ATTORNEY-GENERAL

CANBERRA

14 DEC 2017

MC17-013039

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

I am writing in response to the letter from the Committee Secretary of the Senate Standing Committee for the Scrutiny of Bills (the Committee), Ms Anita Coles, dated 16 November 2017. The letter refers to the Committee's *Scrutiny Digest No. 13 of 2017* and seeks my advice in relation to the Bankruptcy Amendment (Enterprise Incentives) Bill 2017 (the Bill).

The Committee has requested my advice as to the appropriateness of making an offence (for a bankrupt failing to notify of a change in contact details) subject to up to six months imprisonment where strict liability applies.

Subsection 80(1) of the *Bankruptcy Act 1966* currently requires bankrupts to immediately notify the trustee of a change to their name or principal place of residence. Item 4 of Schedule 1 of the Bill repeals subsection 80(1) and replaces it with the requirement for the bankrupt to notify the trustee within 10 business days of changes to their name, address and phone number during the 'prescribed period'. Both the existing subsection and proposed new subsection are strict liability offences which are subject to up to 6 months imprisonment.

I acknowledge that the drafting of the current and proposed subsection 80(1) does not comply with the *Guide to Framing Commonwealth Offences* (the Guide). I thank the Committee for bringing this matter to my attention.

I will seek to amend item 4 Schedule 1 of the Bill to ensure compliance with the Guide.

Thank you again for writing on this matter.

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The Hon Christian Porter MP
Minister for Social Services

MC17-012360

30 NOV 2017

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

Dear ~~Senator Polley~~ Helen

Thank you for your letter of 16 November 2017, regarding the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (the Commonwealth Bill) and the Commonwealth Redress Scheme for Institutional Child Sexual Abuse (Consequential Amendments) Bill 2017. I appreciate the time you have taken to bring this matter to my attention.

I want to provide the context and legislative strategy of the Commonwealth Bill to assist in the Committee's understanding of my response to your questions which are enclosed.

The Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) *Redress and Civil Litigation* Report recommended the establishment of a national redress scheme for survivors. The Royal Commission has highlighted that many victims of child sexual abuse have not had the opportunity to seek compensation for the abuse they suffered. There is a clear need to provide avenues for survivors to obtain effective redress for this past abuse however, for many it is no longer feasible to seek common law damages. Additionally, the Commonwealth does not have comprehensive constitutional power to legislate for a national scheme. A referral from all starts to the Commonwealth under section 51(xxxvii) of the Constitution is the most legally sound way to implement a nationally consistent scheme and maximise participation. It will enable redress to be provided to survivors of institutional child sexual abuse in non-government institutions that occurred in a state or where a state government is deemed responsible.

For this reason, the Commonwealth Bill, which I introduced to Parliament on 26 October 2017, does not facilitate states, or non-government institutions in states, to opt-in to the Scheme. The Commonwealth Bill is a significant first step to encourage jurisdictions to opt-in to the Scheme, and will ensure survivors who were sexually abused as children in Commonwealth institutions will receive redress.

If a state agrees to provide a referral and participate in the Scheme from its commencement, the Government will ensure a national redress scheme can be established via legislation from 1 July 2018.

The Royal Commission has shed light on the issue of institutional child sexual abuse on a national level, however the scale of this Scheme is quite different to other state-based

schemes or overseas experiences (for example, the Irish Redress Scheme only included one institution). This is the reason the Scheme will need to be flexible to account for any unforeseen numbers of survivors, institutional contexts and other circumstances. Further, my experience of the Western Australian Redress Scheme has shown it will be necessary to adjust policy settings to mitigate against unintended outcomes for survivors.

Thank you for raising these important matters with me.

Yours sincerely

The Hon Christian Porter MP
Minister for Social Services

Encl.

Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017

1. Significant matters in delegated legislation

The committee requests the Minister's detailed advice as to:

- **why it is considered necessary and appropriate to leave the elements of this new scheme, as described in 1.8-1.10, to delegated legislation?**
- **what type of institutions may be prescribed as not constituting a Commonwealth institution or Territory institution?**
- **the appropriateness of exempting from disallowance a Ministerial declaration regarding the method or matters to take into account for working out the amount of redress payments.**
- **why it is appropriate to include these in rules rather than regulations?**
- **the type of consultation that is envisaged will be conducted prior to the making of the rules and whether specific consultation obligations (beyond those in s17 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).**

The Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) *Redress and Civil Litigation Report* has formed the basis for the development of the Commonwealth Redress Scheme for Institutional Child Sexual Abuse Bill 2017 (Commonwealth Bill). Further, an Independent Advisory Council on Redress, appointed by the Prime Minister, the Hon Malcolm Turnbull MP, provided expert advice and insight into the policy and implementation considerations for the Commonwealth Bill. The Independent Advisory Council includes survivors of institutional child sexual abuse and representatives from support organisations, as well as legal and psychological experts, Indigenous and disability experts, institutional interest groups and those with a background in government. The Council is chaired by the Hon Cheryl Edwardes AM, a former solicitor and Western Australian Attorney-General.

The Commonwealth Bill acknowledges that child sexual abuse suffered by children in institutional settings was wrong and should not have happened. The Royal Commission highlighted the complex needs and different life outcomes of survivors of institutional child sexual abuse.
The Commonwealth Bill is designed to recognise the suffering survivors have experienced, accept these events occurred and ensure that each institution that is responsible for the abuse pays redress to survivors.

The Commonwealth Redress Scheme for Survivors of Institutional Child Sexual Abuse (the Scheme), which implements all aspects of the Commonwealth Bill, is designed to be responsive to survivors' and participating institutions' needs. This is why it is necessary for elements of the Scheme to be in delegated legislation.

The Royal Commission recommended the establishment of a national redress scheme for survivors. In circumstances where the Commonwealth does not have comprehensive constitutional power to legislate for a national Scheme, a referral to the Commonwealth from the states under section 51(xxxvii) of the Constitution is the most legally sound way to implement a nationally consistent Scheme and maximise participation. It will enable redress to be provided to survivors of institutional child sexual abuse in non-government institutions that occurred in a state or where a state government is deemed responsible.

The Commonwealth Bill is a significant first step to encourage jurisdictions to opt-in to the Scheme, and has been designed in anticipation of their participation should a referral of powers be received.

Scheme participation will be established with jurisdictions and non-government institutions from commencement of the Scheme, as they choose to opt-in. Flexibility is needed to allow adjustments for the differing needs of survivors, participating institutions, and to enable the Scheme to quickly implement changes required to ensure positive outcomes for survivors.

Responsive changes, such as a declaration for subclause 27(1) to provide that a non-government institution is a *participating non-government institution of a Territory* for the purposes of the Scheme, allows that institution to provide redress to a survivor as soon as the institution is included in the declaration. Where a non-government institution decides to opt in to the Scheme, this may also require responsive changes to the rules to provide that a *participating non-government institution* is not a *participating non-government institution* for a specified period as the institution was not established in a Territory during that period (see: subclauses 26(3) and (4)).

Using rules rather than regulations or incorporating all elements of the Scheme in the Commonwealth Bill, provides appropriate flexibility and enables the Scheme to respond to factual matters as they arise. It is uncertain how many applications for redress the Scheme will receive at the commencement of the Scheme, and whether there will be unforeseen issues requiring prompt responses. It is therefore appropriate that aspects of the Scheme be covered by rules that can be adapted and modified in a timely manner. The need to respond quickly to survivor needs is also a key feature of the Scheme as many survivors have waited decades for recognition and justice.

In relation to the eligibility requirements in clause 16, the Explanatory Memorandum explains that the citizenship requirement:

> *…is included to mitigate the risk of fraudulent claims and to maintain the integrity of the Scheme. It would be very difficult to verify the identity of those who are not citizens, permanent residents or within the other classes who may be specified in the Rules. Removing citizenship requirements would likely result in a large volume of fraudulent claims which would impact application timeliness for survivors.*

As the committee has noted, the Explanatory Memorandum details three initial classes of people that will be eligible for redress, despite the citizenship requirements above. Further investigation and consultation is continuing across Government and with states and territories to determine if there are other classes of survivors that do not fit the above citizenship requirements that should be deemed eligible for the Scheme. There may also be classes of survivors that will apply for redress that the Scheme has not, or could not, envisage to include in the legislation. The Scheme may not have accounted for categories of survivors that it needs to deal with promptly, to ensure the timely processing of applications and the best outcomes for survivors so subclause 16(2) is necessary to allow the Scheme to respond to situations as they arise. Subclause 16(3) will be used to respond to exceptional cases, such as to specify people ineligible where they have a criminal conviction and their eligibility would affect the integrity and public confidence in the Scheme.

I note the committee's concerns and I am considering the inclusion of predetermined cases in any future legislation to reflect a national redress scheme.

Subclause 21(7) is intended to operate to ensure that institutions are not found responsible for abuse that occurred in circumstances where it would be unreasonable to hold the institution responsible, despite subclauses 21(2) and (3). For example, from the commencement of the Scheme, it is intended the rules will specify an institution is not responsible for child sexual abuse perpetrated by another child unless there is a reasonable likelihood that the institution mismanaged or encouraged the situation. The power in subclause 21(7) will also be used to clarify circumstances where a participating government institution should not be considered responsible. Such circumstances may include:

- where the government only had a regulatory role over a non-government institution;
- where the government only provided funding to a non-government institution; and
- where the only connection is that the non-government institution was established under law enacted by the government.

Until institutions opt in to the Scheme, it is not possible to envisage every possible circumstance to include in the legislation.

