 2018 application date.

While the reforms may be important considerations for some taxpayers from 1 July 2018, taxpayers will only be expected to register for the program and lodge income tax returns under the reforms following the end of the income year, from 1 July 2019.

The reforms also amend the General Anti-Avoidance Rule contained in Part IVA of the *Income Tax Assessment Act 1936* to ensure the Commissioner can deny inappropriate tax benefits taxpayers may seek to obtain from the program by entering into artificial or contrived arrangements. These integrity amendments apply to tax benefits derived from 1 July 2018, including where the tax avoidance schemes were entered into prior to that date. This is appropriate because tax avoidance schemes operate contrary to the intention of the current law.

ISA delegations

Schedule 3 to the Bill allows the Board of ISA and its committees to delegate their functions to members of the Australian Public Service assisting the Board. This expands the existing delegation power that authorises the Board to delegate to Senior Executive Service employees only.

I note the Committee considers it may be appropriate to require ISA to be satisfied of a person's expertise before delegating a function.

ISA is authorised to approve delegations under the existing legislation and satisfies itself that persons performing delegated functions have the expertise appropriate to the function delegated as part of its approval processes. It is proposed that functions delegated under the amended powers include high-volume, low-risk functions such as granting extensions of time to submit applications and requesting information on an application.

I do not consider that an amendment is necessary or would contribute to the effective administration of the program in light of ISA's existing and proposed processes that support delegations.