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Standing Committee for the Scrutiny of Bills

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Chapter 1

Comment bills

1.1 The committee comments on the following bills and, in some instances, seeks a response or further information from the relevant minister.

Appropriation (Coronavirus Economic Response Package) Bill (No. 1) 2019-2020

Purpose	This bill seeks appropriate an additional $1.651 billion out of the Consolidated Revenue Fund for the ordinary annual services of the government in relation to the coronavirus economic response
Portfolio	Finance
Introduced	House of Representatives on 23 March 2020

Parliamentary scrutiny—ordinary annual services of the government[1]

1.2 Under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation.

1.3 This bill seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government to support the coronavirus economic response. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.4 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[2]

1 Various. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

2 See Senate standing order 24(1)(a)(v).

1.5 The Senate Standing Committee on Appropriations and Staffing[3] has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration over many years.[4] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[5]

1.6 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 the Senate resolved:

> 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
>
> 2) That appropriations for expenditure on:
>
> a) the construction of public works and buildings;
>
> b) the acquisition of sites and buildings;
>
> c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
>
> d) grants to the states under section 96 of the Constitution;
>
> e) new policies not previously authorised by special legislation;
>
> f) items regarded as equity injections and loans; and
>
> g) existing asset replacement (which is to be regarded as depreciation),
>
> are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

1.7 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

> completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities

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3 Now the Senate Standing Committee on Appropriations, Staffing and Security.

4 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

5 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

of government and new programs and projects or to identify the expenditure on each of those areas.[6]

1.8 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.[7]

1.9 Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.[8]

1.10 Based on the Senate resolution of 22 June 2010, it appears that the initial expenditure in relation to the following new measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in the bill:

- the establishment and operation of dedicated respiratory clinics to assist with diagnosing and managing respiratory cases, including the coronavirus, influenza and pneumonia ($113.5 million);[9] and
- the establishment of a Central Patient Coronavirus Triage Hotline to advise people whether to attend a hospital, clinic, to self-isolate at home, to consult a general practitioner or to take no further action ($18 million).[10]

1.11 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of

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6 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

7 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

8 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, see *Senate Hansard*, 19 March 2018, pp. 1487-1490.

9 Explanatory memorandum, p.193.

10 Explanatory memorandum, p.193.

occasions;[11] however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

1.12 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.13 The committee notes that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

1.14 The committee draws this general matter to the attention of senators as it appears that the initial expenditure in relation to certain new coronavirus economic response measures has been inappropriately classified as ordinary annual services of the government (and therefore improperly included in the bill which should only contain appropriations that are not amendable by the Senate).

11 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014,* pp. 402-406; *Fourth Report of 2015*, pp. 267-271; *Alert Digest No. 6 of 2015*, pp. 6-9; *Fourth Report of 2016*, pp. 249-255; *Alert Digest No. 7 of 2016*, pp. 1-9; *Scrutiny Digest 2 of 2017*, pp. 1-5; *Scrutiny Digest 6 of 2017*, pp. 1-6; *Scrutiny Digest 12 of 2017*, pp. 89-95.

Appropriation (Coronavirus Economic Response Package) Bill (No. 2) 2019-2020

Purpose	This bill seeks to appropriate an additional $744 million out of the Consolidated Revenue Fund for certain expenditure in relation to the coronavirus economic response
Portfolio	Finance
Introduced	House of Representatives on 23 March 2020

Parliamentary scrutiny—appropriations determined by the Finance Minister[12]

1.15 Clause 12 seeks to enable the Finance Minister to provide additional funds to entities when he or she is satisfied that there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in Schedule 1. This additional appropriation is referred to as the Advance to the Finance Minister (Advance).

1.16 Subclause 12(2) enables the Finance Minister to make a determination that has the effect of allocating additional amounts, up to a total of $1.2 billion as specified by subclause 12(3), to the appropriations outlined in Schedule 1. Subclause 12(4) provides that a determination under subclause 12(2) is a legislative instrument, which must therefore be registered and tabled in Parliament. However, these determinations are not subject to parliamentary disallowance. The explanatory memorandum suggests that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.[13]

1.17 In relation to the significant amount available under the Advance provision, the explanatory memorandum states that:

> The quantum of the Advance to the Finance Minister provision has been determined by extrapolating the Coronavirus related Advances to the Finance Minister approved since the beginning of March 2020 through until the end of the 2019-20 financial year. The quantum of the Advance to the Finance Minister also takes into consideration the evolving nature of the Coronavirus outbreak, the associated uncertainty around what may be required as part of the Government's response and the likely need for the Government to act quickly. While this new Advance to the Finance Minister provision is significant, it will be limited to Coronavirus response

12 Clause 10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

13 Explanatory memorandum, p. 203.

requirements only (including responses to health and economic impacts).[14]

1.18 The committee notes that clause 12 (the Advance provision) allows the Finance Minister to allocate additional funds to entities up to a total of $1.2 billion via non-disallowable delegated legislation and that it therefore delegates significant legislative power to the Executive. While this does not amount to a delegation of the power to create a new appropriation, one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[15] The Advance provision in this bill leaves the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament. In this instance, however, the committee notes that use of the Advance provision in this bill will be limited to coronavirus response measures.

1.19 Since the bill received the Royal Assent on 24 March 2020, the Finance Minister has made two Advance determinations under the Act allocating the entire $1.2 billion available under the Advance provision in the bill:

- Advance to the Finance Minister Determination (No. 3 of 2019-2020) ($800 million, registered on 3 April 2020);[16] and
- Advance to the Finance Minister Determination (No. 4 of 2019-2020) ($400 million, registered on 10 April 2020).[17]

1.20 Both determinations increased appropriations for the Department of Health to enable the department to fund the further procurement of masks and other emergency medical equipment in response to the COVID-19 outbreak.

1.21 The committee notes that this issue also arises in relation to the Appropriation (Coronavirus Economic Response Package) Bill (No. 1) 2019-2020.[18] The total amount that can be determined under the Advance provision in the No. 1 bill is $800 million.

1.22 As Advance to the Finance Minister determinations are not subject to disallowance, the primary accountability mechanism in relation to Advances (beyond the initial passage of the authorising provision) is an annual report tabled

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14 Explanatory memorandum, p. 190.