In relation to your query about institutions that may be prescribed as not constituting a Commonwealth or territory institution, paragraphs 23(2)(c) and 25(2)(b), and subclause 26(3) allow for flexibility to accommodate opt-in arrangements for different types of institutions.
These rule-making powers are not intended to reduce the scope of the application of the Scheme. Institutions have been established differently in different jurisdictions, which means some institutions may technically be considered a Commonwealth or Territory institution, rather than a non-government institution. For example, the Anglican Church provided comment on a draft of the National Bill that:

> *Read strictly some Anglican bodies (e.g. those established under the* Anglican Church of Australia (Bodies Corporate) Act 1938 *in NSW) may meet the definition of a State institution.*

Paragraphs 23(2)(c) and 25(2)(b) will allow for institutions that have been established under Commonwealth or Territory laws, but would be considered as separate from these jurisdictions for the purposes of the Scheme, to be determined in the rules to be a non-government institution.

Subclause 26(3) may cover situations where an institution was established in a Territory but only for a limited time. Subclause 26(4) is a safeguard should the Scheme want to prescribe situations where a non-government institution established in a Territory is not within scope of the Scheme but only for a specified period of time. It will not be possible to clarify the circumstances of non-government institutions of territories until the scheme commences and non-government institutions take steps to opt-in to the Scheme. For example, where an institution is operation from 2000 to 2018, but only established in a Territory from 2015, subsections 26(3) and 26(4) may be used to clarify that the institution is not a non-government institution of a territory from 2000 to 2015. These provisions are not intended to reduce the scope of the application of the Scheme, but rather to correctly identify institutions that are responsible for the abuse and which are within the scope of the Scheme.

As noted by the committee, the Explanatory Memorandum explains that assessment guidelines would normally be of an administrative character and would not be contained in a legislative instrument. The committee queries whether the guidelines could instead be included in the primary legislation. It is necessary not to publish the detailed assessment guidelines in the primary legislation in order to mitigate the risk of fraudulent applications. Placing the assessment guidelines in the primary legislation would enable people to understand how payments are attributed and calculated, and possibly submit a fraudulent or enhanced application designed to receive the maximum redress payment under the Scheme. The Scheme has a low evidentiary threshold and is

based on a reasonable likelihood test. These aspects of the Scheme are important and provides recognition and redress to survivors who may not be able or want to access damages through civil litigation. However, there needs to be some mechanisms to prevent fraudulent claims. To balance the risk of fraudulent applications with ensuring a transparent and certain process, it was considered necessary to make these declarations legislative instruments.

It is appropriate for matters to be included in rules rather than regulations as the Scheme needs to be responsive to survivors, participating territory institutions, and participating non-government institutions given that the Scheme will operate for a fixed period of time and needs to ensure the timely processing of survivors' applications. The use of rules allows the Scheme to act on and implement changes quickly and as the need arises. As the committee would know, regulations would need to go through the Executive Council process, which may result in the Scheme being less responsive to the needs of survivors and participating institutions.

All aspects of the Scheme have been subject to ongoing consultation with State and Territory Ministers responsible for redress, state and territory departmental officials, the Independent Advisory Council, survivors of institutional child sexual abuse and non-government institutions. The drafting of the legislation, including the rules, have been a part of this consultation with stakeholders.

A Board of Governance will be established to serve in an advisory capacity to provide advice to the Minister, Scheme Operator, the Department of Social Services and the Department of Human Services. The structure of the board is still under development; however, membership will include Ministerial representatives from each participating State and Territory. Consultation and agreement from the Board will be undertaken prior to any legislative changes, including creating or amending legislative instruments.

2. Standing appropriation

I note the Committee's comments regarding the standing appropriation and that some matters are not addressed in the Explanatory Memorandum. An Addendum to the Explanatory Memorandum will clarify this.

3. Civil Penalty

The committee seeks the Minister's advice as to whether it is the intention that subclause 71(1) be subject to a civil, rather than a criminal penalty, and why the note at the end of subclause 71(2) alerts readers to provisions of the Criminal Code when the penalty is civil rather than criminal in nature.

It is intended that a refusal or failure to comply with a requirement to provide information or documents to the Scheme Operator under clause 70 be subject to a civil penalty carrying a penalty of 100 penalty units (subclause 71(1)). Subclause 71(2) correctly states that subclause 71(1) will not apply if the institution or person has a reasonable excuse.

The note at the end of subclause 71(2) was included in error. This error will be corrected.

4. Broad discretionary power

The committee requests the Minister's advice as to:

- **Why (at least high-level) rules or guidance about the exercise of the Operator's disclosure power cannot be included in the primary legislation?**
- **What circumstances are envisaged might necessitate the use of this power noting the provisions of clause 78, which already proposes allowing disclosure for the enforcement of the criminal law or for the purposes of child protection?**
- **Why there is no positive requirement that rules must be made regulating the exercise of the Operator's power?**

The provisions have been drafted to reflect similar provisions in other legislation within the Social Services portfolio, which routinely deals with a person's sensitive information and provides a consistent approach to the way in which the Department deals with protected information. It was considered more appropriate to provide a power to enable rules to be made by the Minister if it was considered necessary to assist with the exercise of the Scheme Operator's disclosure of protected information. This provides flexibility to address any circumstances that arise which are of sufficient public interest to warrant the exercise of that power. Incorporating high-level rules in the Commonwealth Bill would restrict the Scheme Operator's power to make a public interest disclosure to those circumstances set out in the Commonwealth Bill.

Careful consideration will be given to ensure that any personal information held by the Scheme Operator is given due and proper protection. It is envisaged the power to make public interest disclosures will only be used, for instance, where it is necessary to prevent, or lessen, a threat to life, health or welfare, for the purpose of briefing the Minister or if the information is necessary to assist a court, coronial inquiry, Royal Commission, etc., for specific purposes such as a reported missing person or a homeless person.

Despite there not being a positive requirement in the Commonwealth Bill, the intention is to make rules to regulate the Scheme Operator's disclosure power. However, the Committee's concerns are noted and I will consider including a positive requirement for rules in the National Bill.

5. Strict liability offence

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.**
- **A detailed justification from the Minister for the proposed application of strict liability to this offence with reference to the principles set out in the *Guide to Framing Commonwealth Offences.***

Subclauses 84(1) and 84(2) make it an offence to offer to supply protected information about another person, or for a person to hold himself or herself out as being able to supply such information. Subclause 84(3) provides a defence where an officer is acting in the performance or exercise of his or her powers, duties or functions under the Act. Subclause 100(6) provides that a nominee commits an offence if they refuse or fail to comply with a relevant notice. Subclause 100(7) provides a defence where the nominee has a reasonable excuse.

In relation to the offence specific defence in subclause 84(3), whether the person was acting in the performance or exercise of his or her powers, duties or functions under the Act would be peculiarly within the knowledge of the defendant. It is therefore appropriate that the defendant bears the evidential burden of proof in relation to the matter.

In relation to the offence-specific defence in subclause 100(7), evidence pertaining to the defendant's excuse for failing to comply with a relevant notice is a matter peculiarly within the knowledge of the defendant. It is therefore appropriate that the defendant bears the evidential burden of proof in relation to the matter.

Consistent with the *Guide to Framing Commonwealth Offences*, subclauses 84(3) and 100(7) specify that the evidential burden of proof in relation to the defence rests with the defence.

Subclause 100(8) provides that an offence under subclause 100(6) is an offence of strict liability. The offence in subclause 100(6) is not punishable by imprisonment and the penalty in subclause 100(6) is 30 penalty units. The offence in subclause 100(6) is necessary to ensure that the Scheme Operator is able to monitor the disposal of redress payments by payment nominees. A payment nominee may be appointed where, for example, a survivor is a minor or does not have capacity to manage their financial affairs. The payments may be up to $150,000 and it is essential to the integrity of the Scheme that payment nominees who receive money on behalf of survivors are accountable to the Scheme Operator for their use of survivors redress payments.

The Committee's comment that these matters are not addressed in the Explanatory Memorandum are noted. An Addendum to the Explanatory Memorandum will clarify this.

6. Limitations on merits review

The committee seeks the Minister's advice as to:

- **Why internal reviewer of the original determination will only be able to have regard to information and documents that were available to the person who made the original determination.**
- **The justification for excluding external merits review for applicants dissatisfied with the original decision on review, particularly in the context of the committee's concerns regarding the lack of any legislative guidance on the quality of the persons to be appointed as decision-makers.**

The decision to limit the internal reviewer to only have regard to information and documents that were available to the person who made the original determination was to balance the need for an expedited application process for survivors with the burden of administration required when reopening many applications for review. Allowing the internal reviewer to request further information from survivors will create a high level of administrative burden to the individual and the Scheme, add to the potential re-traumatisation of survivors having to seek additional material and increase the operational costs for institutions to participate in the Scheme. To ensure national participation of Territory and non-government institutions in the Scheme, and to allow maximum coverage for survivors, administration costs have to be kept to a minimum. If administration costs are too high, institutions will not participate in the Scheme and many survivors will therefore not have the opportunity to receive redress. The Scheme will provide extensive communication and support to survivors to ensure they provide all information available to them when they lodge an application.

The decision to exclude external merits review for applicants was made on the advice of the Independent Advisory Council on redress following the Royal Commission's recommendation. The Council recommended the Scheme provide survivors with access to an internal review process, but no rights to external merits or judicial review as they considered that providing survivors with external review would be overly legalistic, time consuming, expensive and would risk further harm to survivors.

Survivors of institutional child sexual abuse often have experienced significant and continuing power imbalance between themselves, even as an adult, and institutions. The long-term impacts of child sexual abuse leave many survivors much less able to confront institutions and they remain at great risk of re-traumatisation.

