MINISTER FOR INDIGENOUS AFFAIRS

Reference: MC19-011212

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

Dear Senator

Thank you for your letter of 15 February 2019 on behalf of the Senate Standing Committee for the Scrutiny of Bills (the Committee) about the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018 (the Bill), drawing my attention to the Committee's *Scrutiny of Bills Alert Digest No. 1, 2019*.

I welcome the opportunity to respond to the Committee's comments, and provide the following advice under each.

Committee comment

1.7 The committee requests the minister's advice as to:

- *why it is considered appropriate to leave to delegated legislation the revenue thresholds that would determine whether an Aboriginal and Torres Strait Islander corporation is of a particular size; and*
- *the nature of any consultation that it is envisaged would be undertaken prior to making regulations of that nature.*

Response

Appropriateness of delegated legislation

I agree with the Committee that revenue thresholds are a significant element in the regulatory scheme of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). I also acknowledge that the Committee does not generally consider operational flexibility to be sufficient justification for leaving significant elements of a regulatory scheme to delegated legislation. However, in my view there is a sound justification for prescribing revenue thresholds in the regulations for the purpose of proposed new section 37-10.

As noted by the Committee, size classifications determine various regulatory requirements, including reporting obligations, for Aboriginal and Torres Strait Islander corporations (ATSI corporations) under the CATSI Act and regulations. It is essential that these regulatory requirements remain proportionate and appropriate to the different classes of corporations.

Inevitably, there will be changes in the economic and regulatory environment that will warrant changes to the classification thresholds. Doing so in the regulations allows the regulatory framework to be responsive to change, while retaining an appropriate level of Parliamentary oversight.

It is important to understand that the regulatory scheme under the CATSI Act does not operate in isolation from other regulatory schemes in the corporate sector. Like the CATSI Act, both the *Corporations Act 2001* (Corporations Act) and the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) provide for size thresholds to be prescribed in regulations. Both these Acts are closely connected to the CATSI Act, and potential changes to the thresholds under either Act are variables that may influence size thresholds under the CATSI Act.

Of particular note is that 30 per cent of ATSI corporations are registered, and subject to reporting obligations, under the ACNC Act. Significantly, the ACNC Act has its own size classifications, which are determined by revenue thresholds that can be altered in the regulations under that Act. Currently, these do not align with the CATSI Act and regulations. Consequently, ATSI corporations may be required to prepare and lodge different reports under the CATSI Act on the one hand, and the ACNC Act on the other.

One of the reasons for the proposed reforms is to align classifications and reporting so that ATSI corporations can lodge the same reports under the CATSI Act and ACNC Act. Section 205-25 of ACNC Act also provides for regulations to prescribe thresholds for size classification for organisations registered under that Act. In this context, it is highly desirable and appropriate to allow revenue thresholds to be changed in order to adapt to changes in the broader regulatory environment.

There is also a close alignment between the CATSI Act and the Corporations Act. First, the CATSI Act is largely modelled on the Corporations Act and, in many instances, applies the Corporations Act directly. Secondly, many ATSI corporations hold subsidiary companies registered under the Corporations Act. Section 45B of the Corporations Act provides for regulations to prescribe thresholds for size classifications of companies limited by guarantee. In this context, changes to classification and reporting requirements under the Corporations Act and regulations will be relevant to classifications and reporting under the CATSI Act. Again, potential changes in this context may warrant consideration of changes to the thresholds under the CATSI Act and justify the flexibility allowed for by regulations.

Consultations

Regulations are currently being drafted, including revenue thresholds, in anticipation of the Bill being enacted by Parliament. The proposed revenue thresholds have been determined following a thorough review of the current classifications and thresholds, which was undertaken by a leading national law firm, DLA Piper in 2017. That review included extensive consultations with the Indigenous corporate sector, followed by further consultations with the sector in August and September 2018. Additionally, the review included close engagement with other regulators in the wider corporate sector, including the Australian Securities and Investment Commission and the Australian Charities and Not-for-profits Commission. I anticipate that any change to the regulations in the future will follow a similarly rigorous process of review and consultation.

I note in particular that the Office of the Registrar of Indigenous Corporations (ORIC) published a discussion paper in July 2018 and invited all CATSI corporations, individuals and stakeholders to attend public information sessions. ORIC also invited submissions through its website. The discussion paper outlined very clearly the proposed size thresholds and related reporting obligations. The 14 public information sessions discussed the proposed size thresholds at some length, and submissions commented on them.

Committee comment

1.8 The committee also requests the minister's advice as to the appropriateness of amending the bill to include specific consultation obligations (beyond those in section 17 of the Legislation Act 2003), with compliance with those obligations a condition of the validity of regulations which specify revenue thresholds for Aboriginal and Torres Strait Islander corporations.

