The Senate

Standing Committee for the Scrutiny of Bills

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Terms of Reference

Extract from **Standing Order 24**

(1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

(b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.

(c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

Introduction

Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament in relation to:

- whether it unduly trespasses on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient parliamentary scrutiny.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will often correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

General information

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant legislation committee for information.

Chapter 1

Commentary on Bills

1.1 The committee seeks a response or further information from the relevant minister or sponsor of the bill with respect to the following bills.

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017

Purpose	This bill seeks to amend the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) and the *Financial Transaction Reports Act 1988* to: • expand the objects of the AML/CTF Act to reflect the domestic objectives of AML/CTF regulation; • regulate digital currency exchange providers; • amend industry regulation requirements relating to due diligence obligations for correspondent banking relationships; the cash-in-transit sector, insurance intermediaries and general insurance providers; the term 'in the course of carrying on a business'; and sharing information between related bodies corporate; • increase the investigation and enforcement powers of the Australian Transaction Reports and Analysis Centre (AUSTRAC); • provide police and customs officers broader powers to search and seize physical currency and bearer negotiable instruments; • provide police and customs officers broader powers to establish civil penalties for failing to comply with questioning and search powers; • revise the definitions of 'investigating officer', 'signatory' and 'stored value card' in the AML/CTF Act; and • clarify other regulatory matters relating to the powers of the AUSTRAC CEO
Portfolio	Justice
Introduced	House of Representatives on 17 August 2017
Scrutiny principles	Standing Order 24(1)(a)(i), (iii) and (iv)

Strict liability offences[1]

1.2 Proposed section 76A seeks to establish a number of offences in relation to an unregistered person providing digital currency exchange services. The basic offence[2] of breaching a requirement not to provide a digital currency exchange service unless registered is subject to a penalty of up to two years imprisonment or 500 penalty units. There are also three aggravated offences[3] with increased penalties, of up to seven years imprisonment or 2,000 penalty units for breaching this requirement in circumstances where the person has previously been given a remedial direction or has been convicted of relevant offences. For all four offences, strict liability is stated as applying to whether a person engaged in the relevant conduct and whether their conduct breached the relevant requirement.

1.3 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[4]

1.4 In this instance the explanatory memorandum gives a detailed explanation for the imposition of strict liability. It states that it is appropriate to apply strict liability to ensure the integrity of the regulatory regime is maintained, and requiring proof of fault for the physical elements of the offences would undermine the deterrent effect as it would allow for entities to argue that they did not know or were reckless as to whether they had obligations under the Act.[5]

1.5 The *Guide to Framing Commonwealth Offences* states that applying strict liability may be appropriate where requiring proof of fault would undermine deterrence *and* there are legitimate grounds for penalising persons lacking fault in

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1 Schedule 1, item 20, proposed section 76A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

2 See proposed subsection 76A(3).

3 See proposed subsections 76A(5), (7) and (9).

4 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

5 Explanatory memorandum, p. 19.

respect of that element.[6] The committee notes that while the explanatory memorandum explains that requiring proof of fault may undermine deterrence, it does not explain what the legitimate grounds are for penalising persons lacking fault in respect of conduct that breaches the requirement to be registered before providing a digital currency exchange service. The committee notes that the explanatory memorandum states that requiring proof of fault 'would allow for entities to argue that they did not know or were reckless as to whether they had obligations under the Act'.[7] However, while this may apply in relation to the question of whether a person's conduct intentionally or recklessly breaches a requirement that they be registered or comply with conditions of registration,[8] this would not seem to apply to the question of whether a person has intentionally engaged in the relevant conduct.

1.6 The explanatory memorandum also acknowledges that the penalties that apply in the bill 'do not align with the standard fine/imprisonment ratio set out in the Guide' but states that this is justified on the basis of the need to deter high-risk digital currency exchange providers.[9] The *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[10] In this instance, the bill proposes applying strict liability to offences that are subject to up to 7 years imprisonment. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

1.7 The committee requests the Minister's advice as to the grounds for penalising persons lacking fault in respect of providing a digital currency exchange service without being registered (including providing any examples of where a person could unintentionally provide a digital currency exchange).

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6 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

7 Explanatory memorandum, p. 19.

8 See proposed paragraphs 76A(3)(c); (5)(c); (7)(c); and 9(c).

9 Explanatory memorandum, p. 19.

10 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

Significant matters in delegated legislation[11]

1.8 Proposed sections 76K and 76L provide that the rules (delegated legislation) may make provision for and in relation to the suspension and renewal of registrations by the AUSTRAC CEO. A number of important matters are thereby delegated to the rules, including the grounds on which suspension decisions may be made, the criteria for determining applications for renewal and whether decisions to suspend or not renew registration should be subject to review. The committee's view is that significant matters such as these should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum gives no reason for including such matters in the rules as opposed to the primary legislation.

1.9 The committee also notes that these significant matters are to be included in 'rules' rather than in 'regulations'. The issue of the appropriateness of providing for significant matters in legislative rules (as distinct from regulations) is discussed in the committee's *First Report of 2015*.[12] In relation to this matter, the committee has noted that regulations are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and must also be drafted by the Office of Parliamentary Counsel (OPC). Therefore, if significant matters are to be provided for in delegated legislation (rather than primary legislation) the committee considers they should at least be provided for in regulations, rather than other forms of delegated legislation which are subject to a lower level of executive scrutiny.[13]

1.10 In addition, where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. The committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not

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11 Schedule 1, item 20, proposed sections 76K and 76L. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

12 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 21–35.

13 See also Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No. 17 of 2014*, 3 December 2014, pp 6–24.

be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.[14]

1.11 The committee's view is that significant matters, such as the grounds on which suspension decisions may be made, the criteria for determining applications for renewal and whether decisions to suspend or not renew registration should be subject to review, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's detailed advice as to:

- **why it is considered necessary to leave details about renewal and suspension of registrations to delegated legislation;**
- **if significant matters are to be included in delegated legislation, why it is appropriate to include these in rules rather than regulations;**
- **why the bill only provides that the rules *may* provide for the review of decisions relating to suspension and applications for renewal, rather than providing that such decisions *will* be subject to merits review; and**
- **the type of consultation that it is envisaged will be conducted prior to the making of the rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).**

Civil penalty provisions[15]

1.12 The bill proposes to make four provisions in the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the Act) into civil penalty provisions. Section 175 of the Act states that the maximum pecuniary penalty payable by an individual for a civil penalty provision is 20,000 penalty units (or $4.2 million) and for a body corporate 100,000 penalty units (or $21 million). The changes made by this bill would mean that an individual could be liable to a civil penalty of up to $4.2 million for a failure to notify the AUSTRAC CEO of a change in circumstances that could materially affect the person's registration;[16] a failure to declare an amount of

14 See sections 18 and 19 of the *Legislation Act 2003*.

15 Schedule 1, item 20, proposed subsections 76A(11) and 76P(3); item 73, proposed subsection 199(13); and item 75, proposed subsection 200(16). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

16 See Schedule 1, item 20, proposed subsection 76P(3).

currency or a bearer negotiable instrument when leaving or entering Australia;[17] or providing a registrable digital currency exchange service if not registered.[18] These are extremely significant penalties, yet no justification has been provided in the explanatory memorandum as to the appropriateness of making these provisions subject to such high civil penalties. The committee also notes that the equivalent financial criminal penalties in relation to two of the provisions are up to 60 penalty units,[19] which is substantially lower than up to 20,000 penalty units for an individual or 100,000 for a body corporate for breach of the proposed civil penalty provisions.

1.13 The committee requests the Minister's advice as to the appropriateness of making certain provisions, including a failure to notify of a change of circumstances, subject to civil penalties of up to 20,000 penalty units for an individual (or $4.2 million) and 100,000 penalty units (or $21 million) for a body corporate.

Immunity from civil or criminal liability[20]

1.14 Proposed section 76R provides that no action, suit or proceeding (whether criminal or civil) lies against the Commonwealth, the AUSTRAC CEO or a member of the staff of AUSTRAC in relation to the publication of the Digital Currency Exchange Register or a list of the names of persons whose registration has been cancelled. This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of defamation). The committee notes that this applies even if the action taken was not done in good faith.

1.15 The committee expects that if a bill seeks to provide immunity from liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.[21]

1.16 The committee requests the Minister's advice as to why it is considered appropriate to provide immunity from civil or criminal liability so that affected persons will no longer have a right to bring an action to enforce their legal rights. The committee considers it may be appropriate, at a minimum, for proposed

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17 See Schedule 1, item 73, proposed subsection 199(13) and item 75, proposed subsection 200(16).

18 See Schedule 1, item 20, proposed subsection 76A(11).

19 See sections 199 and 200 of the Act.

20 Schedule 1, item 20, proposed section 76R. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

21 See explanatory memorandum, p. 24.

section 76R to be amended to provide that the immunity only applies to actions taken in good faith, and requests the Minister's response in relation to this matter.

Fair hearing rights[22]

1.17 Proposed subsection 76S(1) states that before the AUSTRAC CEO makes a decision to refuse to register a person as a digital currency exchange provider, to impose conditions on registration or to cancel a person's registration, they must give a written notice to the person, with reasons provided, allowing the affected person to make a submission in relation to the proposed decision. However, proposed subsection 76S(2) provides that the AUSTRAC CEO is not required to give this notice if satisfied that it is inappropriate to do so because of the urgency of the circumstances. This would appear to remove the fair hearing requirements in these circumstances. The explanatory memorandum does not give a justification for limiting the right to a fair hearing in this way.

1.18 The committee notes it is unclear what circumstances may be so urgent in relation to a decision not to register a person. It is also unclear why it is necessary to remove the requirement to give notice regarding cancellation in urgent circumstances, given proposed section 76K gives a power to suspend registration, which could be used in urgent situations before a decision is made to cancel registration.

1.19 The committee therefore requests the Minister's advice as to why it is necessary and appropriate to remove the requirement to notify an affected person before a decision is made not to register the person, to impose conditions on registration or to cancel registration.

Seizure powers[23]

1.20 A number of items in the bill propose broadening the search and seizure powers currently exercisable by police and customs officers at the border. These powers would enable police and customs officers to seize physical currency and bearer negotiable instruments produced or found during a search, in certain circumstances. As recognised in the explanatory memorandum,[24] the *Guide to*

22 Schedule 1, item 20, proposed subsection 76S(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

23 Schedule 1, item 67, proposed subsection 199(2A); item 71, proposed subsection 199(5); item 72, proposed subsection 199(10); and item 74, proposed subsection 200(13A). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

24 Explanatory memorandum, p. 39.

Framing Commonwealth Offences provides that seizure should only be allowed under a warrant, noting that seizure is a significant coercive power and the Commonwealth has consistently taken the approach that it should require authorisation under a search warrant.[25] The Guide also states that there is a very limited range of circumstances where it may be appropriate to allow officers the ability to seize pending issue of a warrant, such as where reasonably necessary to resolve a situation of immediate emergency.[26] The explanatory memorandum appears to reinterpret this to say that the Guide contemplates there is a limited range of circumstances where it may be appropriate to allow for seizure, such as where it may not be possible or practical to obtain a warrant.[27] The committee does not consider this is the appropriate test and affirms its scrutiny view that seizure should only take place under a warrant, unless seizure is necessary to resolve a situation of immediate emergency.

1.21 The committee notes that it is possible to provide that a police or customs officer may, without a warrant, secure an item pending issue of a warrant authorising seizure. The explanatory memorandum does not explain why this approach was not adopted. The committee also notes that provisions in the Act currently give certain powers to police and customs officers to seize such items (in more limited circumstances), and notes that the fact that powers already exist in the Act to enable the seizure of certain items does not, of itself, provide a justification for including such powers in the bill currently under consideration.

1.22 The committee requests the Minister's detailed justification for provisions that give police and customs officers the power to seize physical currency and bearer negotiable instruments without a warrant. In particular, the committee seeks the Minister's advice as to:

- **why the proposed power is to seize the relevant items rather than a power to secure the items pending the obtaining of a warrant;**
- **whether, if the seizure power remains, there could be increased accountability for the exercise of this power, such as requiring senior police or executive authorisation for the exercise of the power; and**

25 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 82–83.

26 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 39.

27 Explanatory memorandum, p. 39.

- **whether legislative requirements are in place (and if not, why not) regulating:**
  - **the period of time seized items can be retained;**
  - **the process for seized material to be reviewed on a regular basis; and**
  - **the procedure for the return of the seized items.**

Australian Bill of Rights Bill 2017

Purpose	This bill seeks to: • introduce a Bill of Rights to give effect to certain provisions of three human rights conventions to which Australia is a signatory; and • allow the Australian Human Rights Commission to inquire into any act or practice that may infringe a right or freedom in the Bill of Rights
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 14 August 2017

The committee has no comment on this bill.

Defence Amendment (Fair Pay for Members of the ADF) Bill 2017

Purpose	This bill seeks to amend the *Defence Act 1903* to link the wages of members of the Australian Defence Force to annual pay increases of federal parliamentarians or to the Consumer Price Index, whichever is greater
Sponsor	Senator Jacqui Lambie
Introduced	Senate on 16 August 2017

The committee has no comment on this bill.

Electoral Amendment (Banning Foreign Political Donations) Bill 2017

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to: • make it unlawful for a political party or candidate to receive a donation of over $1000 from foreign sources; and • require a Statutory Declaration from donors to demonstrate they are not a foreign person
Sponsor	The Hon Bob Katter MP
Introduced	House of Representatives on 14 August 2017

The committee has no comment on this bill.

Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017

Purpose	This bill seeks to amend the *Fair Work (Registered Organisations) Act 2009* to: • expand the automatic disqualification regime to prohibit persons that have committed serious criminal offences punishable by five or more years imprisonment from acting as an official of a registered organisation; • allow the Federal Court to prohibit certain officials from holding office who contravene a range of industrial and other relevant laws, are found in contempt of court, repeatedly fail to stop their organisation from breaking the law or are otherwise not a fit and proper person to hold office in a registered organisation; • make it an offence for a person to continue to act as an official or in a way that influences the affairs of an organisation once they have been disqualified; • allow the Federal Court to cancel the registration of an organisation on a range of grounds; • allow applications to be made to the Federal Court for other orders, including the suspension of rights and privileges of an organisation and individual where its officers or members are acting in a manner that is inconsistent with the rights and privileges of registration; • expand the grounds on which the Federal Court may order remedial action to deal with governance issues in an organisation; and • introduce a public interest test for amalgamations of registered organisations
Portfolio	Employment
Introduced	House of Representatives on 16 August 2017
Scrutiny principles	Standing Order 24(1)(a)(i) and (ii)

Insufficiently defined disqualification powers[28]

1.23 Schedule 1 seeks to amend the *Fair Work (Registered Organisations) Act 2009* to expand the circumstances in which a person may be disqualified from holding office in a registered organisation. Subsection 223(3) provides that, in certain circumstances, a ground for disqualification applies in relation to an officer of a registered organisation if that officer fails to prevent contraventions by the organisation of which they are an officer. Specifically, paragraph 223(3)(a) provides that a ground for disqualification applies in relation to a person if, while the person was an officer of the organisation, two findings[29] have been made against the organisation. Paragraph 223(3)(b), however, provides that this ground for disqualification will only apply if the person has 'failed to take reasonable steps to prevent the conduct'.

1.24 Given that disqualification may have a significant impact on an affected individual, it is of concern that the bill does not provide more specificity about the actions it is expected an individual officer would need to take to avoid bearing consequences of a finding which relates to an organisation, rather than to the individual themselves.

1.25 The explanatory memorandum suggests that the Final Report of the Royal Commission into Trade Union Governance and Corruption recommended this ground of disqualification on the basis of a similar ground for disqualifying a person from managing a corporation provided for in subsection 206E(1) of the *Corporations Act 2001*. While the committee notes this recommendation, the fact that a provision exists in other legislative schemes does not, of itself, address the committee's scrutiny concerns.

1.26 The committee requests the Minister's advice as to the appropriateness of including specific guidance in the primary legislation as to the type of reasonable steps that must be undertaken in order to avoid disqualification under this provision.

Strict liability offences[30]

1.27 The bill seeks to introduce three new strict liability offences relating to a person standing for or continuing to hold office when disqualified,[31] failure to help

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28 Schedule 1, item 9, proposed paragraph 223(3)(b). The committee draws Senators' attention to this provision pursuant to principles 1(a)(i) and (ii) of the committee's terms of reference.

29 Of the sort specified in subparagraphs 223(3)(a)(i)-(iii).

30 Schedule 1, item 9, proposed subsection 226(4) and Schedule 3, item 4, proposed subsections 323G(3) and 323H(5). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

an administrator when required to do so,[32] and failure to give administrators access to an organisation's books when required to do so.[33]

1.28 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[34]

1.29 In this case, there is detailed information about the proposed imposition of strict liability in the statement of compatibility and explanatory memorandum.

1.30 In relation to the offences in proposed section 226 (relating to a person standing for or continuing to hold office when disqualified), the explanatory materials note that strict liability will only apply to the physical element of the offence that the person is disqualified from holding office by an order of the Federal Court, and that strict liability is appropriate because a person would be aware that they have been disqualified where the Federal Court has made such an order.[35] The explanatory materials also highlight the need for deterrence, the fact that a defence of honest and reasonable mistake of fact will be available, that strict liability will not apply where a person is automatically disqualified, and that the provision is modelled on existing section 206A of the *Corporations Act 2001*.[36] In relation to this final point, the committee notes that the penalty in this proposed provision (100 penalty units or imprisonment for two years, or both) is double that in existing section 206A of the *Corporations Act 2001*.

1.31 In relation to the offences in proposed sections 323G and 323H (relating to failure to help an administrator when required to do so and failure to give administrators access to an organisation's books when required to do so), the

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31 Schedule 1, item 9, proposed section 226.

32 Schedule 3, item 4, proposed section 323G.

33 Schedule 3, item 4, proposed sections 323H.

34 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

35 Explanatory memorandum, p. 11.

36 Statement of compatibility, pp xi–xii and explanatory memorandum, p. 11.

explanatory materials emphasise that the provisions (including the level of penalty) are modelled on existing provisions within the *Corporations Act 2001* and that 'the similarities between the regulation of the corporate governance of companies and registered organisations justifies the imposition of strict liability and a penalty of imprisonment'. The explanatory materials also suggest that the offences are necessary to ensure the integrity and effectiveness of the regulatory regime and also note that a defence of honest and reasonable mistake of fact will be available. In relation to the strict liability offence relating to failure to assist administrators in proposed section 323G, there is a reasonable excuse defence and explicit provisions which ensure that the offence does not override the privilege against self-incrimination or legal professional privilege. Finally, the explanatory materials suggest that the strict liability elements of both offences are clear and straightforward.[37] In relation to this final point, the committee notes that it is not evident that the strict liability elements are in fact 'clear and straightforward' because the requirements are framed by reference to what the 'administrator reasonably requires'.

1.32 The *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[38] In this instance, the bill proposes applying strict liability to offences that are subject to up to 12 months or 2 years imprisonment. The committee reiterates its long-standing scrutiny view that it is inappropriate to apply strict liability in circumstances where a period of imprisonment may be imposed.

1.33 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of imposing strict liability in relation to three proposed new offences in the bill, in circumstances where the offences are punishable by imprisonment.

Reversal of evidential burden of proof[39]

1.34 Proposed subsection 323H(5) makes it an offence if a person does not comply with a notice requiring the person to deliver to the administrator specified books that are in the person's possession. Proposed subsection 323H(6) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply to the extent that the person is entitled to retain possession of the books. The

37 Statement of compatibility, p. xii and explanatory memorandum, pp 29–30.

38 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

39 Schedule 3, item 4, proposed subsection 323H(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

offence carries a maximum penalty of 50 penalty units or imprisonment for 12 months, or both.

1.35 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.36 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.37 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in proposed subsection 323H(6) has not been directly addressed in the explanatory materials. In particular, it is not clear why the question of whether a person is entitled to retain possession of the books is a matter peculiarly within the person's knowledge.

1.38 As the explanatory materials do not address this issue, the committee requests the Minister's advice as to why it is proposed to use an offence-specific defence (which reverses 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*.[40]

Immunity from civil liability[41]

1.39 Proposed section 323K seeks to exclude an administrator, or a person acting under the direction of an administrator, from liability for acts or omissions done in good faith in the performance or exercise, or purported performance or exercise, of any function or power of the administrator.

1.40 In relation to the good faith requirement, the committee notes that the courts have taken the position that bad faith can only be shown in very limited circumstances.

40 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 50-52.

41 Schedule 3, item 4, proposed section 323K. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

1.41 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.[42]

1.42 The committee requests the Minister's advice as to why it is considered necessary and appropriate to provide administrators with immunity which may limit the ability of persons to enforce their legal rights. The committee also requests advice as to whether it is possible that the immunity could extend to criminal proceedings and why the provision is framed to extend to the *purported* performance or exercise of any function or power of the administrator.

42 Explanatory memorandum, p. 30.

Medicare Levy Amendment (National Disability Insurance Scheme Funding) Bill 2017 and related Bills

Purpose	This bill seeks to amend the *Medicare Levy Act 1986* to increase the Medicare levy rate from 2 to 2.5 per cent of taxable income for the 2019-2020 income year and later income years The related bills seek to incorporate the change in the Medicare levy rate into various Acts, setting the tax rates that take the rate of Medicare levy into account. The related bills are: • Fringe Benefits Tax Amendment (National Disability Insurance Scheme Funding) Bill 2017; • Income Tax Rates Amendment (National Disability Insurance Scheme Funding) Bill 2017; • Superannuation (Excess Non-concessional Contributions Tax) Amendment (National Disability Insurance Scheme Funding) Bill 2017; • Superannuation (Excess Untaxed Roll-over Amounts Tax) Amendment (National Disability Insurance Scheme Funding) Bill 2017; • Income Tax (TFN Withholding Tax (ESS)) Amendment (National Disability Insurance Scheme Funding) Bill 2017; • Family Trust Distribution Tax (Primary Liability) Amendment (National Disability Insurance Scheme Funding) Bill 2017; • Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 1) Amendment (National Disability Insurance Scheme Funding) Bill 2017; • Taxation (Trustee Beneficiary Non-disclosure Tax) (No. 2) Amendment (National Disability Insurance Scheme Funding) Bill 2017 • Treasury Laws Amendment (Untainting Tax) (National Disability Insurance Scheme Funding) Bill 2017 • Nation-building Funds Repeal (National Disability Insurance Scheme Funding) Bill 2017
Portfolio	Treasury
Introduced	House of Representatives on 17 August 2017

The committee has no comment on these bills.