For these reasons, the Scheme is not intended to be legalistic in nature and is intended as an alternative to civil litigation with a low evidentiary burden and a high level of beneficial discretion. The Scheme aims to have the needs of survivors at the core and to take lengths to avoid further harm or re-traumatisation of survivors. The Scheme has taken many steps to ensure that all aspects are developed in accordance with a trauma-informed approach and the judicial review process has not been developed for these reasons. If judicial review avenues were available, many survivors may have unrealistic expectations of what could be achieved and the judicial review process is likely to re-traumatise a survivor.

My Department will recruit appropriately qualified, independent assessors, known as Independent Decision Makers, who will make all decisions on applications made to the Scheme. Independent Decision Makers will not report or be answerable to Government. The Scheme will allow internal merits review of decisions and the Independent Decision Maker undertaking the review must not have been involved in the making of the original decision. The recruitment process, including the criteria for appropriate skills and attributes of the Independent Decision Makers to ensure objectivity, are under development.

7. Reversal of legal burden of proof

The committee requests the Minister's advice as to why it is proposed to reverse the legal burden of proof in subclause 109(4).

Subclause 109(3) makes it an offence for a financial institution not to comply with a notice given to it by the Scheme Operator requiring repayment to the Commonwealth of an amount that the Scheme Operator considers was wrongly paid to the credit of an account kept with that institution. The financial institution must repay the lessor of the amount stated in the notice or the amount standing to the credit of the relevant account. For a financial institution, it is a defence to the offence of failing to comply with the notice if the financial institution proves that it was incapable of complying with the notice.

The note to subclause 109(4) clarifies that a defendant (financial institution) bears the legal burden of proving that it was incapable of complying with the Scheme Operator's notice. It is appropriate for the financial institution to be required to prove that it was incapable of complying with the notice in order to be released from the usual requirement to repay an amount owing to the Commonwealth. The financial institution bears the legal burden of proof because whether it was incapable of complying with the notice is a matter that would be peculiarly within its knowledge. It would be unreasonable to require the prosecution to disprove, beyond reasonable doubt, that the financial institution was incapable of complying with the notice. For that reason is it appropriate for the defendant to discharge the legal burden of proof in relation to this matter.

The committee's comment that this is not addressed in the Explanatory Memorandum is noted. An Addendum to the Explanatory Memorandum will clarify this.

8. Broad delegation of administrative powers

The committee requests the Minister's advice as to why it is necessary to:

- **allow much of the Operator's powers and functions to be delegated to an APS employee at any level?**
- **allow independent decision-makers to be appointed without any legislative guidance as to their skills, training or experience?**

A broad delegation of the Scheme Operator's powers is necessary to enable the Department of Human Services and the Department of Social Services to administer the Scheme in an efficient manner, which is responsive and flexible to address matters as they arise.

Determinations to do with eligibility or assessment can only be delegated to an Independent Decision Maker. The Scheme Operator will delegate functions for the ordinary administration of the Scheme. The Scheme Operator, who is the Secretary of the Department of Social Services, will determine the appropriate level of delegation commensurate with the administrative function being undertaken.

Subclause 121(2) states that before the Minister can engage a person to be an Independent Decision Maker, the Minister must consult the appropriate Ministers from the self-governing Territories in accordance with the Commonwealth Redress Scheme Agreement. The consultation process will include selection, vetting and training of prospective Independent Decision Makers. This consultative process provides appropriate legislative guidance to engage appropriate Independent Decision Makers, whilst retaining flexibility to respond to cohorts of survivors coming through the Scheme as they present.

Senator the Hon Michaelia Cash
Minister for Employment
Minister for Women
Minister Assisting the Prime Minister for the Public Service

Reference: MB17-003723
Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Chair

Standing Committee for the Scrutiny of Bills - Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

This letter is in response to the letter of 16 November 2017 from the Senate Standing Committee for the Scrutiny of Bills (the Committee) concerning issues raised in the Committee's *Scrutiny Digest No. 13 of 2017* in relation to the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the Bill).

The Australian Government made an election commitment to adopt the majority of the recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption, led by Commissioner John Dyson Heydon AC QC (the Royal Commission). The Bill responds to ten Royal Commission recommendations relating to financial management and accountability (recommendations 9, 10, 17 and 39), the regulation of worker entitlement funds (recommendations 45, 46 and 49), election payments (recommendation 43), prohibiting coerced payments to employee benefit funds (recommendation 50) and disclosable arrangements (recommendation 47).

The Bill addresses Government and community concerns, highlighted by the Royal Commission, that the current regulation of registered organisations and their related entities is not satisfactory. Consistent with the Royal Commission recommendations, the Bill will provide for increased transparency of the financial affairs of registered organisations and worker entitlement funds to ensure greater accountability to the members of registered organisations.

A detailed response to each of the issues raised in your correspondence with my office is at Attachment A. I trust that the Committee will find the information useful.

Yours sincerely

Senator the Hon Michaelia Cash
3 /12/ 2017

Encl.

Attachment A

Detailed response to issues raised in *Scrutiny Digest No. 13 of 2017* in relation to the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

Privacy in relation to proposed subsection 237(4)

Effect of proposed subsection 237(4)

Section 237 of the *Fair Work (Registered Organisations) Act 2009* (RO Act) requires registered organisations to lodge particulars of specified loans, grants and donations with the Registered Organisations Commissioner (the Commissioner). These particulars can include the name and address of the person to whom the loan, grant or donation was made (s237(5) and s237(6)). Members of the organisation have the right to inspect statements given to the Commissioner (s237(4)), however, there is currently no capacity for the Commissioner to protect the privacy of individuals whose personal details are included in the statement.

Proposed subsection 237(4A) of the Bill creates a new protection for persons who give or receive loans, grants or donations by providing that, prior to a member inspecting a statement, the Commissioner must omit any residential address included in the statement. Subsection 237(4A) also provides the Commissioner with the discretion to omit other personal information from statements prior to member inspection.

Issue

The committee notes that whilst a discretion to omit personal information is included in the Bill, the Commissioner would not be obliged to omit such 'other personal information'. The committee requests advice as to why it is necessary and appropriate to leave the protection of personal information to the discretion of the Commissioner, rather than making this a statutory requirement.

Discussion

The Royal Commission noted that creating greater transparency about the financial transactions of registered organisations would ensure that members have the capacity to inquire into individual transactions.

The proposed amendments to section 237 of the RO Act do not add to the level of particularity that needs to be provided to the Commissioner in a statement about any loans, grants or donations made by an organisation that exceed $1,000. As detailed above, under current subsections 237(5) and (6), organisations must already disclose the name and address of the person to whom any loan, grant or donation over $1,000 is made and, in the case of loans, the arrangements made for the repayment of the loan. The principal alteration to section 237 is that organisations will now be required provide the same details about loans, grants and donations made to the organisation, as per recommendation 39 of the Royal Commission.

In providing the discretion to the Commissioner to redact private information, the Bill ensures that members are provided with as much transparency as possible about the persons with whom their organisation arranges loans, grants and donations with, whilst also ensuring personal information is protected. Statements provided to the Commissioner in accordance with section 237 would become futile if, in addition to the omission of residential addresses,

the Commissioner were required to remove the only other detail that organisations will be required to be provided about loans, grants and donations; the name of the other party involved in the transaction.

The Office of the Australian Information Commissioner and the Attorney-General's Department were both consulted during the drafting of the Bill in order to ensure that appropriate attention was directed toward protecting privacy of personal information.

Broad delegation of administrative powers in relation to proposed subsections 329MB(2) and (3)

Effect of proposed subsection 329MB(3)

Proposed paragraph 329MB(2)(b) and subsection 329MB(3) authorise the Commissioner to delegate the authority to issue infringement notices to any member of staff working for the Registered Organisations Commission (the Commission) and any other person assisting the Commissioner.

Issue

The committee considers it may be appropriate to amend the Bill to require persons authorised to issue infringement notices be confined to officers that hold special attributes, qualifications or qualities. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

Discussion

Upon the successful passage of this Bill, the Commission will have the additional function of managing the regulation and oversight of worker entitlement funds. Given that the Commission is a small agency with a limited number of SES officers, it is appropriate not to limit the Commissioner's power to delegate the ability to issue infringement notices to its SES officers.

Procedural fairness in relation to proposed section 329MG

Effect of proposed section 329MG

Under proposed section 329MG, where the Commissioner proposes to deregister a registered worker entitlement fund, he or she must give written notice to the fund operator setting out the grounds for and proposed date of deregistration, and invite submissions from the operator. Proposed section 329MK states that proposed Subdivision B of Division 5 of Part 3C of Chapter 11 is taken to be an exhaustive statement of the requirements of the natural justice hearing rule.

Issue

The committee considers that a consequence of proposed sections 329MG and 329MK could be that a registered worker entitlement fund may be deregistered in circumstances where it has not been afforded a fair opportunity to put its case. The committee seeks advice as to why it is necessary and appropriate to exclude aspects of the natural justice hearing rule in relation to the deregistration process.

Discussion

Proposed sections 329MG and 329MK are not intended to exclude the natural justice hearing rule. Provision is made in proposed paragraph 329MG(2) for a notice of proposed deregistration to a fund operator to specify the grounds for deregistration and for the operator to be invited to make submissions on the proposed deregistration. Under proposed paragraphs 329MH(1)(c) and 329MI(1)(c), the Commissioner must consider any submissions before deciding whether a condition of registration has not been, or is not being, complied with. These provisions ensure that a fund operator has a fair opportunity to put its case should the Commissioner propose that a fund be deregistered and ensure that due consideration is given to submissions before any decision is taken.

In addition, proposed paragraph 329NI(b) provides for application for Administrative Appeals Tribunal (AAT) review of deregistration decisions. This reinforces natural justice requirements for an operator to be heard on decisions concerning deregistration of a worker entitlement fund and for due consideration to be given to the submissions of an operator. Under section 5 of the *Administrative Decisions (Judicial Review) Act 1977*, an application for AAT review may be made on grounds including improper exercise of power or failing to take a relevant consideration into account.