15 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* (2017) 263 CLR 487, 532 [91].

16 https://www.legislation.gov.au/Details/F2020L00402.

17 https://www.legislation.gov.au/Details/F2020L00421.

18 Appropriation (Coronavirus Economic Response Package) Bill (No. 1) 2019-2020, clause 10.

in Parliament on the use of the Advance. These reports are considered in the Senate,[19] and are published on the Department of Finance website.[20] The committee draws these reports, and the information provided in the explanatory statements to the Advance to the Finance Minister Determinations No. 3 and No. 4 of 2019-2020 which allocate an additional $1.2 billion in funding to the Department of Health, to the attention of Senators.

1.23 The committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

19 *Journals of the Senate*, 3 April 2019, p. 4847. See also Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans*, Department of the Senate, 14th Edition, 2016, pp. 395-396.

20 See https://www.finance.gov.au/publications/advance_to_the_finance_minister/.

Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020

Purpose	This bill seeks to appropriate $1 billion from the Consolidated Revenue Fund for community, regional and industry support as part of the Coronavirus Economic Response
Portfolio	Infrastructure, Transport and Regional Development
Introduced	House of Representatives on 23 March 2020

Broad discretionary powers[21]

1.24 The bill seeks to provide funding of up to $1 billion for the purposes of making payments to support communities, regions and industry sectors affected by the economic impacts of COVID-19. Clause 5 of the bill provides that before payments can be made to a state or territory, constitutional corporation or other person the terms and conditions on which money is payable must be set out in a written agreement between the Commonwealth and the recipient. The written agreement may be entered into on behalf of the Commonwealth by a minister or an accountable authority of a non-corporate Commonwealth entity (or their delegate).

1.25 The committee's view is that, where it is proposed to allow the expenditure of a substantial amount of Commonwealth money, the expenditure should be subject to at least some level of parliamentary scrutiny. While subclause 4(2) provides a non-exhaustive list of broad purposes for which payments under the bill may be made, the committee is concerned that the bill contains no guidance on its face as to the terms and conditions that would attach to the payments, beyond requiring that any such terms and conditions are to be set out in a written agreement between the Commonwealth and the recipient. The explanatory memorandum provides no explanation as to why it is considered necessary and appropriate to confer on the minister a broad power to provide financial assistance, without specifying any terms and conditions to which the provision of assistance would be subject.

1.26 The committee also notes that section 96 of the Constitution confers on the Parliament the power to make grants to the states and to determine the terms and conditions attaching to them. Where the Parliament delegates this power, the committee considers that it is appropriate that the exercise of the power be subject

21 Clause 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

to at least some level of parliamentary scrutiny. However, as noted above, the bill does not appear to contain any guidance as to the terms and conditions on which financial assistance may be granted including to the states and territories.

1.27 The committee is concerned that the bill therefore provides the minister and accountable authorities and their delegates with a broad discretionary power to enter into funding arrangements in circumstances where there will be virtually no parliamentary oversight of the funding decisions or of the terms and conditions attached to them. The committee's scrutiny concerns are heightened by the significant amount of money appropriated.

1.28 The committee requests the minister's advice as to how senators and others will be able to scrutinise the payments that are made, or have been made, under the bill and the terms and conditions attached to those payments. In particular, the committee requests the minister's advice as to whether the department could establish a website to list all payments made under the bill, including links to the relevant agreements setting out the terms and conditions attaching to each payment.

1.29 The committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

Significant matters in delegated legislation[22]

1.30 Clause 7 provides that the minister may make, by legislative instrument, rules in relation to the making of payments under the bill. Subclause 7(2) provides that the rules may:

- prescribe circumstances in which the Commonwealth may pay money;
- set amounts to be appropriated for specified purposes; and
- provide for another minister to administer a specified amount appropriated for a specified purpose.

1.31 The committee's view is that significant matters, such as the circumstances in which significant amounts of public money may be spent, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> The Assistance for Severely Affected Regions Bill allows the Minister to make rules to ensure that arrangements for the administration of amounts appropriated can be put in place quickly to ensure those regions, communities and industry sectors most affected by the Coronavirus can be provided with support as soon as is practicable. This will ensure that the

22 Clause 7. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

> Government can respond rapidly to provide support to industries, communities and regions as required.[23]

1.32 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility alone to be a sufficient justification for including significant matters in delegated legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the same level of parliamentary scrutiny as an amendment to the primary legislation.

1.33 The committee draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Senate Select Committee on COVID-19.

1.34 In light of the fact that this bill has already passed both Houses of the Parliament the committee makes no further comment in relation to this matter.

23 Explanatory memorandum, p. 174.

Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020

Purpose	This bill seeks to appropriate $100 million from the Consolidated Revenue Fund for Commonwealth investment in the Australian Business Growth Fund
Portfolio	Treasury
Introduced	House of Representatives on 23 March 2020

Parliamentary scrutiny

Significant matters in delegated legislation[24]

1.35 The bill seeks to authorise investment by the Commonwealth in the Australian Business Growth Fund and to appropriate $100 million for that purpose. Clause 3 of the bill provides that the object of the Act is 'to increase investment in small and medium Australian enterprises by the Commonwealth participating in, and investing in (together with other persons), the Australian Business Growth Fund'. Beyond this provision little detail about how the Fund will operate is provided on the face of the bill, although clause 13 requires the $100 million provided by the Commonwealth to be invested within constitutional limits.

1.36 Clause 16 of the bill provides that the rules may make provision for, or in relation to, the exercise of rights, responsibilities, duties and powers by the minister under the bill.

1.37 The committee's view is that significant matters, such as how a fund to which the Commonwealth will invest a significant amount of public money is to operate, should be included on the face of primary legislation unless a sound justification provided. In this instance, the explanatory memorandum contains no explanation as to why further details as to how the Fund is to operate cannot be included in the bill or any indication of what matters are likely to be included in the rules made under the bill.