Migration and Other Legislation Amendment (Enhanced Integrity) Bill 2017

Purpose	This bill seeks to amend the *Migration Act 1958*, the *Income Tax Assessment Act 1936*, and the *Taxation Administration Act 1953* to: • authorise the public disclosure of sponsor sanction details; • clarify merit review rights for certain skilled visas; • enable the Department of Immigration and Border Protection to collect, record and store tax file numbers of certain visa holders for compliance and research purposes; and • address incorrect references to the *Regulatory Powers (Standard Provisions) Act 2014*
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 16 August 2017
Scrutiny principles	Standing Order 24(1)(a)(i), (iii) and (iv)

Significant matters in delegated legislation[43]

1.43 Section 140K of the *Migration Act 1958* currently sets out sanctions that may be taken in relation to approved sponsors. The bill proposes introducing subsection 140K(4) to provide that the Minister must publish information, including personal information, if an action is taken under section 140K in relation to an approved (or formerly approved) sponsor who fails to satisfy applicable sponsorship obligations. The information to be published is information that is 'prescribed by the regulations'.

1.44 The committee's view is that significant matters, such as the type of information, including personal information, to be published, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the explanatory memorandum does not explain why it is necessary or appropriate to leave the details of what information may be published to delegated legislation. The statement of compatibility also does not explain why these matters are to be left to delegated legislation, however, it does state that 'the

43 Schedule 1, item 1, proposed subsection 140K(4). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

disclosure of information is limited to the name of the business, the Australian Business Number, [and] the relevant legal requirements that have been breached'.[44] The statement of compatibility also goes on to state that the Department will publish an analogous level of detail as is currently published by the Office of the Migration Agents Registration Authority and the Fair Work Ombudsman, such as 'business names, Australian Business Numbers, and specific details of their adverse compliance outcome'.[45]

1.45 However, the committee notes there is nothing in the primary legislation that limits the type of information that may be published in this way. It is not clear to the committee why, if the intention is to publish information of the kind set out in the statement of compatibility, the bill does not specify that this is the information that is to be published.

1.46 The committee therefore requests the Minister's advice as to why it is necessary and appropriate to leave to delegated legislation all details of the categories of information that may be published about actions taken against sponsors who fail to satisfy their sponsorship obligations.

Procedural fairness[46]

1.47 Proposed subsection 140K(5) states that in publishing information, as prescribed by the regulations, about sanctions taken against approved sponsors, the Minister is not required to observe any requirements of the natural justice hearing rule. The committee notes that the natural justice hearing rule, which requires that a person be given an opportunity to present their case, is a fundamental common law principle and if it is to be abrogated this should be thoroughly justified. In this instance, the explanatory memorandum states that this is because the information will only be published once a decision has been made to take action to impose a sanction for failing to satisfy a sponsorship obligation under current section 140K and proposed subsection (5) does not limit the Minister's procedural fairness obligations in relation to that underlying decision.

1.48 The committee notes that while there may already have been a hearing in relation to whether the Minister takes an action under existing section 140K, and the decision to publish is not a discretionary power (there is an obligation to publish), the regulations may prescribe circumstances in which the Minister is not under that obligation (see proposed subsection 140K(7)). It is therefore not clear to the

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44 Statement of compatibility, p. 16.

45 Statement of compatibility, p. 16.

46 Schedule 1, item 1, proposed subsection 140K(5). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

committee why there is no right to a hearing on whether or not any prescribed circumstances exist in a given case. The explanatory memorandum does not address this issue.

1.49 The committee also notes that the publication of the information about sanctions occurs if an action is taken under section 140K. This would therefore require the publication as soon as an action is taken to, for example, bar the sponsor, cancel the person's approval as a sponsor or apply for a civil penalty order. This would therefore be before any review has been undertaken in relation to the initial decision (or before any application for a court order under section 140K has been determined). As such, information about a sponsor may be published in circumstances where it may later be determined on review that the action taken was not justified or where an application for a court order is refused. Therefore, any existing rights of review of action taken under section 140K may not be adequate, given it may not be capable of providing adequate redress to a person who has suffered damage to their reputation.

1.50 The committee requests the Minister's advice as to why the natural justice hearing rule is being excluded in its entirety in relation to the publication by the Minister of information prescribed by the regulations in relation to sanctions taken against approved sponsors. The committee considers it may be appropriate to remove proposed subsection 140K(5) which removes the natural justice hearing rule, or at a minimum, to limit its application so it is clear an affected person is entitled to a hearing as to whether or not the Minister is not required to publish information by virtue of proposed subsection 140K(7), and requests the Minister's advice in relation to this matter.

1.51 The committee also considers it may be appropriate for the bill to be amended to require that publication be delayed until after the time limit for an application for review has expired, after a final determination of a review application, and after a decision in relation to an application for a court order under section 140K has been determined, and requests the Minister's advice in relation to this matter.

Immunity from civil liability[47]

1.52 Proposed subsection 140K(6) provides that no civil liability will arise from any action taken by the Minister in good faith in publishing information under proposed subsection 140K(4), relating to sponsors who fail to satisfy sponsorship obligations. This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack

47 Schedule 1, item 1, proposed subsection 140K(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

of good faith is shown. The committee notes that the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.53 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.[48]

1.54 The committee requests the Minister's advice as to why it is considered appropriate to provide the Minister with civil immunity so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

Retrospective application[49]

1.55 Item 3 provides that the amendments to section 140K of the *Migration Act 1958*, as described above, apply in relation to actions taken under that section on or after 18 March 2015, making the amendments retrospective.

1.56 The committee has a long-standing scrutiny concern about provisions that apply retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals. Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.57 In this instance, the explanatory memorandum states that 18 March 2015 is the date of the government's response to a report which supported a recommendation that the Department disclose greater information on its sanctions actions.[50]

1.58 The committee notes that tying the commencement of legislative provisions to the timing of ministerial announcements tends to undermine the principle that the law is made by Parliament, not by the executive. Retrospective commencement, when too widely used or insufficiently justified, can work to diminish respect for law and the underlying values of the rule of law.

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48 See explanatory memorandum, p. 4.

49 Schedule 1, item 3. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

50 Explanatory memorandum, p. 5.

1.59 The committee therefore requests the Minister's detailed justification for the retrospective application of these amendments, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

Significant matters in delegated legislation[51]

1.60 Proposed section 506B of the *Migration Act 1958* would permit tax file numbers of visa holders to be requested, provided, used, recorded and disclosed. Subsection (7) provides that a tax file number provided under this provision may be used, recorded or disclosed by an officer 'for any purposes prescribed by the regulations'. Thus, the basis on which personal information can be used, recorded or disclosed will be set out in delegated legislation.

1.61 The committee's view is that significant matters, such as the purpose for which personal information can be used, disclosed or recorded, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the explanatory memorandum does not explain why it is necessary to include this information in delegated legislation. It states that the regulations prescribing these matters will be subject to disallowance, meaning there will be parliamentary scrutiny over the kinds of purposes.[52] However, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of primary legislation.

1.62 The committee therefore requests the Minister's advice as to why it is necessary and appropriate to leave to delegated legislation the purposes for which tax file numbers may be used, recorded or disclosed.

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51 Schedule 1, item 8, proposed subsection 506B(7). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

52 Explanatory memorandum, p. 9.

Social Services Legislation Amendment (Cashless Debit Card) Bill 2017

Purpose	This bill seeks to amend the *Social Security (Administration) Act 1999* to remove a provision that specifies that the cashless debit card trials will end on 30 June 2018 and occur in up to three discrete locations
Portfolio	Social Services
Introduced	House of Representatives on 17 August 2017

Significant matters in delegated legislation[53]

1.63 This bill seeks to remove section 124PF of the *Social Security (Administration) Act 1999* which specifies that the cashless debit card trial will occur in up to three discrete locations, include no more than 10,000 people and will end on 30 June 2018. As noted in the explanatory memorandum, removing this section will 'support the extension of arrangements in current sites, and enable the expansion of the cashless debit card to further sites'.[54] These further sites will be determined by disallowable legislative instrument.

1.64 The effect of this bill is to convert a tightly controlled trial program into one which may be expanded so as to apply to any site chosen by the government and determined by legislative instrument. Although a level of parliamentary oversight is maintained, the legislation is no longer framed as an authorisation for a trial, to be evaluated prior to general implementation according to legislatively set criteria. Rather, the legislation now provides authority (through a legislative instrument) for the extension of cashless debit cards to as many future sites as is considered appropriate by the government. Put simply, this bill converts authority to run a trial program into a general power to implement that program.

1.65 In this respect it may be noted that the research commissioned by the government to evaluate the initial trial sites has not yet been completed.[55] As noted in the explanatory memorandum, the legislative instruments may specify other parameters to ensure appropriate safeguards and accountability (such as sunset dates and participant criteria).[56] However, in converting a trial into complete authority to implement cashless debit cards, the case for enabling such matters to be

53 Schedule 1. The committee draws Senators' attention to this Schedule pursuant to principle 1(a)(iv) of the committee's terms of reference.

54 Explanatory memorandum, p. 2.

55 See statement of compatibility, p. 3.

56 Explanatory memorandum, p. 2.

provided for in delegated legislation rather than the primary legislation has not yet been established. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.66 The committee requests the Minister's detailed advice as to why the primary legislation does not include more guidance and safeguards in relation to the cashless debit card scheme, such as in relation to site selection and participant criteria, given the bill proposes that the operation of the debit card be no longer time-limited and restricted to a small-scale trial.

Taxation Administration Amendment (Corporate Tax Entity Information) Bill 2017

Purpose	This bill seeks to amend the *Taxation Administration Act 1953* to align the threshold for private corporate entities with that of public corporate entities by lowering the threshold from $200 million to $100 million
Sponsor	Senator Katy Gallagher
Introduced	Senate on 14 August 2017

The committee has no comment on this bill.

Commentary on amendments and explanatory materials

Petroleum and Other Fuels Reporting Bill 2017
Petroleum and Other Fuels Reporting (Consequential Amendments and Transitional Provisions) Bill 2017
[Digests 5 & 6/17]

1.67 On 15 August 2017 in the House of Representatives the Assistant Minister for Social Services and Disability Services (Mrs Prentice) presented an addendum to the explanatory memorandum to the bills.

1.68 The committee thanks the Assistant Minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[57]

No comments

1.69 The committee has no comments on amendments made or explanatory material relating to the following bills:

- Competition and Consumer Amendment (Misuse of Market Power) Bill 2017;[58] and
- Regional Investment Corporation Bill 2017.[59]

57 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 6 of 2017*, 14 June 2017, pp 132–139.

58 On 14 August 2017 the Senate agreed to one Australian Greens amendment. On 15 August 2017 the House of Representatives agreed to the Senate amendment and the bill was passed.

59 On 17 August 2017 the House of Representatives agreed to four Government amendments and the Assistant Minister to the Deputy Prime Minister (Mr Hartsuyker) presented a supplementary explanatory memorandum.

Chapter 2

Commentary on ministerial responses

2.1 This chapter considers the responses of ministers to matters previously raised by the committee.

Australian Border Force Amendment (Protected Information) Bill 2017

Purpose	This bill seeks to amend the *Australian Border Force Act 2015* (the Act) to: • repeal the definition of 'protected information' in subsection 4(1) of the Act; • remove the current requirement for bodies to which information can be disclosed and classes of information to be prescribed in the Australian Border Force (Secrecy and Disclosure) Rule 2015; and • add new permitted purposes for which 'Immigration and Border Protection information' can be disclosed
Portfolio/Sponsor	Immigration and Border Protection
Introduced	House of Representatives on 9 August 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i) and (iv)

2.2 The committee dealt with this bill in *Scrutiny Digest No. 9 of 2017*. The Minister responded to the committee's comments in a letter dated 29 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[1]

1 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

Broad scope of offence[2]

Initial scrutiny – extract

2.3 Section 42 of the *Australian Border Force Act 2015* (the Act) currently contains a provision that provides that a person commits an offence if they are, or have been, an entrusted person and they make a record of, or disclose information, and the information is protected information. The offence is subject to up to two years imprisonment. The bill proposes replacing the current definition of 'protected information' in the Act with a new definition of 'Immigration and Border Protection Information'. This new definition narrows the type of information which, if recorded or disclosed, would make a person liable to prosecution under section 42 of the Act.

2.4 The new definition provides that 'Immigration and Border Protection information' includes 'information the disclosure of which would or could reasonably be expected to prejudice the security, defence or international relations of Australia'.[3] Proposed subsection 4(5) provides that the kind of information which is taken to so prejudice security, defence or international relations, includes 'information that has a security classification'.[4] There is no definition in the bill of what a 'security classification' means. The explanatory memorandum states that this 'picks up the Australian Government's *Protective Security Policy Framework*' and the security classifications 'reflect the level of damage done to the national interest, organisations and individuals, of unauthorised disclosure, or compromise of the confidentiality, of information'.[5] It goes on to give examples of the type of information that has a security classification:

- new policy proposals and associated costing information marked as Protected or Cabinet-in-Confidence;
- other Cabinet documents, including Cabinet decisions;
- budget related material, including budget related material from other government departments; and
- adverse security assessments and qualified adverse security assessments of individuals from other agencies.[6]

2.5 Additionally, proposed section 50A provides that if an offence against section 42 relates to information that has a security classification, a prosecution must not be initiated 'unless the Secretary has certified that it is appropriate that the

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2 Item 5, proposed subsection 4(5) and item 21. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

3 See item 1, definition of 'Immigration and Border Protection information', paragraph (a).

4 See item 5, proposed paragraph 4(5)(a).

5 Explanatory memorandum, p. 15.

6 Explanatory memorandum, p. 15.

information had a security classification at the time of the conduct'.[7] The explanatory memorandum states that the purpose of the provision is to ensure that a person cannot be prosecuted where 'it was not appropriate that the information had a security classification'.[8]

2.6 The inclusion of proposed section 50A suggests there may be circumstances where information has a security classification which was not appropriately applied. In this regard, the government's *Information security management guidelines* (part of the *Protective Security Policy Framework*) states that '[i]f information is created outside the Australian Government the person working for the government actioning this information is to determine whether it needs a protective marking'.[9] This indicates that any outside contractor or consultant working for the government can mark information with a security classification. A person who makes a record of, or discloses, such information would then be liable for prosecution, unless the Secretary does not certify that the information was appropriately classified. However, if the Secretary does certify that the information was appropriately classified, there does not appear to be any defence on the basis that the information was inappropriately classified. As such, it does not appear that an inappropriate security classification would be a matter that a court could consider in determining whether a person had committed an offence under section 42. It also does not appear that any merits review would be available in relation to the Secretary's decision to issue a certification that the information was appropriately classified.

2.7 The committee requests the Minister's advice as to why it is necessary and appropriate to include a broad definition that effectively makes it an offence to disclose or record any information that has a security classification, in circumstances where there is no defence available if the classification was inappropriately applied and where there is no definition of what constitutes a 'security classification'.

Minister's response

2.8 The Minister advised:

> The concept of security classification is described in the Australian Government's Protective Security Policy Framework- Glossary of security terms. That document describes the Security classification system as a set of procedures for identifying official information whose compromise could have a business impact level of high or above for the Australian

7 See item 21, proposed section 50A.

8 Explanatory memorandum, p. 18.

9 Australian Government, *Information security management guidelines: Australian Government security classification system*, version 2.2, approved November 2014, amended April 2015, p. 4, paragraph [29]. Available at: https://www.protectivesecurity.gov.au/informationsecurity/Documents/INFOSECGuidelinesAustralianGovernmentSecurityClassificationSystem.pdf.

> Government. It is the Government's mechanism for protecting the confidentiality of information generated by it or provided to it by other governments and private entities.
>
> The concept of security classification is not easily reduced to a neat all-encompassing definition within an Act of Parliament. It is for this reason that the concept of 'security classification' is not defined in the Bill. The intention is to adhere to the Protective Security Policy Framework when implementing the amendments.
>
> The test in section 50A to be inserted by the Bill is that the Secretary has certified that it is appropriate that the Immigration and Border Protection information had a security classification at the time of the disclosure of the Immigration and Border Protection information that is alleged to constitute the offence.
>
> The Secretary is not required to certify that the information in question was appropriately classified.
>
> Further, the Secretary certifies that it is appropriate that the Immigration and Border Protection information had a security classification before a decision is made to prosecute the entrusted person under section 42 of the *Australian Border Force Act 2015* (the ABF Act). Due diligence also requires that the information in question was classified at the correct level before a decision is taken to prosecute the entrusted person.
>
> For these reasons, it is not necessary, or appropriate, for a defence concerning the appropriateness of the security classification to be available.

Committee comment

2.9 The committee thanks the Minister for this response. The committee notes the Minister's advice that security classifications are the government's mechanism for protecting the confidentiality of information generated by it or provided to it by other governments and private entities. The committee also notes the Minister's advice that the concept of a security classification is not easily reduced to a definition in an Act of Parliament, and the intention is to adhere to the Protective Security Policy Framework when implementing the amendments. The committee also notes the Minister's advice that the Secretary has to certify that it is appropriate that the information had a security classification at the time of the disclosure, but is not required to certify that the information in question was appropriately classified, and as such it is not necessary or appropriate for a defence concerning the appropriateness of the security classification to be available.

2.10 The committee considers that the concept of a security classification is broad and could result in a person being found to commit an offence for disclosing a document that had been marked as classified, even in circumstances where disclosure of the information would not be likely to prejudice the security, defence or international relations of Australia. The committee therefore considers it might be

more appropriate if proposed subsection 4(5) provided that the fact that information has a security classification is an example of information that could prejudice the security, defence or international relations of Australia, rather than all information with a security classification being included in the definition of 'Immigration and Border Protection information'. This would leave to the discretion of the court whether the information could reasonably be expected to prejudice the security, defence or international relations of Australia, and help ensure information that had a security classification placed on it in circumstances where the disclosure of that information would cause no harm would not be captured.

2.11 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of making it an offence to disclose or record any information that has a security classification, in circumstances where there is no discretion available to the court to consider whether the information could be expected to prejudice the security, defence or international relations of Australia and where there is no definition of what constitutes a 'security classification'.

Significant matters in delegated legislation[10]

Initial scrutiny – extract

2.12 The proposed definition of 'Immigration and Border Protection information' also includes 'information of a kind prescribed in an instrument under subsection (7)'. Proposed subsection 4(7) provides that the Secretary may make a legislative instrument prescribing information if satisfied that disclosure of the information would or could reasonably be expected to 'prejudice the effective working of the Department' or 'otherwise harm the public interest'.

2.13 The committee's view is that significant matters, such as broad powers to state that particular information which, if recorded or disclosed, would lead to the commission of an offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance the explanatory memorandum states:

> New kinds of information, not already covered by the above definition of Immigration and Border Protection information, that require protection could be identified and need to be disclosed by the Department. Such information may require protection more quickly than an amendment to the ABF Act would permit. The new power in subsection 4(7) is necessary

10 Item 1, definition of 'Immigration and Border Protection information', paragraph (f) and item 5, proposed subsection 4(7). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

> to enable the Secretary to act swiftly to protect information that is not covered by one of the other limbs of the definition from disclosure.[11]

2.14 The committee notes that the explanatory memorandum does not provide any examples of the types or categories of information that may need to be captured by this provision. Rather, it gives a broad power to enable the Secretary to prescribe information in delegated legislation. An entrusted person who makes a record of or discloses such information would then be liable for an offence under section 42 of the Act. The committee considers that matters that go to whether a person has committed an offence are more appropriately matters for parliamentary enactment. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. While the committee appreciates that making amendments to primary legislation can take longer than making a legislative instrument (which can take effect on the day that the instrument is registered),[12] the committee notes that in urgent situations Parliament has passed legislation in as little as two sitting days.

2.15 If such matters are to remain in delegated legislation, the committee considers parliamentary scrutiny over such significant matters could be increased by requiring the positive approval of each House of the Parliament before the instrument could come into effect.[13]

2.16 The committee's view is that significant matters, such as what constitutes the type of information which, if recorded or disclosed, would result in the commission of an offence (subject to up to two years imprisonment), should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's advice as to:

- what categories of information it is envisaged may need to be prescribed under this provision; and
- if the matters are to be retained in a legislative instrument, the appropriateness of requiring the positive approval of each House of the Parliament before an instrument comes into effect.

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11 Explanatory memorandum, p. 16.

12 See subsection 12(1) of the *Legislation Act 2003*.

13 See, for example, section 10B of the *Health Insurance Act 1973*.

Minister's response

2.17 The Minister advised:

> Examples of the kinds of information that may come within paragraph (f) of the proposed definition of *Immigration and Border Protection information* in subsection 4(1) of the ABF Act are:
>
> - internal tools for making visa decisions (such as those concerning risk profiling) which, if disclosed, could increase a person's prospects of being granted a visa which they may not otherwise be eligible to be granted;
> - internal procedures for assessing applications for Australian Trusted Trader status under Part XA of the *Customs Act 1901* which, if disclosed, could lead to an entity receiving Australian Trusted Trader status that would not otherwise be given that status.
>
> I note the Committee's view that, if this matter is to remain in a legislative instrument, Parliamentary scrutiny over it could be increased by requiring positive approval of each House of the Parliament before the instrument comes into effect. This would defeat the purpose of the provision, which is to allow the Secretary to act swiftly to protect information that is not covered by one of the other limbs of the definition of *Immigration and Border Protection information* from disclosure.
>
> In addition, the legislative instrument referred to in subsection 4(7) would be subject to public scrutiny and would be disallowable under the *Legislation Act 2003.*

Committee comment

2.18 The committee thanks the Minister for this response. The committee notes the Minister's advice that the kinds of information that may be prescribed as part of the definition of 'Immigration and Border Protection information' include internal tools for making visa decisions which, if disclosed, could increase a person's prospects of being granted a visa or internal procedures for assessing applications for Australian Trusted Trader status which, if disclosed, could leader to an entity receiving such status. The committee also notes the Minister's view that requiring the positive approval of each House of the Parliament before the instrument comes into effect would defeat the purpose of the provision, which is to allow the Secretary to act swiftly.

2.19 The committee reiterates its view that significant matters, such as broad powers to state that particular information which, if recorded or disclosed, would lead to the commission of an offence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee considers that matters that go to whether a person has committed an offence are more appropriately matters for parliamentary enactment. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in

the form of an amending bill. While the committee appreciates that making amendments to primary legislation can take longer than making a legislative instrument (which can take effect on the day that the instrument is registered),[14] the committee notes that in urgent situations Parliament has passed legislation in as little as two sitting days. The committee also notes if there are matters that are already envisaged as being needed to be included in the definition of 'Immigration and Border Protection information', such as internal tools or procedures for decision-making, these could now be included in the bill, and therefore subject to the full range of parliamentary scrutiny.