Exclusion of merits review in relation to proposed section 329MA

Effect of proposed section 329MA

Proposed section 329MA provides the Commissioner with the power to direct the operator of a registered worker entitlement fund to take, or stop taking, one or more actions relating to compliance with an ongoing condition for registration or to ensure that a report, notice, information or statement given in accordance with an ongoing condition for registration is not false or misleading. It is one of a suite of measures intended to ensure compliance with the conditions for registration and is an alternative to the provision in proposed section 329MG for the Commissioner to give notice of a proposed deregistration.

Issue

The committee seeks an explanation as to why decisions taken under proposed section 329MA are considered to be of a law enforcement nature and therefore appropriate for exclusion of merits review.

Discussion

Decisions under proposed section 329MA are directed towards ensuring compliance with the conditions for registration of a worker entitlement fund that are set out in the table of conditions in proposed section 329LA and are thus properly characterise as law enforcement in nature.

Decisions under proposed section 329MA are also subject to separate review processes not administered by the Commissioner. For example, non-compliance with a direction issued by the Commissioner under proposed subsection 329MA(1) is subject to a civil liability action under subsection 329MA(3). Review of a decision under proposed section 329MA is available in the Federal Court and the operator of a worker entitlement fund can explain it s

decision not to comply with a direction in relation to taking, or to stop taking, one or more actions. In addition, decisions of the Commissioner to direct an operator of a worker entitlement fund to take, or stop taking, one or more actions are subject to review by the Federal Court under section 39B of the *Judiciary Act 1903* or the High Court under section 75(v) of the Constitution.

Reversal of evidential burden of proof in relation to proposed subsection 329NF(5)

Effect of proposed subsection 329NF(5)

Proposed section 329NF provides the Commissioner with the power to give a notice requiring a person to produce specified documents or information relevant to determining whether an ongoing condition of worker entitlement fund registration has been or is being complied with or whether a deregistered fund has complied with the requirements of proposed section 329NC in relation to final reports after deregistration.

Proposed subsection 329NF(4) provides that it is an offence for a person who has been provided with a notice to give information or produce documents, to not do so. Proposed subsection 329NF(5) provides an exception to this offence, where the person has a reasonable excuse.

Issue

The committee has requested advice as to why it is proposed to use an offence-specific defence in subsection 329NF(5). The Committee is concerned that this provision reverses the evidential burden of proof and asks for a response that explicitly addresses the relevant principles of the *Guide to Framing Commonwealth Offences* (the Guide). The Committee has also sought clarification as to whether it is intended that proposed subsection 329NF(4) be subject to a civil or criminal penalty.

Discussion

It is intended that proposed subsection 329NF(4) be subject to a criminal penalty.

The offence-specific defence of reasonable excuse in proposed subsection 329NF(5) puts an onus on a defendant to give a reason or reasons why they did not do as they were required to do and requires a consideration of the excuse put forward. The existence of a reason to not give information or not produce documents would be a matter peculiarly within the knowledge of a defendant. It would also be significantly more difficult and costly for the prosecution to disprove that a defendant has a reasonable excuse than for a defendant to establish a reasonable excuse. These factors satisfy the principles in the Guide applicable to the inclusion of offence-specific defences.[1]

The appropriate burden of proof applies to the offence-specific defence in proposed subsection 329NF(5). The principle in the Guide is that an evidential burden should generally apply to an offence-specific defence.[2] Proposed subsection 329NF(5) does not impose a legal

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[1] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2001, p. 50.

[2] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2001, p. 51.

burden of proof upon a defendant as it is not expressed to do so (section 13.4 of the *Criminal Code*). On this basis a defendant has the burden of adducing or pointing to some evidence that suggests a reasonable possibility that the matter exists or does not exist (subsection 13.3(6) of the *Criminal Code*). If the defendant meets this evidential burden, the prosecution then has to refute the defence beyond reasonable doubt (subsection 13.1(2) and section 13.2 of the *Criminal Code*).

It is appropriate that the offence-specific defence of 'reasonable excuse' be applied to the offence in proposed subsection 329NF(4). The principle in the Guide is that such a defence should not be applied unless it is not possible to rely on the general defences in the *Criminal Code* (such as duress, mistake or ignorance of fact, intervening conduct or event, and lawful authority) or to design more specific defences.[3] It is not possible to rely on the general defences in the *Criminal Code* as these are too narrow to encompass all the circumstances of what may be a reasonable excuse. It is therefore preferable to defer the evaluation of the reasonableness of an excuse to the discretion of the Court.

[3] Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2001, p. 52.

The Hon Christian Porter MP
Minister for Social Services

MC17-012358

30 NOV 2017

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

Dear ~~Senator Polley~~ Helen

Thank you for your letter of 16 November 2017, regarding the Family Assistance and Child Support Legislation Amendment (Protecting Children) Bill 2017 (the Bill). I appreciate the time you have taken to bring this matter to my attention.

I note the request at paragraph 2.102 of Scrutiny Digest 13 of 2017 (15 November 2017) to update the explanatory memorandum to include the information provided in my earlier letter of 7 November 2017 to you, regarding the retrospectivity of provisions contained in the Bill. I intend to table an addendum to the explanatory memorandum that will include this information.

I provide the following information in response to the Committee's comments at paragraph 2.104 of Scrutiny Digest 13 in relation to item 51 of Part 3, Schedule 1 of the Bill. The application provision at item 51 enables the amendments made by items 46 and 47 of the Bill to apply to terminating events that occur on or after commencement. The amendments will not have retrospective effect, however, they may apply to any agreement taken to be a consent order, regardless of whether the agreement was made before or after commencement of the amendments.

In relation to whether the proposed changes would apply to any cases currently before the courts. Any decision made by the courts involving an interpretation of existing sections 35C and 95 of the *Child Support (Assessment) Act 1989* before the commencement of item 51 would be upheld, and decisions made after the commencement of item 51 would be made in line with the amended sections 35C and 95.

Thank you for raising this matter with me.

Minister for Social Services

THE HON PETER DUTTON MP
MINISTER FOR IMMIGRATION
AND BORDER PROTECTION

Ref No: MS17-004256

Senator Helen Polley
Chair
Senate Scrutiny of Bills Committee
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Dear Senator

Thank you for your letter of 16 November 2017 in relation to issues identified by the Senate Standing Committee for the Scrutiny of Bills in its *Scrutiny Digest No. 13 of 2017* concerning the *Migration Amendment (Skilling Australians Fund) Bill 2017*.

I note the Committee's concern that the Bill does not set an upper limit on the level of the penalty that may be prescribed in the regulations. I will consider moving an amendment to the Bill to address this concern.

Yours sincerely

PETER DUTTON 04/12/17

Parliament House Canberra ACT 2600 Telephone: (02) 6277 7860 Facsimile: (02) 6273 4144

The Hon Greg Hunt MP
Minister for Health
Minister for Sport

MC17-020024

5 DEC 2017

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

Dear Senator Polley Helen

I refer to the request of the Senate Scrutiny of Bills Committee (the Committee) for further information regarding the National Health Amendment (Pharmaceutical Benefits – Budget and Other Measures) Bill 2017 (the Bill).

In its *Scrutiny Digest 13 of 2017*, the Committee notes that the Bill contains a number of provisions that would give the Minister the power to determine not to apply, or to reduce, a statutory price reduction which would otherwise apply for medicines under the Pharmaceutical Benefits Scheme (PBS).

The Committee has requested my advice as to why the Bill proposes to provide the Minister with broad discretionary power to apply statutory price reductions and to do so by way of written or notifiable instrument (noting that such instruments are not subject to disallowance).

The explanatory memorandum to the Bill explains that the Minister could exercise discretion in applying first new brand price reductions and flow-ons, applying anniversary price reductions, and determining whether certain new brands are to be treated as new presentations, and as such, not be subject to a first new brand price reduction.

The Committee has noted that the explanatory memorandum does not explain the need for statutory price reductions not to apply, or to be reduced, in certain circumstances; does not explain the need for the Minister to have discretion in applying the price reductions rather than setting out criteria in the Bill; and does not provide a justification for the ministerial determinations to be made by written or notifiable instruments.

My advice in response to these matters is as follows.

Agreement between the Government and Medicines Australia
The pricing amendments in the Bill are required to implement measures in agreements made between the Commonwealth and Medicines Australia, representing the originator medicines sector, and the Generic and Biosimilar Medicines Association, representing generic and biosimilar medicine suppliers. The agreements involved extensive consultation with industry and were announced by the Government in the 2017 Budget as part of the PBS Medicines Package. The pricing measures are expected to deliver savings of $1.3 billion over four years (around $1.8 billion over the five years of the agreements).

Details of the pricing measures are set out in the Strategic Agreement (the Agreement) entered into by the Commonwealth and Medicines Australia on 27 April 2017. This Agreement is publicly available on the Department of Health's website.

In return for savings, the Agreement provides greater certainty for the medicines industry regarding pricing policy, where funding for new listings is supported through price reductions that are predictable and applied primarily to medicines reaching the end of their patent life or becoming subject to competition. Savings from the pricing measures will help to support investment in new and extended PBS listings, and maintain the Government's commitment to list all drugs recommended by the Pharmaceutical Benefits Advisory Committee (PBAC).

The Agreement includes specific provisions that reduce statutory price reductions in direct response to previous price reductions. It also provides that the Minister will have the discretion not to apply, or to reduce, a statutory price reduction. Under the Agreement, the Minister's discretion is not limited or subject to additional criteria.

However, Section 11 of the Agreement provides for oversight of implementation of the Agreement via the establishment by the Commonwealth (represented by the Department of Health) and Medicines Australia of a new Joint Oversight Committee. One of the main functions of the Joint Oversight Committee is to oversee the extent of reductions to statutory price reductions.