Response

Section 17 of the *Legislation Act 2003* (the Legislation Act) prescribes the consultation obligations of the rule-maker before making legislative instruments, which includes undertaking appropriate consultation. Paragraph 6(1)(a) of the Legislation Act defines the rule-maker, for an instrument made by the Governor-General, His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd), under enabling legislation, to be the Minister responsible for administering the provision of the enabling legislation under which the instrument is made. For the purposes of the proposed section 37-10 of the Bill, I would be the rule-maker.

I am satisfied that the anticipated new thresholds for the purpose of proposed new section 37-10 have been determined following a thorough review of the current thresholds. Further, I am satisfied there were extensive consultations with the Indigenous corporate sector during the course of the review. Following the completion of the review, there were further consultations with the sector in August and September 2018. I am satisfied that both the review and the extensive consultations in relation to thresholds were appropriate in the circumstances and complied with the requirements of section 17 of the Legislation Act.

Whether the same consultation process is appropriate for future proposed changes to the thresholds will depend on the circumstances in which those changes are being contemplated. In my view, it is not appropriate to prescribe specific consultations as a precondition to amending the revenue thresholds. Doing so will create a real risk that inappropriate and unnecessary consultations are undertaken, which are wasteful of valuable public resources, for the sole purpose of satisfying a prescribed statutory process.

Committee comment

1.14 As the explanatory materials do not sufficiently address this issue, the Committee requests the minister's advice as to why it is considered necessary and appropriate to allow regulations to modify proposed section 66-5.

Response

Proposed new section 66-5 is one of several amendments that reform the way replaceable rules operate in relation to ATSI corporations. If applicable, replaceable rules form part of the internal governance rules of an ATSI corporation. Replaceable rules apply by default unless modified or replaced in a corporation's constitution. However, if replaceable rules do apply, currently there is no requirement that they be included in the corporation's constitution.

Consultations during the Technical Review of the CATSI Act in 2017 revealed that many corporations were not aware that their internal governance rules might include replaceable rules because they stand outside their constitutions. This lack of visibility can be confusing to members and undermine good governance.

Part 2 of the Bill reforms the operation of replaceable rules by requiring that, if they apply, they be included in a corporation's constitution. The central amendment is subsection 66-1(3), which requires that a corporation's constitution must include provisions that "modify or replace" each of the replaceable rules. Proposed section 66-5 supports subsection 66-1(3) by defining "modify" and "replace".

The CATSI Act is a special measure for the purpose of the *Racial Discrimination Act 1975* and is intended to establish a flexible regulatory framework that benefits Aboriginal and Torres Strait Islander Australians. The CATSI Act envisages that the internal governance rules of ATSI corporations will be tailored to suit the unique cultural characteristics of different Indigenous communities across the country. It is vitally important that the Act's framework of replaceable rules does not operate in a way that frustrates the need for ATSI corporations to have internal governance rules that suit their members. To this end, subsection 66-5(3) is designed as a safeguard against the rigid application of subsections (1) and (2) contrary to the interests of ATSI corporations and their members. Allowing regulations to modify section 66-5 for this purpose is an effective solution that can be sufficiently responsive to needs as they emerge, while retaining an appropriate level of Parliamentary oversight.

Committee comment

1.28 The committee requests the minister's advice as to why it is considered necessary and appropriate to confer immunity from liability (that is, a qualified privilege) on auditors and associated persons, in respect of things done in the course of their duties.

Response

The CATSI Act creates, for auditors, a legal duty of disclosure of certain circumstances with the prospect of criminal sanctions for non-disclosure (section 339-90).

Under the general law, the defence of qualified privilege in proceedings for defamation is available if a statement is made in the performance of any legal duty to a person having a corresponding duty or interest to receive it. Consequently, the defence of qualified privilege is available under the general law to auditors exercising their statutory functions in respect of statements that the auditor may make in the performance of their statutory duties. Furthermore, statutes in each jurisdiction provide for the defence of qualified privilege in relation to the provision of certain information, additional to any other defence available under the general law, for example, sections 24 and 30 of the *Defamation Act 2005* (NSW).

The Technical Review of the CATSI Act in 2017 noted the defence of qualified privilege is expressly stated in the Corporations Act, but is not expressly stated in the CATSI Act, and recommended the latter be amended to bring it into alignment with the Corporations Act.

The policy reason for including the privilege expressly in the CATSI Act is the same as for including it in the Corporations Act, being that while it is recognised legal practitioners should be familiar with the law of defamation, the law in this area is specialised and is most likely unfamiliar to many people who may be affected by it. Stating the qualified privilege expressly in the CATSI Act is necessary and appropriate to ameliorate the lack of familiarity with the law of defamation and assist users of the Act dealing with this aspect of the law.