2.20 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of enabling a legislative instrument to specify information which, if recorded or disclosed, would result in the commission of an offence (subject to up to two years imprisonment).

2.21 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

14 See subsection 12(1) of the *Legislation Act 2003*.

Education Services for Overseas Students (TPS Levies) Amendment Bill 2017

Purpose	This bill seeks to amend the *Education Services for Overseas Students (TPS Levies) Act 2012* to enable the Minister to proactively manage the balance of the Overseas Students Tuition Fund
Portfolio	Education and Training
Introduced	House of Representatives on 10 August 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(iv) and (v)

2.22 The committee dealt with this bill in *Scrutiny Digest No. 9 of 2017*. The Minister responded to the committee's comments in a letter dated 31 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[15]

Significant matters in delegated legislation[16]

Initial scrutiny – extract

2.23 This bill seeks to enable the Minister for Education and Training to proactively manage the balance of the Overseas Students Tuition Fund (the Fund). The Tuition Protection Service (TPS) assists international students whose education providers are unable to fully deliver their course of study by ensuring that international students are able to complete their studies in another course or with another education provider, or receive a refund of their unspent tuition fees. The TPS is funded by an annual levy on all international education providers. The levy compromises administrative fee and base fee components. Amounts collected are credited into the Fund, which is a Special Account established under section 52A of the *Education Services for Overseas Students Act 2000* (the ESOS Act).[17] Under section 52C of the ESOS Act amounts in the Fund can only be expended for making

15 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

16 Schedule 1, item 5, proposed sections 6, 7 and 7A. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

17 Explanatory memorandum, p. 2.

payments to affected international students and paying the Commonwealth's costs associated with managing the Fund.

2.24 Currently the administrative and base fee components are set out in the primary legislation, however the bill would enable the Minister to set the administrative and base fee components of the TPS levy through a legislative instrument.[18] The explanatory memorandum explains this by noting that recent growth in student enrolments has resulted in an increased collection of the TPS levy and 'since this growth has not been offset by a similar proportion of claims on the Fund, reserves have increased sharply'.[19] The explanatory memorandum further notes that:

> An appropriate reduction to the current administrative and base fees is needed to ensure the Fund remains within the target range of $30 million to $50 million recommended by the Australian Government Actuary and endorsed by the TPS Advisory Board. It is anticipated that this will be a one-off reduction to the Fund and the fee settings may not be updated every year.
>
> Giving the Minister authority to proactively manage the Fund will maintain sufficient reserves to meet claims each year, commensurate with an increase in student enrolments. It also allows the Fund to remain viable in case any unforeseen events or major provider closures occur.[20]

2.25 Thus, in order to provide this flexibility, the bill proposes that the legislative instrument could set the administrative and base fee components of the TPS levy.[21] In making such a legislative instrument, the Minister must have regard to the sustainability of the Fund, and may also have regard to any other matter he or she considers appropriate.[22] The bill also sets an upper limit which the Minister cannot exceed in determining the administrative and base fee components through a legislative instrument.[23]

2.26 One of the most fundamental functions of the Parliament is to levy taxation.[24] The committee's consistent scrutiny view is that it is for the Parliament,

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18 Proposed subsections 7A(1)–(2).

19 Explanatory memorandum, p. 2.

20 Explanatory memorandum, p. 2.

21 Proposed subsections 7A(1)–(2).

22 Proposed subsections 7A(4)–(5).

23 Proposed subsection 7A(3).

24 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

rather than makers of delegated legislation, to set a rate of tax. In this case, the detailed explanation in the explanatory memorandum, the fact that a maximum cap is set in the primary legislation and amounts collected by the levy are credited to a Special Account (which limits the use of the funds to purposes specified in primary legislation) largely addresses the committee's scrutiny concerns. However, any delegation to the executive of legislative power in relation to taxation still represents a significant delegation of the Parliament's legislative powers.

2.27 While the committee welcomes the important limitations on the proposed ministerial power to alter the rate of the TPS levy, from a scrutiny perspective, the committee considers that it may be appropriate for the bill to be amended to further increase parliamentary oversight by:

- requiring the positive approval of each House of the Parliament before a new determination under proposed subsection 7A comes into effect;[25] or
- providing that the determinations do not come into effect until the relevant disallowance period has expired (while retaining the usual procedures in subsection 42(2) of the *Legislation Act 2003* so that any determinations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period).

2.28 The committee requests the Minister's response in relation to this matter.

Minister's response

2.29 The Minister advised:

> I understand the Committee's view is that Parliament, rather than makers of delegated legislation, should set the levy and has suggested possible amendments to provide further parliamentary oversight.
>
> The Bill amends the *Education Services for Overseas Students (TPS Levies) Act 2012* (the Act). I consider the Bill in its current form already contains strong safeguards that ensure appropriate parliamentary oversight over the powers of the Minister, to make a legislative instrument to set the administrative and base fee components of the Tuition Protection Service (TPS) levy under the Act. As such, I do not propose to proceed with any amendments to the Bill.
>
> The proposed new subsection 7A(3) of the Act (see item 5 of the Bill) sets maximum fee caps in the primary legislation which the Minister cannot exceed in determining the administrative and base fees through a legislative instrument. The maximum fee caps reflect the current legislated indexed amounts in the Act which were previously passed in Parliament. The imposition of a maximum fee cap limits the amount of administrative

25 See, for example, section 10B of the *Health Insurance Act 1973*.

> and base fees which can be collected each year, preventing any excessive financial impact on international education providers.
>
> I have considered the Committee's suggestion to provide that the determination does not come into effect until after the relevant disallowance period has expired. However, I consider that existing disallowance processes give sufficient parliamentary oversight. Legislative instruments made under the proposed new section 7A of the Act are legislative instruments for the purposes of the *Legislation Act 2003.* These instruments will be subject to the usual disallowance procedures and parliamentary scrutiny under section 42 of the *Legislation Act 2003.*
>
> As the Committee has noted, given the funds reside in a Special Account, they cannot be redirected toward any other program or portfolio, as legislation prescribes how the funds can be used.
>
> The Australian Government's objective in amending the Act is to be able to act quickly and proactively in adjusting the levy settings when market conditions demand. Requiring positive approval from both Houses of Parliament to change the fee settings would impede the Government's ability to respond with agility.

Committee comment

2.30 The committee thanks the Minister for this response. The committee notes the Minister's advice that the bill in its current form already contains strong safeguards that ensure appropriate parliamentary oversight over the powers of the Minister to set the amount of the Tuition Protection Service (TPS) levy by legislative instrument. The committee also notes the Minister's advice that requiring positive approval from both Houses of Parliament to alter the level of the TPS levy would impede the government's ability to respond quickly when market conditions demand.

2.31 The committee takes this opportunity to reiterate that one of the most fundamental functions of the Parliament is to levy taxation. The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In its initial comments the committee welcomed the inclusion of a maximum cap in the primary legislation and the fact that amounts collected by the levy are credited to a Special Account (which limits the use of the funds to purposes specified in primary legislation). However, any delegation to the executive of legislative power in relation to taxation still represents a significant delegation of the Parliament's legislative powers.

2.32 The committee notes that requiring the positive approval of both Houses of Parliament may not unduly limit the government's ability to respond quickly to changing market conditions as any motions approving new determinations with broad support within the Parliament could be passed by both Houses within a few sitting days of an instrument being tabled. In fact, a positive approval procedure

could provide certainty sooner than the usual disallowance procedures where there is a period of 15 sitting days within which an instrument may be disallowed.[26]

2.33 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the Minister to alter the rate of a levy via delegated legislation.

2.34 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

26 See, for example, section 10B of the *Health Insurance Act 1973*. The committee notes that in the United Kingdom approximately ten per cent of statutory instruments are subject to an affirmative approval procedure where both Houses of the Parliament must expressly approve them: United Kingdom House of Commons Library, *Statutory Instruments*, Briefing Paper, 15 December 2016, p. 9

Migration Amendment (Regulation of Migration Agents) Bill 2017

Purpose	This bill seeks to amend the *Migration Act 1958* to: • remove legal practitioners from regulation by the Migration Agents Registration Authority (MARA); • provide that the time period in which a person can be considered an applicant for repeat registration as a migration agent is set out in delegated legislation; • remove the 12-month time limit within which a person must apply for registration following completion of a prescribed course; • enable MARA to refuse an application to become a registered migration agent where the applicant does not respond to requests for further information; • require migration agents to notify MARA that they have ceased acting on a non-commercial basis and commenced acting on a commercial basis; • ensure that the definitions of 'immigration assistance' and 'immigration representations' include assisting a person in relation to a request to the minister to revoke a character-related visa refusal or cancellation decision; and • remove redundant regulatory provisions
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 21 June 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (ii) and (iv)

2.35 The committee dealt with this bill in *Scrutiny Digest No. 8 of 2017*. The Assistant Minister responded to the committee's comments in a letter dated 28 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Assistant Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[27]

27 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

Broad delegation of administrative powers[28]

Initial scrutiny – extract

2.36 Proposed subsection 320(1) would allow any of the powers or functions given to the Migration Agents Registration Authority (MARA) under Part 3 of the *Migration Act 1958* to be delegated to 'any APS employee in the Department'. Some of these powers and functions are significant including, for example, the power to cancel or suspend the registration of a registered migration agent,[29] require registered migration agents or former registered migration agents to give information,[30] and bar former registered migration agents from being registered for up to 5 years.[31]

2.37 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated officers or to senior executive service (SES) officers. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

2.38 In this case, the explanatory memorandum notes that proposed new subsection 320(1) is similar to existing subsection 320(1) which already provides that the Minister may delegate MARA's powers or functions to 'a person in the Department who is appointed or engaged under the *Public Service Act 1999*'. The most significant change is to remove the reference in current subsection 320(1) to the Migration Institute of Australia.[32]

2.39 While the committee notes that, in effect, this provision largely replicates existing subsection 320(1), the committee still expects that the explanatory memorandum will explain why it is considered necessary to allow the broad delegation of MARA's powers and functions as provided for in proposed new subsection 320(1). The committee notes that there is no guidance on the face of the bill as to the relevant skills or experience that would be required to undertake delegated functions. Nor is there any limitation on the level to which significant powers or functions could be delegated. The committee has generally not accepted a

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28 Schedule 3, item 17, proposed subsection 320(1). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

29 *Migration Act 1958*, s 303.

30 *Migration Act 1958*, ss 308, 311EA.

31 *Migration Act 1958*, s 311A.

32 Explanatory memorandum, p. 31.

desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level.

2.40 The committee requests the Assistant Minister's advice as to why it is considered necessary to allow *all* of MARA's powers and functions to be delegated to *any* APS employee in the Department and requests the Minister's advice as to the appropriateness of amending the bill to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated. For example, the committee notes that it may be possible to provide that MARA's significant cancellation, suspension and information gathering powers (such as those referred to in paragraph [2.362.36] above) may only be delegated to SES officers.

Assistant Minister's response

2.41 The Assistant Minister advised:

> The delegation of power at proposed subsection 320(1) is appropriate and consistent with the current framework of the *Migration Act 1958* (the Act).
>
> It is currently the case that powers and functions of the MARA under Part 3 of the Act are delegated to a person in the Department who is appointed or engaged under the *Public Service Act 1999.* The committee may note that the proposed amendment to subsection 320(1) does not extend the delegation of administrative powers; rather it provides that the Minister may delegate the MARA's powers and functions under Part 3 of the Act more specifically to an APS employee in the Department. The use of the term "APS employee" is consistent with the *Acts Interpretation Act 1901.*
>
> Any attempt to specify details of the level of delegation in the Act would create an unnecessary administrative and legislative burden, as it would require a change to the Act each time there was a restructure to the administrative arrangements of the MARA. Further, the Committee may not be aware that, while the MARA reports to a SES Band 1, there are currently no SES level positions within the MARA itself. Delegation to the SES level would therefore be impractical in this instance.
>
> Further, the existing powers and functions under Part 3 of the Act have been delegated by the Minister under a legislative Instrument and have been working effectively, with no findings of inappropriate use or abuse of powers have been made against the MARA under these arrangements.

Committee comment

2.42 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice that any attempt to specify details of the level of delegation in the Act would create an unnecessary administrative and legislative burden, that there are currently no SES level positions within the Migration Agents Registration Authority (MARA) itself, and that the existing delegation of powers and functions under Part 3 of the Act have been working

effectively, with no findings of inappropriate use or abuse of powers being made against the MARA under these arrangements.

2.43 The committee takes this opportunity to reiterate that it has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of powers and functions to officials at any level. While the committee understands that there are currently no SES level positions within the MARA, the committee notes that it may at least be possible to restrict the delegation of significant cancellation, suspension and information gathering powers (such as those referred to in paragraph [2.36] above) to Executive level employees.

2.44 The committee requests that the key information provided by the Assistant Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.45 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the delegation of significant cancellation, suspension and information gathering powers to *any* APS employee in the Department of Immigration and Border Protection.

Significant matters in delegated legislation[33]

Initial scrutiny – extract

2.46 The purpose of the proposed amendments in Schedule 4 is to allow MARA to refuse an application to become a registered migration agent where the applicant has been required to, but has failed to, provide information or answer questions in relation to their application.[34] Proposed paragraph 288B(4)(a) provides that MARA may consider refusing an application for registration if the applicant fails to provide the information or answer the questions 'within the period prescribed for the purposes of this section' (unless MARA has approved an extension).

2.47 The committee's view is that significant matters, such as time limits for providing information, where failure to provide the requested information could have significant adverse consequences, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, no information is provided in the explanatory memorandum.

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33 Schedule 4, item 1, proposed paragraph 288B(4)(a). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

34 Explanatory memorandum, p. 33.

2.48 The committee requests the Assistant Minister's advice as to why it is proposed to leave the determination of the time limit for complying with a request for information to delegated legislation.

Assistant Minister's response

2.49 The Assistant Minister advised:

> The Act is structured to contain broad concepts, with the specific details, such as time periods for responding to notices, contained in delegated legislation.
>
> The proposed legislation, requiring an applicant for registration as a migration agent to answer questions or provide information, is specifically for an applicant who has not previously applied for registration as a migration agent.
>
> Under current subsection 288B(1) of the Act, the MARA may require such an applicant to provide further information by statutory declaration or in person. However, if the applicant does not comply, the MARA is prevented from acting further. The matter remains an open application, which cannot be further resolved or closed, which is neither satisfactory to the MARA nor the applicant.
>
> While the proposed paragraph 288B(4)(a) provides that the MARA may consider refusing an application if the applicant fails to comply with the time period for responding to the notice, as specified in delegated legislation, the proposed notice must comply with subsection 309(1) which provides that:
>
> > If the Migration Agents Registration Authority is considering refusing a registration application, it must inform the applicant of that fact and the reasons for it and invite the applicant to make a further submission in support of his or her application.
>
> The proposed notice would clearly advise the applicant of the significance of not replying to the request to answer questions or provide information within the specified time period.
>
> An example of the Act providing the broad parameters, with regulations dealing with details, is subsection 280(1) of the Act, which provides that a person who is not a registered migration agent, must not give immigration assistance. The *Migration Agent Regulations 1998* set out the contents of the infringement notice relating to giving of immigration assistance. Under regulation 3K(1)(e), the infringement notice must:
>
> > state that, if the person on whom it is served does not wish the matter to be dealt with by a court, he or she may pay that penalty within 28 days after the date of service of the notice unless the notice is withdrawn before the end of that period.

Committee comment

2.50 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice that the Act is structured to contain broad concepts, with the specific details, such as time periods for responding to notices, contained in delegated legislation. The committee also notes the Assistant Minister's advice that if the Migration Agents Registration Authority is considering refusing a registration application, it must inform the applicant of that fact and the reasons for it and invite the applicant to make a further submission in support of his or her application, and that as a result an applicant would be aware of the significance of not replying to the request to answer questions or provide information within the specified time period.

2.51 The committee takes this opportunity to reiterate its view that significant matters, such as time limits for providing information, where failure to provide the requested information could have significant adverse consequences, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Broad explanations relating to the structure of the Act will generally not address the committee's scrutiny concerns in this regard. However, in this instance, the committee notes there is a statutory requirement which will ensure that applicants are aware of the significance of not replying to a request for further information, and that any amendments to the regulations specifying a time limit will be subject to parliamentary disallowance.

2.52 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.53 The committee draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

2.54 In light of the information provided, the committee makes no further comment on this matter.

Strict liability offence[35]

Initial scrutiny – extract

2.55 Subitem 4(1) of Schedule 5 sets out a notification obligation in relation to registered migration agents who, prior to commencement, had paid the charge applicable to migration agents who act solely on a non-commercial or non-profit

35 Schedule 5, item 4. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

basis, but who then gave immigration assistance otherwise than on a non-commercial basis. Individuals subject to the notification obligations will be required to notify MARA in writing within 14 days of commencement of the Schedule. Subitem 4(2) provides that failing to comply with the notification obligation is an offence of strict liability. The offence is subject to a maximum penalty of 100 penalty units. The explanatory memorandum provides no justification as to why this offence is subject to strict liability, other than to note that the proposed notification obligation is consistent with current notification obligation on migration agents set out in section 312 of the *Migration Act 1958*.[36]

2.56 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[37]

2.57 In the this case, it is noted that the proposed penalty of 100 penalty units for an individual is above the recommended maximum of 60 penalty units outlined in the Guide. In addition, the fact that individuals will only have 14 days from commencement to comply with the notification obligation raises questions as to whether all affected individuals will be placed on notice to guard against the possibility of inadvertently contravening this proposed strict liability provision.[38]

2.58 The committee requests a detailed justification from the Assistant Minister for the proposed imposition of strict liability in this instance, with particular reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[39]

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36 Explanatory memorandum, p. 40.

37 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

38 See Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

39 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

Assistant Minister's response

2.59 The Assistant Minister advised:

Under sub item (4)(1) of Schedule 5, a migration agent who has paid the registration charge to act on a non-commercial basis, then proceeds to give immigration assistance on a commercial basis, is required to notify MARA within 14 days of the commencement of the Schedule. It is further provided under sub item 4(2) that failure to comply is a strict liability offence with a maximum penalty of 100 penalty points.

The definition of strict liability is subject to the definition contained in the Criminal Code, which allows the defence of honest and reasonable mistake of fact. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that 'a defendant must turn his or her mind to the existence of the facts, and be under a mistaken but reasonable belief about those facts.' Therefore, although the offence is one of strict liability, a migration agent has a defence if he or she can demonstrate making a reasonable mistake of fact, regarding the difference between operating on a non-commercial versus a commercial basis.

The application of strict liability to this offence significantly enhances the ability of the MARA to effectively regulate the migration agent industry and deter the conduct of registering on a non-commercial basis, then proceeding to give advice on a commercial basis without informing the MARA. It is significantly cheaper to register on a non-commercial basis; therefore, it would be tempting for an agent to continue to be registered on this basis, regardless of work undertaken, if the penalty were not significant. Requiring the MARA to prove guilt to a higher standard would undermine deterrence by the MARA.

The proposed amendment seeks to repeal and substitute the provisions of paragraph 312(1)(ea) of the Act to provide these new requirements for migration agents.

Other parts of subsection 312(1), which have not been repealed and replaced, provide that a registered migration agent must notify the MARA in writing within 14 days of the following events, failure of which to do so are offences of strict liability, incurring the penalty of 100 penalty units:

(a) he or she becomes bankrupt;

(b) he or she applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;

(c) he or she compounds with his or her creditors;

(d) he or she makes an assignment of remuneration for the benefit of his or her creditors;

(e) he or she is convicted of an offence under a law of the Commonwealth or of a State or Territory;

(f) he or she becomes an employee, or becomes the employee of a new employer, and will give immigration assistance in that capacity;

(fa) he or she becomes a member of a partnership and will give immigration assistance in that capacity;

(g) if he or she is a member or an employee of a partnership and gives immigration assistance in that capacity – a member of the partnership becomes bankrupt;

(h) if he or she is an executive officer or an employee of a corporation and gives immigration assistance in that capacity:

(i) a receiver of its property or part of its property is appointed; or

(ii) it begins to be wound up.

Further, under the proposed Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017, it is clear that a registered migration agent must work for or with a charity or an organisation that works for the benefit of the Australian community to be eligible to pay the lower, non-commercial fee. This provides clarity as to the difference between providing advice on a commercial versus non-commercial basis.

Committee comment

2.60 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice that the proposed transitional notification offence is one of strict liability (rather than absolute liability) and therefore it allows the defence of honest and reasonable mistake of fact. The committee also notes the Assistant Minister's advice that the proposed offence will significantly enhance the ability of the Migration Agents Registration Authority to effectively regulate the migration agent industry, and that a significant penalty is required in order to ensure compliance with the notification obligation.

2.61 While the committee welcomes this additional explanation, the committee remains concerned that individuals will only have 14 days from the commencement of the Schedule to comply with the notification obligation. This raises questions as to whether all affected individuals will be placed on notice to guard against the possibility of inadvertently contravening this proposed strict liability provision as it is possible that individuals may not be aware that the Schedule has actually commenced (and the 14 day notice period has therefore also commenced).

2.62 The committee also reiterates that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[40] In this instance, the bill proposes applying strict liability to an offence that is subject to a penalty of up to 100 penalty units.

40 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

2.63 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.64 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of imposing strict liability in circumstances where individuals concerned may not be placed on notice to guard against the possibility of inadvertently contravening the new notification obligation.

Migration Amendment (Validation of Decisions) Bill 2017

Purpose	This bill seeks to amend the *Migration Act 1958* to preserve existing section 501 character decisions made relying on information provided by gazetted law enforcement and intelligence agencies which is protected from disclosure
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 21 June 2017
Bill status	Passed both Houses on 4 September 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

2.65 The committee dealt with this bill in *Scrutiny Digest No. 8 of 2017*. The Minister responded to the committee's comments in a letter dated 23 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[41]

Retrospective validation[42]

Initial scrutiny – extract

2.66 The purpose of this bill is to validate certain decisions to cancel a visa or refuse a visa application on character grounds, particularly on the basis that a non-citizen has committed a crime in Australia and poses a risk to the Australian community.[43]

2.67 Section 503A of the *Migration Act 1958* provides that information supplied to an authorised Commonwealth migration officer by identified law enforcement or intelligence agencies for the purposes of making a decision to refuse or cancel a visa on character grounds is protected from disclosure to any person. This includes disclosure to a court reviewing any decision to cancel or refuse to grant a visa. The consequences of existing section 503A is that information which is relevant and

41 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

42 Proposed subsection 503E. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

43 Decisions made under sections 501, 501A, 501B, 501BA, 501C or 501CA of the *Migration Act 1958*.

significant to the exercise of the power to cancel or refuse a visa, and which would otherwise need to be disclosed to afford an affected non-citizen a fair hearing, need not be disclosed.