An exposure draft of the pricing components of the Bill was provided for review to Medicines Australia, the Generic and Biosimilar Medicines Association, several innovator and generic pharmaceutical companies, the Pharmacy Guild of Australia, the Pharmaceutical Society of Australia, the National Pharmaceutical Services Association, the Consumers' Health Forum, and the Medical Software Industry Association.

As a result of that consultation, some provisions were revised to ensure consistency with the Agreement. However, there was no expectation that the Bill would contain set criteria for exercising the Minister's discretionary power to apply statutory price reductions and no requests have been received from stakeholders for additional detail in the explanatory memorandum.

The pricing changes in the Bill are extensions to, or adjustments of, existing processes. PBS pricing reforms and various PBS policies that can affect pricing have been in place for more than ten years. This means that many PBS medicines will have been subject to previous price reductions. The Agreement recognises that the increased frequency and magnitude of the new price reductions need to be balanced by allowing at least some previous price reductions to be taken into account and by allowing ministerial discretion to reduce the amount of a price reduction in some circumstances. To do otherwise may have meant that it would not have been possible to achieve the price reduction percentages set in the Agreement and that it would be unreasonable or unworkable to apply the maximum reduction in some cases.

Current requirements for statutory price reductions and price disclosure reductions mean that price reductions are required regardless of the nature of a medicine, the supply history, or supply volume for a product. If mandatory reductions (especially flow-on reductions) make products unviable to supply, it can be difficult for companies to maintain supply which threatens continuity of therapy for patients. In some cases, it has been necessary for companies to apply for price increases immediately following a statutory price reduction in order to continue to support the supply of affected products in Australia. The Agreement acknowledges that it would be preferable for relevant information to be considered before applying the new statutory price reductions.

First new brand price reductions
Schedule 1 of the Bill provides for the price reduction that applies on listing the first additional new brand to be increased from 16 per cent to 25 per cent. However, this is subject to item 8 of Schedule 1 which provides that no reduction applies where the price of the brand has already been reduced by 40 per cent or more since 1 January 2016, and item 12 of Schedule 1 which provides that the reduction is capped at 40 per cent of the price of the brand on 1 January 2016 if there have been reductions since then of more than 15 per cent. This means that the full 25 per cent reduction applies only when price reductions since 1 January 2016 have been 15 per cent or less.

Item 14 of Schedule 1 provides for ministerial discretion to determine by written instrument to apply a lesser or no first new brand price reduction. The Bill includes, and the explanatory memorandum explains, that the Minister must take into account what the price of the new brand would otherwise be if the statutory reduction were applied. This makes it clear that previous reductions for the listed brand must be identified and the statutory price reduction calculated in the usual way before ministerial discretion can be applied. In exercising the discretional power, there is provision for the Minister to take any other relevant matter into account.

The provisions protect brands already subject to price reductions of more than 40 per cent and other reductions are capped so that the total reduction, including previous reductions since 1 January 2016, ranges between 25 and 40 per cent.

Anniversary price reductions
Schedule 2 provides for new anniversary price reductions to apply for brands of pharmaceutical items on F1 on the 5, 10, and 15 year anniversary of the drug being listed on the PBS.

Item 11 of Schedule 2 provides for ministerial discretion to determine by written instrument to apply a lesser or no anniversary price reduction. The Bill includes, and the explanatory memorandum explains, that the Minister must take into account what the price of the new brand would otherwise be if the statutory reduction were applied. This makes it clear that previous reductions for the listed brand must be identified and the statutory price reduction calculated in the usual way before ministerial discretion can be applied. In exercising the discretional power, there is provision for the Minister to take any other relevant matter into account.

The Agreement requires that in applying ministerial discretion for anniversary price reductions the total of previous reductions since 1 January 2016 must be considered. Because the current five year anniversary price reduction has applied since April 2016, most F1 drugs to which the new anniversary reductions apply would have had a five year anniversary five per cent reduction.

Ministerial discretion in relation to first new brand and anniversary price reductions
The provisions in the Bill and the Agreement provide some criteria that should be taken into account in considering whether a statutory price reduction should be reduced or not applied. The Bill specifies that the Minister must take into account what the price would otherwise be, and may take into account any other matter the Minister considers relevant.

It would be counterproductive for a detailed list of criteria for ministerial discretion to be included in the Bill. Ministerial discretion is intended to be exercised only where genuinely justified based on pricing or other history. Including further criteria may result in applications prioritising those criteria when others could be more important for a particular medicine, and create the perception or expectation that applications would be judged according to the response to the criteria. Setting criteria may also inadvertently fetter the Minister from

considering unusual circumstances which would warrant adjustment of a price reduction. Either way, including criteria in the legislation is unlikely to be of assistance.

In practice, the Department of Health will be able to source the necessary information and provide advice to the Minister in most cases where ministerial discretion is required for statutory price reductions. The Department of Health has access to information regarding the listing, pricing and use of PBS medicines, including the timing and quantum of previous price changes, recommendations from the PBAC regarding pricing, and other matters that may be relevant for a particular medicine. The Bill does not contain specific provisions regarding applications from companies as no application is required for ministerial discretion to be applied and a price reduction adjusted. However, a pharmaceutical company (referred to in the *National Health Act 1953* as a 'responsible person') could submit an application for ministerial discretion using any justification considered relevant or provide additional information for consideration by the Minister. In addition, information regarding price reductions is made available to companies prior to the reduction taking place. In situations where there were particular considerations for a medicine, consultation would occur between the Department of Health and the company.

Determination of new brands as new presentations
Schedule 4 provides for a new brand which is a variation of an existing brand to be listed as a 'new presentation' without a first new brand price reduction. If the applications for the new presentation and the listed brand have been made by the same responsible person and the new presentation is listed on or before the fifth anniversary of the drug being listed on the PBS, it is automatic that the price reduction does not apply. Items 4 and 7 of Schedule 4 provide that the Minister may determine by notifiable instrument that a new brand is a new presentation of a listed brand if satisfied that the new brand will be listed on the PBS after the fifth, but before the tenth, anniversary of the drug being listed on the PBS.

In making the determination, the Minister may take into account any advice given by the PBAC, any information provided by the responsible person for the new brand, and any other matter the Minister considers relevant.

Ministerial discretion in relation to determining new presentations
There would be no merit in setting specific criteria for determining whether a new brand is a new presentation at this stage, as the Minister would not want to limit the PBAC's consideration or advice nor limit the other matters that could be considered relevant in a particular case.

The Bill already provides that the responsible person can submit information and that the Minister may take that information into account. It is intended that the information be submitted by the applicant (in the case of determinations it does not need to be the same responsible person), as part of the usual listing and pricing process. There would be no merit in requiring that the information submitted by an applicant responds to set criteria as this could unnecessarily limit the information provided.

In addition, information on determinations for new presentations involving ministerial discretion will be subject to monitoring by the Joint Oversight Committee (as referred to above).

Use of written instruments for price reduction determinations made by the Minister
The Bill provides that the Minister may determine by written instrument that a first new brand or anniversary statutory price reduction should be reduced or not applied.

Information about determinations made for this purpose will be made available publicly on the PBS website (www.pbs.gov.au) along with other pricing determinations and information on price reductions for PBS medicines. The PBS website is the primary source of information for pharmaceutical companies and other PBS users regarding pricing and price reductions. Notification of updates to pricing information is sent to stakeholders via the PBS Subscription distribution list.

It is unlikely that price reductions included in the instrument would need to be revisited as any company affected by a decision would have been consulted or received information regarding the outcome prior to the instrument being finalised.

The highly technical nature of the subject matter, as evidenced by the role of the PBAC in advising the Minister on matters relating to PBS medicines, means that if expert advice is required the matter should be referred before the decision is made. The Joint Oversight Committee, which will include members with particular expertise regarding the PBS, will monitor the manner in which ministerial discretion is exercised.

In view of these factors, it was not considered necessary for a determination which serves to reduce or not apply a price reduction to be subject to Parliamentary scrutiny.

In response to the concern raised by the Committee, the Department of Health will investigate voluntary inclusion of the written instrument on the Federal Register of Legislation and will seek the advice of the Office of Parliamentary Counsel for this to occur. If agreed, the explanatory memorandum will be updated to this effect.

Use of notifiable instruments for new presentation determinations made by the Minister
A determination by the Minister that a new brand is a new presentation will be made by notifiable instrument for registration on the Federal Register of Legislation. It was not considered necessary for a determination of this kind to be subject to Parliamentary scrutiny as the Minister would be able to access expert advice from the PBAC in making the decision.

Oversight of implementation of the Agreement and ministerial discretion
The terms of reference for the Joint Oversight Committee, as outlined in the Agreement, include that it will consider the effectiveness of measures relating to the application of statutory price reductions; consider and agree details intended to guide companies in making applications regarding statutory price reductions; and identify unintended consequences arising from the measures in the Agreement, including in relation to the extent of exemptions from statutory price reductions agreed by the Commonwealth.

It would be premature to include in the Bill criteria for applying for ministerial discretion regarding price reductions as considering the effectiveness of the provisions and providing advice on applications is part of the role of the Joint Oversight Committee.

Limited duration of pricing amendments
The Agreement and the pricing amendments in the Bill are effective until 30 June 2022, after which time the current pricing arrangements are reinstated. Limiting the duration of the changes means that experience from the implementation of the Agreement and advice from the Joint Oversight Committee will be able to inform any future pricing arrangements.

