The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 6 of 2020

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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 as to whether the bills, 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.

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 correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

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 Senate legislation committee for information.

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 Bill (No. 6) 2019-2020

Purpose	This bill appropriates funds from the Consolidated Revenue Fund for services that are not the ordinary annual services of the Government, in addition to amounts appropriated through the *Supply Act (No. 2) 2019-2020*, the *Appropriation Act (No. 2) 2019-2020,* the *Appropriation Act (No. 4) 2019-2020* and the *Appropriation (Coronavirus Economic Response Package) Act (No. 2) 2019-2020*
Portfolio	Finance
Introduced	House of Representatives on 8 April 2020

Parliamentary scrutiny—appropriations determined by the Finance Minister[1]

1.2 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).

1.3 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 12(3), to the appropriations outlined in Schedule 1.[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

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

2 Subclause 12(5) provided that where an allocation is made from the Advance provided by this bill, an offsetting reduction to the Advance available through *Supply Act (No. 2) Act 2020-2021* will occur. This has the effect of limiting the total Advance available under the bill and the Supply Ac to $24 billion across 2019-20 and 2020-21.

frustrate the purpose of the provision, which is to provide additional appropriation for urgent expenditure'.[3]

1.4 The explanatory memorandum states that:

> The quantum of the [Advance] takes into consideration the evolving nature of the COVID-19 pandemic, 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.[4]

1.5 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.

1.6 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'.[5] 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.

1.7 The committee has examined Advance provisions in previous appropriation bills and sought further information from the Finance Minister about their use.[6] 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.[7]

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3 Explanatory memorandum, p. 10.

4 Explanatory memorandum, p. 10.

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

6 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.

7 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.

1.8 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;[8] and
- increase appropriations for the Department of Industry, Science, Energy and Resources by $94 million to enable the department to purchase oil stocks and to lease storage in the United States Strategic Petroleum Reserve.[9]

1.9 The committee notes that this issue also arises in relation to the Appropriation Bill (No. 5) 2019-2020.[10] The total amount that can be determined under the Advance provision in the No. 5 bill is $16 billion.

1.10 In light of the unprecedented amount available under the Advance provisions in recent supply and appropriation 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.[11] The committee welcomes these increased transparency measures although notes that they are not provided for on the face of the bill.

1.11 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,[12] and are published on the Department of Finance website.[13] As noted above, in this instance the Finance Minister will also issue a media release each week

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8 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).

9 Advance to the Finance Minister Determination (No. 6 of 2019-2020) [F2020L00467] ($2.5 million); Advance to the Finance Minister Determination (No. 7 of 2019-2020 [F2020L00468] ($91.5 million).

10 Appropriation Bill (No. 5) 2019-2020, clause 10.

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

12 *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.

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

that Advance determinations under recent supply and appropriation bills are made.[14] The committee draws these reports and media statements to the attention of Senators.

1.12 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.

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

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

Coronavirus Economic Response Package (Payments and Benefits) Bill 2020

Purpose	This bill seeks to provide financial support to entities directly or indirectly affected by the coronavirus, in relation to the coronavirus economic response
Portfolio	Treasury
Introduced	House of Representatives on 8 April 2020

Broad delegation of legislative power

Significant matters in delegated legislation[15]

1.14 Clause 7 of the bill provides that the rules may make provision for one or more kinds of payments by the Commonwealth to an entity between 1 March 2020 and 31 December 2020. The rules may also provide for the establishment of a scheme in relation to these payments.

1.15 The committee considers that these provisions provide the Treasurer with a broad discretionary power to create a payment scheme 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 should be justified in the explanatory memorandum.

1.16 Additionally, the committee has consistently drawn attention to 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. The committee considers that such an approach 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 payment scheme involving the expenditure of a significant amount of public money, should be in the primary legislation unless a sound justification for the use of delegated legislation is provided.

1.17 In this instance, the explanatory memorandum states that:

> Details of eligibility for particular payments as well as the amount of payments and the time when they are to be paid are to be set out in the rules made by the Treasurer. This allows for flexibility of the arrangements

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

> to introduce and modify payments to appropriately respond to the impacts of the Coronavirus…
>
> Effectively, the rules may establish particular payments programs and deal with matters that are specific to the payment programs, such as entitlement, amount and timing. Any payments must relate to the prescribed period – that is, the period from 1 March 2020 to 31 December 2020.[16]

1.18 The committee has generally not considered administrative flexibility to be a sufficient justification for leaving significant elements of a legislative scheme to delegated legislation.

1.19 While the committee notes that the payments scheme is only intended to operate for 10 months, from a scrutiny perspective, the committee considers that some of the matters that are to be provided for in the rules (such as the core eligibility requirements for a payment and the obligations for recipients of payments) should have been included on the face of the primary legislation.

1.20 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.

Sub-delegation of administrative and legislative powers[17]

1.21 Clause 20 provides that the Treasurer may make rules prescribing matters required or permitted by the bill or matters which are necessary or convenient for giving effect to the provisions of the bill. Subclause 20(4) provides that the rules may confer a power on the Commissioner of Taxation to make instruments of a legislative or administrative character, as well as decisions of an administrative character.

1.22 The explanatory memorandum states:

> It is anticipated that there may be administrative matters for which it may be appropriate for the Commissioner to make general provision by making legislative instruments (for example, exempting a class of entities from reporting requirements)…
>
> The legislative instrument made by the Commissioner can be used to supplement the rules made by the Treasurer. This sub-delegation is intended to further promote the policy objectives of this measure and to ensure its responsiveness. Given that the Commissioner is administering the payments, the Commissioner is a suitable delegate with firsthand

16 Explanatory memorandum, pp. 34 and 38.

17 Subclause 20(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

knowledge about how the administration of the payment framework can remain robust over time.

1.23 While the committee notes this explanation, the powers that may be subdelegated to the Commissioner are broad and significant, such as the ability to exempt a class of entities from the reporting requirements by legislative instrument. By leaving the delegation of these matters to the rules, the ability of the Parliament to have oversight over any delegation is limited.

1.24 From a scrutiny perspective, the committee considers that further guidance as to the administrative and legislative powers that may be sub-delegated to the Commissioner of Taxation should have been included on the face of the primary legislation.

1.25 The committee draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Incorporation of external materials existing from time to time[18]

1.26 Subclause 20(5) provides that the rules may make provision in relation to a matter by incorporating any matter contained in an instrument or other writing as in force or existing from time to time. The explanatory materials contain little information about what documents may be incorporated by these provisions, merely noting that it may include international treaties or World Health Organisation documents.[19]

1.27 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

18 Subclause 20(5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

19 Explanatory memorandum, p. 47.

1.28 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

1.29 Noting the above comments, the committee requests the Treasurer's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under subclause 20(5), whether these documents will be made freely available to all persons interested in the law and why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.

Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020

Purpose	This bill implements changes to various acts in relation to the coronavirus economic response
Portfolio	Treasury
Introduced	House of Representatives on 8 April 2020

Broad discretionary powers

Significant matters in delegated legislation[20]

1.30 Schedule 1 to the bill seeks to insert proposed section 789GX into the *Fair Work Act 2009*, which would provide the minister with the ability to, by legislative instrument, exclude one or more employers from proposed sections 789GDC, 789GE, 789GF, 789GG and 789GJ. These sections authorise an employer to make a jobkeeper stand down direction and directions relating to duties and location of work, and to make agreements with employees relating to days of work and the taking of paid annual leave. The explanatory memorandum states that proposed section 789GX is a 'limited regulation making power' and may be utilised in circumstances where, for example, an employer contravenes a civil remedy provision.[21]

1.31 The committee considers that these provisions provide the minister with a broad discretionary power to exempt employers from provisions of the bill by legislative instrument in circumstances where there is no guidance on the face of the bill as to when these powers should be exercised. The committee expects that the inclusion of broad discretionary powers should be thoroughly justified in the explanatory memorandum. In this instance, the committee does not consider that the explanation provided in the explanatory memorandum adequately justifies the inclusion of a broad rule making power to exempt employers from the operation of certain provisions.

1.32 As only limited justification has been provided in the explanatory materials, the committee requests the Minister for Industrial Relations' more detailed advice as to why it is necessary and appropriate to provide the minister with broad discretionary powers to exempt employers from provisions of the bill in

20 Schedule 1, item 5, proposed section 789GX. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

21 Explanatory memorandum, p. 29.

circumstances where there is no guidance on the face of the bill regarding the circumstances in which these powers are to be exercised.