2.68 The committee notes that at the time of tabling the High Court of Australia had reserved its judgment in relation to two cases that have challenged the constitutional validity of section 503A.[44] If the provisions of this bill are not enacted, and the High Court were to hold that section 503A is constitutionally invalid, an exercise of power in reliance on this provision would itself have no legal foundation and would therefore also be invalid.

2.69 The effect of proposed section 503E would be to deem decisions which have been made in reliance on, or having regard to, information purportedly covered by section 503A, or where the Minister failed to disclose such information, to have been validly made, even if that provision is held to be constitutionally invalid. The committee notes that proposed subsection 503E(2) provides that the validation provisions would not apply in relation to the current High Court proceedings.

2.70 In the event that section 503A is held to be constitutionally invalid, the effect of the bill would be to retrospectively validate invalid decisions with significant consequences for affected persons. The committee has a long-standing scrutiny concern about provisions that apply retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals. Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum does not address the appropriateness or fairness of the retrospective effect of this bill.

2.71 The committee considers there may be cases where a judicial declaration that an administrative decision is invalid would result in such significant consequences that it may justify legislation seeking to validate other decisions infected by the same error. For instance, where the invalidity resulted from an administrative oversight that does not affect the substance of the power exercised,[45] the value of legal certainty of administrative decisions may override the principle that invalid decisions are of no force and effect. However, much would depend on the nature of the error and whether that error affected the fairness of any individual

44 See *Graham v Minister for Immigration and Border Protection*, M97/2016, and *Te Puia v Minister for Immigration and Border Protection*, P58/2016.

45 For example, an administrative oversight relating to the appointment of the officer who made the decision.

decision. Other relevant matters would include the number of decisions affected and alternative ways of addressing the administrative problems and uncertainty created.

2.72 In this instance, the issue before the High Court is whether the non-disclosure provided for by current section 503A affects the proper administration of justice and strikes at the role of the court in granting a fair hearing. Deeming decisions reached in these circumstances to be valid, even though the decision applied or relied on a potentially unconstitutional provision, cannot, therefore, be characterised as curing a mere technical or administrative failing.

2.73 Underlying the basic rule of law principle that all government action must be legally authorised, is the importance of protecting those affected by government decisions from arbitrary decision-making and enabling affected persons to rely on the law as it currently exists. Retrospective legislation threatens these values (even accepting that in limited cases it may be justified). In addition, legislation which deems invalid administrative decisions to be valid, where the reason for the invalidity rests on reliance on an unconstitutional statutory provision, has significant implications for the rule of law. The practical effect of such legislation would be to reverse a judicial finding of constitutional invalidity (even if there is a specific exemption in relation to the existing cases before the High Court). There are also questions as to whether such deeming legislation is itself constitutionally valid.[46]

2.74 In light of the discussion above, the committee requests the Minister's detailed justification for seeking to retrospectively validate decisions made in circumstances which may have denied an applicant the right to a fair hearing, and where the practical effect of the legislation would be to reverse any High Court declaration of constitutional invalidity.

Minister's response

2.75 The Minister advised:

> The *Migration Amendment (Validation of Decisions) Bill 2017* (the Bill) supports the Australian Government's commitment *to* protect the Australian community from people who have had their visa cancelled or their visa application refused because they are of serious character concern. The amendments in this Bill proactively address the risk to the safety of Australians and reflect the Government's and the Australian community's low tolerance for criminal behaviour by those who are given the privilege of holding a visa to enter into and stay in Australia.
>
> **Retrospective application and the right to a fair hearing**
>
> The Bill validates decisions that have already been made to cancel visas, or refuse the application for a visa, of non-citizens who are of character

46 Considerable uncertainty attends this question, see Will Bateman, Legislating Against Constitutional Invalidity: Constitutional Deeming Legislation' (2012) 34 *Sydney Law Review* 712.

concern, based on information provided by intelligence or law enforcement agencies and protected from disclosure under the *Migration Act 1958* (the Act).

The changes to Australian law will apply to:

- people who have had their visa cancelled, or their visa application refused, on character grounds, or there has been a decision not to revoke such a cancellation or refusal on character grounds, under section 501 prior to the legislation taking effect; and
- their cancellation, refusal or revocation decision relied on, or otherwise took into account, information that was provided by intelligence or law enforcement agencies on the basis that it was protected from disclosure under section 503A of the Act; and
- they have not accrued any rights or liabilities as a result of other court proceedings, in which their case has either been fully heard, or finally determined, by a court at the time of commencement.

All non-citizens who have had a visa decision have access to specified review rights under law. This can include merits or judicial review. This amendment does not affect access for these individuals to avail themselves of judicial review should they decide to seek it.

Does the amendment reverse any High Court declaration of constitutional invalidity?

I want to make it clear that this amendment is not an attempt to undermine the jurisdiction of the High Court. This amendment will not affect the High Court's decision in the cases of *Graham* and *Te Puia*, but will rather ensure that decisions that had already been made under the law at that time are not invalidated merely because of their use of protected information.

Similarly, the amendments do not seek to affect cases that the court has already fully heard, or cases that have already been decided by the court. The amendments have been written to specifically exclude such cases from being affected by the validating provision.

Committee comment

2.76 The committee thanks the Minister for this response. The committee notes the Minister's advice as to who will be affected by these changes and that the purpose of the bill is to 'proactively address the risk to the safety of Australians'. The committee notes the Minister's advice that all non-citizens who have had a visa decision have access to specified review rights under the law and the amendment does not affect these individuals' right to avail themselves of judicial review. The committee also notes the Minister's advice that the bill does not attempt to undermine the jurisdiction of the High Court but will ensure that decisions already made under the law at that time are not invalidated merely because of their use of protected information.

2.77 The committee accepts that the bill does not impact the right of affected individuals to avail themselves of judicial review. However, the effectiveness of that review is limited by existing section 503A as the courts are unable to access all information on which a decision was made to cancel a visa. If the High Court rules that section 503A is unconstitutional then all decisions made relying on protected information, which the courts were unable to consider, would be invalid. The bill's purpose of validating any invalid decision would have a practical effect of reversing the court's constitutional findings, even though the bill specifically exempts the two individuals who have brought the current High Court challenges.

2.78 The committee reemphasises its long-standing scrutiny concern about provisions that apply retrospectively, as it challenges a basic value of the rule of law that all government action must be legally authorised. Underlying this is the importance of protecting those affected by government decisions from arbitrary decision-making and enabling affected persons to rely on the law as it currently exists. Retrospective legislation threatens these values (even accepting that in limited cases it may be justified). In addition, legislation which deems invalid administrative decisions to be valid, where the reason for the invalidity rests on reliance on an unconstitutional statutory provision, has significant implications for the rule of law.

2.79 The committee retains scrutiny concerns about retrospectively deeming decisions to be valid that have been made in circumstances which may have affected the proper administration of justice and the right to a fair hearing and applied or made in reliance on a potentially unconstitutional provision.

2.80 However, in light of the fact that this bill has already passed both Houses of Parliament the committee makes no further comment on the matter.

Product Emissions Standards Bill 2017

Purpose	This bill seeks to establish a national framework to address the adverse impacts of air pollution from certain products on human and environmental health
Portfolio	Environment and Energy
Introduced	House of Representatives on 10 August 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (iv) and (v)

2.81 The committee dealt with this bill in *Scrutiny Digest No. 9 of 2017*. The Minister responded to the committee's comments in a letter received 4 September 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[47]

Significant matters in delegated legislation[48]

Initial scrutiny – extract

2.82 The bill seeks to regulate emissions from certain products by setting national emissions standards. It seeks to do so by providing that rules (delegated legislation) may prescribe a product as an emissions-controlled product. The rules may also provide for an emissions-controlled product to be certified. The bill makes it an offence to import or supply an uncertified or unmarked emissions-controlled product.[49] The explanatory memorandum states that prescribing a product as an emissions-controlled product 'has the effect of triggering the key requirements in the Bill'[50] and certification, which is also left to the rules, 'is a key concept in the Bill, and underpins its operation, including the offence and civil penalty provisions'.[51]

2.83 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the matters to be set out in the rules are central to the

47 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

48 Clauses 9, 10, 11, 20, 22, 43 and 51. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

49 Clauses 13-16.

50 Explanatory memorandum, p. 16.

51 Explanatory memorandum, p. 17.

emissions standards framework being established. The explanatory memorandum states that 'it is anticipated' that the first emissions-controlled products to be prescribed will be non-road spark ignition engines and equipment.[52] However, the substantive clauses of the bill do not set out any basis as to what products will be prescribed as being emissions-controlled and required to be certified. It also provides no detail as to the process by which a product will be certified, the process by which certain products will be exempted and what decisions regarding the certification process will be subject to merits review. In addition, a broad power to disclose information obtained under the Act is proposed to be granted to any 'agency, body or person' as prescribed by the rules.[53]

2.84 Clause 51 sets out the power for the Minister to makes the rules, and also provides that the rules may provide for charging fees for services and the review of decisions made under the bill. The explanatory memorandum explains why these matters are to be set out in the rules rather than the primary legislation:

> Because the Bill establishes a framework which enables different classes of emissions-controlled products to be prescribed in the future and the details applying to future products would vary, it is necessary and appropriate for the rules rather than the Bill to prescribe what products are emissions-controlled products and the processes that relate to their certification (including the emissions standards that must be satisfied), the fees associated with the certification process and what decisions are subject to review.[54]

2.85 The committee appreciates that the detail of future products that may need to be classified as emissions-controlled products will vary over time and as such the specific classes of products to be subject to the new framework may be more appropriately prescribed in delegated legislation. However, it is not clear why there is no detail in the primary legislation as to the type of products that may be prescribed, the process for certification and exemptions from certification and the applicability of merits review for decisions made under this regulatory scheme.

2.86 The committee also notes that these significant matters are to be included in 'rules' rather than in 'regulations'. The issue of the appropriateness of providing for significant matters in legislative rules (as distinct from regulations) is discussed in the committee's *First Report of 2015*.[55] In relation to this matter, the committee has noted that regulations are subject to a higher level of executive scrutiny than other instruments as regulations must be approved by the Federal Executive Council and

52 Explanatory memorandum, p. 2.

53 See paragraph 43(1)(b).

54 Explanatory memorandum, p. 43.

55 Senate Standing Committee for the Scrutiny of Bills, *First Report of 2015*, 11 February 2015, pp 21–35.

must also be drafted by the Office of Parliamentary Counsel (OPC). Therefore, if significant matters are to be provided for in delegated legislation (rather than primary legislation) the committee considers they should at least be provided for in regulations, rather than other forms of delegated legislation which are subject to a lower level of executive scrutiny.[56]

2.87 In addition, where the Parliament delegates its legislative power in relation to significant regulatory schemes the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. While subclause 51(6) provides that consultation must be undertaken with the Information Commissioner before rules are made regarding the persons to whom information can be disclosed, no other specific consultation obligations are included in the bill. The committee notes that section 17 of the *Legislation Act 2003* sets out the consultation to be undertaken before making a legislative instrument. However, section 17 does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker is satisfied that any consultation, that he or she thinks is appropriate, is undertaken. In the event that a rule maker does not think consultation is appropriate, there is no requirement that consultation be undertaken. In addition, the *Legislation Act 2003* provides that consultation may not be undertaken if a rule-maker considers it to be unnecessary or inappropriate; and the fact that consultation does not occur cannot affect the validity or enforceability of an instrument.[57]

2.88 The committee's view is that significant matters, such as the core elements of the new emissions standards framework, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's detailed advice as to:

- why it is considered necessary and appropriate to leave most of the elements of this new scheme to delegated legislation;
- if significant matters are to be included in delegated legislation, why it is appropriate to include these in rules rather than regulations;
- why the bill only provides that the rules 'may' provide for the review of decisions under the Act, rather than the bill stating that decisions made regarding the certification of an emissions-controlled product, the granting of exemptions relating to those products, and the imposition of fees for service will be subject to merits review; and

56 See also Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation Monitor No. 17 of 2014*, 3 December 2014, pp 6–24.

57 See sections 18 and 19 of the *Legislation Act 2003*.

- the type of consultation that it is envisaged will be conducted prior to the making of the rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Minister's response

2.89 The Minister advised:

(a) The Committee has requested advice as to why it is considered necessary and appropriate to leave most of the elements of this new scheme to delegated legislation

As the Bill is a framework bill, rules made for the purposes of the Bill will determine the products that are to be regulated under the framework and how those products are to be regulated.

The capacity to prescribe elements of the emissions standard framework in rules is consistent with good regulatory practice, particularly where there is a high level of scientific and technical detail that underpins the legislative scheme. Using rules enables flexibility and adaptability in an area where there are frequent scientific developments and advancement in relation to products, emissions standards, certification testing requirements and the risks to human health and the environment.

The extent and technical complexity of the information needed to set out what certification is required or recognised for each type of product means that these matters are better dealt with in rules rather than the Act. This also enables regular updating as new products are released, emissions standards are updated and foreign certification schemes change.

The ability to prescribe these matters in rules made for the purposes of the Bill avoids the need for product-specific legislation and promotes a consistent approach to matters such as reporting, compliance and enforcement.

(b) The Committee has requested advice as to whether, if significant matters are to be included in delegated legislation, why it is appropriate to include these in rules rather than regulations

The Bill enables rules to be made which will specify the types of products to be regulated under the framework and how those products are to be regulated. Specifying these matters in rules rather than regulations accords with the Office of Parliamentary Counsel's *Drafting Direction No. 3.8 – Subordinate Legislation.* Paragraph 2 of that Drafting Direction states that "OPC's starting point is that subordinate instruments should be made in the form of legislative instruments (as distinct from regulations) unless there is good reason not to do so".

Consistent with paragraph 16 of the Drafting Direction, the approach of including the elements of the new emissions standards framework in rules (rather than regulations) has a number of advantages including:

(a) it facilitates the use of a single type of legislative instrument being needed for the Bill, thereby reducing the complexity otherwise imposed on the regulated community if these matters were to be prescribed across a number of different types of instruments;

(b) it simplifies the language and structure of the provisions in the Bill that provide the authority for the legislative instruments; and

(c) it shortens the Bill.

Due to these advantages, paragraph 17 of the Drafting Direction states that drafters should adopt this approach where appropriate with new Acts.

Paragraph 3 of the Drafting Direction states that matters such as compliance and enforcement, the imposition of taxes, setting amounts to be appropriated, and amendments to the text of an Act, should be included in regulations unless there is a strong justification otherwise. The Bill does not enable the rules to provide for any of the types of matters listed. This is clarified by clause 51(5) of the Bill, which specifically prevents the rules from including these types of matters. As rules made under the Bill cannot provide for these types of matters, it is appropriate that the elements of the emissions standards framework be prescribed in rules rather than regulations.

In addition, clause 51 clarifies that the rules made under the Bill are a legislative instrument for the purposes of the *Legislation Act 2003.* Pursuant to sections 38 and 39 of that Act, all legislative instruments and their explanatory statements must be tabled in both Houses of the Parliament within 6 sitting days of the date of registration of the instrument on the Federal Register of Legislation. Once tabled, the rules will be subject to the same level of Parliamentary scrutiny as regulations (including consideration by the Senate Standing Committee on Regulations and Ordinances), and a motion to disallow the rules may be moved in either House of the Parliament within 15 sitting days of the date the rules are tabled (see section 42 of the *Legislation Act 2003).*

(c) The Committee has requested advice as to why the Bill only provides that the rules 'may' provide for the review of decisions under the Act, rather than the Bill stating that decisions made regarding the certification of an emissions-controlled product, the granting of exemptions relating to those products, and the imposition of fees for service will be subject to merits review

As stated above, the Bill creates a framework for the regulation of emissions from products. The manner in which those products are to be regulated will be specified in the rules.

It is appropriate that the Bill provides that the rules 'may' and not 'must' make provision for the merits review of certain decisions because decisions pertaining to particular types of emissions-controlled products may not apply to others. This will in tum inform what decisions contained in the rules would be subject to merits review. For example, the first rules made under the framework will be for non-road spark ignition engines and equipment (NRSIEE). It is anticipated that the rules for these products will establish an Australian certification process, including merits review for decisions to certify, or refuse to certify, products. However, future emissions-controlled products regulated under the framework may not require an Australian certification process. In this instance, it would not be possible to specify that decisions to certify products will be subject to merits review. Therefore the use of 'may' provides the necessary flexibility to adapt the rules to the manner in which each particular emissions controlled product is to be regulated.

The use of 'may' in this context is consistent with other powers in the Bill to prescribe matters in the rules. For example, clause 9 of the Bill provides that the rules *may* prescribe a product as an emissions-controlled product, and clause 20 provides that the rules *may* require a person who imports or supplies emissions-controlled products to make and keep records in relation to the imports or supplies. It is also consistent with the standard form of legislative instrument-making provisions as set out in the Office of Parliamentary Counsel's *Drafting Direction No. 3.8 – Subordinate Legislation* (see, for example, paragraph 12 of that Drafting Direction). The use of 'may' ensures that the Minister's rule making power in clause 51 is not fettered and that the Bill does not pre-empt future Ministerial decisions on the content of the rules.

Clause 51 clarifies that the rules made under the Bill are a legislative instrument for the purposes of the *Legislation Act 2003.* Once tabled, the rules will be subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances. Amongst other things, the Committee examines each instrument to ensure "that it does not make the rights and liberties of citizens unduly dependent on administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal". This scrutiny will also ensure that administrative decisions made under rules are subject to an appropriate level of review.

(d) The Committee has requested advice regarding the type of consultation that it is envisaged will be conducted prior to the making of the rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003)* can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument)

The *Australian Government Guide to Regulation* requires every policy proposal designed to introduce or abolish regulation to be accompanied by a Regulation Impact Statement (RIS). This ensures that every policy

option is carefully assessed, its likely impacts costed and a range of viable alternatives considered in a transparent and accountable manner. The *Australian Government Guide to Regulation* defines regulation as 'any rule endorsed by government where there is an expectation of compliance'.

As stated above, rules made under clause 51 of the Bill will specify the types of products to be regulated under the framework and how those products are to be regulated. As the rules determine how emissions-controlled products are to be regulated, there is an expectation of compliance associated with the rules. Therefore, before the rules can be made, the policy options available to regulate an emissions-controlled product will be informed through the development of a RIS.

The *Australian Government Guide to Regulation* requires policy makers to consult in a genuine and timely way with affected businesses, community organisations and individuals. ARIS will need to demonstrate that appropriate consultation has been undertaken.

It is anticipated that the first emissions-controlled products to be regulated under the Bill are NRSIEE. Extensive stakeholder consultation with affected industry bodies and other Commonwealth agencies has been undertaken to inform the development of these rules through the preparation of the RIS for NRSIEE (available at http://ris.pmc.gov.au/2016/05/12/reducingemissions- small-engines).

The main Australian industry bodies that represent the recreational marine engine and powered outdoor equipment sectors support the regulation of NRSIEE through emissions standards. Initial consultation was undertaken as part of the Consultation RIS, released in May 2010. In 2012, additional consultation was undertaken and clarification sought on issues that were raised during the 2010 consultation period. Since 2012 leading up to the introduction of the Bill in August 2017, there has been ongoing consumer groups and some major retailers/suppliers, for example, through correspondence and briefing sessions. It is also intended that affected industry stakeholders will be provided with an opportunity to comment on the draft rules before they are made, including through the release of an exposure draft of the rule and a subsequent meeting with industry representatives.

Due to the extensive consultation that has occurred to date, the intention to release an exposure draft of the rules and the consultation requirements as part of the development of a RIS, it was not considered necessary to specify particular consultation requirements for the making of the rules in the Bill.

Committee comment

2.90 The committee thanks the Minister for this response. The committee notes the Minister's advice that the bill is a framework bill and avoids the need for product-specific legislation, and the extent and technical complexity of the information needed to set out the certification required or recognised for each type of product means the matter is better dealt with in the rules (delegated legislation), rather than the Act. The committee also notes the Minister's advice that these are being provided in rules rather than regulations as this accords with the Office of Parliamentary Counsel's *Drafting Direction No. 3.8*. The committee also notes the Minister's advice that the bill only provides that the rules 'may' and not 'must' make provision for the merits review of certain decisions because some products regulated under the framework may not require an Australian certification process and so it would not be possible that decisions to certify products will be subject to merits review. The committee notes the advice that the use of 'may' ensures that the Minister's rule-making power in clause 51 is not fettered and does not pre-empt future Ministerial decisions on the content of the rules. The committee also notes the advice that extensive stakeholder consultation with affected industry bodies and other Commonwealth agencies has been undertaken in relation to the development of the initial set of rules expected to be prescribed under this power, and the Australian Government Guide to Regulation requires policy makers to consult in a genuine and timely way.

2.91 The committee takes this opportunity to reiterate its long-standing scrutiny concerns about 'framework bills' which primarily contain only broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. The committee has regularly highlighted instances in which primary legislation may excessively rely on delegated legislation for its operation.[58] In this instance, the rules referred to by the Minister have not been made available to the committee for its consideration. The committee appreciates that the detail of future products that may need to be classified as emissions-controlled products will vary over time and, as such, the specific classes of products to be subject to the new framework may be more appropriately prescribed in delegated legislation. However, the committee notes there is no detail in the primary legislation as to the type or classes of products that may be prescribed, the process for certification and exemptions from certification and the applicability of merits review for decisions made under this regulatory scheme.

2.92 The committee is also concerned that the rule-making power in clause 51 may provide too much flexibility and unfettered power to the Minister in relation to deciding whether a matter should be subject to merits review. While the committee

58 See Senate Standing Committee for the Scrutiny of Bills, *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee, Final Report*, May 2012, pp 33–36.

appreciates that there may be different processes applicable depending on the product that the rules relate to, some of which may not require certification, the committee considers it would be possible for the bill to be drafted in such a way as to ensure that any relevant decision would be subject to merits review. The committee also notes that while extensive consultation may have been undertaken in relation to the initial set of rules to be made if the bill becomes an Act, there is no requirement that such consultation be undertaken in the future.