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

Greg Hunt

TREASURER

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

Dear Senator Polley

Thank you for the letter of 16 November 2017 from the Standing Committee for the Scrutiny of Bills (the committee) Secretary to my office in relation to issues raised in *Scrutiny Digest No.13 of 2017* concerning the following Bills:

- Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017;
- Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017;
- Treasury Laws Amendment (Banking Measures No.1) Bill 2017; and
- Treasury Laws Amendment (National Housing and Homelessness Agreement) Bill 2017.

I would like to thank you for the opportunity to provide further information on the issues identified by the committee. I have addressed each of the issues in **Attachment A** to this letter.

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

The Hon Scott Morrison MP
5 / 12 / 2017

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ATTACHMENT A

RESPONSE TO QUESTIONS FROM THE COMMITTEE

Financial Sector Legislation Amendment (Crisis Resolution Powers and Other Measures) Bill 2017

Issue: Reversal of evidential burden of proof

The committee requests the Minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences (which reverse the evidential burden of proof). 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*.

Explanation:

Proposed sections 11CI of the *Banking Act 1959* (Banking Act), 109A of the *Insurance Act 1973* (Insurance Act) and 231A of the *Life Insurance Act 1995* (Life Insurance Act) set out secrecy provisions which the Australian Prudential Regulation Authority (APRA) may apply to ensure that details of a direction given by APRA to an authorised deposit-taking institution (ADI) or insurer or related entities are not disclosed. While most directions will properly be publically available, there are limited circumstances where a period of confidentiality is necessary to ensure panic does not develop in financial markets as a consequence of precipitously announced resolution actions.

There are a number of defences available to a person who has made a relevant disclosure. The defences are that the disclosure is:

- of information that has already been lawfully made available to the public;
- permitted by APRA as set out in the determination;
- made to a legal representative for the purpose of seeking legal advice;
- authorised by a relevant exception in the secrecy provision in the *Australian Prudential Regulation Authority Act 1998* (APRA Act);
- made in circumstances specified in the regulations;
- for the same purpose as one of the above (but made by a different person); or
- required by an order or direction of a court or tribunal.

The defendant bears an evidential burden in relation to these defences. This means that a defendant has the burden of adducing or pointing to evidence that suggests a reasonable possibility that the basis of the defence exists.

The matters listed as defences would normally be expected to be peculiarly within the knowledge of the defendant For example:

- If the disclosure was allowed by a determination made by APRA (e.g. under proposed section 11CK of the Banking Act) and complied with any conditions imposed by APRA in the determination, the defendant, having made the disclosure, and having been privy to all the relevant surrounding circumstances of the disclosure, will be in the best position to raise initial evidence of the possibility that the disclosure aligned with APRA's determination.

- It should be noted that APRA must provide a copy of the determination permitting the disclosure to the entity and any person covered by the determination, or else the determination will be a legislative instrument and therefore publicly available.

- Therefore the defendant will generally have:

  : knowledge of the content of the determination; and

  : peculiar knowledge of the precise circumstances of the disclosure in question, and whether they align with the terms of the determination.

- They will therefore be in the best position to raise evidence supporting the possibility that the defence can be made out, which will return the onus to the prosecution to prove the contrary.

- If the disclosure was made to a legal representative for the purpose of seeking legal advice or a legal service (e.g. under proposed section 11CL of the Banking Act), the defendant will be in the best position to adduce evidence of both elements. Specifically, the defendant will have peculiar knowledge of the relationship between the defendant and the recipient of the information (that the recipient was in fact the defendant's legal representative) and of the purpose for which the disclosure was made (i.e. so that the recipient of the information could provide the advice or service, rather than for some other reason).

- If the disclosure is authorised by an exception to the secrecy provision in section 56 of the APRA Act – which it should be noted will only be relevant if the defendant is a APRA member, APRA staff member or other Commonwealth officer – evidence of that fact will generally be peculiarly within the knowledge of the defendant. For example, where the disclosure was made to a financial sector supervisory agency, the defendant will be in the best position to raise evidence that when they made the disclosure they were "satisfied that the disclosure ... [would] assist [that] financial sector supervisory agency ... to perform its functions or exercise its powers"(see paragraph 56(4)(a) of the APRA Act). It should be noted that section 56 of the APRA Act itself casts an evidential burden on the defendant to adduce prima facie evidence of the existence of each defence, and therefore the approach taken in the new secrecy provisions in the Bill is consistent.

- If the disclosure was made in circumstances prescribed by the regulations it will generally be the case that the defendant will be in the best position to adduce evidence of that possibility because the defendant will again be the person with peculiar knowledge of the facts and circumstances of the disclosure and whether they align with the terms of the determination.

- If the disclosure was in response to an order or direction of a court or tribunal, the defendant will generally be in possession of a copy of the order (e.g. subpoena), and will have the peculiar knowledge to adduce evidence of this.

- The above considerations also apply to secondary disclosures (e.g. where an initial permissible disclosure is made to a solicitor, who then seeks advice from a barrister who is a legal representative of the solicitor's client).

Further, the defendant is merely required to adduce or point to evidence that suggests a reasonable possibility that the relevant fact or facts exist.

It would be onerous, costly and (often) redundant for the prosecution to have to prove beyond reasonable doubt, in every prosecution, that every single one of the above circumstances does

not exist. It is inherently difficult to prove a negative, and in most cases there will usually be no reason to suggest that the factual circumstances described in the defence provisions exist.

It is highly unlikely that a prosecution would be brought where the information about the direction had already been lawfully made available to the public and it submitted that it would be onerous for the prosecution to be required to prove, beyond reasonable doubt, the negative proposition that the information had not been lawfully made available to the public. Again, should there be some prospect that the information was lawfully made available to the public, the defence would only be obliged to adduce evidence of this possibility, rather than prove it to a legal standard. It is submitted that the Bill strikes an appropriate balance in this regard.

Finally, the approach taken is broadly consistent with other secrecy provisions in Commonwealth legislation (including, as noted, section 56 of the APRA Act).

Issue: Removal of cause of action

The committee therefore seeks the Minister's advice as to whether creditors and third parties would be adversely affected by the bar on beginning or continuing court or tribunal proceedings at the point in time that the statutory manager is no longer in control of the body corporate's business.

Explanation:

The proposed sections 15B of the Banking Act, 62ZOR of the Insurance Act and 179AR of the Life Insurance Act are necessary to allow breathing space for the stabilisation of an insolvent entity in order to prepare it for resolution and to allow the statutory or judicial manager to focus on the interests of depositors or policyholders and properly discharge their statutory mandate.

It should be noted that they are moratorium provisions only. They temporarily suspend or stay the right to bring or continue proceedings rather than remove the cause of action as such.

Without these provisions, orderly resolution could be constrained by creditor or other third party actions. A disorderly resolution would result in poorer outcomes for depositors and policyholders, as well as creditors and other third parties. Depending on the entity involved a disorderly resolution may also have an adverse impact on the stability of financial markets or the wider industry.

There are sufficient checks and balances to mitigate against the risk of these provisions applying in a harsh or unjust way (indeed in certain respects they improve on the current provisions). To elaborate:

- Proposed sections 15B of the Banking Act, 62ZOR of the Insurance Act and 179AR of the Life Insurance Act apply where a statutory manager has been appointed to a regulated entity or related body. They provide that a person cannot begin or continue a proceeding in a court or tribunal in respect of the body corporate if a statutory manager is in control of the body corporate's business.

- However, the court or tribunal may grant leave for the proceeding to be begun or continued with on the ground that the person would be caused hardship if leave were not granted. This serves as a safeguard where, for example, the plaintiff would be prejudiced by the expiry of a limitation period if they were unable to commence the relevant proceeding. It should also be noted that APRA, or the statutory manager (after considering APRA's views) may consent to the proceeding beginning or continuing.

    - It should also be noted that APRA, or the statutory manager (after considering APRA's views) may consent to the proceeding beginning or continuing (proposed subsection 15B(5) in the Banking Act, proposed subsection 62ZOR(5) in the

Insurance Act and proposed subsection 179AR(5) in the Life Insurance Act). At the point in time that the statutory manager is no longer in control of the body corporate's business, there is no longer a bar on beginning or continuing proceedings.

- Existing section 15B of the Banking Act is in similar terms (although it does not refer to the statutory manager being able to consent).

- Proposed sections 62P of the Insurance Act and 161 of the Life Insurance Act apply where a judicial manager has been appointed to an insurer. They allow the court or tribunal, or the judicial manager (after considering APRA's views) to consent to the beginning or continuing of the proceedings. Again, this will allow the court, tribunal or judicial manager to allow proceedings to be filed where there would otherwise be hardship for the plaintiff (for example, proceedings need to be filed promptly as a limitation period is about to expire).

- Existing sections 62P of the Insurance Act and 161 of the Life Insurance Act are in similar terms except that, rather than allowing the court or tribunal in which the proceedings have been (or are to be) brought to allow them to be commenced or continue, they refer to the Federal Court giving leave.

- Similar moratorium provisions exist in other legislation, for example section 440D of the *Corporations Act 2001* (Corporations Act) (in the case of voluntary administration, under Part 5.3A of the Corporations Act).

Issue: Privilege against self-incrimination

The committee requests the Minister's advice as to why it is proposed to abrogate the privilege against self-incrimination in these two instances, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences*.

Explanation:

These provisions are based on existing section 14A of the Banking Act. It is critical that a statutory manager, having taken over what will often be an insolvent or near insolvent financial institution or related entity, be in a position to obtain all relevant information about the institution from officers (and former officers) in order for the statutory manager to control, stabilise, investigate and (to the extent possible) resolve the institution or resolve a related entity.

Overriding the privilege against self-incrimination is justified in this context because only the key personnel of a relevant entity will have access to information and documents relating to that entity's financial condition. It is essential for a statutory manager to be able to obtain this information quickly to assist with the management and crisis resolution of a relevant entity that is financially distressed. By compelling relevant officers or ex-officers to provide the required information and documents, statutory managers will be able to maximise their ability to rehabilitate a distressed entity. This will benefit the entity's customers, creditors and other suppliers. In the event of a significant crisis, APRA would also be able to use the information gathered to support decision making and prevent contagion in the system.