1.38 The committee therefore requests the Treasurer's advice as to:

- **how it is intended that the Australian Business Growth Fund will operate (for example, which other persons will participate in the formation of the Fund, any limits on the amount of investment that the Fund may make in relation to an individual enterprise, the criteria that enterprises must meet before being eligible to receive investment from the Fund, and how**

24 Clause 7. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

competing requests for investment from enterprises will be prioritised, including competing requests from different states and regions);

- **the governance arrangements for the Fund (including the level of control that the Commonwealth will have over the money that is has committed to the Fund in circumstances where other persons are also participating in the formation and operation of the Fund); and**
- **the types of matters that are likely to be included in rules made under clause 16 of the bill.**

1.39 The committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

Coronavirus Economic Response Package Omnibus Bill 2020

Purpose	This bill is part of a legislation package which seeks to amend various Acts to provide an economic response, and deal with other matters, relating to the coronavirus
Portfolio	Treasury
Introduced	House of Representatives on 23 March 2020

Henry VIII clauses—modification of primary legislation by delegated legislation[25]

1.40 Item 1 of Schedule 8 seeks to insert new section 1362A into the *Corporations Act 2001* (Corporations Act), to provide that the Treasurer may, by disallowable legislative instrument, temporarily exempt specified classes of persons from the operation of specified provisions, or temporarily modify the operation of specified provisions of, the Corporations Act or the Corporations Regulations. The Treasurer must be satisfied that it would not be reasonable to expect the relevant persons to comply with the relevant provisions because of the impact of COVID-19 or that the exemption is necessary to facilitate the continuation of business or mitigate the economic impact of COVID-19. Any instrument made under this provision may only operate for up to 6 months.

1.41 Additionally, item 40A of Schedule 11 provides that the Minister for Social Services may, by legislative instrument, modify social security law to vary provisions relating to the qualifications of persons for social security payments and the rate of social security payments.

1.42 A provision that enables delegated legislation to amend or modify primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

1.43 The explanatory memorandum provides no explanation for why it is necessary and appropriate to include either Henry VIII clause. While noting that both clauses are limited in the length of their operation, the committee has significant

25 Schedule 8, item 1 and Schedule 11, item 40A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

scrutiny concerns regarding the inclusion of broad and relatively unlimited powers for ministers to use delegated legislation to amend the operation of primary legislation.

1.44 As no justification has been provided in the explanatory materials, the committee requests the Treasurer's advice as to why it is necessary and appropriate to include broad powers in the bill which allow delegated legislation to amend the operation of the *Corporations Act 2001*, and the circumstances in which it is envisaged that these powers are likely to be used.

1.45 The committee also requests the Minister for Families and Social Services' advice as to why it is necessary and appropriate to include broad powers in the bill which allow delegated legislation to amend the operation of the social security law, and the circumstances in which it is envisaged that these powers are likely to be used.

1.46 The committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

Delegation of legislative power

Broad discretionary powers[26]

1.47 Item 12 of Schedule 11 seeks to insert proposed section 504 into the *Social Security Act 1991* to provide that if a person is receiving a parenting payment, the rate of the payment is increased by the amount of the COVID-19 supplement. Proposed subsection 504(3) provides that the minister may, by legislative instrument, extend the initial period of the supplement by a period of up to 3 months. Proposed subsection 504(5) provides that the minister may, by legislative instrument determine an amount for the supplement. Proposed subsection 504(7) provides that the minister may, by legislative instrument, determine the amount of the supplement for any extension period. These provisions are repeated at item 21 (in relation to youth allowance), item 30 (in relation to the jobseeker payment), item 34 (in relation to sickness allowance) and item 39 (in relation to other social security payments).

1.48 The committee considers that these provisions provide the minister with a broad discretionary power to alter or extend the operation of supplement payments by legislative instrument in circumstances where there is limited guidance on the face of the primary legislation as to when these powers should be exercised. The committee expects that the inclusion of broad discretionary powers, which could result in a reduction in the amount of supplement paid to certain persons, should be

26 Schedule 11, items 12, 13, 21, 22, 30, 34 and 39. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

thoroughly justified in the explanatory memorandum. In this instance, no explanation is provided in the explanatory memorandum.

1.49 As no justification has been provided in the explanatory materials, the committee requests the Minister for Families and Social Services' advice as to why it is necessary and appropriate to provide the minister with broad discretionary powers to alter or extend the operation of supplement payments in the *Social Security Act 1991*, including the appropriateness of allowing the minister to set the amount of supplement below the amount provided for by the Parliament in the primary legislation.

1.50 The committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

Deferral of sunsetting[27]

1.51 Schedule 16 seeks to provide the relevant minister with the power to determine a new sunset date for legislation that is due to sunset on or before 15 October 2020. Subitem 1(2) provides that the sunsetting day can be deferred for up to 6 months from the original sunset day.

1.52 In relation to sunset clauses in primary legislation, the committee considers that these clauses are important safeguards which facilitate increased parliamentary scrutiny and oversight of primary legislation containing extraordinary measures. Where a sunset clause is enacted in primary legislation, the committee considers that it should not be extended without a thorough review and the presentation of compelling evidence to the Parliament.

1.53 In relation to sunset clauses in delegated legislation, the committee considers that the current sunsetting framework provides an important opportunity for Parliament to maintain effective and regular oversight of delegated legislative powers, and, in particular, ensure that the content of legislative instruments remains current and lawful. In this way, the regime promotes parliamentary supremacy.

1.54 The committee therefore has significant scrutiny concerns about the provisions of the bill which allow sunsetting dates to be deferred for any Act or legislative instrument that would sunset on or before 15 October 2020 in circumstances where there are no requirements on the face of the bill requiring the relevant minister to consider whether it is appropriate that sunsetting be deferred. The explanatory memorandum contains no information regarding when it will be appropriate for relevant ministers to determine that an extension of the sunsetting date is appropriate.

27 Schedule 16. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

1.55 The committee therefore requests the Attorney-General's advice as to what criteria ministers will consider before determining whether it is appropriate to defer sunsetting under the provisions of the bill (including whether any guidance is being developed in this regard).

1.56 The committee also requests that the Attorney-General provide the committee with a list of Acts and provisions of Acts that are due to sunset on or before 15 October 2020.