2.93 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving core elements of the new emissions standards framework to delegated legislation.

2.94 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Reversal of evidential burden of proof[59]

Initial scrutiny – extract

2.95 Clause 33(1) proposes to make it an offence to engage in certain conduct. Subclause 33(2) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the person engages in the conduct in accordance with a direction given to the person by the Minister. The offence carries a maximum penalty of 6 months imprisonment.

2.96 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

2.97 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

2.98 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

2.99 In this case, the explanatory memorandum states that reversal of the burden of proof is appropriate here 'as the manner of the person's conduct are within the knowledge of that person'.[60] In addition, the statement of compatibility states:

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59 Subclause 33(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

> The reversal is justified in this instance, as the matter to be proved (namely that the person's conduct was in accordance with a direction give to the person by the Minister) is a matter that would be in the particular knowledge of the defendant. It is expected that it would not be unreasonably difficult for the defendant to discharge the evidentiary burden in this circumstance.[61]

2.100 The committee notes that the *Guide to Framing Commonwealth Offences*[62] provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[63]

2.101 In this case, it is not apparent that whether a person engages in conduct in accordance with a direction given to the person by the Minister is one that is *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish the matters. It would appear that whether the Minister has issued a direction for a person to engage in specified conduct would be a matter that the Minister (and therefore the prosecution) would be particularly apprised of. The committee considers that this matter appears to be one that would be more appropriate to be included as an element of the offence, rather than as a defence.

2.102 The committee requests the Minister's detailed justification as to the appropriateness of including the specified matter as an offence-specific defence. The committee suggests that it may be appropriate if clause 33(1) were amended to add an additional paragraph providing that a person will commit the offence if the Minister has not given a direction to the person to engage in that conduct (and the defence at subclause 33(2) were removed). The committee also requests the Minister's advice in relation to this matter.

Minister's response

2.103 The Minister advised:

> Subclause 33(1) of the Bill makes it an offence for a person to engage in conduct which causes an emissions-controlled product that is the subject of a forfeiture notice under subclause 32(2) to be moved, altered or

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60 Explanatory memorandum, p. 35.

61 Statement of compatibility, p. 10.

62 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 50–52.

63 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

interfered with. Subclause 33(2) provides that subclause 33(1) does not apply if the person engages in conduct in accordance with the direction given to the person by the Minister. The note to subclause 33(2) directs readers to subsection 13.3(3) of the *Criminal Code* which provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

An evidential burden of proof requires a defendant to adduce or point to evidence which suggests there is a reasonable possibility that the defence is made out (section 13.6 of the *Criminal Code).* If the defendant meets the standard of proof required, the prosecution then has to refute the defence beyond reasonable doubt (section 13.1 of the *Criminal Code).*

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that an evidential burden is easier for a defendant to discharge, and does not completely displace the prosecutor's burden (only defers that burden). Thus as a general rule, the default position in section 13.3 of the *Criminal Code* should apply and the defendant should bear an evidential burden for an offence-specific defence, unless there are good reasons to depart from this position.[64]

Framing this as a defence has the effect of requiring the defendant to put forward adequate evidence that their conduct, which caused an emissions-controlled product that is the subject of a forfeiture notice, to be moved, altered or interfered with, was in accordance with a direction given by the Minister. It would then be for the prosecution to refute that evidence beyond reasonable doubt. This does not place the defendant in a position in which he or she would find it difficult to produce the information needed to suggest there is a reasonable possibility that the defence is made out. It is peculiarly within the knowledge of the defendant whether their conduct was in accordance with a direction given by the Minister. It would be relatively easy for the defendant to raise evidence of this, whereas it would be significantly more difficult and costly for the prosecution to establish that the defendant's conduct was not in accordance with that direction.

For the reasons outlined above, it is appropriate and consistent with the provisions of the *Criminal Code* and the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* that the evidential burden of proof be imposed on a defendant seeking to prove the existence of the defence. As this is the case, it is not necessary to amend clause 33 of the Bill to add an additional paragraph as suggested by the Committee.

64 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* September 2011, p. 52.

Committee comment

2.104 The committee thanks the Minister for this response. The committee notes the Minister's advice that requiring a defendant to put forward adequate evidence that their conduct was in accordance with a direction by the Minister would not place the defendant in a position of difficulty, that it is a matter peculiarly within the knowledge of the defendant and it would be relatively easy for the defendant to raise evidence of this whereas it would be significantly more difficult and costly for the prosecution to establish that the defendant's conduct was not in accordance with that direction.

2.105 The committee also notes the Minister's statement that the *Guide to Framing Commonwealth Offences*[65] provides that an evidential burden is easier for the defendant to discharge and that as a general rule the default position in section 13.3 of the *Criminal Code* should apply and the defendant should bear an evidential burden of proof for an offence-specific defence, unless there are good reasons to depart from this. The committee notes that the *Guide to Framing Commonwealth Offences* is, in this instance, noting that it is preferable to apply an *evidential* burden of proof rather than a *legal* burden of proof and does not provide a justification for including a matter as an offence-specific defence. The committee reiterates that the Guide provides that a matter should only be included as an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[66]

2.106 The committee notes that the Minister's response does not explain why it would be significantly more difficult and costly for the prosecution to establish that the defendant's conduct was not in accordance with a Ministerial direction, given it would be within the prosecution's knowledge as to whether the Minister has issued a direction for a person to engage in specified conduct. The committee also notes that the advice does not explain how such a matter would be *peculiarly* within the defendant's knowledge. The committee appreciates it may be relatively easy for the defendant to raise evidence as to whether their conduct was in accordance with a Ministerial direction. However, the committee reiterates that at common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to raise evidence to

65 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 52.

66 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

disprove one or more elements of an offence, interferes with this common law right, and the burden should not be reversed simply on the basis of the ease by which a defendant may raise evidence.

2.107 In order to address the committee's scrutiny concerns outlined above, the committee considers it would be appropriate for subclause 33(1) to be amended to add an additional element providing that a person will commit the offence if the Minister has not given a direction to the person to engage in that conduct (and the defence at subclause 33(2) is removed).

2.108 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to a matter that does not appear to be peculiarly within the defendant's knowledge or significantly more costly for the prosecution to disprove.

Product Emissions Standards (Customs) Charges Bill 2017
Product Emissions Standards (Excise) Charges Bill 2017

Purpose	These bills seek to impose a charge on: • the importation of products; and • domestically manufactured products prescribed under the Product Emissions Standards legislation
Portfolio	Environment and Energy
Introduced	House of Representatives on 10 August 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(iv) and (v)

2.109 The committee dealt with this bill in *Scrutiny Digest No. 9 of 2017*. The Minister responded to the committee's comments in a letter received 4 September 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[67]

Significant matters in delegated legislation[68]

Initial scrutiny – extract

2.110 These bills seek to impose a charge on the importation and manufacture of 'emissions-controlled products'.[69] Products may be prescribed as an 'emissions-controlled product' by rules (delegated legislation) made under clause 9 of the Product Emissions Standards Bill 2017. The amount of the charge imposed is to be prescribed in regulations (or worked out in accordance with a method prescribed in regulations).[70]

67 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

68 Clause 6 (in both the Customs and Excise bills). The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

69 Clause 5 (in both the Customs and Excise bills).

70 Clause 6 (in both the Customs and Excise bills).

2.111 The explanatory memorandum suggests that it is necessary to have flexibility in prescribing the amount of the charge in regulations as different charges may be prescribed for different emissions-controlled products. The explanatory memorandum also suggests that the charges 'would enable full cost recovery of the costs associated with regulating emissions-controlled products':

> Consistent with Australian Government policy, the amount of any applicable charge for different types of emissions-controlled products will be determined on a case-by-case basis through a Cost Recovery Implementation Statement. The amount of the charge imposed would be set at a level that is designed to recover no more than the estimated cost of regulating the type of emissions-controlled product.[71]

2.112 One of the most fundamental functions of the Parliament is to impose taxation (including duties of customs and excise).[72] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. The committee notes the statement in the explanatory memorandum that it is intended that the charges are to be imposed for the purposes of cost recovery. However, no guidance is provided on the face of the bills limiting the imposition of the charges in this way (for example, there is no provision limiting the charges to 'the estimated cost of regulating the type of emissions-controlled product'), nor are maximum charges specified.

2.113 The committee therefore requests the Minister's advice as to whether at least some level of guidance (for example, limiting the charges to 'the estimated cost of regulating the type of emissions-controlled product') or a maximum level of charge can be specifically included in each bill.

2.114 If no guidance is to be included on the face of the bill, the committee considers that it may be appropriate for the bill to be amended to increase parliamentary oversight by:

- requiring the positive approval of each House of the Parliament before new regulations under clause 6 come into effect;[73] or
- providing that the regulations do not come into effect until the relevant disallowance period has expired (while retaining the usual procedures in subsection 42(2) of the *Legislation Act 2003* so that any regulations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period).

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71 Explanatory memorandum, pp 46–47 and 48–49.

72 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

73 See, for example, section 10B of the *Health Insurance Act 1973*.

2.115 The committee also requests the Minister's response in relation to this matter.

Minister's response

2.116 The Minister advised:

> Specifying the amount of the charge, or the method for working out the amount of the charge, in the regulations provides the level of flexibility required as different charges may be prescribed for different emissions-controlled products. It also avoids the need to amend the primary legislation each time a new charge is imposed, an existing charge is updated or the method for calculating an existing charge is updated.
>
> Consistent with the *Australian Government Cost Recovery Guidelines,* the amount of any applicable charge for different types of emissions-controlled products will be determined on a case-by-case basis through a Cost Recovery Implementation Statement (CRIS). The amount of the charge imposed would reflect the overall costs of the activity being recovered and be set at a level that is designed to recover no more than the estimated cost of regulating the type of emissions-controlled product.
>
> A CRIS must detail the activities that are to be cost recovered, an explanation of how an activity is costed, an explanation of the design of the charges, an assessment of the regulatory charging risk, a stakeholder engagement strategy, financial estimates for the activity, and reporting on the financial and non-financial performance of the activity. A finalised CRIS must also be published which provides the necessary transparency to ensure that the amount of the charge imposed by regulation is not excessive.
>
> In addition, as the Minister recommends the Governor-General make the regulations specifying the amount of the charge or the method for calculating the amount of the charge, the Minister must be satisfied that the fees and charges are not excessive. Regulations must be tabled in both Houses of the Parliament, and are subject to motions of disallowance and scrutiny by the Senate Standing Committee on Regulations and Ordinances. This Parliamentary scrutiny provides another safeguard against over-recovery through the imposition of excessive charges. This provides a high degree of accountability and transparency to stakeholders, such that the need to include a maximum charge in the bills is reduced.
>
> Specifying a maximum level of charge in each bill has the potential to cause confusion for the regulated entities. As more products are regulated under the emissions standard framework, it would be unclear to importers and manufacturers of different types of products how that maximum charge would apply in their circumstances.
>
> For these reasons, the bills do not set an upper limit for the charge and instead rely on the general cost recovery rules to provide the necessary assurances and transparency to stakeholders. In addition, as the amount

of the charge, or the method for calculating the charge, will be informed through the development of a CRIS, which involves extensive stakeholder consultation, it is also considered unnecessary to amend the Bills to require the periods for Parliamentary scrutiny of the regulations to expire before the charge can commence.

Committee comment

2.117 The committee thanks the Minister for this response. The committee notes the Minister's advice that the amount of the charge for different types of emissions-controlled products will be determined in a way that is consistent with the Australian Government Cost Recovery Guidelines, and that therefore the amount of the charge imposed would be set at a level that is designed to recover no more than the estimated cost of regulating the relevant type of emissions-controlled product. The Minister also advised that specifying a maximum level of charge has the potential to cause confusion for regulated entities because as more products are regulated, 'it would be unclear to importers and manufacturers of different types of products how that maximum charge would apply in their circumstances'. Finally, the Minister also advised that extensive stakeholder consultation will be undertaken prior to determining the amount of the charge (or the method for calculating the charge), and therefore it is also considered unnecessary to amend the bill so that the regulations do not come into effect until the relevant disallowance period has expired.

2.118 The committee welcomes the Minister's indication that the amount of the charge will be set at a level that is designed to recover no more than the estimated cost of regulating the relevant emissions-controlled product and that extensive consultation will be undertaken. However, the committee notes that there is nothing on the face of the bill that will ensure that these limitations and requirements are met.

2.119 The committee takes this opportunity to reiterate that one of the most fundamental functions of the Parliament is to levy taxation (including duties of customs and excise).[74] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Therefore, the committee considers that guidance in relation to the level of a charge should be included on the face of the primary legislation. The committee does not consider that including a maximum limit (or limits) on the face of the bill would cause unnecessary confusion as it would be clear that such a limit would simply represent an upper limit on the amount of the charge that could be levied without amendment of the primary legislation. Importers and manufacturers would already need to be

74 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

aware of how their products are classified within the new framework, so the addition of a maximum limit should not cause undue confusion.

2.120 If guidance in relation to the level of a charge is not included on the face of the bill, the committee considers that it may be appropriate for the bill to at least be amended to require the positive approval of each House of the Parliament before relevant regulations setting the amount of the charge (or the method for calculating the charge) come into effect.[75] Alternatively, the committee considers that it would be appropriate to provide that the regulations do not come into effect until the relevant disallowance period has expired (while retaining the usual procedures in subsection 42(2) of the *Legislation Act 2003* so that any regulations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period).

2.121 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing regulations to determine the amount of a charge payable without any guidance being provided on the face of the bill as to the method of calculation or the maximum amount of the charge.

2.122 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

75 See, for example, section 10B of the *Health Insurance Act 1973*. The committee notes that in the United Kingdom approximately ten per cent of statutory instruments are subject to an affirmative approval procedure where both Houses of the Parliament must expressly approve them: United Kingdom House of Commons Library, *Statutory Instruments*, Briefing Paper, 15 December 2016, p. 9.

Social Services Legislation Amendment (Payment Integrity) Bill 2017

Purpose	This bill seeks to amend the law relating to family assistance, social security and veterans' entitlements Schedule 1 amends residency requirements for the Age Pension and the Disability Support Pension Schedule 2 ceases the payment of pension supplement after six weeks temporary absence overseas and immediately for permanent departures Schedule 3 introduces a 30 cents in the dollar income test taper for Family Tax Benefit Part A families with a household income in excess of the Higher Income Free Area Schedule 4 extends the maximum liquid assets waiting period for Newstart Allowance, Sickness Allowance, Youth Allowance and Austudy from 13 weeks to 26 weeks
Portfolio	Social Services
Introduced	House of Representatives on 21 June 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i)

2.123 The committee dealt with this bill in *Scrutiny Digest No. 8 of 2017*. The Minister responded to the committee's comments in a letter dated 28 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[76]

Retrospective effect[77]

Initial scrutiny – extract

2.124 Schedule 1 to the bill seeks to amend the residency requirements for the Age Pension and Disability Support Pension (DSP) by changing certain timeframes which need to be met before claims will be deemed payable to eligible recipients.

76 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

77 Schedule 1. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference

Currently, in order to qualify for the Age Pension or DSP a person must either have been an Australian resident for a continuous period of at least 10 years or, alternatively, for an aggregate period in excess of 10 years but including a continuous period of at least 5 years within that aggregate.

2.125 The proposed amendments to the residency requirements would introduce a new requirement that at least 5 years of the 10 year continuous Australian residency period must be during a person's working life. If this 5 year working life test is not met, then a person will be required to demonstrate self-sufficiency by having 10 years continuous Australian residency with greater than 5 years (in aggregate) relating to periods in which the person has not been in receipt of an activity tested income support payment. If a person does not meet either of these new requirements then they will have to demonstrate at least 15 years continuous Australian residency to satisfy the residency requirements for the Age Pension and DSP. The explanatory memorandum notes that 'access to Special Benefit will remain for those people who experience financial hardship, and existing exemptions will remain, such as for refugees or where a person incurs a continuing inability to work after arrival in Australia for DSP'.[78]

2.126 Although the amendments in this Schedule are to commence prospectively on 1 July 2018, the effect of the proposed amendments is that a person who may have made arrangements based on an understanding of the existing law may have to wait a further five years to satisfy the residency requirements for the Age Pension or DSP. For example, a person who arrived in Australia on 1 February 2009 may have arranged their affairs on the expectation that they would be eligible to receive the Age Pension after 10 years of continuous Australian residence (i.e. from 1 February 2019). However, under the proposed amendments, if the person does not meet the new self-sufficiency test or the requirement for at least five of the 10 years to be within the person's working life, they would not be eligible to receive the Age Pension until 1 February 2024.

2.127 The committee has a long-standing scrutiny concern about provisions that, while not technically retrospective, may raise questions as to the fairness of applying a change in the law to individuals who have arranged their long-standing affairs on the basis of the existing law. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

2.128 Generally, where proposed legislation will have such an effect the committee expects the explanatory materials should set out whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

2.129 The committee therefore requests the Minister's advice as to why it is considered necessary to apply the amended residency requirements to individuals

78 Explanatory memorandum, pp 6–7.

who may have arranged their affairs on the basis of the existing law, and the number of people likely to be adversely affected by these proposed changes.

Minister's response

2.130 The Minister advised:

> This measure balances a number of policy objectives, strengthening residency requirements and encouraging people who intend to migrate to Australia to be more self-supporting, while maintaining the existing basic social security safety net for Australian residents who are in financial need.
>
> It is unreasonable to expect Australian taxpayers to fund the retirement of migrants who have arranged their circumstances in order to retire in Australia on the Age Pension having spent the vast majority of their working lives in a foreign country. The Australian community reasonably expects people who plan on migrating to Australia for the purposes of retirement to have spent a large proportion of their working life in Australia, or to have made provision for their retirement before migrating to Australia, such as being supported by their family sponsors.
>
> The measure addresses concerns raised by the Productivity Commission (No. 77, 13 April 2016, Migrant Intake into Australia) regarding the cost of parent migrants who have not resided in Australia during any part of their working lives and who subsequently receive Australian social security payments to financially support themselves in their retirement.
>
> This measure reinforces the residence-based nature of the Australian social security system and contributes to the ongoing sustainability social welfare system.
>
> This measure will only apply prospectively to qualification for the Age Pension and Disability Support Pension (DSP) from 1 July 2018, and will not have retrospective effect for those who have already previously been granted the Age Pension or DSP at any time prior to 1 July 2018. If grandfathering arrangements were to be applied to this measure, they would be required to operate for a significant period. Operating parallel residency systems for the Age Pension and DSP would also be complex from a policy and administrative perspective.
>
> This measure will affect approximately 2,390 people on average each year over the forward estimates. This includes future migrants and people already in Australia who have not already qualified for Age Pension or DSP at the time of commencement.
>
> The vast majority of Age Pension and Disability Support Pension claimants (98 per cent) will be unaffected by this measure as they already have the required 10 continuous years residence with five years during their working life, having being born in Australia and/or lived here for many years. People who qualified and received Age Pension or DSP at any time prior to 1 July 2018 will not be affected by the changed residence rules.

> Newly arrived residents who do not meet the Age Pension and Disability Support Pension residency requirements will continue to have access to other social security payments, if eligible, after the existing two-year newly arrived residence waiting period.
>
> In addition, migrants within their first two years of Australian residence or where the person is not residentially qualified for Age Pension or DSP will continue to have access to Special Benefit. Special Benefit is an income support payment that provides financial assistance to people who, due to reasons beyond their control, are in financial hardship and unable to earn a sufficient livelihood for themselves and their dependants. The rate of Special Benefit is the same as Newstart Allowance. Recipients of Special Benefit may also be entitled to supplementary payments such as Rent Assistance and the Pension Supplement, if over age pension age.
>
> The measure contains safeguards for individuals who incur a continuing inability to work after arrival in Australia, by not applying the residency requirements for the purposes of DSP in such instances. It is important to note that the measure also maintains Age Pension and DSP residency exemptions for humanitarian and refugee entrants.
>
> In addition, Australia has 30 International Social Security Agreements that allow people from these agreement countries to apply for and receive their foreign pension contributions in Australia. These Agreements reinforce the idea that retirement costs and pensions paid should reflect where they have spent periods of their working life. These International Social Security Agreements also commonly allow people to combine periods of residence in those countries with Australian residence for the purpose of meeting pension residence requirements.

Committee comment

2.131 The committee thanks the Minister for this response. The committee notes the Minister's advice that this measure will affect approximately 2,390 people on average each year over the forward estimates. The committee also notes the advice that if grandfathering arrangements were to be applied they would be required to operate for a significant period and operating parallel residency systems for the Age Pension and Disability Support Pension (DSP) would be complex from a policy and administrative perspective. The committee further notes the Minister's advice that newly arrived residents who do not meet the Age Pension and DSP residency requirements will continue to have access to other social security payments after the existing two-year newly arrived residence waiting period and that people may be able to apply for and receive foreign pensions in Australia under various international social security agreements.

2.132 The committee does not consider that administrative complexity, of itself, is sufficient justification for applying a change in the law to individuals who may have arranged their long-standing affairs on the basis of the existing law. The committee also notes that while other social security payments would provide some level of

income support, this does not address the fact that some individuals would have arranged their long-standing affairs on the basis of being eligible to receive a pension.

2.133 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.134 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying amended residency requirements to individuals who may have arranged their affairs on the basis of the existing law.