These powers only apply in relation to an 'officer' as defined in section 9 of the Corporations Act (e.g. a director or other senior person with significant strategic responsibilities in relation to the failed entity), and a person who has been such an officer. Circumstances may exist where the failure of the institution can be attributed to a failure by the one or more officers to comply with their statutory responsibilities, including where there has been a breach of Corporations Act provisions carrying an offence. This raises the real possibility of the statutory manager's

ability to fulfil his or her duties being hampered by a refusal to provide information on self-incrimination grounds, making the override of the privilege against self-incrimination necessary in this instance.

As the committee has noted, direct use immunity is conferred by these provisions, but not derivative use immunity. The reason for this is that if derivative use immunity applied, it would often be very difficult for the prosecution to show that the evidence they rely on to prove a criminal case against an officer relating to the failure of the financial institution was uncovered through an absolutely independent and separate investigation process. This may in turn lead to hesitation on the part of a statutory manager to exercise the information-obtaining power, undermining the purpose for which the power was conferred. Another difficulty with derivative use immunity is that further evidence obtained through a chain of inquiry resulting from the protected evidence cannot be used in relevant proceedings even if the additional evidence would have been uncovered through independent investigative processes. Also, where the information-obtaining power is exercised against officers or ex-officers who may have been responsible for the deterioration or failure of a financial institution, for example, a director implicated in a failure such as HIH, a derivative use immunity would not be helpful in building a case against the director for breach of their duties under law.

These provisions are consistent with the majority of existing self-incrimination provisions in other APRA-administered legislation, including provisions in the *Superannuation Industry (Supervision) Act 1993* (SIS Act) and *Private Health Insurance (Prudential Supervision) Act 2015*.

Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017

Issue: Reversal of evidential burden of proof

As the explanatory materials do not 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 this instance. 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*.

Explanation

Item 5 of Schedule 1, which introduces proposed offence-specific defences to section 56 of the APRA Act, reflects the current structure of section 56: the section currently consists of definitions (subsection 56(1)), an offence provision (subsection 56(2)) and numerous offence-specific defences in the subsections that follow. Section 56 follows a similar structure to section 79A of the *Reserve Bank of Australia Act 1959*.

The current structure of section 56 reflects that APRA needs to receive significant amounts of confidential information and documents from its regulated entities, which should not be disclosed except in specific circumstances.

Section 56 concerns the confidentiality of 'protected information' and 'protected documents'. Broadly, documents and information become 'protected' by virtue of both having been received by APRA and relating to the affairs of entities that APRA regulates, or customers of those entities, or entities that APRA registers or collects data from under the *Financial Sector (Collection of Data) Act 2001* (FSCODA). The offence can only be committed by an 'officer', defined in subsection 56(1) of the APRA Act as an APRA member or staff member, or any other person who, because of his or her employment, or in the course of that employment, has acquired protected information or has had access to protected documents.

While section 56 does address the possibility of protected information or protected documents being disclosed by persons who are not part of APRA, the overwhelming majority of instances in which disclosure might conceivably occur are from APRA staff, dealing with information held by APRA.

Item 5 of Schedule 1 seeks to introduce three exceptions to the offence that would otherwise be committed if a person who is, or has been an officer, discloses protected information or a protected document to any person or to a court: subsection 56(2) APRA Act. The three subsections proposed to be added to section 56 of the APRA Act relate to matters which would normally be expected to be peculiarly within the knowledge of the defendant. For example:

- This Bill will amend the Banking Act such that authorised deposit-taking institutions (ADIs) will be required register their 'accountable persons' (certain of their senior executives and directors that meet the description in proposed section 37BA of the Banking Act). APRA will be required to maintain a register of accountable persons: proposed section 37H of the Banking Act (the Register). As paragraph 1.139 of the Explanatory Memorandum to this Bill points out:

  'The register is not a public document nor is it a legislative instrument. Information provided to APRA under the BEAR is subject to the confidentiality provisions in the APRA Act. This means that APRA can disclose the information to an ADI, to the accountable person to whom the information relates and APRA may make any other disclosures permitted by the APRA Act, including where it has disqualified a person under BEAR.'

- Proposed subsection 56(7D) of the APRA Act has been introduced to permit officers of APRA to provide information contained on the Register to an ADI so that an ADI might consider that information in seeking to comply with its obligations under this Bill. In particular, an ADI is required make a declaration that the ADI is satisfied a person is suitable to be an accountable person (subsection 37(HA)) upon registration.

- Proposed subsection 56(7E) of the APRA Act has been introduced to permit officers of APRA to provide information contained on the Register to an individual, where that information is personal information about the individual.

- In both instances, the APRA officer disclosing the information will be in the best position to point to evidence that the information was contained on the Register as they will have access to the Register and in the case of proposed subsection 56(7E) will be best-placed to point to evidence as to whether the information was personal information relating to the person to who it was disclosed.

- Proposed subsection 56(7F) of the APRA Act has been introduced to permit officers of APRA to disclose information as to whether a person is disqualified under proposed section 37J of the Banking Act or whether APRA has made a decision under proposed Subdivision C of Division 6 of Part IIAA of that Act and the reasons for the decision. Decisions made under Subdivision C include a decision to disqualify an accountable person, and to vary or revoke such a decision. The APRA officer, who will have access to protected information relating to the decisions made under Subdivision C, will also be in the best position to point to evidence that the information met the criteria in subsection 56(7F) of the APRA Act.

It should also be emphasised that the defendant is merely required to adduce or point to evidence that suggests a reasonable possibility that the relevant fact or facts exist. It would be onerous, costly and (often) redundant for the prosecution to have to prove beyond reasonable doubt, in every prosecution, that the above circumstances do not exist. It is inherently difficult to prove a negative.

Issue: Privilege against self-incrimination

The committee therefore requests the Minister's advice as to:

a) the appropriateness of not providing a derivative use immunity with respect to the abrogation of the privilege against self-incrimination; and

b) the justification for limiting the use immunity to cases where a person has made a claim in advance of providing the potentially self-incriminating material.

Explanation

In order to protect the integrity of the prudential regulatory regime, and protect the interests of bank depositors and promote financial system stability, it is necessary to override the privilege against self-incrimination. This is to allow APRA to acquire all relevant information to administer the laws for which it is responsible.

(a) **Derivative use immunity**

The committee has noted that subsection 52F(2) of the Banking Act provides for 'use immunity', in that any information given to APRA in compliance with a requirement to give information under the Banking Act or the FSCODA is not admissible in evidence against the individual in criminal or civil penalty proceedings, other than in respect of the falsity of the information, but does not provide for derivative use immunity (meaning that any information

obtained as a consequence of the production of the information or documents may in fact be admissible).

The omission of any provision for derivative use immunity is consistent with the general position under the SIS Act, the Insurance Act and the Life Insurance Act.

The provision of derivative use immunity with respect to self-incriminating information would impair APRA's ability to effectively perform its regulatory functions.

It is relatively straightforward to prove compliance with use immunity in that all of the evidence obtained under compulsion from the person concerned is easily identifiable and can be excluded from any subsequent criminal or civil penalty proceedings against that person.

In most cases, establishing compliance with derivative use immunity would be substantially more difficult. It would require persuading the court to the required standard that no part of the original information was taken into account, directly or indirectly, when obtaining the information upon which the prosecution is based. This may require the introduction of Chinese walls in the agency who received the original information in order to avoid contagion of other employees of that agency who may be involved in obtaining the information upon which the prosecution is based. The effectiveness of these Chinese walls would also have to be proven.

The task would be made more difficult given that the required proof is a negative one (i.e., to disprove use). Disproving use would require the agency to prove that no person who had knowledge of the original information was in any way involved in the obtaining of the evidence on which the proceedings would be based. Even though the test is whether the further evidence was obtained as a direct or indirect consequence of the original information (as opposed to obtained by a person who is apprised of the original information), it would be practically impossible to prove that any information which was known to an employee of the agency was not causative in obtaining (directly or indirectly) any evidence to be relied upon in the proceedings by that agency. This would create significant resourcing constraints and financial burdens on an agency because it could not use any employees who have received the original information to obtain further evidence to be relied upon in the proceedings.

Both the Australian Securities and Investments Commission (ASIC) and APRA have similar views on the matter of derivative use immunity. APRA has advised that it agrees with the view expressed in ASIC's submissions to the Australian Law Reform Commission Inquiry into Traditional Rights and Freedoms: Issues Paper 46 (March 2015) at page 25: 'Any grant of derivative use immunity has the potential to render a person conviction-proof for an unforeseeable range of offences'.

Further, derivative use immunity has the potential to significantly impede the usefulness of information sharing about a person of common interest with another agency. This is because the other agency would also be bound by any derivative use immunity. In the event that the other agency wished to commence criminal or civil penalty proceedings against that person, it would not be able to make use of any evidence derived as a result of the originally received information. It would also face the additional evidentiary hurdle of establishing that no use was made of the shared information in obtaining the evidence to be relied upon in the prosecution. Please see above comments in relation to the difficulties in proving a negative assertion.

(b) Limitation of immunity

The application of use immunity to individuals who claim self-incrimination is an approach consistent with provisions in the SIS Act, the Life Insurance Act and the Insurance Act.

The process by which a person can make a claim for privilege against self-incrimination in the course of an examination is clearly explained to the examinee prior to the examination being conducted by APRA. It is then up to the examinee to assert that right.