1.57 The committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Bill 2020

Purpose	This bill seeks to guarantee loans for small and medium enterprises, relating to the Coronavirus Economic Response. The bill seeks to appropriate up to $20 billion from the Consolidated Revenue Fund to meet any liabilities that the Commonwealth incurs under those guarantees
Portfolio	Treasury
Introduced	House of Representatives on 23 March 2020

Significant matters in delegated legislation[28]

1.58 Clause 5 provides that the minister may grant a guarantee to a financial institution in connection with loans made, or to be made, by the financial institution to SME entities; however, the minister must not grant a guarantee unless he or she is satisfied that granting the guarantee is likely to assist in dealing with the economic impacts of COVID-19. Clause 4 provides that 'SME entity' has the meaning given by the legislative rules and subclause 5(3) provides that the grant of a guarantee must be in accordance with any requirements prescribed by the legislative rules. Clause 6 provides that the total amount appropriated from the Consolidated Revenue Fund for the purposes of meeting any liabilities that the Commonwealth incurs under the guarantees granted under clause 5 must not exceed $20 billion.

1.59 The committee has consistently raised concerns about framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. As the detail of the delegated legislation is generally not publicly available when Parliament is considering the bill, this considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's view is that significant matters, such as details of the operation of a guarantee scheme that could result in the Commonwealth incurring liabilities of up to $20 billion, should be in the primary legislation unless a sound justification for the use of delegated legislation is provided.

28 Clause 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

1.60 The explanatory memorandum states that the legislative rules may include the following matters:

- the definition of 'SME entity';
- the eligibility criteria for a financial institution to receive a guarantee;
- the proportion of risk to be held by the Commonwealth and a financial institution subject to a guarantee;
- the types and terms of loans subject to a guarantee; and/or
- the maximum size of an individual loan subject to a guarantee. [29]

1.61 The committee notes that the explanatory memorandum contains no explanation for why these significant matters have been left to delegated legislation or why at least high-level guidance in relation to the operation of scheme could not have been included on the face of the bill.

1.62 From a scrutiny perspective, the committee considers that the matters that are to be provided for in the legislative rules (such as the definition of 'SME entity', the eligibility criteria for a financial institution to receive a guarantee, and the types and terms of loans subject to a guarantee) are central to the operation of the guarantee scheme and should therefore have been included in primary legislation.

1.63 The committee draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Senate Select Committee on COVID-19.

29 Explanatory memorandum, p. 160.

Structured Finance Support (Coronavirus Economic Response Package) Bill 2020

Purpose	This bill seeks to establish the Structured Finance Support (Coronavirus Economic Response) Fund to allow the Commonwealth to make investments, to ensure continued access to funding markets economically impacted by the coronavirus, and mitigate the impact of these economic effects on competition in consumer and business lending markets
Portfolio	Treasury
Introduced	House of Representatives on 23 March 2020

Parliamentary scrutiny

Delegated legislation not subject to disallowance[30]

1.64 The bill seeks to establish the $15 billion Structured Finance Support (Coronavirus Economic Response) Fund and the Structured Finance Support (Coronavirus Economic Response) Fund Special Account.

1.65 Clause 3 of the bill provides that the objects of the Act are to ensure continued access to funding markets impacted by the economic effects of COVID-19 and to mitigate impacts, resulting from those economic effects, on competition in consumer and business lending markets. These objects are intended to be achieved by the Commonwealth making investments in authorised debt securities and other investments prescribed by the rules. Beyond these broad objects little detail about how the Fund will operate is provided on the face of the bill, although clause 17 sets constitutional limits on the minister's power to invest amounts in authorised debt securities, etc.

1.66 The committee's view is that significant matters, such as how a fund to which the Commonwealth will invest a significant amount of public money is to operate, should be included on the face of primary legislation unless a sound justification provided. In this instance, the explanatory memorandum contains no explanation as to why further details as to how the Fund is to operate cannot be included in the bill.

1.67 Clause 13 of the bill provides that $15 billion must be credited to the Special Account. Additionally, subclause 13(2) provides that the minister may determine that additional amounts are to be credited to the account. A determination would be a notifiable instrument. The committee notes that notifiable instruments are not

30 Clause 13. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

subject to the tabling, disallowance or sunsetting requirements imposed on legislative instruments. As such, there can be no parliamentary scrutiny over a notifiable instrument. The explanatory memorandum provides no explanation as to why a determination by the minister will be a notifiable instrument.

1.68 In addition, clause 20 allows the minister to make rules as required or permitted, or that are necessary or convenient to give effect to the provisions of the bill.

1.69 The committee therefore requests the Treasurer's advice as to:

- **how it is intended that the Structured Finance Support (Coronavirus Economic Response) Fund will operate (for example, the decision-making criteria that will be used for making investments, any limits on making investments, and governance arrangements relating to investments);**
- **why the bill provides that determinations made under subclause 13(2), which credit additional amounts to the Special Account, are not to be subject to parliamentary disallowance; and**
- **the types of matters that are likely to be included in rules made under clause 20 of the bill.**

1.70 The committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

Supply Bill (No. 2) 2020-2021

Purpose	This bill seeks to appropriate $6.67 billion from the Consolidated Revenue Fund for services that are not the ordinary annual services of the government. It seeks greater appropriations for entities with disproportionately high expenditure required to support the coronavirus response, such as the Department of Health and Services Australia
Portfolio	Finance
Introduced	House of Representatives on 23 March 2020

Parliamentary scrutiny—appropriations determined by the Finance Minister[31]

1.71 Clause 12 seeks to enable the Finance Minister to provide additional funds to entities when he or she is satisfied that there is an urgent need for expenditure that is not provided for, or is insufficiently provided for, in Schedule 2. This additional appropriation is referred to as the Advance to the Finance Minister (Advance).

1.72 Subclause 12(2) enables the Finance Minister to make a determination that has the effect of allocating additional amounts, up to a total of $24 billion as specified by subclause 13(3), to the appropriations outlined in Schedule 2. Subclause 12(4) provides that a determination under subclause 12(2) is a legislative instrument, which must therefore be registered and tabled in Parliament. However, these determinations are not subject to parliamentary disallowance. The explanatory memorandum suggests that allowing these determinations to be disallowable 'would frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.[32]

1.73 The explanatory memorandum states that $24 billion in additional appropriations is required to be made available to the Finance Minister 'to provide the Government with the capacity to allocate additional appropriations for COVID-19 related responses that are not contemplated in the current package'.[33] The committee notes, however, that the use of the Advance provision to allocate additional appropriations is not limited on the face of the bill to COVID-19 response measures.