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

Henry VIII clauses—modification of primary legislation by delegated legislation[22]

Retrospectivity

1.34 Item 28 of Schedule 2 to the bill seeks to provide that the Social Services Minister may, by legislative instrument, determine modifications of Part 5 of the *Social Security (Administration) Act 1999* (the Administration Act) in connection with payments under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*. Part 5 of the Administration Act relates to information management, and includes provisions relating to the collection, use, recording and disclosure of information. The minister must be satisfied that a determination under item 28 is in response to circumstances relating to COVID-19. The explanatory memorandum states:

> It is intended that a circumstance where the Social Services Minister may make a determination is to permit the Australian Taxation Office to provide information to Services Australia about payments under the Payments and Benefits Bill, to facilitate the efficient assessment of claims for social services payments by Services Australia.
>
> A determination is a legislative instrument that is subject to disallowance.
>
> The Social Services Minister's power to make determinations is temporary in nature. The power to make determinations will be repealed at the end of 31 December 2020. Any determinations made by the Minister will cease to have any effect after 31 December 2020.[23]

1.35 Item 1 of Schedule 5 to the bill seeks to provide that a relevant minister for an Act or a legislative instrument that requires or permits certain matters, such as the giving of information and the signing, production and witnessing of documents, to temporarily vary these requirements or permissions in response to circumstances relating to COVID-19. Subitem 1(3) provides that a determination may apply retrospectively. The explanatory memorandum states:

> A determination under this mechanism may apply retrospectively. However, a determination will be beneficial to individuals and businesses

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22 Schedule 2, item 28, Schedule 5, item 1 and Schedule 6, item 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

23 Explanatory memorandum, p. 51.

> by retrospectively validating approaches to providing information or meeting documentary and witnessing requirements that may otherwise have been invalid.
>
> This mechanism is necessary to respond flexibly to the unprecedented challenges of the Coronavirus, particularly the challenges posed by social distancing measures.
>
> The mechanism is temporary and will cease to have effect after 31 December 2020.[24]

1.36 Item 3 of Schedule 6 to the bill provides that the Veterans' Affairs Minister may, by legislative instrument, modify veterans' law to vary provisions relating to the qualifications of persons for payments and the rate of payments. The explanatory memorandum states:

> Item 3 of Schedule 6 to this Bill provides the Veterans' Minister with the flexibility and legislative instrument making power to deal with necessary amendments to the qualifications and payments under the Veterans' Law.
>
> The Veterans' Minister receives powers similar to those of the Social Services Minister under Item 40A of Schedule 11 to the Coronavirus Omnibus Act. The principal difference is the requirement for the Veterans' Minister to consult with the Social Services Minister prior to modifying a qualification or payment.
>
> This will ensure that payments and assistance for veterans and their dependents can be changed in line with future changes to payments and assistance for equivalent social security recipients. It means the Government can undertake comprehensive measures to address the effects of the Coronavirus without distinction between whether a person receives social security benefits or benefits in recognition of their (or a member of their family's) military service.
>
> The Veterans' Minister must be satisfied that the use of these powers is in response to the circumstances relating to the Coronavirus.
>
> Instruments made under this item have no operation after 31 December 2020.
>
> The power given to the Veterans' Minister will end when Item 3 of Schedule 6 to this Bill is repealed at the end of 31 December 2020 [25]

1.37 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.

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24 Explanatory memorandum, p. 69.

25 Explanatory memorandum, pp. 75–76.

As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

1.38 In this instance, as the explanatory memorandum provides a justification for each Henry VIII clause in the bill, and each provision is time-limited, the committee makes no further comment in relation to the Henry VIII clauses in this bill other than to reiterate its general scrutiny concerns regarding provisions which enable ministers to use delegated legislation to amend the operation of primary legislation. In this regard, the committee notes that if the Parliament is sitting changes to, or exemptions from, primary legislation should be made by introducing a bill for consideration by the Parliament, rather than relying on the use of a Henry VIII clause.

1.39 The committee also draws each Henry VIII clause to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Senate Select Committee on COVID-19.

Retrospective application[26]

1.40 Part 1 of Schedule 4 to the bill seeks to make amendments to how Child Care Subsidy (CCS) entitlements are reviewed when an individual who is a member of a couple for some but not all of the CCS fortnights in an income year meets the CCS reconciliation conditions. These provisions are identical to provisions in Schedule 2 to the Family Assistance Legislation Amendment (Improving Assistance for Vulnerable and Disadvantaged Families) Bill 2020. The committee's comments on these provisions can be found in *Scrutiny Digest 4 of 2020*.[27]

26 Items 1 and 2 of Schedule 4. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

27 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2020*, 2 April 2020, pp. 5–6). See also pages 26 to 35 in this Digest.

Bills with no committee comment

1.41 The committee has no comment in relation to the following bill which was introduced into the Parliament on 8 April 2020:

- Appropriation Bill (No. 5) 2019-2020

Commentary on amendments and explanatory materials

1.42 No comments or explanatory materials have been received since the tabling of *Scrutiny Digest 5 of 2020*.

Chapter 2

Commentary on ministerial responses

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

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
Bill status	Received Royal Assent on 24 March 2020

Broad discretionary powers[1]

2.2 In *Scrutiny Digest 5 of 2020* the committee requested 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 requested 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.[2]

Minister's response[3]

2.3 The minister advised:

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

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2020*, pp. 8-9.

3 The minister responded to the committee's comments in a letter dated 1 May 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

In response, I advise that measures that are being funded under the *Assistance for Severely Affected Regions (Special Appropriation) (Coronavirus Economic Response Package) Act 2020* (the Act), announced by the Australian Government, are published on my Department's website at www.regional.gov.au/regional/programs/covid-19-relief-and-recovery-fund.aspx. Additionally, information on the COVID-19 Relief and Recovery Fund, established under the Act, can be found at treasury.gov.au/coronavirus/resources.

To ensure good governance and compliance with the Act, a Ministerial Advisory Group chaired by myself was established to provide advice to Cabinet, through the Expenditure Review Committee, on the selection of measures to be funded under the Act. This ensures funding is targeted to communities, regions and industry sectors severely affected by the impacts of COVID-19.

Financial assistance under the Act is being delivered through existing or newly established Government programs or initiatives. Information about these finding decisions will be published in accordance with existing arrangements for each mechanism. For example:

- where grants programs are used, grant agreements will be established and relevant information will be published on GrantConnect at www.grants.gov.au;
- where payments are made to States and Territories under the Intergovernmental Agreement on Federal Financial Relations, written agreements will be amended or established to outline the agreement between the Commonwealth and relevant State and/or Territory and published on at www.federalfinancialrelations.gov.au; and
- where payments are made through contracts, a contract notice will be reported where appropriate on AusTender at www.tenders.gov.au.

Public reporting on funding decisions or the implementation of specific measures will be managed by the Government agency responsible for the initiative, in consultation with the Department of Finance, and I have established a Secretariat function within my Department to oversee the administration of the Act. Agencies will continue to comply with all legislative obligations for the expenditure of public funding, including the *Public Governance, Performance and Accountability Act 2013*.

I note the Committee also draws this matter to the attention of the Senate Select Committee on COVID-19.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that, to ensure good governance and compliance with the Act, a Ministerial Advisory Group was established to provide advice to Cabinet, through the

Expenditure Review Committee, on the selection of measures to be funded under the Act.

2.5 The committee welcomes the minister's advice that details about the measures that are being funded under the Act are published on the department's website. The committee also notes the minister's advice that financial assistance under the Act is being delivered through existing or newly established government programs or initiatives and that information about these finding decisions will be published in accordance with existing arrangements for each mechanism.

2.6 The committee draws the various resources for scrutinising payments made under the bill to the attention of senators and the Senate Select Committee on COVID-19.

2.7 In light of the information provided, and the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

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
Bill status	Received Royal Assent on 24 March 2020

Parliamentary scrutiny

Significant matters in delegated legislation[4]

2.8 In *Scrutiny Digest 5 of 2020* the committee requested the Treasurer's advice as to the intended operation of the Australian Business Growth Fund, any limits to the Fund's investments in relation to an individual enterprise, the eligibility criteria and prioritisation method for investment applications. The committee also requested the Treasurer's advice as to the governance arrangements for the Fund, and the types of matters that are likely to be included in rules made under clause 16 of the bill.[5]

Treasurer's response[6]

2.9 The Treasurer advised:

> **How the Fund will operate**
>
> The Fund will be set up as a corporation formed under the *Corporations Act 2001*. In addition to the Commonwealth, entities who will participate in the formation of the Fund and will constitute the founding shareholders include the National Australia Bank, the Commonwealth Bank of Australia, Westpac, ANZ, HSBC and Macquarie. The Fund will have an initial investment capacity of $540 million and will operate independently to make equity investments in eligible businesses.