Social Services Legislation Amendment (Welfare Reform) Bill 2017

Purpose	This bill seeks to amend the law relating to family assistance, social security, paid parental leave and student assistance Schedule 1 introduces a single Jobseeker Payment, to replace seven existing payments as the main payment for people of working age Schedules 2, 3, 4 and 5 ceases Widow B Pension; Wife Pension; Bereavement Allowance; and Sickness Allowance from 20 March 2020 Schedule 6 will close the Widow Allowance to new entrants from 1 January 2018 and will cease on 1 January 2022, when all recipients have moved to Age Pension Schedule 7 ceases Partner Allowance from 1 January 2022 Schedule 8 allows the Minister to make rules of a transitional nature in relation to the amendments and repeals made by Schedules 1 to 7 to this bill Schedule 9 amends the activity tests for Newstart Allowance and certain Special Benefit recipients aged 55 to 59 who engage in voluntary work for at least 30 hours Schedule 10 amends the start day for some participation payments and the RapidConnect arrangements Schedule 11 removes intent to claim provisions, resulting in social security claimants receiving payments from the date they lodge a complete claim Schedule 12 provides for the trialling of drug testing 5000 new recipients of Newstart Allowance and Youth Allowance in three locations over two years Schedule 13 provides that exemptions from the activity test and participation requirements will no longer be available in relation to circumstances directly attributable to drug or alcohol misuse for certain social security recipients Schedule 14 amends the reasonable excuse rules Schedule 15 introduces a new compliance framework for mutual obligation requirements in relation to participation payments Schedule 16 would allow a request to provide a tax file number and/or a relevant third party's tax file number as part of a claim for a social security payment or seniors health card

	Schedule 17 allows information and documents obtained by the Department of Human Services to be used in welfare fraud prosecution proceedings starting from 1 January 2018 Schedule 18 aligns the social security and disability discrimination laws
Portfolio	Social Services
Introduced	House of Representatives on 22 June 2017
Bill status	Before House of Representatives
Scrutiny principle(s)	Standing Order 24(1)(a)(i), (ii), (iii), (iv) and (v)

2.135 The committee dealt with this bill in *Scrutiny Digest No. 8 of 2017*. The Minister responded to the committee's comments in a letter dated 28 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[79]

Significant matters in delegated legislation (Schedule 12)[80]

Initial scrutiny – extract

2.136 Schedule 12 provides for a two year trial in three regions for the mandatory drug testing of 5,000 recipients of Newstart Allowance and Youth Allowance. Proposed section 38FA provides that the Minister may make rules (legislative instruments) providing for a number of matters relating to the establishment of the drug testing trial. This includes a number of significant matters, such as the confidentiality and disclosure of drug test results and the keeping and destroying of records relating to samples and drug tests. Proposed section 64A also provides that the drug test rules may require contracts for the carrying out of drug tests to meet certain requirements, including provisions requiring the giving, withdrawal or revocation of a notice to the Secretary saying that a person should be subject to income management,[81] with the intention that the circumstances in which such a notice may be given to be provided in the drug test rules.[82]

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79 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

80 Schedule 12, item 3, proposed section 38FA; item 18, proposed section 64A; and item 24, proposed subsection 123UFAA(1B). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) and (v) of the committee's terms of reference.

81 Schedule 12, item 18, proposed section 64A.

82 Explanatory memorandum, p. 76.

2.137 In addition, proposed subsection 123UFAA(1B) provides that the Secretary may, by legislative instrument, determine a period longer than 24 months as to when a person may be subject to income management. This would give the Secretary the power, via legislative instrument, to extend the period of income management for longer than the 24 month trial period.[83]

2.138 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum does not explain why the confidentiality and disclosure of drug test results, the keeping and destroying of records relating to samples and drug tests, and requirements regarding the contractual arrangements for drug testing are to be included in delegated legislation rather than set out in the primary legislation. In relation to extending the trial period beyond 24 months, the explanatory memorandum suggests this might be used 'where it is considered to be beneficial to a person's drug rehabilitation outcome to remain on income management for a longer period of time'.[84] The committee notes that no time limit is set in the bill on the period that the trial could be extended via legislative instrument.

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

- why it is considered necessary to leave significant matters of the type referred to above to delegated legislation; and
- the type of consultation that it is envisaged will be conducted prior to the making of rules and determinations and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Minister's response

2.140 The Minister advised:

> As described in the House of Representatives Practice (6th Edition), delegated legislation is necessary and often justified by its facility for adjusting administrative detail without undue delay, its flexibility in matters likely to change regularly or frequently, and its adaptability for other matters such as those of technical detail. Once Parliament has laid down the principles of a new law, delegated legislation is the appropriate method through which to work out the application of the law in greater detail within, but not exceeding, those principles. The items on which you seek further advice fall within this category of business.

83 See explanatory memorandum, p. 76.

84 Explanatory memorandum, p. 76.

Drug Test Rules

With respect to Schedule 12 of the Social Security Legislation Amendment (Welfare Reform) Bill 2017 (the Welfare Reform Bill), the introduction of a two year drug testing trial for new claimants of Newstart Allowance and Youth Allowance (other), clause 38FA allows for the creation of Drug Test Rules via legislative instrument that will set out certain details relating to the establishment and operation of the trial. This includes the rules for conducting the tests, including the taking of samples, carrying out of the tests and disclosure of results.

The reason for the use of delegated legislation to set out the rules for conducting the tests is that these technical and more administrative details rely to an extent on the advice of the preferred tenderer for the provision of drug testing trial services as well as other stakeholders. Use of a legislative instrument gives the necessary flexibility to ensure that the arrangements for the drug testing will meet the intention of the legislation but can accommodate practicalities that may have been unknown at time the Bill was drafted.

The Drug Test Rules will also set out the three areas in which the trial will operate. The Government had not finalised the selection of the trial sites at the time the Bill was drafted. Using subordinate legislation to set out these areas gives flexibility for consultation, and consideration of the relevant factors in making this decision, after introduction of the Bill to the Parliament.

The Department has been engaging with stakeholders from the health, alcohol and other drug, and welfare sectors and this consultation will be ongoing. The Department has spoken to all state and territory governments as well as a range of drug and alcohol treatment providers and peak bodies, and related experts across the country. The advice and feedback of stakeholders will be considered in finalising the Drug Test Rules.

Income Management

New paragraph 1(B) of 123UFAA of the *Social Security Administration Act 1999* (the Administration Act) will give the Secretary the power to determine a longer period of time than 24 months for a person to remain on Income Management. It is intended that this power would be used where it is considered to be beneficial to the person and/or their drug rehabilitation outcome to remain on Income Management. For example, to return the job seeker to unrestricted welfare payments part way through their rehabilitation could jeopardise their long term outcomes, if the use of Income Management as a tool in helping them to manage their payments is proving successful overall.

Committee comment

2.141 The committee thanks the Minister for this response. The committee notes the Minister's advice that the reason for the use of delegated legislation for details

relating to drug testing is that the matters to be included are technical and administrative detail that rely, to an extent, on the advice of the preferred tenderer for the provision of drug testing trial services and other stakeholders.

2.142 However, the committee notes that many of the matters relating to drug testing that will be included in the drug testing rules appear to go beyond merely technical and administrative detail. In particular, the rules are to provide for the confidentiality and disclosure of results of drug tests and the keeping and destroying of records relating to drug tests and samples for use in drug tests.[85] The committee notes that an exposure draft of the Drug Test Rules has been tabled by the Minister in another inquiry.[86] These Rules provide for matters such as when a drug test notice will be considered to be invalid, withdrawn or revoked; how a drug test is to be carried out (i.e. affording reasonable privacy and in a respectful manner); when samples (which contain highly personal information) are to be destroyed; and the steps that occur when a drug test is disputed. The committee does not consider that these matters are technical and administrative detail. The committee considers that these are significant matters that are not appropriate to be left to delegated legislation, which is subject to significantly less parliamentary oversight than primary legislation.

2.143 The committee also notes the Minister's advice that the power of the Secretary to determine that a person may be subject to income management for a longer period than 24 months is intended to be used when it is considered to be beneficial to the person. However, the committee notes that the legislation is not limited in this way: proposed subsection 123UFAA(1B) simply provides that the Secretary may, by legislative instrument, determine a period longer than 24 months. There is also no cap on the length of time that the Secretary could prescribe under this provision.

2.144 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of including significant matters, such as how a drug test is to be conducted and the confidentiality of that test, and the extension of the period of income management, in delegated legislation.

2.145 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

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85 Schedule 12, item 3, proposed paragraphs 38FA(g) and (i).

86 See Senate Standing Committee on Community Affairs, inquiry on the Social Services Legislation Amendment (Welfare Reform) Bill 2017, Additional Documents, tabled on 30 August 2017 by the Department of Social Services.

Broad delegation of administrative power (Schedule 12)[87]

Initial scrutiny – extract

2.146 Proposed section 64A provides that the Secretary may enter into contracts for the carrying out of drug tests of drug trial pool members. Such a contract must meet any requirements to be prescribed in rules (legislative instruments). Proposed paragraph 123UFAA(1A)(c) provides that a person will be subject to income management on a number of specified bases, including that the contractor who carried out the drug test has given a written notice to the Secretary 'saying that the person should be subject to the income management regime'.[88] Additionally, a person will not be subject to the income management regime if the contractor has withdrawn or revoked its notice,[89] and a person will not be required to pay for a drug test 'if the contractor who carried out the test gives a written notice to the Secretary that the test should not be taken into account'.[90] These provisions appear to give the contractor the power to determine who should be subject to the income management regime.

2.147 The explanatory memorandum states that if a person's drug test result is positive 'the contractor will give a notice to the Secretary that the person should be subject to income management'.[91] The circumstances under which such a notice may be given are intended to be provided for in the drug test rules 'for instance, if the drug test result is positive'.[92] The explanatory memorandum also notes that the contractor can withdraw or revoke a notice or give notice that a positive drug test should not be taken into account:

> For example, if a person requests a second drug test which results in a negative result or if the contractor receives evidence that the person is taking legal medication which could cause a false positive result, the contractor can withdraw or revoke a notice that was previously given a notice under paragraph 123UFAA(1A)(c)
>
> …

87 Schedule 12, item 18, proposed section 64A and item 24, proposed paragraph 123UFAA(1A)(c). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

88 See Schedule, item 18, proposed paragraph 64A(3)(b) and item 24, proposed paragraph 123UFAA(1A)(c).

89 See Schedule, item 24, proposed paragraph 123UFAA(1A)(d), together with item 18, proposed paragraph 64A(3)(c).

90 See Schedule 12, item11, proposed subsection 1206XA(5).

91 Explanatory memorandum, p. 73.

92 Explanatory memorandum, p. 76.

> For example, if the contractor becomes aware…of a false positive test result such as if the contractor received evidence that the person is taking legal medication which could cause a false positive result, the contractor will be required under the drug testing rules to notify the Secretary that the test should not be taken into account for the purposes of a drug test repayment deduction.[93]

2.148 The bill states that the criteria for guiding when the contractor would give a written notice may be provided in the drug test rules, but no detail is provided in the bill itself. Additionally, proposed paragraph 64A(3)(a)[94] provides that the rules may include provisions noting that any subcontracts should include similar provisions to those set out for contractors, which suggests a subcontractor may also be able to determine if a person is to be subject to income management.

2.149 The explanatory memorandum provides no details as to who is likely to be contracted to perform the task of determining which social security recipients are to be subject to income management, and what their qualifications must be. Contractors will not be subject to the same level of accountability and oversight that apply to members of the public service. For example, the APS Code of Conduct applies only to employees of the Australian Public Service.

2.150 There is also nothing in the primary legislation, nor any indication that it will be in the rules, as to how the contractor is to 'receive evidence', for example that a person is taking legal medication. There is no information in the bill or explanatory materials as to what are the review rights of a person who is made subject to income management based on a contractor's written notice. It appears that a person will be made subject to income management automatically once certain criteria is met, including that a contractor has given written notice to this effect. It is unclear whether the contractor's provision of a notice to the Secretary stating that a person should be subject to income management is a 'decision' that would be reviewable.

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

- the appropriateness of allowing contractors to make a determination as to who is to be subject to income management;
- the qualifications to be required of such contractors;
- any accountability or oversight mechanisms that contractors will be subject to (covering matters such as the protection from unauthorised disclosure of personal information obtained by a contractor); and
- the availability of review of a contractor's decision to give, vary or revoke a written notice to the Secretary subjecting a person to income management or a refusal to vary or revoke such a notice.

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93 Explanatory memorandum, p. 74.

94 Schedule 12, item 18.

Minister's response

2.152 The Minister advised:

Referral to Income Management and Review of this Referral

The drug testing provider does not make determinations as to who is subject to Income Management. The contracted provider will be contracted by the Department of Human Services (DHS) to drug test individuals and to notify DHS of test results under the drug testing trial. The circumstance in which the drug test provider is to provide DHS with a notice of the test results will be if the individual returns a positive drug test. DHS then cross reference the results of the drug test with customer information to confirm the drug test relates to a specific customer.

The notice of decision that an individual will be placed on Income Management is provided in a letter sent by DHS to the individual requiring attendance at an initial Income Management interview. At this initial interview, an individual can request a wellbeing review if being placed on Income Management will be a serious risk to the person's mental, physical or emotional wellbeing. DHS officers can then refer the individual to DHS social workers to review whether this would be the case. While the drug testing provider is responsible for the drug testing and the notification of test results to DHS, the decision to place an individual on Income Management will be a decision made by a DHS officer under social security law.

This safeguard has been strengthened in response to comments made by the Senate Standing Committee for the Scrutiny of Bills in Scrutiny Digest No.8 of 2017. These comments noted it might be appropriate to review the provisions in the *Social Services Legislation Amendment* 5 *(Welfare Reform) Bill 2017* governing when and how the Secretary might make determinations to remove people from Income Management. In response, the Government made amendments to the provisions in the Bill to limit the Secretary's discretion to make determinations to remove people from Income Management.

The drug testing provider will also be required to notify DHS to revoke a person's referral to Income Management if they subsequently become aware that the positive test result was in error. This may be because:

- the job seeker requested a re-test and the sample was subsequently found to return a negative result;
- the drug test provider was given evidence (by the job seeker or their representative) of legal medications or other circumstance which would, in their professional opinion, produce a positive drug test result without the consumption of illicit drugs; or
- they became aware of any other error within their testing process for that person's sample.

These circumstances and requirements will be stipulated in the Drug Test Rules.

Referral of a person to Income Management by an external party is already an established process under existing Income Management provisions in the Administration Act. For example, the local child protection authority or, in Queensland, the Families Responsibility Commission can refer people to Income Management under certain circumstances.

The decision that a person is subject to Income Management, based on a referral from a third party (such as the drug testing provider) is a decision under social security law. Any decision made under social security law, including implementation of the drug test provider's referral of a person to Income Management, may be appealed in accordance with existing review and appeal provisions. Under existing review and appeal mechanisms in the Administration Act, recipients can request a review of the decision by a DHS Authorised Review Officer and, if they disagree with the decision by this officer, can appeal the decision to the Administrative Appeals Tribunal.

Qualifications of the Drug Test Provider

The minimum requirements, including qualifications, of the drug test provider and its officers will also be set out in the Drug Test Rules. It is intended that the drug testing provider will need to deliver testing services in accordance with the relevant Australian Standards (where these exist) being *AS/NZS 4308:2008 Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* and *AS4760: 2006 Procedures for specimen collection and the detection and quantitation of drugs in oral fluid.* It is also intended that the provider will also be required by the Rules to utilise authorised laboratories – those accredited by the National Association of Testing Authorities, Australia - and to use authorised analysts for the purposes of analysing the results of samples taken for drug testing. The final details of the Drug Test Rules may be subject to further consultation with stakeholders.

Privacy

With respect to privacy concerns, there are existing privacy safeguards in place under the *Privacy Act 1988* and the confidentiality provisions in Division 3 of Part 5 of the Administration Act.

These confidentiality provisions stipulate that protected information, including any personal information such as health information, can only be accessed, used or disclosed in limited circumstances. This includes for the purposes of administering the social security law; for research, statistical analysis or policy development; and where it has been certified as being in the public interest.

These existing safeguards will apply to any information gathered as part of this trial, including that obtained or generated by the drug test provider.

Any accessing, use or disclosure of this information, including test results, will only occur in accordance with these existing laws.

Committee comment

2.153 The committee thanks the Minister for this response. The committee notes the Minister's advice that the drug testing provider does not make determinations as to who will be subject to income management. Rather, the Minister advises that the decision to place an individual on income management will be a decision made by a DHS officer under social security law, and an individual can request a wellbeing review. The committee also notes the Minister's advice that referral of a person to income management by an external party is already an established process under the existing income management provisions in the *Social Security (Administration) Act 1999* (the Administration Act). The committee notes the advice that the decision that a person is to be subject to income management 'based on a referral from a third party (such as the drug testing provider)' is a decision that may be appealed in accordance with existing review and appeal provisions.

2.154 However, the committee notes that the only relevant decision that is subject to review under the Administration Act is the decision that determines whether the conditions in proposed subsection 123UFAA(1A) have been met, namely that, at or before the test time:

- the person is an eligible recipient of a relevant welfare payment;
- there was a positive drug test for the person;
- the contractor who carried out the test gave the Secretary a written notice saying that the person should be subject to the income management regime, and that notice has not been withdrawn or revoked;
- the person is not covered by a determination that the person should not be subject to the income management regime; and
- any payment nominee is not an excluded nominee and the person is otherwise subject to income management.

2.155 In relation to the contractor's decision that the person should be subject to income management, there appears only to be a requirement that the DHS officer is satisfied that a written notice has been provided. The decision as to whether the notice has been provided would be a reviewable decision under the Administration Act.[95] However, there is no right of review under the Administration Act of the contractor's decision to issue the notice. Similarly, the fact of whether there was a positive drug test would appear to simply require the DHS officer to be satisfied that the drug test was positive, but would not enable to officer to look behind whether the test results were accurate.

95 See Part 4 of the *Social Security (Administration) Act 1999*, relating to decisions of 'officers'.

2.156 As the Minister's response notes, the contractor's notice is analogous to the existing referral to income management by a third party. The government's *Guide to Social Security Law* notes that a review of a decision to impose income management when there is a referral by a third party, is a review as to whether the legislative conditions have been met, but the decision of the third party whether to issue the notice is 'not made under the social security law'[96] and is therefore not reviewable under the Administration Act. As the Guide states in relation to referrals by State or Territory authorities:

> The decision by the recognised state or territory officer or employee to issue the notice is not reviewable under the social security law, although *the question of whether or not the notice was actually given is reviewable*. The decision by the a recognised state or territory officer or employee to give the notice to the Commonwealth may be able to be appealed or reviewed in the relevant state or territory jurisdiction.[97]

2.157 In this instance there is no applicable State or Territory jurisdiction by which a decision of the contractor to refer a person to income management can be reviewed. The committee notes the Minister's response that the contractor will be required to notify DHS to revoke the referral if they subsequently become aware the positive test result was in error because the contractor was 'given evidence (by the job seeker or their representative) of legal medications or other circumstance which would, *in their professional opinion*, produce a positive drug test result without the consumption of illicit drugs'.[98]

2.158 From a scrutiny perspective, the committee is concerned that it appears that the only way a person subject to income management under this proposed provision could seek review of the results of the drug test itself is by asking the contractor to review its own processes. The committee notes that an exposure draft of the Drug Test Rules has been tabled by the Minister in another inquiry.[99] This draft suggests that there will be a process by which an affected person can provide evidence to the contractor about the drug test and the contractor will need to satisfy itself, having regard to that evidence, as to the validity of the drug test. The details of this process, as to how a person will apply to the contractor and how the contractor will assess any submissions or evidence, do not appear to be set out in legislation. Indeed, the draft explanatory statement accompanying the exposure draft of the rules states

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96 Australian Government, *Guide to Social Security Law*, version 1.235, released 14 August 2017, Chapter 11.9.7.

97 Australian Government, *Guide to Social Security Law*, version 1.235, released 14 August 2017, Chapter 11.9.7.10. Emphasis added.

98 Emphasis added.

99 See Senate Standing Committee on Community Affairs, inquiry on the Social Services Legislation Amendment (Welfare Reform) Bill 2017, Additional Documents, tabled on 30 August 2017 by the Department of Social Services.

that the rules only set out 'high level requirements' and that more detailed requirements will be set out in the government's contract with the selected providers.[100]

2.159 The committee has significant scrutiny concerns about private contractors making a referral as to who will be subject to income management. The committee notes that private contractors are not subject to the same level of accountability and oversight that apply to members of the Australian Public Service. The committee's scrutiny concerns are heightened by the fact that it does not appear that the contractor's decision to make the referral will be subject to any form of merits or judicial review, as only the question of whether or not the notice was actually given appears to be reviewable under the Administration Act. The committee also has scrutiny concerns that the process by which an affected person can seek to challenge a positive drug test is not contained in any legislation. The committee draws these significant scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of this proposed approach.

Restriction on judicial review (Schedule 12)[101]

Initial scrutiny – extract

2.160 Proposed subsection 123UFAA(1C) provides that the Secretary may determine that a person is not subject to the income management regime if the Secretary is satisfied that being subject to the regime poses a serious risk to the person's mental, physical or emotional wellbeing.

2.161 However, proposed subsection 123UFAA(1D) makes it clear that the Secretary has no duty to even consider whether or not to exercise this power.

2.162 The explanatory memorandum states that the Secretary is not required to actively take steps to assess every trial participant, who is referred to income management, but will consider making this determination once he or she is made aware of facts which indicate that being subject to income management may seriously risk a person's mental, physical or emotional wellbeing.[102] However, the committee notes, even if the Secretary has been made aware of such facts, proposed

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100 Explanatory statement to the exposure draft of the Social Security (Drug Test) Rules 2017, p. 1. See Senate Standing Committee on Community Affairs, inquiry on the Social Services Legislation Amendment (Welfare Reform) Bill 2017, Additional Documents, tabled on 30 August 2017 by the Department of Social Services.

101 Schedule 12, item 24, proposed subsection 123UFAA(1D). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

102 Explanatory memorandum, p. 77.

subsection 123UFAA(1D) makes clear there is no duty on the Secretary to consider this.

2.163 'No-duty-to-consider' clauses do not by their terms oust the High Court or Federal Court's judicial review jurisdiction. However, they do significantly diminish the efficacy of judicial review in circumstances where no decision to consider the exercise of a power has been made. Even where a decision has been made to consider the exercise of the power, some judicial review remedies will not be available.[103]

2.164 The committee notes that the no-duty-to-consider clause has not been thoroughly justified in this case. The explanatory memorandum indicates that once the Secretary is made aware of facts which indicate income management may seriously risk a person's well-being, the Secretary *will* consider making a determination. The committee considers it may be appropriate to amend the no-duty-to-consider clause to ensure it does not apply where the Secretary is made aware of facts that indicate that income management may risk a person's well-being. The committee requests the Minister's response on this matter and an explanation as to why proposed subsection 123UFAA(1D) is otherwise considered necessary and appropriate.

Minister's response

2.165 The Minister advised:

> The Committee's comments regarding the no-duty-to-consider clause have been noted. I agree to amend new clause 123UFAA(1C) of the Welfare Reform Bill through Government amendments to read that the Secretary will determine that a person is not subject to the income management regime under subsection (1A) if the Secretary is satisfied that being subject to the regime under that subsection poses a serious risk to the person's mental, physical or emotional wellbeing.

Committee comment

2.166 The committee thanks the Minister for this response. The committee welcomes the Minister's advice that government amendments will be made to state that the Secretary *will* (rather than *may*) determine that a person is not subject to income management if satisfied that it would poses a serious risk to the person's mental, physical or emotional wellbeing.