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31 Clause 10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

32 Explanatory memorandum, p. 10.

33 Explanatory memorandum, p. 10.

1.74 The committee notes that clause 12 (the Advance provision) allows the Finance Minister to allocate additional funds to entities up to a total of $24 billion via non-disallowable delegated legislation and that it therefore delegates significant legislative power to the Executive. While this does not amount to a delegation of the power to create a new appropriation, one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[34] The Advance provision in this bill leaves the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.75 The committee has examined Advance provisions in previous appropriation bills and sought further information from the Finance Minister about their use.[35] The committee notes that Advance provisions have been used in previous years to allocate additional funds of varying amounts for a wide variety of purposes. Previous examples include $48.8 million for Mersey Community Hospital and Tasmanian Health Initiatives, $206.5 million for payments to local governments, and $6 million for grants to arts and culture bodies.[36]

1.76 In 2019-20 to date Advance provisions have been used to increase appropriations for the Department of Health by $1.88 billion to enable the department to fund the procurement of masks and other emergency medical equipment in response to the COVID-19 outbreak.[37]

1.77 The committee notes that this issue also arises in relation to the Supply Bill (No. 1) 2020-2021.[38] The total amount that can be determined under the Advance provision in the No. 1 bill is $16 billion.

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34 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* (2017) 263 CLR 487, 532 [91].

35 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 95–8; *and Scrutiny Digest 2 of 2018*, 14 February 2018, pp. 5-7.

36 For further examples see Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, 18 October 2017, pp. 97–8. For a comprehensive list of AFMs made between the 2006-07 and 2017-18 financial years, see Appendix 1 to Senate Standing Committee for the Scrutiny of Bills*, Scrutiny Digest 12 of 2017*, 18 October 2017.

37 Advance to the Finance Minister Determination (No. 1 of 2019-2020) [F2020L00220] ($100 million); Advance to the Finance Minister Determination (No. 2 of 2019-2020) [F2020L00235] ($200 million); Advance to the Finance Minister Determination (No. 3 of 2019-2020) [F2020L00402] ($800 million); Advance to the Finance Minister Determination (No. 4 of 2019-2020) [F2020L00421] ($400 million); Advance to the Finance Minister Determination (No. 5 of 2019-2020) [F2020L00422] ($380 million).

38 Supply Bill (No. 1) 2020-2021, clause 10.

1.78 In light of the unprecedented amount available under the Advance provisions in the supply bills ($40 billion in total), the Finance Minister advised the Senate that the government had agreed to provide for increased transparency and oversight of use of the Advance. Under these measures a media release will be issued each week that Advance determinations are made and the Finance Minister will write to the shadow finance minister to seek her concurrence prior to drawing any funding from an Advance for proposed expenditure greater than $1 billion.[39] The committee welcomes these increased transparency measures although notes that they are not provided for on the face of the bill.

1.79 As Advance to the Finance Minister determinations are not subject to disallowance, the primary accountability mechanism in relation to Advances (beyond the initial passage of the authorising provision) is an annual report tabled in Parliament on the use of the Advance. These reports are considered in the Senate,[40] and are published on the Department of Finance website.[41] As noted above, in this instance the Finance Minister will also issue a media release each week that Advance determinations under the supply bills are made.[42] The committee draws these reports and media statements to the attention of Senators.

1.80 The committee otherwise draws its general scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Finance Minister to determine the purposes for which up to $40 billion in additional funds may be allocated in legislative instruments not subject to disallowance, particularly in circumstances where the purposes for which the additional funds may be allocated are not limited on the face of the bills to COVID-19 response measures.

1.81 The committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

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39 *Senate Hansard*, 23 March 2020, p. 81.

40 *Journals of the Senate*, 3 April 2019, p. 4847. See also Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans*, Department of the Senate, 14th Edition, 2016, pp. 395-396.

41 See https://www.finance.gov.au/publications/advance_to_the_finance_minister/.

42 See https://www.financeminister.gov.au/media-releases/2020.

Telecommunications Legislation Amendment (International Production Orders) Bill 2020

Purpose	This bill seeks to provide the legislative framework for Australia to give effect to future bilateral and multilateral agreements for cross-border access to electronic information and communications data
Portfolio	Home Affairs
Introduced	House of Representatives on 5 March 2020

Trespass on personal rights and liberties—international production orders[43]

1.82 The bill seeks to provide the legislative framework for Australia to give effect to future bilateral and multilateral agreements for cross-border access to electronic information and communications data.[44] To do so, the bill seeks to introduce International Production Orders (IPOs), which may be issued by a judge or nominated Administrative Affairs Tribunal (AAT) member. Such orders would allow Commonwealth, state and territory law enforcement and national security agencies to acquire data held in a foreign country by a designated communications provider (outgoing orders), and to allow foreign governments to access private communications data held by a communications provider in Australia (incoming orders).[45]

1.83 Proposed new Schedule 1 to the *Telecommunications (Interception and Access) Act 1979* (TIA Act) sets out the scheme, and proposes the introduction of three types of IPOs, relating to:

- interception of telecommunications;
- accessing stored communications (for example, stored messages, voice mails, video calls); and
- accessing telecommunications data (being information about the communication, other than information that is the contents or substance of the communication).

43 Proposed Schedule 1 to the *Telecommunications (Interception and Access) Act 1979*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

44 Explanatory memorandum, p. 1.

45 Statement of compatibility, paras [3] and [8].

1.84 IPOs can be issued for three different purposes:

- to enforce a number of serious offences or offences punishable by imprisonment of at least seven years (for intercepted material) or three years (for stored communications and telecommunications data); [46]
- in connection with the monitoring of a person subject to a control order; [47] and
- in connection with the carrying out of the Australian Security and Intelligence Organisation's (ASIO) functions. [48]

1.85 IPOs to enforce the criminal law or monitor a person subject to a control order can be issued by a judge (or in some cases a magistrate) or a nominated member of the AAT. IPOs that relate to the carrying out of ASIO's functions can be issued by a nominated AAT Security Division member.