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

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2020*, pp. 11-12.

6 The minister responded to the committee's comments in a letter dated 11 May 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

The Act provides the authority for the Commonwealth to invest in the Fund and for the governance of that investment. The Act is not designed to define the operating characteristics of the Fund, such as the governance around how the Fund itself will operate, the investments that it will make, or the rights and obligations of its shareholders. Rather, these aspects will be settled as part of commercial negotiations between the Commonwealth and the other shareholders as the Fund will be a commercial enterprise separate from the Commonwealth.

In respect of the investments of the Fund and the investment criteria, it is anticipated that the Fund will provide eligible businesses with long-term capital investments of between $5 million and $15 million, representing a minority equity interest in those businesses of between 10 and 40 per cent. The Fund will be set up with an investment mandate agreed by the Fund's shareholders that will define the characteristics of the types of businesses in which the Fund can invest. Those characteristics include businesses that have revenue of between $2 million and $100 million per year, that want funding of minority stakes between 10 and 40 per cent and that have a three year track record in revenue growth and profitability (appropriately adjusted to take account of the economic effects of the COVID-19 pandemic). Eligible businesses can be from a range of industries, be at different stages in their development and come from around the country. The Fund will also provide other services, such as advice and mentoring.

Investments of the Fund will be based on criteria specified in the investment mandate. The responsibility of investment decisions by the Fund rests with the Fund, and its investment decisions will be made in line with the Fund's investment mandate.

The governance arrangements for the Fund

Governance arrangements will be in place to protect the Commonwealth's and other participants' interests in the Fund, and will ensure that the Fund is, and its investments are, appropriately managed.

The Fund will employ an executive team to independently manage the corporation, with oversight from a Board of Directors (the Board). A Chief Executive Officer (CEO) will be appointed and will be responsible for the day to day management of the Fund.

The Board will generally comprise nominees from the Fund's shareholders, and three independent directors. The Commonwealth, being a founding shareholder and providing an initial commitment of $100 million, will be entitled to appoint one nominee director.

The role of the Board will be to oversee the management of the Fund to make sure that the capital and investments of the Fund are being managed in a way that is consistent with the investment mandate and with the legislative requirements for the Fund.

It is intended that the Fund operate independently of its shareholders. The Commonwealth will not have a role in the day-to-day operations of the Fund or in individual investments made by the Fund. On this basis, it was appropriate that the Act only provide for the authority for the Commonwealth to make an investment in the Fund, and leave the further operational aspects and governance arrangements to be determined by all the Fund's shareholders by commercial arrangement.

The Commonwealth continues to have reporting requirements on its investment in the Fund in accordance with section 20 of the Act. Further, the Minister is required, under section 72 of the *Public Governance, Performance and Accountability Act 2013*, to inform the Parliament of certain events, such as the Commonwealth's participation in the formation of a company, or its acquisition of shares in a company. Arrangements will be in place with other shareholders of the Fund to ensure the Commonwealth will have the necessary information to properly provide these reports.

The types of matters likely to be included in the rules

Section 16 of the Act provides that rules may make provision for, or in relation to, the exercise of rights, responsibilities, duties and powers by the Minister under the Act. The powers the Minister has under the Act include the power to participate in the forming of the Fund, acquiring shares in, or debentures of, the Fund, the power to make arrangements relating to the operation of the Fund, and the powers that come with these actions (for example, the power of the Minister as a shareholder in the Fund).

It is anticipated that the rules could be used to make further provisions in relation to the governance, integrity and clarity of the use of the Minister's powers under the Act, where necessary. For example, the rules could be used to govern the use of the Minister's powers, set the Minister's expectations on the use of those powers, or put in place limitations, if such powers are delegated in accordance with the Act.

The scope of the rule making power has been limited and ensures that the rules cannot create an offence or civil penalty, provide coercive enforcement powers, impose a tax, appropriate an amount from the Consolidated Revenue Fund or directly amend the text of the Act.

Committee comment

2.10 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the Act provides the authority for the Commonwealth to invest in the Australian Business Growth Fund (the Fund) and for the governance of that investment. The committee also notes the Treasurer's advice that the Act is not designed to define the operating characteristics of the Fund, such as the governance around how the Fund itself will operate, the investments that it will make, or the rights and obligations of its shareholders, and that these aspects will be settled as

part of commercial negotiations between the Commonwealth and the other shareholders as the Fund will be a commercial enterprise separate from the Commonwealth. In this respect, the committee notes that the Commonwealth will not have a role in the day-to-day operations of the Fund or in individual investments made by the Fund.

2.11 The committee further notes the Treasurer's advice that it is anticipated that the Fund will provide eligible businesses with long-term capital investments of between $5 million and $15 million, representing a minority equity interest in those businesses of between 10 and 40 per cent. An investment mandate agreed by the Fund's shareholders will define the characteristics of the types of businesses in which the Fund can invest, including businesses that have revenue of between $2 million and $100 million per year, that want funding of minority stakes between 10 and 40 per cent and that have a three year track record in revenue growth and profitability. The committee notes that the investment mandate is not a legislative instrument and is therefore not subject to Parliamentary scrutiny.

2.12 In relation to the types of matters likely to be included in the rules, the committee notes the Treasurer's advice that it is anticipated that the rules could be used to make further provisions in relation to the governance, integrity and clarity of the use of the Minister's powers under the Act. The committee also notes the Treasurer's advice that scope of the rule making power has been limited, however the committee notes that these are standard limitations included in almost all rule-making powers.

2.13 The committee reiterates its view 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.

2.14 The committee considers that some of the matters that are to be left to the Fund's investment mandate (such as the core eligibility requirements for businesses to receive investment from the Fund) should have been included on the face of the primary legislation, particularly in circumstances where the governance arrangements for the Fund mean that the Commonwealth will have little direct control over the $100 million that it has committed to the Fund.

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
Bill status	Received Royal Assent on 24 March 2020

Henry VIII clauses—modification of primary legislation by delegated legislation[7]

2.15 In *Scrutiny Digest 5 of 2020* the committee requested 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.[8]

Minister's response[9]

2.16 The Minister for Families and Social Services advised:

> I note the issues the Committee has outlined in *Scrutiny Digest 5 of 2020*, particularly in relation to item 40A of Schedule 11 to the Act, which provides me the power to modify social security law by legislative instrument to vary provisions on a temporary basis relating to the qualifications of persons for social security payments and the rate of social security payments.
>
> I appreciate the need for scrutiny around a provision such as item 40A of Schedule 11 and I note the Committee's concerns in relation to the Explanatory Memorandum. This power will allow the Government to act rapidly to ensure appropriate support is provided to those in need during the unprecedented and rapidly changing circumstances we are

7 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).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2020*, pp. 13-14.

9 The minister responded to the committee's comments in a letter dated 6 May 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

experiencing in respect of the Coronavirus outbreak. It also allows the Government to address any unintended consequences in the application of legislation as changes to social security payments are implemented. I have provided some additional information below in relation to its inclusion, for the Committee's consideration.

The Committee requested advice on the circumstances in which the power in item 40A of Schedule 11 would be used.

By way of example, the item 40A of Schedule 11 power has been used to:

- provide additional financial support to students
- extend the period that applicants for social security payments have to lodge a claim after submitting an intent to claim, to address the unprecedented number of applications for social security made to Services Australia
- reduce the partner income test taper rate for JobSeeker Payment from 60 cents in the dollar to 25 cents in the dollar.

As the Committee notes, item 40A of Schedule 11 will be repealed on 31 December 2020 and all instruments made under the item will cease having effect on that date. In addition, before making temporary modifications to social security law under item 40A of Schedule 11, I must be satisfied that the modifications are in response to circumstances relating to COVID-19.

Committee comment

2.17 The committee thanks the minister for this response. The committee notes the minister's advice that item 40A of Schedule 11 will allow the government to act rapidly to ensure appropriate support is provided to those in need during the unprecedented and rapidly changing circumstances experienced in respect of the coronavirus outbreak.

2.18 The committee also notes the minister’s advice regarding the circumstances where the power at item 40A has been used, including to extend the period that applicants for social security payments have to lodge a claim after submitting an intent to claim.

2.19 While the committee welcomes this additional information, the committee takes this opportunity to reiterate that 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.