2.167 The committee notes that on 5 September 2017, Government amendments were circulated that would ensure that the Secretary must determine that a person is not subject to income management if satisfied that being subject to the regime poses a serious risk to the person's mental, physical or emotional wellbeing, but the

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103 For example, certiorari will be futile given that mandamus could not issue to compel the re-exercise of the power, even if it had been unlawfully exercised.

Secretary is not required to inquire into whether being subject to income management would pose such a risk. This effectively removes the no-duty-to-consider clause.

2.168 **The committee welcomes the proposed Government amendments to the bill which respond to its scrutiny concerns. In light of the amendments that have been circulated, the committee makes no further comment on this matter.**

Broad delegation of legislative power (Schedule 14)[104]

Initial scrutiny – extract

2.169 Currently under Division 3A of the *Social Security (Administration) Act 1999* the Secretary is required not to determine that a person has committed a number of specified participation failures[105] if the person satisfies the Secretary that the person has a reasonable excuse for the failure. Current section 42U provides that the Secretary must make a legislative instrument that determine matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for such failures, but this does not limit the matters the Secretary may take into account in making such a decision. Item 7 proposes to amend section 42U to include a power for the Secretary to, by legislative instrument determine matters that the Secretary must *not* take into account in deciding whether a person has a reasonable excuse.

2.170 The committee notes that there is no limit in the primary legislation on the matters that could be included in such a legislative instrument and is concerned that the matters that the Secretary (and his or her delegates) would be bound *not* to consider, could be so broad as to undermine the reasonable excuse provisions as set out in the Act. The explanatory memorandum sets out the intention of this provision as follows:

> It is envisaged that the Secretary will exercise the new power provided for in this Schedule to make a legislative instrument determining that where a person's abuse of, or dependency on, drugs or alcohol is used once as a reasonable excuse for a relevant participation failure, such abuse or dependency must not be used in relation to determining whether the person has a reasonable excuse for committing a second or subsequent

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104 Schedule 14, item 7. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

105 Namely, a 'no show no pay' failure (see paragraph 42C(4)(a)); a connection failure (see paragraph 42E(4)(a)); a reconnection failure (see paragraph 42H(3)(a)); a serious failure (see paragraph 42N(2)(a)); or a non-attendance failure (see subsection 42SC(2)).

participation failure if they have previously refused available and appropriate treatment.[106]

2.171 The committee notes that it would appear that the current requirement that the excuse be 'reasonable' would sufficiently constrain the use of the excuse provision.

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

- why it is necessary to bind decision-makers via delegated legislation as to what must *not* be considered a 'reasonable excuse' for a participation failure, given the existing requirement that any excuse be 'reasonable'; and
- the appropriateness of providing a broad and unfettered power to prescribe *any* matter that must not be considered when determining a reasonable excuse (rather than more specifically limiting this power to provide that drug or alcohol abuse or dependency must not be considered in relation to determining whether a person has a reasonable excuse for committing a second or subsequent participation failure if they have previously refused available and appropriate treatment).

Minister's response

2.173 The Minister advised:

> *The need for delegated legislation to specify what must not be considered a 'reasonable excuse'*
>
> Implementing the measure purely on the basis of what individual decision-makers believe is reasonable would lead to administrative inconsistency and inequity and may not achieve the policy intent of providing an incentive to job seekers with drug and alcohol issues to try to address those issues.
>
> Without the proposed legislative change allowing the Secretary to determine, by legislative instrument, what factors must not be considered when deciding whether a person had a reasonable excuse, decision-makers would continue to be required to consider drug and alcohol dependency for every failure. This is not consistent with policy intent of the measure. Policy guidelines could be used to specify that decision makers should consider whether a job seeker has turned down treatment in determining whether a job seeker has a reasonable excuse. However, without an instrument specifying the circumstances in which drug and alcohol must and must not be taken into account, the discretion to find a reasonable excuse in circumstances that are inconsistent with the policy intent would remain in place. This would allow inconsistent application of the policy, as different decision-makers will have different views on what is reasonable, depending on their experience and values.

106 Explanatory memorandum, p. 85.

The appropriateness of providing a broad power to prescribe matters that must not be considered when determining 'reasonable excuse'

The alternative to providing a broad power in the primary legislation to specify, in a legislative instrument, matters which must not be taken into account when considering reasonable excuse would be to use the primary legislation itself to specify the circumstances in which drug or alcohol dependency must or must not be taken into account.

This would require the inclusion of an inappropriate level of detail in the primary legislation. Also, using a legislative instrument is preferable because it provides greater flexibility should any refinement to the policy be required, while still allowing appropriate Parliamentary oversight through the disallowance process. This oversight will ensure that the instrument does not include matters that go beyond the Government's declared policy intent.

Committee comment

2.174 The committee thanks the Minister for this response. The committee notes the Minister's advice that implementing the measure purely on the basis of what individual decision-makers believe is reasonable would lead to administrative inconsistency and inequity. The Minister also acknowledged that policy guidelines could be used to specify that decision-makers should consider whether a job seeker has turned down treatment in determining whether they have a reasonable excuse; however, the Minister considered that this would be inconsistent with the policy intent of providing an incentive to job seekers with drug and alcohol issues to try to address those issues. The committee also notes the Minister's advice that specifying the circumstances in which drug or alcohol dependency must or must not be taken into account would require an inappropriate level of detail in the primary legislation.

2.175 The committee reiterates that there is no limit in the primary legislation on the matters that could be included in a legislative instrument setting out what must *not* be considered a 'reasonable excuse' for a participation failure. From a scrutiny perspective, the committee therefore remains concerned that the matters that the Secretary (and his or her delegates) would be bound *not* to consider, could be made so broad as to undermine the reasonable excuse provisions as set out in the Act. The committee draws these scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of this measure.

2.176 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Significant matters in delegated legislation (Schedule 15)[107]

Initial scrutiny – extract

2.177 Schedule 15 seeks to introduce a new compliance framework for mutual obligation requirements in relation to participation payments. It is intended that job seekers that repeatedly fail to comply with their employment pathway plan requirements will gradually lose income support payments. A number of significant elements of this proposal appears to be included in delegated legislation:

- proposed section 42AC states that a person commits a mutual obligation failure if the person fails to satisfy the Secretary that the person has undertaken adequate job search efforts (the question of whether a person has undertaken adequate search efforts is to be worked out in accordance with a legislative instrument made by the Secretary);[108]
- proposed section 42AI states that the Secretary must, by legislative instrument, determine matters that the Secretary must, or must not, take into account in deciding whether a person has a reasonable excuse for committing a mutual obligation failure or work refusal failure; and
- proposed section 42AR provides that the Minister must, by legislative instrument, determine the circumstances in which the Secretary must, or must not, be satisfied that a person has persistently committed mutual obligation failures and the circumstances in which a determination is to be made regarding reducing a person's instalments or cancelling their payments.

2.178 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum does not explain why matters are to be set out in legislative instruments in relation to proposed sections 42AC or 42AI. In relation to proposed section 42AR, no information is given as to why it is appropriate to include these matters in delegated legislation; however it does state the intention behind the legislative instrument:

> The intention is for the legislative instrument to provide, among other things, safeguards (such as the person having committed a number of failures without a reasonable excuse, the existence of checks having been undertaken by the employment service provider and the Department of Human Services ensuring that the person did not have any undisclosed issues that are affecting their ability to comply with their mutual

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107 Schedule 15, item 1, proposed sections 42AC, 42AI, 42AR. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

108 Schedule 15, item 1, proposed section 42AC(1)(e).

obligations and/or the suitability of the person's employment pathway plan) to be taken into account by the Secretary before a determination that a person has persistently committed mutual obligation failures can be made.

2.179 The committee notes that significant matters such as safeguards and principles guiding whether a person's social security payments are to be reduced or temporarily cancelled are matters that would appear to be more appropriate for inclusion in primary legislation to allow for greater parliamentary scrutiny of the processes and of any future amendments to them.

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

- why it is considered necessary to leave significant matters of the type referred to above to delegated legislation; and
- the type of consultation that it is envisaged will be conducted prior to the making of rules and determinations and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Minister's response

2.181 The Minister advised:

The use of delegated legislation

The reliance on legislative instruments to specify micro-policy details in relation to the application and administration of the compliance framework is based on the principle that delegated legislation is necessary and justified because it allows administrative and technical detail to be adjusted relatively quickly (compared to provisions of the primary legislation), in the event that shifting policy imperatives give rise to the need to change policy at an administrative level. The use of delegated legislation such as legislative instruments allows policy departments, with appropriate parliamentary scrutiny, to work out the application of the law in greater detail within, but not exceeding, the principles that the Parliament has laid down by statute in the primary legislation.

The targeted job seeker compliance framework is intended to deal with one-off instances of non-compliance through payment suspension (where the job seeker receives full back-payment once they re-engage) and apply penalties only to job seekers who have demonstrated persistent and deliberate non-compliance. It is intended that generally compliant job seekers would be dealt with through administrative processes while those who persist in their non-compliance, for no good reason, will be dealt with through the legislation.

A legislative instrument provides the best mechanism for specifying in detail when a job seeker should move from being primarily subject to the administrative regime to being fully subject to the legislative regime. An

instrument will therefore be used to determine when a job seeker is considered to have been persistently non-compliant and, once they are so determined, the level of payment reduction that they would face for any subsequent failure (within constraints imposed in the primary legislation). The instrument will also stipulate that job seekers must have been assessed by the Department of Human Services as able to meet their requirements prior to becoming subject to financial penalties for repeated mutual obligation failures.

Also important is the potential need for future changes to these micro-policy settings. While it is informed by significant research, evidence and modelling, the targeted compliance framework is a new approach to job seeker compliance. Accordingly, some flexibility has been purposely built into the framework to allow rapid adjustment of some policy parameters. The use of legislative instruments to specify these policy parameters will allow such adjustment, while the disallowance process would ensure that Parliament is appropriately able to oversee and approve any particular policy changes.

The Bill would also introduce an instrument-making power for determining whether a job seeker has undertaken adequate job search. In the current job seeker compliance framework there is no such instrument-making power and no legislated definition of adequate job search. Using an instrument to specify this level of policy detail will therefore provide greater clarity regarding what does and does not constitute adequate job search, while not burdening the primary legislation with administrative detail. It will also provide greater flexibility should any refinement to the policy be warranted, while still allowing appropriate Parliamentary oversight through the disallowance process.

With regard to the instrument-making power relating to reasonable excuse decisions, the requirement to make an instrument specifying matters that must be taken into account reflects current arrangements. This power was introduced in 2006, as a result of Senate amendments to the Family and Community Services Legislation Amendment (Welfare to Work) Bill 2005. The requirement to specify matters that must not be taken into account will reflect the arrangements that will be in place on 1 July 2018, if Schedule 14 is passed and commences on 1 January 2018. The need for this latter power is outlined in the above response regarding Schedule 14.

Consultation

As part of the development of the targeted job seeker compliance framework, the Department of Employment consulted and worked with the Department of Human Services, the Department of Social Services and the Department of the Prime Minister and Cabinet. Other Australian Government Departments were also consulted as part of usual Budget processes. In addition, the Department of Employment continually seeks and reflects on feedback it receives regarding its policies and programmes.

> Views and evidence from other stakeholders, including welfare sector organisations, employment service providers and job seekers, were therefore able to be considered as part of the policy development process.
>
> The Department of Employment will consult with other Government Departments and other affected parties on the specific content of the instruments. However, the inclusion of specific consultation obligations in the legislation is unprecedented in job seeker compliance legislation and the Government sees no value in including such a requirement in this Bill.

Committee comment

2.182 The committee thanks the Minister for this response. The committee notes the Minister's advice that a legislative instrument provides the best mechanism for specifying in detail when a job seeker should move from primarily administrative processes to being subject to legislative requirements for non-compliance. The committee notes the advice that an instrument will be used to determine when a job seeker is considered to be persistently non-compliant and the level of payment reduction they face for that non-compliance (within the constraints of the primary legislation). The committee also notes the advice that there is a potential need for future changes to these policy settings and there may need to be rapid adjustment of some policy parameters.

2.183 The committee also notes the Minister's advice that details about determining whether a job seeker has undertaken an adequate job search will be set out in an instrument to provide greater clarity regarding what does and does not constitute adequate job searches. The Minister also notes that the power to make an instrument in relation to the circumstances that must or must not be taken into account in determining whether a person has a reasonable excuse are based partly on existing powers regarding reasonable excuse and on the basis of the reasoning the Minister set out above at paragraph [2.173].

2.184 The committee also notes the Minister's advice that the Department consulted with a number of other government departments in developing the targeted job seeker compliance framework and will consult with government departments and other affected parties on the specific content of the instruments, but that the government sees no value in including consultation requirements in the bill.

2.185 The committee considers that it would be possible for the primary legislation to set out some high level guidance on what would constitute a persistent mutual obligation failure, with more specific details being left to delegated legislation. The committee also reiterates its scrutiny concerns, as set out above at paragraph [2.175] regarding the power for an instrument to prescribe matters that must *not* be taken into account in considering whether a person has a 'reasonable excuse' for a participation failure.

2.186 In addition, the committee takes this opportunity to reiterate its general view that where the Parliament delegates its legislative power in relation to significant regulatory schemes it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

2.187 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.188 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of including these significant matters in delegated legislation.

2.189 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Merits review (Schedule 15)[109]

Initial scrutiny – extract

2.190 Currently, sections 131 and 145 of the *Social Security (Administration) Act 1999* provide that if an adverse decision is made in relation to a social security payment which depends on the exercise of a discretion or the holding of an opinion (or which would result in the application of a compliance penalty period), and a person has applied for merits review of that decision, the Secretary may declare that the payment is to continue pending the determination of the review. In effect this would allow a person to continue to have their social security payments paid to them while awaiting the determination of the review process. Items 25 and 27 seek to amend these sections to provide that this will not apply in relation to adverse decisions made under proposed new Division 3AA relating to compliance with participation payment obligations.

2.191 The effect of these proposed items would be that a person who has sought merits review of a decision made under Division 3AA to suspend or cancel their welfare payments would not be able to have their payments continue while awaiting that review. The committee notes that merits review, particularly review by the Administrative Appeals Tribunal, may take many months to complete. For welfare recipients on limited income the practical operation of these items appears to

109 Schedule 15, items 25 and 27. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(i) and (iii) of the committee's terms of reference.

diminish the effectiveness of the right to seek merits review. The explanatory memorandum provides no justification for the proposed amendments.

2.192 The committee requests that the Minister's advice as to why it is considered necessary and appropriate to remove the Secretary's ability to ensure that certain welfare payments continue to be paid pending the outcome of merits review.

Minister's response

2.193 The Minister advised:

> Under the new compliance framework, while job seekers are able to appeal any financial penalty, they will not be paid pending the outcome of the appeal (payment pending review). However, job seekers will be back paid if their appeal is successful.
>
> Under the current compliance framework, in practice payment pending review is only available for eight week serious failure penalties and unemployment non-payment periods, which will no longer exist under the new framework. Payment pending review is currently not available for the majority of penalty types.
>
> Under the new framework, the appeal processes that will apply for all penalties will be the same as those that currently apply for all but eight week penalties. However, the longest penalty applicable under the new framework, which will apply only to those with a record of deliberate and persistent non-compliance, will be four weeks.
>
> Before a job seeker faces any financial penalty under the new framework, they will have missed a minimum of five requirements in six months, without reasonable excuse, or will have refused work (and will therefore be demonstrably capable of obtaining work). The job seeker's capabilities will also generally have been assessed twice, by both their employment services provider and Human Services, before any penalties are applied. These arrangements are intended to ensure that only those job seekers who are fully capable of meeting their requirements but deliberately choose not to do so will lose payment. The intention is to provide such job seekers with a strong incentive to change their behaviour or find work. Allowing payment pending review for such job seekers would significantly undermine this incentive effect.

Committee comment

2.194 The committee thanks the Minister for this response. The committee notes the Minister's advice that in practice payment pending review is only available for eight week serious failure penalties and unemployment non-payment periods, which will no longer exist under the new framework, and that payment pending review is currently not available for the majority of penalty types. The committee also notes the Minister's advice that allowing payment pending review for job seekers under the new compliance framework would significantly undermine the incentive for such job seekers to change their behaviour or find work.

2.195 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.196 In light of the information provided, including that in practice payment pending review is not currently available for the majority of penalty types, the committee makes no further comment on this matter.

Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017

Purpose	This bill seeks to amend various Acts relating to telecommunications to: • amend the superfast network rules to make the default structural separation requirement a baseline for industry; • introduce a statutory infrastructure provider regime; and • implement administration arrangements for the Regional Broadband Scheme to fund the net costs of NBN Co Limited's fixed wireless and satellite networks
Portfolio	Communications and the Arts
Introduced	House of Representatives on 22 June 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (iv) and (v)

2.197 The committee dealt with this bill in *Scrutiny Digest No. 8 of 2017*. The Minister responded to the committee's comments in a letter dated 23 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[110]

Modified disallowance procedures[111]

Initial scrutiny – extract

2.198 This bill, along with the Telecommunications (Regional Broadband Scheme) Charge Bill 2017, seeks to establish an ongoing funding arrangement for fixed wireless and satellite broadband infrastructure through a new industry charge to be known as the Regional Broadband Scheme. Schedule 4 to this bill, among other things, seeks to establish the types of broadband services subject to and exempt from the charge, penalties for avoiding the charge, and information gathering and disclosure powers and information reporting obligations.

110 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

111 Schedule 4, item 13, proposed subsection 76AA(2), 79A(1) and 79A(2) and section 102ZFB. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

2.199 Proposed subsection 76AA(2) and proposed section 79A would give the Minister the power to determine, by legislative instrument, that one or more classes of carriage service be excluded from the definition of 'designated broadband service', and to determine whether a location is taken, or not taken, to be 'premises', for the purpose of the Regional Broadband Scheme.

2.200 The explanatory memorandum notes that as ministerial determinations made under these provisions would alter the tax base, it is appropriate to give the Parliament the opportunity to scrutinise and disallow the determinations before they take effect.[112] To this end, proposed section 102ZFB seeks to modify the usual commencement and disallowance procedures for these determinations in two ways.[113]

2.201 First, proposed subsection 102ZFB(3) improves parliamentary oversight of these determinations by ensuring that they do not come into effect until 15 sitting days after the disallowance period has expired. The committee welcomes this modified commencement procedure.

2.202 However, proposed subsection 102ZFB(2) seeks to reverse the usual disallowance procedure in subsection 42(2) of the *Legislation Act 2003* to require a House of the Parliament to positively pass a resolution disallowing a determination within the 15 sitting day disallowance period in order for the disallowance to be effective.[114] Normally, subsection 42(2) of the *Legislation Act 2003* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'* further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.[115]

2.203 Under the modified disallowance procedure proposed in subsection 102ZFB(2), if a disallowance motion is lodged, but not brought on for debate before the end of the 15 sitting day disallowance period, the relevant instrument will take effect. In practice, as the executive has considerable control

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112 Explanatory memorandum, pp 165 and 196.

113 The usual commencement and disallowance procedures are contained in sections 12 and 42 of the *Legislation Act 2003*, respectively.

114 Proposed subsection 102ZFB(4) also states that section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

115 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

over the conduct of business in the Senate, there may be occasions where no time is made available to consider the disallowance motion within 15 sitting days after the motion is lodged and therefore the instrument would be able to take effect regardless of the attempt to disallow it. As a result, the proposed procedure would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days. The explanatory memorandum provides no justification for this proposed reversal of the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003*.

2.204 Noting the significant practical impact on parliamentary scrutiny of this measure, the committee requests the Minister's detailed justification as to why it is proposed to reverse the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003* so that where a motion to disallow an instrument is not resolved by the end of the disallowance period, the instrument will be taken *not* to have been disallowed and would therefore be able to come into effect.

2.205 To address this issue, and also noting that these ministerial determinations relate to important matters which could impact on the tax base under the proposed Regional Broadband Scheme, the committee notes that, from a scrutiny perspective, it may be appropriate for the bill to be amended to further increase parliamentary oversight by requiring the positive approval of each House of the Parliament before a new determination under proposed subsections 76AA(2), 79A(1) and 79A(2) comes into effect. The committee also requests the Minister's response in relation to this matter.[116]

Minister's response

2.206 The Minister advised:

> *Subsection 76AA(2) - Ministerial determinations affecting the meaning of 'designated broadband service'*
>
> The overriding objective underpinning the design of both the Ministerial powers under proposed subsection 76AA(2) and proposed section 79A of the TLA Bill has been to maximise parliamentary scrutiny whilst maintaining a sufficient degree of flexibility. While proposed subsection 76AA(2) of the TLA Bill would enable a Ministerial determination that a carriage service is not a designated broadband service for the purposes of the regional broadband scheme, the Minister has discretion whether or not to make such a determination. The effect of any determination made under proposed subsection 76AA(2) is to remove a carriage service from the scheme with the effect that any liability to pay the charge that might otherwise arise, is also removed.

116 See, for example, section 10B of the *Health Insurance Act 1973*.

Section 79A - Ministerial determinations affecting the meaning of 'premises'

Proposed section 79A would enable the Minister, by written determination, to specify locations that satisfy one or more conditions either to be, or not to be, premises for the purposes of the regional broadband scheme. This proposed power is discretionary. If the determination had the effect of excluding a particular location, or a class of locations, that would otherwise fall within the ordinary meaning of 'premises', and therefore attract liability to pay the charge, the effect of any such determination would be to remove a legislative obligation to pay the charge. As the TLA Bill intends that the expression 'premises' has its ordinary meaning, rather than giving that term a precise technical meaning, this Ministerial determination power ensures that any unintended consequences that might arise from relying on the ordinary meaning of premises at large can be adequately dealt with in a timely manner to ensure that the regional broadband scheme does not have an anomalous, inequitable or otherwise unacceptable impact.

Section 102ZFB - modified disallowance of Ministerial determinations

I also note that proposed section 102ZFB of the TLA Bill provides for a modified disallowance procedure in respect of a Ministerial determination made under each of subsections 76AA(2), 79A(1) or (2). This modified disallowance procedure provides greater Parliamentary scrutiny over any such Ministerial determination than would be available under the usual disallowance procedure in section 42 of the *Legislation Act 2003* (Legislation Act). Under the usual disallowance procedure, a legislative instrument will take effect from when it is made, and by virtue of section 12 of the Legislation Act, commences from the day after the date of registration, and if disallowed, will only cease to have effect from the time of disallowance, with the result that there may be a period of time during which a subsequently disallowed instrument is in effect. Under the modified procedure in the TLA Bill, a Ministerial determination can only commence and take effect once the disallowance period has passed and the Parliament has had sufficient time to scrutinise the determination.