1.86 The committee notes that the framework the bill seeks to establish could significantly trespass on a person's rights and liberties and considers that the inclusion of such provisions should be sufficiently justified and that appropriate safeguards should be in place to ensure that a person's electronic information and communications data is only accessed in appropriate circumstances. The committee's view on the relevant safeguards contained in the bill is set out in the following paragraphs.

Issuing of IPOs by members of the AAT

1.87 Clause 15 of proposed Schedule 1 to the TIA Act provides that the Attorney-General may nominate an AAT member for the purpose of issuing IPOs for the interception of data in relation to enforcing the criminal law and monitoring a control order. The nominated AAT member can be an AAT member of any level, although members and part-time senior members must also have been enrolled as a legal practitioner for at least five years.

1.88 Clause 16 of proposed Schedule 1 to the TIA Act provides that the Attorney-General may nominate a judge or magistrate, or an AAT member of any level who has been enrolled as a legal practitioner for at least five years, as an issuing authority for the purpose of issuing IPOs for accessing stored communications or telecommunications data in relation to enforcing the criminal law and monitoring a control order.

1.89 Clause 17 of proposed Schedule 1 to the TIA Act provides that the Attorney-General may nominate a member of the Security Division of the AAT for the purpose of issuing IPOs in connection with carrying out ASIO's functions. The

46 See Schedule 1, item 43, proposed Schedule 1, Part 2.

47 See Schedule 1, item 43, proposed Schedule 1, Part 3.

48 See Schedule 1, item 43, proposed Schedule 1, Part 4.

nominated AAT member can be an AAT member of the Security Division at any level, although members and part-time senior members of the Security Division must also have been enrolled as a legal practitioner for at least five years.

1.90 The committee has a long-standing scrutiny view that the power to issue warrants or orders relating to the use of intrusive powers should only be conferred on judicial officers. In this regard, the committee does not consider that consistency with existing provisions is, of itself, a sufficient justification for allowing warrants or orders relating to the use of intrusive powers to be issued by non-judicial officers.

1.91 In light of the extensive personal information that could be covertly accessed, the committee would expect a detailed justification to be given as to the appropriateness of conferring such powers on AAT members, particularly full-time senior members without experience as a legal practitioner and part-time senior members and general members. In this instance, the explanatory memorandum provides no such justification.

1.92 The committee therefore requests the minister's advice regarding why it is necessary and appropriate to allow IPOs to be issued by members of the AAT.

Public Interest Monitors

1.93 Where Victorian and Queensland law enforcement agencies make an application for an IPO relating to interception, the public interest monitors (PIMs) that exist in those states can appear at hearings of IPO applications to test the content and sufficiency of the information relied on, can question any person giving information, and can make oral and written submissions as to the appropriateness of granting the application, which must be considered by the judge or AAT member when deciding whether to grant an IPO.

1.94 The statement of compatibility states:

> Victorian and Queensland PIMs will add an additional layer of oversight to ensure the use of the IPO framework by agencies in their jurisdictions is appropriate and remains consistent with their use of the domestic warrants regime under the TIA Act.
>
> For these reasons, the inclusion of provisions relevant to PIMs strengthens the existing protections in the Bill against arbitrary or unlawful interference with privacy in Victoria and Queensland. Moreover, while the current provisions relating to PIMs are relevant only to Victoria and Queensland, there is scope to accommodate similar oversight bodies in the framework, should they be established in other jurisdictions in the future.

1.95 While noting this information, from a scrutiny perspective, the committee considers that the bill should be amended to establish a national system so that public interest monitors may make submissions in relation to all IPO applications, regardless of whether they relate to interception or involve Victorian or Queensland

law enforcement agencies. The committee considers that this would provide a significant safeguard to the issuing of all IPOs.

1.96 The committee requests the minister's advice as to whether the bill could be amended to include a national public interest monitor scheme so that public interest monitors may make submissions in relation to all IPO applications.

Consistency of safeguards

1.97 The committee notes that before issuing an IPO in relation to a person subject to a control order, the relevant decision maker must be satisfied that the IPO 'would be likely to *substantially* assist' with the relevant purpose for issuing the IPO.[49] However, in relation to the two other types of control orders, the decision maker merely has to determine that the IPO is 'would be likely to assist' with the relevant purpose.[50]

1.98 The committee requests the minister's advice as to whether the bill could be amended to require that, for all IPOs, the relevant decision maker must be satisfied that an IPO would be 'likely to *substantially* assist' with the relevant purpose for which the IPO is sought, rather than merely 'likely to assist'.

Oversight by the Commonwealth Ombudsman

1.99 Subclause 81(1) of proposed Schedule 1 to the TIA Act provides that, within 3 months after an IPO in relation to a control order is issued, the chief officer of the relevant agency must notify the Ombudsman that the order has been issued and give the Ombudsman a copy of the order.

1.100 The committee notes that the 3 month period for notification that a control order IPO has been issued is a considerable period of time. The committee considers that, noting the significant consequences that could flow from the issuing of an IPO, this period should be reduced to allow for more effective and responsive oversight by the Ombudsman.

1.101 Additionally, Part 10 of proposed Schedule 1 to the TIA Act provides the Ombudsman with the ability to inspect records of a relevant agency and the Australian Designated Authority to determine compliance with the Schedule.

1.102 Clause 144 provides the Ombudsman with the power to obtain information from an officer of a relevant agency or from a member of staff of the Attorney-General's Department. The Ombudsman may obtain information where the Ombudsman has reasonable grounds to believe that the officer is able to give relevant information.

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49 Schedule 1, item 43, proposed paragraphs 60(2)(i), 60(2)(j), 69(2)(e) and 78(2)(e).

50 Schedule 1, item 43, proposed paragraphs 30(2)(g), 30(2)(h), 39(2)(d), 48(2)(d), 89(2)(g), 89(2)(h) and 98(2)(e).

1.103 It is unclear to the committee why the Ombudsman cannot obtain information when they have reasonable grounds to *suspect* an officer is able to give information. The committee notes that Part 10 provides a significant safeguard regarding the issuing of IPOs and that this power would be strengthened if the Ombudsman were only required to *suspect* that the officer is able to give relevant information, rather than *believe* the officer is able to give relevant information.