2.20 The committee considers that if the Parliament is sitting changes to, or exemptions from, primary legislation should be made by introducing a bill for consideration by the Parliament, rather than relying on the use of a Henry VIII clause.

2.21 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.

Delegation of legislative power

Broad discretionary powers[10]

2.22 In *Scrutiny Digest 5 of 2020* the committee requested 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.[11]

Minister's response

2.23 The minister advised:

> The Committee has also raised concerns regarding my ability to alter or extend the operation of supplement payments, including allowing the amount of the Supplement to be set below the amount provided for by the Parliament in the primary legislation.
>
> The Government has announced the Supplement will be paid at the rate of $550 per fortnight, and will be paid from 27 April 2020. As the situation develops, the Government will review the settings associated with income support to ensure we are responding to circumstances as they arise. Flexibility around the timing and scope of payments is required given the uncertainty over the length and severity of the economic impacts of the Coronavirus, and how we emerge from the crisis.
>
> Providing additional financial support through social security is just one of the ways we are helping support individuals, communities and the economy during these testing times.

Committee comment

2.24 The committee thanks the minister for this response. The committee notes the minister's advice that the government will review the settings associated with income support to ensure they are responding to circumstances as they arise. The committee also notes the minister's advice that flexibility around the timing and

10 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).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2020*, pp. 14-15.

scope of payments is required given the uncertainty over the length and severity of the economic impacts of the coronavirus, and how we emerge from the crisis.

2.25 While the committee acknowledges this advice, the committee has generally not accepted administrative flexibility as a sufficient justification for broad discretionary powers to modify significant schemes by delegated legislation, particularly when there is limited guidance on the face of the primary legislation as to when these powers should be exercised.

2.26 The committee considers that if the Parliament is sitting changes to the COVID-19 supplement scheme should be made by introducing a bill for consideration by the Parliament, rather than relying on the use of the broad discretionary power to modify the scheme by delegated legislation.

2.27 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.

Family Assistance Legislation Amendment (Improving Assistance for Vulnerable and Disadvantaged Families) Bill 2020

Purpose	This bill seeks to makes changes to Additional Child Care Subsidy (child wellbeing) and to the calculation method used when an individual whose relationship status changes throughout the year meets the Child Care Subsidy (CCS) reconciliation conditions
Portfolio	Education
Introduced	House of Representatives on 26 February 2020
Bill status	Before the House of Representatives

Retrospective commencement—Schedule 1[12]

2.28 In *Scrutiny Digest 4 of 2020* the committee requested the minister's advice as to why it is necessary and appropriate for the measures in items 7 and 8 of Schedule 1 to commence retrospectively. In particular, in relation to item 7, whether there will be a detrimental effect for any providers, and if so the extent of that detriment and the number of providers affected, and in relation to item 8, whether any providers may have reasonably relied on the removal of the civil penalty amount and how many providers may be subject to the penalty retrospectively.[13]

Minister's response[14]

2.29 The minister advised:

> **Item 7 of Schedule 1 – subparagraph 197G(1)(b)(ii) and (iii)**
>
> **Background to the measure in item 7 of Schedule 1**
>
> Section 197G of the *A New Tax System (Family Assistance) (Administration) Act 1999* (Family Assistance Administration Act) allows the Secretary to vary the approval of an approved provider to remove an approved child care service from the provider's approval if that service has failed to

12 Schedule 1, items 7 and 8. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2020*, pp. 3-5.

14 The minister responded to the committee's comments in a letter dated 6 May 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

provide care for 3 continuous months. The effect of a service being removed from a provider's approval is that families can no longer receive the Child Care Subsidy for care provided by the provider at that service and the provider will need to reapply for approval in respect of that service for that service to be able to provide care that is eligible for Child Care Subsidy.

Paragraph 197G(1)(b) sets out circumstances, where although a service may not have been providing care for 3 continuous months, it is not appropriate for the service to be removed from the provider's approval; in other words where there is an appropriate reason for the service to not be providing care over the 3 month period and removal of approval in respect of the service is therefore not warranted. This is a protection for the provider. It also protects the interests of families that are enrolled with the service.

Prior to amendments to paragraph 197G(1)(b) made under the Family Assistance Legislation Amendment (Building on the Child Care Package) Bill 2019 (Building on the Child Care Package Bill), these circumstances, where non-operation for 3 months was appropriate, were:

i. **the service is subject to a determination under section 195C** that the service need not operate for the period;

ii. the Secretary is satisfied that, because of special circumstances affecting the service, the provider's approval should not be varied to remove the child care service from the approval.. [Emphasis added]

The Building on the Child Care Package Bill amended the Family Assistance Administration Act to insert a new section 197AA, which gave the Secretary the power to suspend the approval of an approved provider, or the approval of the approved provider in respect of one or more of its services, at the provider's request (i.e. voluntary suspension) (item 17 of Schedule 2 to the Building on the Child Care Package Bill).

Consequently, in order to address this new circumstance, where it would be appropriate for a service to not be operating for 3 months, a consequential amendment was made to paragraph 197(1)(b) to repeal that paragraph and substitute it with a new paragraph that included voluntary suspension under section 197AA ((item 20 of Schedule 2 to the Building on the Child Care Package Bill). The circumstances in the new paragraph 197G(1)(b) were:

i. the provider's approval with respect to the service is suspended under section 197AA for any part of the 3 month period;

ii. **all approved child care services** of the provider are subject to a determination under section 195C that the service need not operate for the period;

ii. the Secretary is satisfied that, because of special circumstances affecting the provider, the provider's approval should not be cancelled. [Emphasis added]

Unfortunately, an error was made in the drafting of the new subparagraph 197G(1)(b)(ii), which instead of referring to *the service* (which was not operating for 3 months) being subject to a determination under section 195C, referred to *all approved child care services* as needing to be subject to a determination under section 195C.

This drafting error:

- disadvantages providers, and families wishing to receive care at the service, as it means that even if the *one* service which was not operating for 3 months, and there was a determination under section 195C in place allowing this, the Secretary could still remove the service from the provider's approval, because *all* approved services of the provider did not have such a determination under section 195C in place (even though technically they would not need such a determination); and
- undermines the proper operation of section 197G, as logically it does not make sense.

The measure in item 7 and reason for its retrospectivity

Item 7 of Schedule 1 to the Bill repeals subparagraphs 197G(1)(b)(ii) and (iii) and substitutes them with the following:

> *"(ii) **the service** is subject to a determination under section 195C that the service need not operate for the period;*
>
> *(iii) the Secretary is satisfied that, because of special circumstances affecting the service, the provider's approval should not be so varied."* [Emphasis added]

The amendment to subparagraph 197G(1)(b)(ii) under item 7 of Schedule 1 in practice merely repeals the reference to "*all approved child care services of the provider*" and replaces it with a reference to "*the service*" (which has not been operating for 3 months).

This amendment corrects the drafting error made to paragraph 197G(1)(b) in the Building the Child Care Package Bill and returns the particular circumstance, which justifies why a service need not have been operating for the 3 month period, to the form that it was in prior to amendments made in the Building the Child Care Package Bill.

This restores a necessary protection to providers and families receiving care at the service. It also enables the provision to operate effectively in a manner consistent with the long standing policy intention behind the provision.

Item 7 of Schedule 1 has the retrospective commencement date of 13 December 2019, being immediately after Schedule 2 to the *Family*

Assistance Legislation Amendment (Building on the Child Care Package) Act 2019 (Building on the Child Care Package Act) commenced. This retrospective commencement date means that as soon as the erroneous paragraph 197G(1)(b) took effect, the correction to it under item 7 of Schedule 1 would also take effect.

This retrospective commencement date would thus ensure that there was no period of time in which:

- providers and families at their affected services could be disadvantaged by an unintentional drafting error; and
- the proper, fair and effective operation of the Family Assistance Administration Act could be undermined through the unintentional error.

It is noted that the retrospective commencement of item 7 has had no detrimental effect for any providers. Indeed, it would be of beneficial effect.

Item 8 of Schedule 1 – subsection 204K(6)

Background to the measure in item 8 of Schedule 1

Section 204K of the Family Assistance Administration Act required an approved provider to give notice to an appropriate State/Territory body that the provider considered a child to be at risk of serious abuse or neglect:

- within 6 week after a certificate given to the Secretary under section 85CB of the *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) that a child is or was at risk of serious abuse or neglect takes effect (subsection 204K(1));
- before applying for a determination under section 85CE of the Family Assistance Act in respect of a child being at risk of serious abuse or neglect (subsection 204K(3)).