I thank the Committee for their consideration and would like to note that the Finance and Public Affairs Legislation Committee conducted an enquiry into the Bill and, in their report published on 11 February 2019, recommended that the Bill be passed.

Yours sincerely

NIGEL SCULLION

13 / 3 / 2019

The Hon Darren Chester MP

Minister for Veterans' Affairs
Minister for Defence Personnel
Minister Assisting the Prime Minister for the Centenary of ANZAC

MB19-000241

28 FEB 2019

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator Polley

Thank you for the correspondence of 15 February 2019 from the Senate Scrutiny of Bills Committee about the Defence Legislation Amendment Bill 2018. I note that the Bill has passed both Houses of Parliament. It is regrettable that the Committee's advice was not received until after the Bill was passed.

The Committee has expressed concern about the delegation provision in Item 35 of Schedule 2, which inserts new subsection 79(2), providing that the Chief of the Defence Force (CDF) may delegate all or any of their powers and functions under Part 10, or Divisions 1B, 1C or 3 of Part 11. Delegates must be at or above Executive Level 2 or Colonel and equivalent ranks. The explanatory memorandum states that these are appropriate levels for the delegations, noting the experience and skills of people at these levels, the history of administration of similar powers, and the need for flexibility.

The Committee has indicated that it does not consider administrative flexibility sufficient justification for enabling delegation of these powers beyond Senior Executive Service employees, proposing amendment of the Bill to require that CDF be satisfied that persons performing delegated functions have expertise appropriate to the function or power.

I acknowledge the Committee's concerns about the delegation of administrative powers to relatively large classes of persons, and I have asked the Department to pursue further amendments when possible, as proposed by the Committee.

Yours sincerely

DARREN CHESTER

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THE HON JOSH FRYDENBERG MP
TREASURER
DEPUTY LEADER OF THE LIBERAL PARTY

Ref: MC19-001426

Senator Helen Polley
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Senate Scrutiny of Bills Committee
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Dear Chair

A representative of the Senate Scrutiny of Bills Committee wrote to my office on 15 February 2019 requesting a response from me in relation to issues raised in *Scrutiny Digest 1 of 2019* regarding Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018.

Item 5 of Schedule 2 to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 amends the *Competition and Consumer Act 2010* (CCA) to insert new sections 44AAFA and 44AAFB. These provisions provide the Australian Energy Regulator (AER) with new compulsory information gathering powers and create an offence that applies if a person fails to comply.

The Committee has sought advice as to the appropriateness of the offence-specific defences that reverse the evidential and legal burden of proof in these provisions.

The new information gathering powers can only be used where the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance of the functions referred to in existing section 44AH of the CCA. Section 44AH refers to functions conferred by a Commonwealth Act or regulations made under the CCA. As mentioned in the explanatory memorandum, paragraph 44AH(b) could be used to confer on the AER the function of setting maximum default offer prices for electricity retailed to small customers. In this event, the section 44AAFA power would be expected to be used against affected electricity retailers only.

Failure to comply with a notice issued under section 44AAFA is an offence. However, a person who fails to comply with a notice does not commit an offence to the extent that the person is not capable of complying with the notice (subsection 44AAFB(2)) (for example, because a requested document does not exist) or the person proves that, after a reasonable search, the person is not aware of the document (subsection 44AAFB(3)). A person who wishes to rely on the defence contained in subsection 44AAFB(2) bears the evidential burden of proving the circumstance

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(subsection 13.3(3) of the *Criminal Code*). That is, the person must produce evidence that suggests that the person is not capable of complying with the notice. A person who wishes to rely on the defence contained in subsection 44AAFB(3) bears the legal burden of proving that, after a reasonable search, the person is not aware of a requested document (subsection 13.4(b) of the *Criminal Code*). That is, the person must prove, on the balance of probabilities that, after a reasonable search, the person is not aware of a requested document (section 13.5 of the *Criminal Code*).

The reverse burden of proof is appropriate in the circumstances of this provision. The capacity of a person to comply with a notice, and information as to whether a person has undertaken a reasonable search for a requested document, are all matters that are peculiarly within the person's knowledge and would not generally be available to the prosecution. Affected persons (generally, electricity retailers) are expected to maintain thorough records of their business activities. Raising evidence of their capacity to comply with a notice, or proving on the balance of probabilities that they have undertaken a reasonable search for a document, should place no significant additional burden on them.

If the burden of proof was not reversed, the prosecutor would be required to undertake costly and difficult investigations. In many cases the prosecutor may have some difficulty accessing information about the person's capacity to comply with a notice or whether they have undertaken a reasonable search for a requested document. This could in turn undermine the effectiveness of the information gathering regime and the ability of the AER to perform its Commonwealth functions.

I have copied this letter to the Minister for Energy.

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

5 / 3 /2019