1.104 The committee requests the minister's advice regarding whether the 3 month period in subclause 81(1) of proposed Schedule 1 to the TIA Act could be reduced to provide the Ombudsman with more immediate oversight of the issuing of control order IPOs.

1.105 The committee also requests the minister's advice as to whether clause 144 of proposed Schedule 1 to the TIA Act could be amended to provide that the Ombudsman has the power to obtain relevant information from officers and members of staff if the Ombudsman has 'reasonable grounds to *suspect*' that the officer or member of staff is able to give the relevant information, rather than the higher threshold of 'reasonable grounds to *believe*'.

Delegation of administrative powers—applications for international production orders[51]

1.106 The bill provides that a wide variety of persons may make an application for an IPO relating to enforcement of the criminal law or relating to control orders on behalf of their agency, including any member of the Australian Federal Police, any member of the staff of the Crime Commission or any officer of a Police Force of a State.[52] Applications for an IPO relating to the carrying out of ASIO's functions may be made by any ASIO employee authorised by the Director-General of Security.[53]

1.107 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 offices or to members of the Senior Executive Service. 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. In this

51 Schedule 1, item 43, clause 22. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

52 Schedule 1, item 43, subclauses 22(3), 33(3), 52(3) and 63(3).

53 Schedule 1, item 43, subclauses 83(3), 92(3) and 101(3).

instance, the explanatory memorandum provides no explanation for the broad delegation of power to make an application for an IPO.

1.108 The committee's scrutiny concerns in this instance are heightened by the significant nature of the powers and the potential trespass on a person's rights and liberties flowing from the issue of an international production order.

1.109 The committee requests the minister's advice regarding why it is necessary and appropriate to allow a broad range of persons to make an application for an international production order.

1.110 The committee also requests the minister's advice as to whether the bill could be amended to:

- **limit the persons who can make an application for an international production order to only the heads of relevant agencies and members of the senior executive service (or equivalent); or**
- **at a minimum, require that the relevant agency head be satisfied that persons authorised to apply for an IPO have the relevant qualifications and expertise to do so.**

No-invalidity clause[54]

1.111 As noted above, subclause 81(1) of proposed Schedule 1 to the TIA Act provides that, within 3 months after an IPO in relation to a control order is issued, the chief officer of the relevant agency must notify the Ombudsman that the order has been issued and give the Ombudsman a copy of the order. Additionally, subclause 81(2) provides that if the chief officer of a control order IPO agency contravenes paragraph 114(1)(d) of Schedule 1, the chief officer must notify the Ombudsman of the contravention as soon as practicable. Paragraph 114(d) provides that the chief officer of an agency must revoke an IPO issued under Part 2 or 3 if the chief officer is satisfied that the grounds on which the order was issued have ceased to exist.

1.112 Subclause 81(3) provides that a failure to comply with subclause 81(1) or 81(2) does not affect the validity of an IPO. A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause.

1.113 There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the

54 Schedule 1, item 43, clause 81. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a) (i) and (iii).

decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.[55]

1.114 The committee requests the minister's advice as to the rationale for including a no-invalidity clause in relation to requirements to notify the Ombudsman about the issuing of control order IPOs or where the chief officer of an agency has contravened paragraph 114(1)(d).

Delegation of administrative powers—functions of the Ombudsman[56]

1.115 Proposed subclause 148(1) provides the Ombudsman may, by writing, delegate all or any of the Ombudsman's powers under Part 10 of proposed Schedule 1 to the TIA Act, other than a power to report to the Minister, to an APS employee responsible to the Ombudsman or to a person having similar oversight functions to the Ombudsman under the law of a State or Territory or to an employee responsible to that person.

1.116 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 offices or to members of the Senior Executive Service. 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. In this instance the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.[57]

1.117 The committee requests the minister's advice as to why it is necessary to allow most of the Ombudsman's powers and functions to be delegated to APS employees at any level.

55 Explanatory memorandum, paragraph [274].

56 Schedule 1, clause 148. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

57 Explanatory memorandum, paragraph [488].

1.118 The committee also requests the minister's advice as to whether the bill could be amended 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; or**
- **at a minimum, require that the Ombudsman be satisfied that persons performing delegated functions and exercising delegated powers have the expertise appropriate to the function or power delegated.**

Immunity from liability[58]

1.119 Clause 149 provides that the Ombudsman, an inspecting officer, or a person acting under an inspecting officer's direction or authority, is not to be sued for, or in relation to, an act or omission done in good faith in the performance or exercise, or the purported performance or exercise, of a function or power conferred by Part 10. The clause therefore removes any common law right to bring an action to enforce legal rights, unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.120 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.[59]

1.121 The committee requests the minister's advice as to why it is necessary to provide the Ombudsman, an inspecting officer, or a person acting under an inspecting officer's direction or authority with 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.

58 Schedule 1, clause 149. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

59 Explanatory memorandum, paragraph [490].

Evidentiary certificates[60]

1.122 Proposed subclauses 161(1) and 161(2) provide that a provider or manager of a designated communications provider, may issue a signed written certificate setting out facts detailing acts or things done by the provider in order to comply with an IPO. Proposed subclause 161(3) permits a certificate issued under subclauses 161(1) and 161(2) to be received in evidence in a proceeding in Australia without further proof, and the certificate is to be conclusive evidence of the matters stated in the document in those proceedings.

1.123 In this instance, the explanatory memorandum states:

> Taking the designated communications provider's evidentiary certificate as conclusive evidence of the matters stated in the document ensures that employees of the provider are not required to testify in each proceeding where evidence obtained under an IPO is adduced. Current practices within the TIA Act for domestic interception, access to stored communications and telecommunications data allow for evidentiary certificates. The use of evidentiary certificates for IPOs is of significant utility as requiring the appearance of employees of foreign designated communications providers to court proceedings held in Australia will be complex and, at times, impractical. This also recognises the novel fact that whilst it will be easier to obtain information by virtue of the new order framework, Australian prosecutorial and law enforcement bodies will not be able to compel foreign provider employees to attend court to give evidence.[61]

1.124 The *Guide to Framing Commonwealth Offences* states, in relation to conclusive evidentiary certificates, that requiring courts to exclude evidence to the contrary in this way can destroy any reasonable chance to place the complete facts before the court.[62] As a result the committee will have significant scrutiny concerns regarding the use of such certificates. Additionally, the committee notes that, as the relevant employees will be located outside of Australia, it will be difficult for a defendant to confirm that the relevant information provided in the certificate is accurate.