The reason for the notification requirement is to ensure that the appropriate State/Territory bodies are made aware of the risk to the child and can work with the child's family to provide assistance to benefit the child's wellbeing, health and safety.

Failure by a provider to give the notification to the State/Territory body has been both an offence (60 penalty units) and civil penalty provision (50 penalty units) under subsection 204K(5) and (6) of the Family Assistance Administration Act respectively since section 204K was included in the Administration by the *Family Assistance Legislation Amendment (Jobs for Families Child Care Package) Act 2017* with effect from 2 July 2018. This recognises that failure by a provider to notify appropriate State/Territory bodies that a child is at risk of serious abuse or neglect could compromise the ability of the family to receive the appropriate help needed.

Item 81 of Schedule 1 of the Building on the Child Care Package Bill repealed section 204K and substituted a new section 204K. However, the only substantive, intentional change to section 204K was that the bodies formerly known as an 'appropriate State or Territory body' were renamed as 'appropriate State/Territory support agency'. This change in terminology was made to address confusion in the child care sector, where some child care providers had thought that the term referred only to a state or territory department or agency dealing with matters of child protection and did not realise that other support agencies were also included.

The drafting approach of repealing and substituting the whole of section 204K, despite the minimal substantive changes, was taken as the term 'appropriate State or Territory body' was used many times throughout the provision.

However, due to an unintentional drafting error, although subsection 204K(6) was still identified as a civil penalty provision, the civil penalty amount of 50 penalty units was inadvertently omitted.

This had the unintended consequence of creating uncertainty for providers, families, appropriate State/Territory support agencies and the Australia Government about the civil penalty consequences attached to a breach of subsections 204K(1) and (3). It also potentially undermined the safety and wellbeing of vulnerable children, who were at risk of serious abuse or neglect, as a failure by a provider to appropriately notify the appropriate State/Territory support agencies no longer attracted a clear civil penalty.

The measure in item 8 and reason for its retrospectivity

Item 8 of Schedule 1 to the Bill adds the civil penalty amount of 50 penalty units to the end of subsection 204K(6). The amendment merely reinstates the civil penalty amount that has been attached to breach of subsection 204K(1) and 204K(3) since these provisions took effect on 2 July 2018; and which were unintentionally repealed.

Item 8 of Schedule 1 has the retrospective commencement date of 16 December 2019, being immediately after Part 1 of Schedule 1 to the Building on the Child Care Package Act commenced. This retrospective commencement date means that as soon as the erroneous omission of the civil penalty amount in subsection 204K(1) took effect, the correction to reinsert in under item 8 of Schedule 1 would also take effect.

This retrospective commencement is appropriate as it:

- ensures that there is certainty for providers, families, appropriate State/Territory support agencies and the Australia Government about the civil penalty consequences attached to a breach of subsections 204K(1) and (3);

- promotes and facilitates the safety and wellbeing of vulnerable children at risk of serious abuse or neglect, by ensuring there is no uncertainty about, or gap in the application of an appropriate civil penalty amount, that applies where there has been a failure by a provider to appropriately notify the appropriate State/Territory support agencies;
- ensures that at all times the importance of a provider notifying appropriate State/Territory support agencies where a child is at risk of serious abuse or neglect is supported by the legislation through a clear and enforceable civil penalty provision;
- merely reinstates what was previously in the legislation, is the long standing policy intention behind the provision, and was unintentionally repealed.

It is noted that the retrospective commencement of item 8 has, to date, had no detrimental effect for any providers during the period 16 December 2019 to the present.

It is respectfully submitted to the committee that the retrospective commencement of items 7 and 8 of Schedule 1 of the Bill are necessary and appropriate in the above described circumstances.

Committee comment

2.30 The committee thanks the minister for this response. The committee notes the minister's advice that, in relation to item 7 of Schedule 1, the amendment corrects the drafting error made to paragraph 197G(1)(b) in the Building the Child Care Package Bill and returns the particular circumstance, which justifies why a service need not have been operating for the 3 month period, to the form that it was in prior to amendments made in the Building the Child Care Package Bill. The committee also notes the minister's advice that this restores a necessary protection to providers and families receiving care at the service and that this enables the provision to operate effectively in a manner consistent with the long-standing policy intention.

2.31 The committee also notes the minister's advice that the retrospective commencement of item 7 has had no detrimental effect for any providers and would be of beneficial effect.

2.32 In relation to item 8 of Schedule 1, the committee notes the minister's advice that the amendment merely reinstates the civil penalty amount that has been attached to breach of subsection 204K(1) and 204K(3) since these provisions took effect on 2 July 2018; and which were unintentionally repealed.

2.33 The committee also notes the minister's advice that the retrospective commencement of item 8 has, to date, had no detrimental effect for any providers during the period 16 December 2019 to the present.

2.34 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*).

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

Retrospective application—Schedule 2[15]

2.36 In *Scrutiny Digest 4 of 2020* the committee requested the minister's advice as to why it is necessary and appropriate for the amendments in Schedule 2 to apply retrospectively. The committee's consideration of the matter would be assisted if the advice addresses whether the amendments will have a detrimental effect on any individuals, and if so, the number of individuals that may be affected.[16]

Minister's response

2.37 The minister advised:

> Please note that Schedule 2 of the Bill will be removed by Parliamentary amendment prior to debate on the Bill recommencing. This is because the measures in Schedule 2 were moved to Part 4 of Schedule 2 to the Coronavirus Economic Response Package Omnibus (Measure No. 2) Bill 2020 (Coronavirus Measures No. 2 Bill), which was passed by both Houses on 8 April 2020.
>
> Notwithstanding, I have provided advice to the Committee about why the retrospective commencement of the measures in Schedule 2 is necessary and appropriate.
>
> **Schedule 2 – Amendment to CCS reconciliation**
>
> The measures at Schedule 2 insert new subsections 105E(4) to (7) of the Family Assistance Administration Act. These new subsections modify how Child Care Subsidy (CCS) entitlements are reviewed and calculated when an individual, who is a member of a couple for some but not all of the CCS fortnights in an income year, meets the CCS reconciliation conditions.
>
> Currently all CCS claimants' entitlement to CCS is calculated using the methodology in Schedules 2 and 3 of the Family Assistance Act. CCS reconciliation occurs after the income year, when the individual meets the CCS reconciliation conditions. At that point, the Secretary reviews all

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15 Schedule 2, item 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2020*, pp. 5-6.

entitlement determinations made throughout the year in respect of that individual, using the person's actual Adjusted Taxable Income (ATI) (and other information relevant to the individual's entitlement) and remakes all entitlement determinations.

There are 3 possible outcomes from CCS reconciliation. The individual can owe a debt due to being paid more CCS during the year than they were entitled to, be paid an additional amount of CCS due to not being paid all the CCS they were entitled to during the year, or have no adjustment where the individual was paid the correct amount of CCS during the year.

Around 45,000 individuals receiving CCS partner, separate or die during the year. During the financial year, a claimant's CCS percentage rate is calculated and paid based on a claimant's (combined with their partner's if they have one) estimated ATI for that financial year.

If an individual had a partner during the financial year, but the partnership did not extend for the entire financial year (a 'part year partner'), instead of using the part year partner's entire actual ATI for that financial year, only a proportion of the partner's ATI (based on the number of CCS fortnights they were partnered) is used to re-calculate the CCS percentage rate the claimant was actually entitled to for that financial year. So, for example, if the partnership lasted for 3 months, only 3 months' worth of the part year partner's ATI will be added to the claimant's income at CCS reconciliation, in recognition that the partner only contributed to the partnership for 3 months.

If the difference between:

- the part year partner's total annual income used to pay CCS during the year; and
- the proportion of the partner's income used at CCS reconciliation was large enough,

it resulted in the claimant having a final CCS reconciliation outcome of being entitled to a higher CCS percentage rate than they were paid during the year, resulting in arrears being paid directly to the claimant as a 'top up'.

Analysis revealed, however, for example, if the individual earned a low income, and the part year partner earned a high income, the proportion of the partner's income added to the individual's income at CCS reconciliation could result in the individual being entitled to a lower CCCS percentage rate than they were paid during the year, creating a debt.

Consequently, this methodology was unfair, since their CCS reconciliation outcome was dependent on an unpredictable set of personal circumstances (i.e. the duration of the partnership and the income of the part year partner throughout the year).