The Explanatory Memorandum to the TLA Bill (at page 196) notes that, as the Ministerial determinations affect liability to pay the regional broadband scheme charge, it is appropriate to give the Parliament the opportunity to scrutinise and disallow the determinations before they take effect. Ensuring adequate Parliamentary scrutiny through only the disallowance process, rather than through that process and an additional process of uncertain duration, provides certainty for industry concerning liability to pay the charge.

The Committee has identified a preference for requiring the positive approval of each House of the Parliament before a new determination comes into effect and directed my attention to section 10B of the *Health Insurance Act 1973,* which provides in subsection (2) that a determination

made as a legislative instrument does not come into effect until approved by resolution of each House of Parliament. Such a provision is irregular in the Commonwealth statute book and does not reflect customary legislative practice. Further, as the regional broadband scheme imposes liability on a carrier to pay a charge comprising two components, in cases where the consequential effect of the Ministerial determination is to remove or reduce the amount of one or both of those charge components because certain premises otherwise captured were no longer captured, it would not be appropriate to delay the date of effect of any such Ministerial determination beyond the closure of the period for moving a disallowance motion as it would impose an unnecessary compliance burden on carriers.

Committee comment

2.207 The committee thanks the Minister for this response. The committee notes the Minister's advice that the overriding objective underpinning the design of both the ministerial powers under proposed subsection 76AA(2) and proposed section 79A has been to maximise parliamentary scrutiny whilst maintaining a sufficient degree of flexibility. The committee also notes the Minister's advice that the modified disallowance procedure provides greater parliamentary scrutiny than the usual disallowance procedure because relevant ministerial determinations can only commence and take effect once the disallowance period has passed.

2.208 In its initial comments the committee welcomed this aspect of the modified disallowance procedures; however, the committee also noted that proposed subsection 102ZFB(2) seeks to reverse the usual disallowance procedure in subsection 42(2) of the *Legislation Act 2003* so that if a disallowance motion is lodged, but not brought on for debate before the end of the disallowance period, the relevant instrument will remain in force by default.[117] As a result, in practice, as the executive has considerable control over the conduct of business in the Senate, there may be occasions where no time is available to consider the disallowance motion within disallowance period. In such cases, the determination would prevail regardless of the attempt to disallow it. The proposed procedure would therefore undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days.

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117 Normally, subsection 42(2) of the Legislation Act provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. Odgers' Australian Senate Practice notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' Odgers' further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation': Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

2.209 In relation to the committee's preference for requiring the positive approval of each House of the Parliament before a new determination comes into effect, the committee notes the Minister's advice that such a provision would be irregular in the Commonwealth statute book and that it would not be appropriate to delay the date of effect of any such Ministerial determination beyond the closure of the period for moving a disallowance motion as it would impose an unnecessary compliance burden on carriers.

2.210 Although the committee acknowledges that provisions requiring the positive approval of each House of the Parliament before a legislative instrument comes into effect are not common within the Commonwealth statute book, this does not, of itself, mean that it would be improper or undesirable to include such provisions in cases where legislative instruments relate to important matters (such as instruments which could impact the tax base). The committee notes that in the United Kingdom approximately ten per cent of statutory instruments are subject to an affirmative approval procedure where both Houses of the Parliament must expressly approve them.[118] The committee also notes that a positive approval procedure could, in practice, be speedier than providing that an instrument does not come into effect until 15 sitting days after the disallowance period has expired, as any motions approving new determinations with broad support within the Parliament could be passed by both Houses within a few sitting days of an instrument being tabled.

2.211 Therefore, from a scrutiny perspective, the committee remains of the view that it may be appropriate for the bill to be amended to require the positive approval of each House of the Parliament before relevant ministerial determinations which could impact the tax base come into effect.[119] If this is not accepted, the committee considers that it would be appropriate for the disallowance procedures for these ministerial determinations to be amended so that the determinations are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period. The committee notes that this should be in addition to the procedure as currently drafted which provides that the determinations do not come into effect until the relevant disallowance period has expired.

118 United Kingdom House of Commons Library, *Statutory Instruments*, Briefing Paper, 15 December 2016, p. 9.

119 See, for example, section 10B of the *Health Insurance Act 1973*.

2.212 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the Minister to make determinations which could impact the tax base via delegated legislation.

2.213 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Strict liability offences[120]

Initial scrutiny – extract

2.214 Proposed subsections 101(1) and 102ZF(5) provide for strict liability offences for failing to lodge certain reports to the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC). The offences are subject to a maximum penalty of 50 penalty units. A person who contravenes these provisions by failing to lodge the relevant report commits a separate offence in respect of each day during which the contravention continues.[121] The explanatory memorandum provides no justification as to why this offence is subject to strict liability.[122]

2.215 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[123]

120 Schedule 4, item 13, proposed section 101 and subsections 102ZF(5)–(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

121 Proposed subsections 101(2) and 102ZF(6).

122 Explanatory memorandum, pp 187 and 195.

123 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

2.216 The committee requests a detailed justification from the Minister for the proposed imposition of strict liability in this instance, with particular reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[124]

Minister's response

2.217 The Minister advised:

> *Subsections 101(J) and 102ZF(5) - strict liability offences*
>
> The Committee has raised concerns regarding proposed subsections 101(1) and 102ZF(5) of the TLA Bill. Under these provisions failure to provide a report about chargeable premises to the ACMA, and failing to provide a report about reportable premises to the ACCC, respectively, are strict liability offences. These proposed subsections are consistent with the principles for strict liability offences as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide) developed by the Attorney-General's Department, and further enable internal consistency between comparable reporting obligations in the *Telecommunications (Consumer Protection and Service Standard) Act 1999* (TCPSS Act).
>
> The penalty proposed in subsections 101(1) and 102ZF(5) does not include imprisonment and being specified as 50 penalty units, is below the maximum fine of 60 penalty units suggested in the Guide. The Guide further indicates that strict liability offences may be appropriate where it is necessary to ensure the integrity of a regulatory regime. The reports to which the offence provisions relate are critical to the integrity to the regional broadband scheme, as they serve to establish the extent of a carrier's liability to pay the charge under proposed subsection 101(1), and to enable the ACCC to provide informed advice to the Minister under proposed subclauses 13(1) and 17(1) of the RBS Bill. The use of strict liability offences in this context helps ensure compliance by the carriers liable to pay the charge via specific deterrent effect and is considered justified.
>
> In addition, the offence provisions are consistent with the principle in the Guide that specific criteria, as opposed to broad or uncertain criteria, should be included. In both proposed subsections, there is no criteria uncertainty. The content of the reports (and the circumstances under which a report is required to be given) are clearly set out in proposed sections 100 and 102ZF of the TLA Bill and the failure to provide the reports by the required timeframe (being the requirement for triggering the offence) is unequivocally clear.
>
> An additional justification for these offences is that they provide the requisite deterrent effect consistent with the principle set out in the

124 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

> Guide. If carriers do not report as required the legitimate policy imperatives of ensuring that carriers pay regional broadband scheme charges and that the Minister can be appropriately advised by the ACCC will be substantially weakened. Enabling the ACCC to provide accurately informed advice to the Minister is particularly critical as this advice may form part of the advice that the Minister must have regard to in deciding whether to make a determination under proposed subclauses 12(4) and 16(8) of the RBS Bill as to the base component or the administrative cost component respectively.
>
> Subsections 101(1) and 102ZF(5) are proposed to be inserted into the TCPSS Act as part of the proposed new Part 3 of that Act. The TCPSS Act already includes a strict liability offence in section 69 in Part 2 regarding failure to lodge an eligible revenue return. As proposed subsections 101(1) and 102ZF(5) will apply to the same industry group, it is important to maintain consistency between reporting obligations including between the consequences for failing to meet those obligations.

Committee comment

2.218 The committee thanks the Minister for this response. The committee notes the Minister's advice that proposed strict liability offences are consistent with the *Guide to Framing Commonwealth Offences*[125] as the proposed penalties do not include imprisonment and are below the maximum suggest fine of 60 penalty units, the offences are critical to the integrity of the regional broadband scheme, and the requirements for triggering the offence are unequivocally clear.

2.219 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.220 In light of the detailed information provided, the committee makes no further comment on this matter.

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125 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22-25.

Exemption from disallowance[126]

Initial scrutiny – extract

2.221 Proposed sections 102Z and 102ZA provide the ACMA and ACCC, respectively, with the power to disclose certain information to certain other government bodies if the ACMA or ACCC is satisfied that the information will enable or assist the body to perform or exercise any of the functions or powers of the body. Proposed subsections 102Z(2) and 102ZA(2) provide that the ACMA and ACCC may, by notifiable instrument, declare that other Commonwealth, State or Territory departments or authorities are 'authorised government agencies' thereby allowing the ACMA and ACCC to disclose relevant information to these additional agencies.

2.222 Given that these declarations will allow the ACMA and ACCC to disclose information to further bodies not specified on the face of the primary legislation, it is not clear to the committee why these declarations are to be notifiable instruments (which are not subject to parliamentary disallowance), rather than legislative instruments.

2.223 The committee therefore requests the Minister's advice as to why declarations made under proposed subsections 102Z(2) and 102ZA(2) which authorise further government bodies to receive information from the ACMA and ACCC are to be notifiable, rather than legislative, instruments (and therefore not be subject to disallowance).

Minister's response

2.224 The Minister advised:

> *Subsections 102Z(2) and 102ZA(2) - authorised government agencies*
>
> The Committee notes that proposed subsections 102Z(2) and 102ZA(2) of the TLA Bill provide the ACMA and ACCC, respectively, with the power to declare, by notifiable instrument, that a specified department or authority of the Commonwealth, a State or a Territory is an authorised government agency to whom specified information may be disclosed. This power is constrained in each proposed subsections in two ways: first, by reference to the requirement that the information must have been obtained in specified ways; and secondly, by the requirement that the ACMA and ACCC, respectively, be satisfied that the information will enable or assist the body (to whom disclosure is proposed to be made) to perform or exercise any of the functions or powers of the body.
>
> The declarations under these proposed subsections will be consistent with the purposes for which notifiable instruments may be used as given in

126 Schedule 4, item 13, proposed subsections 102Z(2) and 102ZA(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

section 11 of the Legislation Act. It is generally accepted that permitted uses of notifiable instruments include the following three circumstances, which are applicable to declarations that would be made under proposed subsections 102Z(2) and 102ZA(2):

(a) in determining particular cases or circumstances where the law is to apply or not to apply and not altering the content of the law;

(b) where it is appropriate to be publicly available over the medium and/or longer term; and

(c) where the integrity of the information needs to carefully maintained and/or updated over time.

Requiring additional government entities to be specified in a notifiable instrument ensures that the public in general, or a member of the public, will be able to benefit from access to an authoritative form of the information from a centrally managed source. I consider that it is appropriate for the instruments that would be made under proposed subsections 102Z(2) and 102ZA(2) to be notifiable, as industry would benefit from public access to the instrument, as well as the nominated government entities which are the subject of the notifiable instrument. Further, the class of persons to whom the ACCC and the ACMA can specify to be an authorised government agency is a confined class (i.e. department or authority of a State or Territory) and this provides further protection and justification for the notifiable instrument form. Disallowance of the notices would not be apt or practically suitable. It is expected that this specification power would only be exercised in exceptional cases. I also note that the ACCC and the ACMA, respectively, have the ability to impose conditions on any disclosures made under proposed subsections 102Z or 102ZA.

Committee comment

2.225 The committee thanks the Minister for this response. The committee notes the Minister's advice that the power to declare government agencies to whom specified information may be disclosed is constrained in two ways: first, by reference to the requirement that the information must have been obtained in specified ways; and secondly, by the requirement that the ACCC and ACMA be satisfied that the information will enable or assist the body (to whom disclosure is proposed to be made) to perform or exercise any of the functions or powers of the body. The committee also notes the Minister's advice that the relevant declarations are consistent with the purpose for which notifiable instruments may be used, that the classes of persons to whom the ACCC and ACMA can specify as an authorised government agency is limited to a confined class (departments or authorities of a State or Territory), and that it is expected that the power will only be exercised in exceptional cases.

2.226 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.227 In light of the detailed information provided, the committee makes no further comment on this matter.

Telecommunications (Regional Broadband Scheme) Charge Bill 2017

Purpose	This bill seeks to establish an ongoing funding arrangement for fixed wireless and satellite infrastructure by imposing a monthly charge on carriers, including NBN Co Ltd, in relation to each premises connected to their network that has an active fixed-line superfast broadband service during the month
Portfolio	Communications and the Arts
Introduced	House of Representatives on 22 June 2017
Scrutiny principles	Standing Order 24(1)(a)(iv) and (v)

2.228 The committee dealt with this bill in *Scrutiny Digest No. 8 of 2017*. The Minister responded to the committee's comments in a letter dated 23 August 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.[127]

Significant matters in delegated legislation[128]

Initial scrutiny – extract

2.229 This bill seeks to establish an ongoing funding arrangement for fixed wireless and satellite broadband infrastructure through the imposition of a charge. The funding arrangement is to be known as the Regional Broadband Scheme and the explanatory memorandum notes that the bill is a taxation measure.[129] The bill operates in conjunction with Schedule 4 to the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 which, among other things, seeks to establish the types of broadband services subject to and exempt from the charge, penalties for avoiding the charge, and information gathering and disclosure powers and information reporting obligations.[130]

127 See correspondence relating to *Scrutiny Digest No. 10 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

128 Clauses 8, 11 and 14. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

129 Explanatory memorandum, p. 2. See also explanatory memorandum for the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017, p. 11.

130 Explanatory memorandum, p. 3.

2.230 The bill sets out default rates of charge which will require all telecommunications carriers to pay a charge of approximately $7.10 per month, per chargeable premises. Chargeable premises are premises where a carriage service provider (i.e. a provider of retail broadband services) provides a designated broadband service. Under the bill, the initial $7.10 monthly charge will be comprised of a $7.09 base component[131] and a $0.01266 administrative cost component.[132] The base component is indexed annually to the consumer price index (CPI).[133] The default administrative cost component is specified in the bill for each of the first five years,[134] and then is indexed annually to CPI thereafter.[135]

2.231 Although specific default rates of charge are set out on the face of the bill, the Minister may, by legislative instrument, change the amount of both the base component and the administrative cost component;[136] however, the sum of the base and administrative cost components for any month cannot exceed $10, indexed annually to CPI.[137] In addition, in deciding whether to make such a determination the Minister must have regard to advice provided by the ACCC.[138]

2.232 One of the most fundamental functions of the Parliament is to levy taxation.[139] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this case, the fact that default rates of the charge and a maximum cap is set in the primary legislation partly addresses the committee's scrutiny concerns. However, any delegation to the executive of legislative power in relation to taxation still represents a significant delegation of the Parliament's legislative powers.

2.233 While the committee welcomes the important limitations in the bill on the proposed ministerial power to alter the rate of taxation, from a scrutiny perspective, the committee considers that it may be appropriate for the bill to be amended to further increase parliamentary oversight by requiring the positive approval of each

131 Subclause 12(1).

132 Subclause 16(1).

133 Subclauses 12(2)–(3).

134 Subclauses 16(1)–(5).

135 Subclauses 16(6)–(7).

136 Subclauses 12(4) and 16(8).

137 Subclause 17A.

138 Paragraph 12(5)(a), clause 13, paragraph 16(9)(a), and clause 17.

139 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

House of the Parliament before a new determination under subclause 12(4) or 16(8) comes into effect.[140]

2.234 The committee requests the Minister's response in relation to this matter.

Minister's response

2.235 The Minister advised:

> *Subclauses 12(4) and 16(8) – positive approval of effective date for determination*
>
> The Committee has expressed a preference for positive approval of each House of Parliament before a new determination under proposed subclause 12(4) or 16(8) of the RBS Bill comes into effect. In addition to the points raised above in relation to proposed subsections 76AA(2), 79A(1) and 79A(2) of the TLA Bill, it is important to note that any charge that might be set by Ministerial determination would apply on a financial year basis, and it is important to ensure that the commencement date is aligned to natural business cycles for the telecommunications sector, for instance to ensure that any changes to the charge are known in advance of the start of the relevant financial year to provide industry with certainty and the opportunity to make commercial and investment decisions based on known liability. Imposing an additional requirement, that operated on top of the existing disallowance mechanism, would undermine this ability to provide industry certainty.
>
> Requiring the positive approval of each House of Parliament risks additional delay in commencement of any revised charge and, this additional uncertainty, risks imposing unnecessary compliance burdens on carriers, and potentially resulting in over-collection of the charge. As the Explanatory Memorandum to the RBS Bill notes the Ministerial determination power in proposed subclause 12(4) is designed to provide a discretion that is necessary to reduce the risk that the regional broadband scheme over or under recovers the amount of money necessary to fund NBN Co Limited's (and other eligible funding recipient's) fixed wireless and satellite networks.

Committee comment

2.236 The committee thanks the Minister for this response. The committee notes the Minister's advice that imposing an additional requirement, that operated on top of the existing disallowance mechanism, would undermine the ability to provide industry certainty. The committee also notes the Minister's advice that requiring the positive approval of each House of the Parliament risks additional delay in the commencement of any revised charge and this additional uncertainty risks imposing

140 See, for example, section 10B of the *Health Insurance Act 1973*.

unnecessary compliance burdens on carriers, and potentially resulting in over-collection of the charge.

2.237 The committee notes that it was not suggesting that a positive approval procedure should operate on top on the existing disallowance mechanism, but rather than a positive approval procedure replace this mechanism. As a result, moving to a positive approval procedure could, in practice, be speedier than providing that an instrument does not come into effect until 15 sitting days after the disallowance period has expired, as any motions approving new determinations with broad support within the Parliament could be passed by both Houses within a few sitting days of an instrument being tabled.

2.238 The committee also takes this opportunity to reiterate that one of the most fundamental functions of the Parliament is to levy taxation.[141] The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax.

2.239 Therefore, from a scrutiny perspective, the committee remains of the view that it may be appropriate for the bill to be amended to require the positive approval of each House of the Parliament before relevant ministerial determinations setting the rate of tax come into effect.[142]

2.240 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the Minister to alter the rate of a tax via delegated legislation.

2.241 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Modified disallowance procedures[143]

2.242 In relation to the ministerial determinations altering the base component and administrative cost component made under subclauses 12(4) and 16(8), the bill (as currently drafted) proposes to modify the usual commencement and disallowance procedures for these determinations in two ways.[144]

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141 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

142 See, for example, section 10B of the *Health Insurance Act 1973*.

143 Clauses 8 and 13. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

144 See clause 19. The usual commencement and disallowance procedures are contained in sections 12 and 42 of the *Legislation Act 2003*, respectively.

2.243 First, subclause 19(3) improves parliamentary oversight of these determinations by ensuring that they do not come into effect until 15 sitting days after the disallowance period has expired. The committee welcomes this modified commencement procedure.

2.244 However, subclause 19(2) seeks to reverse the usual disallowance procedure in subsection 42(2) of the *Legislation Act 2003* to require a House of the Parliament to positively pass a resolution disallowing a determination within the 15 sitting day disallowance period in order for the disallowance to be effective.[145] Normally, subsection 42(2) of the *Legislation Act 2003* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'* further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.[146]

2.245 Under the modified disallowance procedure proposed in subclause 19(2), if a disallowance motion is lodged, but not brought on for debate before the end of the 15 sitting day disallowance period, the relevant instrument will take effect. In practice, as the executive has considerable control over the conduct of business in the Senate, there may be occasions where no time is made available to consider the disallowance motion within 15 sitting days after the motion is lodged and therefore the instrument would be able to take effect regardless of the attempt to disallow it. As a result, the proposed procedure would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days. The explanatory memorandum provides no justification for this proposed reversal of the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003*.

2.246 Noting the significant practical impact on parliamentary scrutiny of this measure, the committee requests the Minister's detailed justification as to why it is proposed to reverse the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003* so that where a motion to disallow an instrument is not resolved by the end of the disallowance period, the instrument will be taken *not* to have been disallowed and would therefore be able to come into effect.

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145 Subclause 19(4) also states that section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

146 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

2.247 The committee notes that the suggested amendment outlined at paragraph [2.233] above would address the committee's concerns in this regard.

Minister's response

2.248 The Minister advised:

> The Committee notes that proposed subclause 19(2) modifies subsection 42(2) of the Legislation Act in the same way as proposed section 102ZFB of the [Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017]. The response provided above in relation to those clauses applies equally to proposed subclause 19(2) of the RBS Bill.

Committee comment

2.249 The committee thanks the Minister for this response. The committee notes the Minister's advice provided in relation to proposed section 102ZFB of the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 that the modified disallowance procedure provides greater parliamentary scrutiny than the usual disallowance procedure because relevant ministerial determinations can only commence and take effect once the disallowance period has passed.

2.250 In its initial comments the committee welcomed this aspect of the modified disallowance procedures; however, the committee also noted that proposed subclause 19(2) seeks to reverse the usual disallowance procedure in subsection 42(2) of the *Legislation Act 2003* so that if a disallowance motion is lodged, but not brought on for debate before the end of the disallowance period, the relevant instrument will remain in force by default.[147] As a result, in practice, as the executive has considerable control over the conduct of business in the Senate, there may be occasions where no time is available to consider the disallowance motion within disallowance period. In such cases, the determination would prevail regardless of the attempt to disallow it. The proposed procedure would therefore undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days.

2.251 The committee considers that, from a scrutiny perspective, it would be appropriate for the disallowance procedures for these ministerial determinations to be amended so that the determinations are taken to be disallowed if a

147 Normally, subsection 42(2) of the Legislation Act provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. Odgers' Australian Senate Practice notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' Odgers' further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation': Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

disallowance motion remains unresolved at the end of the disallowance period. The committee notes that this should be in addition to the procedure as currently drafted which provides that the determinations do not come into effect until the relevant disallowance period has expired.

2.252 The committee notes that the suggested amendment in relation to subclauses 12(4) or 16(8) outlined at paragraph [2.239] above would address the committee's scrutiny concerns in this regard.

2.253 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of reversing aspects of the usual disallowance procedure in relation to these instruments.

2.254 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Chapter 3

Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.[1] It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

> (iv) inappropriately delegate legislative powers; or
>
> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.[2]

3.4 The committee draws the following bill to the attention of Senators:

- Nil

Senator Helen Polley
Chair

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1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills *Fourteenth Report of 2005*.