1.125 The committee therefore requests the minister's advice regarding whether the bill can be amended to provide that an evidentiary certificate made under clause 161 will be prima facie evidence rather than conclusive evidence of the matters stated in the certificate.

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60 Schedule 1, item 43, clause 161. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

61 Explanatory memorandum, paragraph 540.

62 *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 55.

Trespass on personal rights and liberties

Lack of parliamentary oversight

Privacy[63]

1.126 Clause 168 provides that if there is a designated international agreement between Australia and one or more foreign countries and the agreement deals with the issue of orders or the making of requests by a competent authority of the foreign country then a number of statutory provisions will not apply to the issue or making of the order or request or an act or thing done in compliance with such an order or request. The excluded provisions include:

- subsections 7(1) and 108(1) of the TIA Act, which relate to the prohibition on interception of telecommunications and access to stored communications;
- subsections 63(1) and 133(1) of the TIA Act, which relate to the prohibition on dealing with intercepted information and interception warrant information, and accessed information; and
- sections 276, 277 and 278 of the *Telecommunications Act 1997*, which deal with the prohibition on, and offences relating to, the disclosure or use of certain information by current or former eligible persons, eligible number-database persons or emergency call persons.

1.127 Clause 169 provides that for the purposes of the *Privacy Act 1988* (Privacy Act), if there is a designated international agreement between Australia and one or more foreign countries and the agreement deals with the issue of orders or the making of requests by a competent authority of the foreign country, any disclosure of information in compliance with any such order or request will be taken to be a disclosure that is authorised under the Privacy Act.

1.128 The committee has significant scrutiny concerns regarding the broad ability for foreign governments to access information held in Australia in circumstances where many of the legislative protections surrounding the accessing of data are removed. Where a provision has the potential to significantly trespass on personal rights and liberties, the committee expects that a sufficient justification for the inclusion of these provisions is included in the explanatory memorandum. In this instance, the explanatory memorandum merely repeats the operation of the provisions. In relation to the removal of the operation of the provisions of the Privacy Act, the explanatory memorandum states that:

63 Schedule 1, item 43, clauses 168 and 169. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i), (iv) and (v).

> In practice, it is expected that consideration of protections and safeguards related to privacy will also be a consideration when developing international agreements.[64]

1.129 The committee does not consider that the information provided constitutes a sufficient justification for provisions that would have the potential to trespass on personal rights and liberties. While noting the statement that privacy will be considered when developing international agreements, there is nothing on the face of the bill that requires this. The committee also notes there is no guidance on the face of the bill as to how the issue of orders or making of requests will occur or what will constitute a competent authority. The committee considers that, as currently drafted, there are no safeguards on the face of the bill to ensure that information requested by foreign governments is only accessed in appropriate circumstances. The committee therefore considers that the provisions as currently drafted have the potential to significantly trespass on a person's rights and liberties.

1.130 The committee's concerns are heightened by the lack of parliamentary oversight of any relevant international agreement. Clause 3 merely provides that the name of the relevant designated international agreement must be specified in the regulations. Given the significant nature of the power and the potential trespass on a person's rights and liberties, the committee considers that, at a minimum, the bill should be amended to require that designated international agreements be subject to parliamentary scrutiny.

1.131 Based on the above, the committee therefore considers that the provisions as currently drafted have the potential to significantly trespass on a person's rights and liberties, particularly in circumstances where access to information held in Australia may be given to foreign jurisdictions whose governance structures are not underpinned by respect for the rule of law and the separation of powers.

1.132 The committee requests the minister's more detailed advice regarding why it is considered necessary and appropriate to allow information held in Australia to be accessed by foreign governments in circumstances where existing legislative protections for the accessing of information have been removed and no safeguards are provided on the face of the bill to ensure a designated international agreement contains sufficient safeguards regarding the circumstances in which information can be accessed.

1.133 The committee also requests the minister's advice as to whether the bill can be amended to:

- **set out minimum protections and safeguards related to privacy that must be included in designated international agreements;**

64 Explanatory memorandum, paragraph [559].

- **specify that designated international agreements must be tabled in the Parliament; and**
- **provide that any regulation that specifies the name of a designated international agreement does not commence until after the Parliament has had the opportunity to scrutinise the designated international agreement.**

Bills with no committee comment

1.134 The committee has no comment in relation to the following bills which were introduced into the Parliament on 23 March 2020:

- Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020
- Supply Bill (No.1) 2020-2021
- Supply (Parliamentary Departments) Bill (No. 1) 2020-2021

Commentary on amendments and explanatory materials

1.135 The committee has no additional comments on amendments made or explanatory materials relating to the following bill:

- Coronavirus Economic Response Package Omnibus Bill 2020.[65]

65 On 23 March 2020 the House of Representatives agreed to 11 Government amendments, the Assistant Treasurer (Mr Sukkar) presented a supplementary explanatory memorandum, and the bill was read a third time. On the same day the Senate agreed to one Government amendment, and the bill was read a third time.

Chapter 2

Commentary on ministerial responses

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

2.2 The committee has not finalised its consideration of any responses since the tabling of *Scrutiny Digest 4 of 2020* on 2 April 2020.

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 bills to the attention of Senators:

- **Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Bill 2020**—clause 4;
- **Australian Business Growth Fund (Coronavirus Economic Response Package) Bill 2020**—clause 18;
- **Australian Education Amendment (Direct Measure of Income) Bill 2020**—Schedule 1, item 40, subsection 126(2);
- **Guarantee of Lending to Small and Medium Enterprises (Coronavirus Economic Response Package) Bill 2020—**clause 6; and

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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*.

- **Structured Finance Support (Coronavirus Economic Response Package) Bill 2020**—clause 11 (Special account: CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*)

Senator Helen Polley
Chair