The amendments made by the measures in Schedule 2 of this Bill to section 105E were intended to address this and to provide for a fairer

entitlement calculation methodology to apply to individuals with part year partners, at CCS reconciliation. This fairer result was to be achieved as the new subsection 105E(4) to (7) of the Family Assistance Administration Act have the following effect:

- They adjusted whether or not the annual cap (which is a cap on the CCS payable based on whether the individual exceeded the annual cap income threshold) would apply to each CCS fortnight (as opposed to the entire income year) depending on whether the individual was single or partnered and their income was under or above the annual cap income threshold during that CCS fortnight;
- For the purpose of determining the individual's applicable percentage, the individual's ATI would also be considered across each CCS fortnight (as opposed to across the entire income year), depending on whether or not the individual was single or in a relationship with a part year partner and the impact of that on the individual's ATI for that CCS fortnight.

A fairer CCS reconciliation entitlement outcome would thus be achieved, as individuals with part year partner's would have their annual cap and ATI considered on a CCS fortnightly basis as opposed to on an income year basis, which better recognises the fluctuations to their ATI which might result from them being in relationship(s) for only part of the year.

Essentially, the new CCS reconciliation method means that if the individual follows the Government's instructions to keep their estimated annual income up to date, their CCS reconciliation outcome will closely reflect the CCS entitlements paid to them during the year. The fairer calculation method to be used at CCS reconciliation imposes no additional requirements for CCS claimants to meet, or plan for and greatly increases the probability of a nil adjustment CCS reconciliation outcome where individuals have accurately reported their income throughout the year.

Additionally, the retrospective commencement of the provisions in Schedule 2 allow the new reconciliation methodology to be applied to CCS amounts payable to individuals for care provided to their children during the 2019-2020 financial year. This would not be possible without retrospective commencement of the provisions. This is to enable the fair reconciliation methodology to be applied to individuals sooner.

Notably, the Constitutional savings provision included at subitem 2(2) of Schedule 2 states that the amendment made by item 1 of Schedule 2 have no effect to the extent (if any) to which it would:

• result in an acquisition of property (within the meaning of paragraph 51 (xxxi) of the Constitution) from a person otherwise than on just terms (within the meaning of that paragraph); or

• impose taxation (within the meaning of section 55 of the Constitution).

> Thus to the extent that any individuals were disadvantaged by the retrospective commencement of these provisions, it would be open to them to challenge the application of the provision to them and seek compensation on just terms for an amount equal to the amount they were disadvantaged by.
>
> Extensive analysis by the Department of Education, Skills and Employment has been unable to identify that any of the around 45,000 individuals who partner, separate or die during the year that make up the cohort would be disadvantaged by this new measure.
>
> This measure allows for a more consistent and fair outcome at CSS reconciliation for this cohort.
>
> It is respectfully submitted to the committee that the retrospective commencement of the measures in Schedule 2 of the Bill, while to be removed from the Bill as they are now dealt with in the Coronavirus Measures No. 2 Bill, are necessary and appropriate in the above described circumstances.

Committee comment

2.38 The committee thanks the minister for this response. The committee notes the minister's advice that the retrospective commencement of the provisions in Schedule 2 allow the new reconciliation methodology to be applied to CCS amounts payable to individuals for care provided to their children during the 2019-2020 financial year and that this is to enable the fair reconciliation methodology to be applied to individuals sooner.

2.39 The committee also notes the minister's advice that extensive analysis by the Department of Education, Skills and Employment has been unable to identify that any of the around 45,000 individuals who partner, separate or die during the year that make up the cohort would be disadvantaged by this new measure. Additionally, the committee also notes the minister's advice that for any individuals who were disadvantaged by the retrospective commencement of these provisions, it would be open to them to challenge the application of the provision to them and seek compensation on just terms for an amount equal to the amount they were disadvantaged by.

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

Health Insurance Amendment (General Practitioners and Quality Assurance) Bill 2020

Purpose	This bill seeks to modify Medicare administrative processes for recognition as a specialist general practitioner for Medicare purposes under the *Health Insurance Act 1973* and to align Medicare eligibility for GPs with the National Registration and Accreditation Scheme registration requirements. The bill also seeks to remove references to repealed legislation, and to repeal the *Health Practitioner Regulation (Consequential Amendments) Act 2010*
Portfolio	Health
Introduced	House of Representatives on 27 February 2020
Bill status	Before the House of Representatives

Retrospective validation[17]

2.41 In *Scrutiny Digest 4 of 2020* the committee requested the minister's advice as to the necessity and appropriateness of retrospectively validating declarations made by the minister under section 124X, including a more detailed explanation regarding whether there will, or may, be a detrimental effect to any involved parties.[18]

Minister's response[19]

2.42 The minister advised:

> The changes proposed in the Bill address an outdated reference within the definition of 'quality assurance activity' provided in Section 124W(1)of the HIA. This will be corrected by updating the reference from the repealed *Health Care (Appropriation} Act 1998* (HCAA) to the *Federal Financial Relations Act 2009* (FFRA). From 1 July 2009 the FFRA became the main vehicle for Commonwealth payments to states and territories for public hospital and other public healthcare services. As a consequence of updating that reference within the definition of a 'quality assurance activity', the Bill provides for declarations made since the change in

17 Schedule 2, items 1 and 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2020*, pp. 8-9.

19 The minister responded to the committee's comments in a letter dated 7 May 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

legislation to be taken to have been valid even though there was a delay in changing the reference to that legislation in s124W(l).

The amendment addresses the risk that these declarations might be considered to be technically invalid. If that were the case, people participating in the scheme might not receive the protections intended by those declarations.

It is therefore desirable to retrospectively validate declarations made since 1 July 2009 so that, notwithstanding the outdated legislative reference, people who have participated in declared quality assurance activities can remain confident that they are protected by the immunity conferred by s124ZB; and the prohibition of disclosure of information and production of documents at s124Y of the HIA.

The Bill will not result in a detrimental effect on anyone. The Bill does not expand or otherwise alter existing or future declarations of qualified privilege in any way. Any person participating in a declared activity will continue to be protected and will be taken to have always been participating in a validly declared activity, as intended from the date of each declaration. A quality assurance activity declaration ceases after 5 years, unless another is made, and this is not affected by the proposed amendment (s124X(4)).

In contrast, however, if the changes are not made to have retrospective effect, there is a risk that people who participated in good faith in those activities declared as a 'quality assurance activity' after 1 July 2009 might be taken to have participated in an activity not protected under the immunity relied on under s124ZB and not protected by the prohibition on disclosure relied on under s124Y.

One such practical implication of this could arise if a person had a material right to proceed against another person·, for example in the event of a defamation case, if it were successfully claimed that immunity never applied due to an administrative delay in updating a reference to repealed legislation. If this was to occur it would cause unnecessary detriment to participants and organisations undertaking the quality assurance activities and undermine confidence in the operation of quality assurance confidentiality arrangements under the HIA.

The Commonwealth is not aware of any action where a person or organisation has any interest in challenging the immunity conferred under s124ZB for any declarations made-past or current.

Committee comment

2.43 The committee thanks the minister for this response. The committee notes the minister's advice that the amendment addresses the risk that declarations made since the change from the *Health Care (Appropriation) Act 1998* to the *Federal Financial Relations Act 2009* might be considered to be technically invalid. The

committee notes that if that were the case, people participating in the scheme might not receive the protections intended by those declarations.

2.44 The committee also notes the minister's advice that the bill will not result in a detrimental effect on anyone and that the bill does not expand or otherwise alter existing or future declarations of qualified privilege in any way. The committee further notes the minister's advice that any person participating in a declared activity will continue to be protected and will be taken to have always been participating in a validly declared activity, as intended from the date of each declaration.

2.45 The committee also notes the minister's advice that if the changes are not made to have retrospective effect, there is a risk that people who participated in good faith in those activities declared as a 'quality assurance activity' after 1 July 2009 might be taken to have participated in an activity not protected under the immunity relied on under s124ZB and not protected by the prohibition on disclosure relied on under s124Y.

2.46 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*).

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

National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020

Purpose	This bill seeks to amend the *National Radioactive Waste Management Act 2012* to establish a single, purpose built National Radioactive Waste Management Facility, which will support Australian nuclear science and technology by providing for the permanent disposal of low level waste and temporary storage of intermediate level waste
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 13 February 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation—acquisition of land by the Commonwealth[20]

2.48 In *Scrutiny Digest 3 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to allow the minister to specify additional land that is required to provide all-weather access to the site via a notifiable instrument, which is not subject to parliamentary tabling or disallowance; and whether the bill can be amended to specify that any regulations prescribing additional land for expansion of the site, and any instruments specifying additional land for all-weather access, do not commence until after the Parliament has had the opportunity to scrutinise the instruments or regulations.[21]

Minister's response[22]

2.49 The minister advised:

All-weather road access

While investigations to date have not identified the need for additional all-weather road access, there remains the potential for such access to be

20 Schedule 1, item 15, proposed sections 19A and 19B. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2020*, pp. 7-8.