Issue: Procedural fairness

The committee therefore requests the Minister's detailed advice as to:

a) whether the discretion granted to an investigator to limit the involvement of an examinee's lawyer in an APRA examination will be subject to an overarching obligation that the examinee be given a fair hearing;

c) whether an examinee would be able to include in a record of examination any objections he or she may have as to it accuracy prior to signing it; and

c) the extent to which the requirement that a lawyer must provide the name and address of a party to a privileged communication, and the particulars of the relevant document, book or account, would limit the application of legal professional privilege.

Explanation

(a) Limiting the involvement of the examinee's lawyer

An equivalent power to limit the involvement of the examinee's lawyer under proposed section 61E of the Banking Act is already provided in respect of examinations conducted under subsection 279(2) of the SIS Act and subsection 62E(2) of the Insurance Act.

An examination is part of the information gathering process to be used in the course of an investigation. APRA's internal documented examination procedures recognise the importance of fairness when conducting examinations and provide, in part, that:

- questions must be fair and relevant;
- questions must be clear and unambiguous;
- the examination must always be conducted in a professional and courteous manner;
- the examinee must be given an adequate opportunity to answer questions and to address the inspector (i.e. investigator); and
- the examinee's lawyer should be allowed to examine the examinee.

In order to ensure that an examination is conducted fairly, the investigator permits the rights of the examinee's lawyer to be exercised at appropriate times during the course of the examination. In a practical sense, the power to limit the involvement of the examinee's lawyer provides the investigator with the opportunity to impose a structure around the exercise of these rights. By imposing limits on the times during the examination when these rights can be exercised, the investigator is able to control the course of examination in order to increase the likelihood that the examination will be conducted in an efficient and effective manner, while also reducing the likelihood that these rights will be used to obstruct the examination.

The exercise of the power to limit the role of the examinee's lawyer in the course of an examination would only be used in exceptional circumstances and not to deprive the examinee's lawyers of the rights provided under the proposed section 61E(4). It is anticipated that the requirement for an examinee's lawyer to stop addressing the investigator or examining the examinee would only be made in those rare instances where the investigator formed the opinion that the examinee's lawyer was deliberately attempting to obstruct the examination.

(b) Objections to the accuracy of the record of an examination

An examinee would be able to include in a record of examination corrections of typographical or transcription errors. To elaborate:

- It is APRA practice to make a sound recording of all examinations conducted pursuant to its compulsory powers. APRA then engages the services of a transcription company to prepare a transcript of the examination and provides the examinee with a copy of the transcript as well as a copy of the sound recording.

- The examinee is requested to review the transcript to ensure that it is an accurate record of the statements made at the examination and invited to make any corrections to the transcript. The only corrections made should be typographical errors or transcriptions error as the transcript should be an accurate reflection of the actual words said during the examination.

- If an examinee advises APRA of any areas where their evidence is different to that given during the examination, they will be requested to do so in writing, as per APRA's documented internal examination procedures.

(c) Legal professional privilege

Proposed section 62AA of the Banking Act is consistent with section 288 of the SIS Act. The section recognises that legal professional privilege belongs to the client and not the legal representative. Furthermore, the person who asserts legal professional privilege has the obligation of establishing that the claim is valid. In order for an investigator to make an informed decision about the validity of the claim, it is necessary for the examinee to provide the investigator with sufficient information: *National Crime Authority v S (1991) 29 FCR 203* at 211.

Proposed section 62AA is intended to provide the investigator with the opportunity to obtain the minimum information necessary in order to make an informed assessment of the validity of a legal professional privilege claim made by a lawyer.

Treasury Laws Amendment (Banking Measures No.1) Bill 2017

Issue: Incorporation of material as in force from time to time

The committee requests the Treasurer's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subsection 38C(7), 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 instrument is first made.

Explanation

The ability for APRA to incorporate extrinsic material into a non-ADI lender rule as permitted under proposed section 38C(7) of the Banking Act is essential to ensuring the effectiveness of the rules and minimising their associated compliance burden.

If APRA determines to make a non-ADI lender rule, it is possible that the rule will need to refer to complex concepts that are already defined in existing commercial standards. In these circumstances, it is clearer to incorporate the source material detailing these concepts rather than seeking to duplicate the concepts in the rule. Referring to extrinsic materials in rules – rather than attempting to replicate the terms in rules – would avoid APRA's rules becoming out of step with commercial practice.

Examples of extrinsic material that might be used are Prudential Practice Guides published by APRA or documents published by the Australian Bureau of Statistics (ABS), such as the Household Expenditure Measure (HEM) devised by the ABS to calculate living expenses of borrowers.

Examples of extrinsic material that might be used are Prudential Practice Guides published by APRA or documents published by the Australian Bureau of Statistics (ABS), such as the 'HEM' (Household Expenditure Measure) devised by the ABS to calculate living expenses of borrowers.

Persons likely to be interested in the non-ADI lender rules would be familiar with the publishers or entities responsible for such extrinsic material (e.g. APRA or the ABS) and, as these documents are freely available on the internet to all, should be able to locate such material. This said, when incorporating such extrinsic material into a rule, APRA would also take efforts to provide information as to where that material could be found (for example, the URL of the appropriate document) to assist readers and remove doubt.

It is necessary to apply these documents as in force or existing from time to time due to the fact that the financial markets can alter relatively quickly; reference to static documents would not provide responsiveness in the same manner and could also necessitate frequent changes being made to non-ADI lender rules.

Rules made under proposed paragraphs 38C(2)(a) and (b) (the most likely form of rules to be issued) are legislative instruments and the process for making and commencing takes time. Given that non-ADI lender rules are likely to be most needed in times of financial instability, rules that are slow in responding to market changes are unlikely to be as effective as rules that are responsive.

Issue: Consultation prior to making delegated legislation

The committee therefore requests the Treasurer's advice as to the rationale for including a no-invalidity clause in this provision, which has the effect that a failure to appropriately consult prior to making a non-ADI lender rule will not invalidate the rule.

Explanation

It is expected that APRA will, in all but extreme or time-critical circumstances, make efforts to consult not only ASIC under proposed subsection 38F(4) of the Banking Act, but also the non-ADI lenders subject to be subject to the rule (via a regulation impact statement-like process). This is consistent with the Government's position as put forward in the explanatory memorandum, and statements made in the regulation impact statement.

Nevertheless, there are three rationales that underpin the no-invalidity clause in proposed subsection 38F(5), which provides that failure to comply with the consultation obligation in proposed subsection 38F(4) does not invalidate the making, varying, or revoking of a non-ADI lender rule.

Firstly, the no-invalidity clause reflects Parliament's intention to vest the jurisdiction to make, vary, or revoke non-ADI lender rules exclusively with APRA.

Secondly, the no-invalidity clause acknowledges the safeguards against the arbitrary use of non-ADI lender rules. The availability of avenues of review and potential for Parliamentary scrutiny will ensure public confidence in decisions made by APRA relating to non-ADI lender rules. For example:

- Proposed section 38H provides for merits review of decisions relating to non-ADI lender rules. There is also the usual recourse to judicial review afforded under the *Administrative Decisions (Judicial Review) Act 1977* and the Constitution.

- Additionally, should a rule be made by APRA to be complied by non-ADI lenders, or a class of non-ADI lenders, these rules will be legislative instruments under proposed section 38G.

  - As a legislative instrument, the rule will therefore be subject to the scrutiny of, and potential disallowance by, the Parliament.

Thirdly, the no-invalidity clause recognises that the desirability of consultation with ASIC is outweighed by the public inconvenience that would arise if a failure to consult deprived the making, varying, or revoking of a non-ADI lender rule of legal validity.

- Members of the public, particularly those affected by non-ADI lender rules (such as non-ADI lenders), should be able to organise their affairs on the basis of apparently valid decisions.

- To invalidate a decision relating to non-ADI lender rules as a result of a failure by APRA to consult with ASIC would invariably cause undue expense, inconvenience and loss of public confidence.

  - This is particularly the case where, in these circumstances, such non-compliance would be extremely difficult for members of the public to detect, given the confidentiality and secrecy protections that attach to consultation between APRA and ASIC.

  - Such an outcome would also be directly at odds with the rationale of enabling APRA to make non-ADI lender rules which, as outlined at proposed subsection 38C(1), is to empower APRA with the ability to address material risks of financial instability in the Australian financial system.

Treasury Laws Amendment (National Housing and Homelessness Agreement) Bill 2017
Issue:

'...the committee suggests it may be appropriate for the bill to be amended to:

- **include some high-level guidance as to the terms and conditions that States will be required to comply with in order to receive payments of financial assistance under a designated housing agreement; and**
- **include a legislative requirement that any primary, supplementary or designated housing agreements are:**
  - **tabled in the Parliament within 15 sitting days of being made, and**
  - **published on the internet within 30 days of being made.**

The committee seeks the Minister's advice in relation to the above.'

Explanation:

Guidance on Designated Housing Agreements

As noted by the Committee in its Digest, proposed section 15D of the *Federal Financial Relations Act 2009* provides for designated housing agreements between the Commonwealth and States or Territories (States). These could be either a multi-party or bilateral agreement. I note that, consistent with the proposed amendment to section 4, a designated housing agreement (DHA) must relate to any or all of: housing, homelessness and housing affordability matters.

This provides the flexibility for the Commonwealth and States to enter into other housing and homelessness agreements as may be needed from time to time. Funding is only payable if it is spent by the State in accordance with the DHA. Including additional guidance on terms and conditions that States would be required to comply with may unduly limit the Commonwealth's ability to provide financial assistance in the future and the States' ability to respond flexibly to jurisdiction-specific circumstances.

Tabling and publication of Agreements

I note the suggestion by the committee in its Digest, to include a requirement to table Agreements in Parliament and publish them on the internet. All agreements under the Federal Financial Relations framework are available publicly on the Council on Federal Financial Relations website.