22 The minister responded to the committee's comments in a letter dated 20 March 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

required as a condition of the Australian Radiation Protection and Nuclear Safety Agency siting, construction and/or operational licenses. The Bill provides for this additional land to be acquired under proposed section 19B by notifiable instrument.

It is necessary to carry over a provision which allows for additional land to be acquired for all-weather road access, in order to retain the ability to respond to regulatory requirements for access to the site. It is appropriate that this land be acquired by way of notifiable instrument rather than by disallowable instrument. This is because an inability to construct all-weather road access may jeopardise the ability for the Facility to obtain its operational licence. An inability to acquire this land at this point in the development process would adversely impact on the ability for the government to safely deliver the Facility, which is necessary to support the nuclear medicine industry.

The current Act specifically allows for the Minister to acquire land for the purposes of providing all-weather road access to the Facility, without parliamentary oversight. This power was also conferred on the Minister under the Act's predecessor, the *Commonwealth Radioactive Waste Management Act 2005*.

The proposed specification of the site in the Bill provides oversight beyond the current provisions in the Act that enable a single minister to apply their absolute discretion to the land acquisition. In addition, the requirement to make a notifiable instrument to prescribe land for all-weather road access improves public accessibility to the instrument. While the current Act requires declarations to be published in the Gazette, the Bill requires acquisitions be made by notifiable instrument, which must be published on the centrally managed Federal Register of Legislation. This will allow members of the public to view any such instruments alongside the regulations acquiring additional land for the facility and the Act.

Site expansion

Proposed subsection 19A(1) allows for the regulations to prescribe additional land required for the purposes of expanding the site for the establishment and operation of the Facility. Where this occurs, the regulations are also required to state a 'prescribed acquisition time' from which the additional land will be acquired for these purposes. This provides flexibility in the date the acquisition may take effect. Subject to any regulatory requirements or lengthy delays in the Parliamentary calendar, the government expects to specify an acquisition time that sits outside of the relevant disallowance period.

The Bill makes clear that no other land may be acquired to expand the site of the Facility by specifying the boundaries and location of the land for this purpose (proposed subsection 19A(2)). This provides Parliament with the opportunity to consider this land alongside the land proposed for the site of the Facility, allowing both defined pieces of land to be subject to Parliamentary scrutiny. This land specified in proposed subsection 19A(2)

is entirely within the parcel of land originally nominated by the land owners as part of the site selection process. The proposed site for the Facility, specified in proposed section 5, comprises only one part of the parcel of land nominated by the same land owners. Extensive consultation has taken place with the land owners as part of the nomination and approval process relating to this land.

Committee comment

2.50 The committee thanks the minister for this response. In relation to the acquisition of land required for all-weather access to the site by notifiable instrument, the committee notes the minister's advice that it is considered necessary and appropriate to specify additional land for all-weather access to the site via notifiable instrument, rather than disallowable instrument, as it will provide for greater certainty for the facility to obtain its operational license and the government to safely deliver the facility. The committee also notes the advice that providing for all-weather access without parliamentary oversight is consistent with past practice and that by specifying the use of notifiable instrument, the bill ensures greater transparency than in the past.

2.51 In relation to the acquisition of land for expansion of the site through regulations, the committee acknowledges that proposed subsection 19A(2) limits the additional land that may be prescribed for expansion of the site. The committee also notes the minister's advice that, subject to any regulatory requirements, the government expects to specify an acquisition time that sits outside of the relevant disallowance period.

2.52 In light of the minister's detailed advice, the committee leaves to the Senate as a whole the appropriateness of:

- **allowing regulations prescribing additional land for expansion of the site made under proposed subsection 19A(1) to commence before the Parliament has had the opportunity to scrutinise the regulations; and**
- **specifying additional land that is required to provide all-weather access to the site via notifiable instruments, which are not subject to parliamentary tabling or disallowance.**

2.53 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation for information.

Procedural fairness[23]

2.54 In *Scrutiny Digest 3 of 2020* the committee requested the minister's advice as to why it is necessary and appropriate to limit the operation of the natural justice hearing rule in relation to consultation conducted under proposed section 19C.[24]

Minister's response

2.55 The minister advised:

> **Procedural Fairness**
>
> In light of the lack of information provided, the committee requests the minister's advice regarding why it is necessary and appropriate to limit the operation of the natural justice hearing rule in relation to consultation conducted under proposed section 19C.
>
> The Bill has been introduced to give effect to the Government's commitment to establish a single, purpose built Facility at Napandee, near Kimba in South Australia, and to provide certainty to impacted communities and other stakeholders regarding the location of the Facility.
>
> Although the Bill would prescribe the location for the Facility, the Facility could not be established without the necessary regulatory approvals, licences and permits. In the process of applying for these, it may become necessary for the Commonwealth to acquire additional land to allow for further enabling works, cultural heritage protection, community research and development opportunities, and to accommodate site-specific designs for the Facility. Regulators may also require secondary or emergency all-weather road access to the site.
>
> New sections 19A and 19B would allow for the Commonwealth to make additional land acquisitions that may be necessary for the Facility to be established at Napandee. They provide further certainty to impacted communities by ensuring the Commonwealth is equipped to deal with critical issues that could be raised by regulators, which have the potential to prevent the Facility from being established at Napandee. Consequently, the validity of acquisitions made under new section 19A or 19B could become critical to ensuring that the Facility is ultimately able to be established at Napandee.
>
> New section 19C would provide an exhaustive statement of the requirements of the natural justice hearing rule in relation to additional land acquisitions made under new section 19A or 19B. At common law, the natural justice hearing rule broadly requires that a person 'be given a hearing before a decision is made that adversely affects a right, interest or

23 Schedule 1, item 15, proposed section 19C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2020*, p. 9.

expectation which they hold.'[25] The requirements in new section 19C embody this principle, insofar as they would require the Minister to:

- notify the community of any proposals to make acquisitions under section 19A or 19B;
- invite interested persons to comment on the proposed acquisition; and
- take into account any relevant comments received prior to making the acquisition.

This would operate in a similar manner to section 18 of the current Act, which also provides an exhaustive statement of the rules of natural justice with respect to site selection decisions under section 14 of the Act. Both these sections would be repealed as part of the broader repeal of the current framework for selecting a site.

New section 19C seeks to retain the key elements of the 'procedural fairness requirements' set out in section 18 of the current Act. However, the process set out new section 19C is less extensive. This is appropriate because, under the Act as amended, the Minister[26] would only be making minor, ancillary acquisition decisions about land nearby the area specified in new section 5. Furthermore, certain acquisitions, such as those relating to all-weather road access for the Facility, would be (subject to licensing requirements) unlikely to significantly affect the rights or interests of any person other than the owner of the land to be acquired.

New section 19C would ensure fairness remains at the centre of any decision-making under section 19A or 19B, while also addressing the uncertainties that flow from continually evolving common law conceptions of natural justice. The codification of the natural justice hearing rule in this respect serves the broader objects of the Bill - namely, to provide certainty to impacted communities and stakeholders. This is achieved by ensuring all parties are precisely aware of what is required to comply with the natural justice hearing rule, and to ensure additional land acquisitions are properly made.

New section 19C ensures an appropriate balance is struck between the rights of interested parties (to be heard before an additional land acquisition is made), and the need for communities and stakeholders to have certainty about the Commonwealth's ability to establish the Facility at Napandee.

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25 R Creyke & J McMillan, Control of Government Action: Text, Cases and Commentary, 3rd ed, 2012, p 629.

26 In the case of an acquisition made under section 19A, in the Minister's capacity as the rule maker for the regulations.

Committee comment

2.56 The committee notes the minister's advice that providing an exhaustive statement of the requirements of the natural justice hearing rule, and thereby limiting its operation, is considered necessary and appropriate in relation to the consultation conducted under proposed section 19C to provide greater certainty to impacted communities and stakeholders. The committee further notes that section 19C is intended to retain key elements of the procedural fairness requirements set out in section 18 of the current Act and that, while it is less extensive than the current requirements, this is appropriate as decisions would be unlikely to significantly affect the rights or interests of any person other than the owner of the land to be acquired.

2.57 In light of the minister's detailed advice, the committee leaves to the Senate as a whole the appropriateness of excluding aspects of the natural justice hearing rule in relation to decisions about the making of regulations to expand the site and the making of instruments to provide all-weather access to the site.

Significant matters in delegated legislation—exclusion of State, Territory and Commonwealth laws[27]

2.58 In *Scrutiny Digest 3 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to allow regulations to exclude the operation of prescribed State, Territory or Commonwealth laws; and the appropriateness of amending the bill to remove proposed subsections which provide that the regulations may exclude the operation of prescribed State, Territory or Commonwealth laws.[28]

Minister's response

2.59 The minister advised:

> Detailed technical assessments were conducted at a number of shortlisted sites before Napandee was identified as the preferred site for the Facility. As part of this process, there may have been disruption to land caused by activities such as constructing or rehabilitating bores, operating drilling equipment, placing meteorological or hydrological monitoring equipment on the land, or collecting water or flora and fauna samples.
>
> Section 11 of the Act currently provides authority for activities to be conducted at shortlisted sites for a wide range of purposes, including to ensure land is left, as nearly as practicable, in the condition it was in

27 Schedule 1, item 35, proposed sections 34G, 34GA and 34GB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2020*, pp. 9-10.

immediately before the site assessment process. Section 23 of the Act ensures that activities to remediate the land can be conducted after the site is acquired, and sections 12 and 13 of the Act ensure these activities can be conducted irrespective of other Commonwealth, State or Territory laws. The Bill repeals these sections of Act.

Proposed sections 34G, 34GA and 34GB are transitional provisions that would confer a narrower authority for the Commonwealth to conduct activities at shortlisted sites, only insofar as 'necessary for or incidental to the purpose of leaving the land, as nearly as practicable, in the condition in which it was immediately before the [assessment process]'. Proposed subsections 34GA(2)-(4) are based on subsections 12(2)-(4) in the Act and proposed section 34GB(2) is based on subsection 13(2). These provisions applied to activities conducted on the land throughout the site selection process.

These provisions are important as they ensure that the Government is able to continue to remediate land after the commencement of the Bill. It is appropriate to retain the ability to exclude State, Territory and other Commonwealth laws that would regulate, hinder or prevent the Commonwealth from conducting activities necessary to remediate land disrupted during the site assessment process.

The absence of these provisions would disadvantage landholders of shortlisted sites, as remediation activities could be stymied by regulatory requirements that did not apply when the land was initially disrupted.

Any proposal to prescribe a State, Territory or Commonwealth law in the regulations for the purposes of sections 34GA and 34GB would be subject to appropriate consultation with relevant departments and ministers. Furthermore, the relevant regulations will be subject to disallowance by either house of Parliament.

Committee comment

2.60 The committee thanks the minister for this response. The committee notes the minister's advice that it is necessary and appropriate to allow regulations to exclude the operation of prescribed State, Territory or Commonwealth laws as the absence of these provisions would disadvantage landlords of shortlisted sites as remediation activities could be hindered by regulatory requirements that did not apply when the land was initially disrupted. The committee further notes the advice that any proposal to prescribe a State, Territory or Commonwealth law for the purposes of sections 34GA and 34GB would be subject to appropriate consultation with relevant departments and ministers and the regulations will be subject to disallowance.

2.61 In light of the minister's detailed advice, the committee leaves to the Senate as a whole the appropriateness of allowing delegated legislation to exclude the operation of prescribed State, Territory or Commonwealth laws.

2.62 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation for information.

Significant matters in delegated legislation—establishment of community fund[29]

2.63 In *Scrutiny Digest 3 of 2020* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave establishment of the NRWMF Community Fund entity, as well as any additional terms and conditions on which any payment to the fund is to be made, to either delegated legislation or the provisions of a written agreement of which the Parliament may have no oversight. The committee also requested the minister's advice as to whether the bill can be amended to include at least high level guidance in relation to these matters on the face of the primary legislation, or at a minimum, to provide that the regulations *must*, rather than may, prescribe other terms and conditions that are to be set out in the agreement.[30]

Minister's response

2.64 The minister advised:

> The National Radioactive Waste Management Facility (NRWMF) Community Fund entity will be community-controlled and representative of a broad range of views in the host community. The Bill requires the Minister to ensure that there is consultation with the Regional Consultative Committee (RCC), the local council, and the South Australian government regarding the type of entity to be established and associated governance arrangements, before regulations are made to prescribe the NRWMF Community Fund entity.
>
> The RCC will be an important conduit to facilitate communication between the Commonwealth and the host community on the development of the NRWMF Community Fund entity. The RCC will be established under section 22 of the Act as soon as possible following passage of the legislation.
>
> It is therefore appropriate for the NRWMF Community Fund entity to be prescribed in the regulations, to provide the required flexibility to ensure the appropriate consultation can be conducted, and that the needs of the host community are met.
>
> Proposed subsection 34AC(5) sets out the core condition of what the fund can be used for. It states that the NRWMF Community Fund must be used

29 Schedule 2, item 3, proposed sections 34AA, 34AB and 34AC. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2020*, pp. 11-12.

> for the purposes associated with the economic and social sustainability of the host community for the Facility, so as to support the establishment and operation of the Facility in safely and securely managing controlled material. Any additional conditions imposed by an agreement between the Commonwealth and the NRWMF Community Fund entity will be geared toward supplementing and supporting this core condition.
>
> It would not be possible to prescribe high level guidance on the NRWMF Community Fund entity in legislation as its composition and structure is subject to future consultation with the host community.
>
> In addition to the core condition, the Bill provides scope for the Commonwealth to structure its agreement with the NRWMF Community Fund entity in such a way that ensures the terms upon which the payment is made are consistent with the *Public Governance, Performance and Accountability Act 2013*.
>
> Proposed subsection 34AC(7) provides flexibility, allowing for the regulations to prescribe other terms and conditions required in the written agreement between the Commonwealth and the NRWMF Community Fund entity. It is proposed these are prescribed by regulation rather than in the primary legislation, as the precise terms and conditions that will be needed are not known at this time. It is anticipated that appropriate contractual arrangements will become clear once the relevant entity has been established, consultation has completed, and any relevant negotiations have been conducted.

Committee comment

2.65 The committee thanks the minister for this response. The committee notes the minister's advice that it is considered necessary to leave the establishment of the NRWMF Community Fund entity to delegated legislation as it allows for the required flexibility to ensure the appropriate consultation can be conducted prior to its establishment and the needs of the host community are met.

2.66 The committee further notes the minister's advice that proposed subsection 34AC(5) sets outs the core condition of what the fund must be used for; however, it is not possible to provide high-level guidance with regard to the NRWMF Community Fund entity in the bill as its composition and structure is subject to future consultation with the host community.

2.67 In light of the minister's detailed advice, the committee leaves to the Senate as a whole the appropriateness of leaving the establishment of the NRWMF Community Fund entity, as well as any additional terms and conditions on which any payment to the entity is to be made, to either delegated legislation or the provisions of a written agreement.

2.68 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation for information

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
Bill status	Received Royal Assent on 24 March 2020

Parliamentary scrutiny

Delegated legislation not subject to disallowance[31]

2.69 In *Scrutiny Digest 5 of 2020* the committee requested the Treasurer's advice as to how the Fund is intended to operate, why the bill provides that determinations 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.[32]

Treasurer's response[33]

2.70 The Treasurer advised:

> **How will the Fund operate?**
>
> Under the Act, I am responsible for operating the Fund. I have delegated my powers to make the investments of the Fund to the Chief Executive Officer (CEO) of the Australian Office of Financial Management (AOFM). The instrument of delegation is the *Structured Finance Support (Coronavirus Economic Response Package) Delegation 2020*, which is a notifiable instrument registered on the Federal Register of Legislation (FRL ID: F2020N00035).

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

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2020*, pp. 19-20.

33 The minister responded to the committee's comments in a letter dated 11 May 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

The Account for the Fund has been credited with an initial balance of $15 billion for the AOFM to invest in wholesale funding markets used by small ADIs and non-ADI lenders. The assets being purchased by the AOFM will include residential mortgage backed securities as well as securities backed by a range of other assets. This will enable customers of smaller lenders to continue to access affordable credit despite the significant challenges presented by the COVID-19 pandemic.

I have given a direction under subsection 18(4) of the Act that applies to the CEO of the AOFM, as my delegate, concerning his exercise of the investment powers under the Act. This direction is the *Structured Finance Support (Coronavirus Economic Response Package) (Delegation) Direction 2020*, which is also a notifiable instrument registered on the Federal Register of Legislation (FRL ID: F2020N00034).

I have made this direction so that it is clear both to the delegate and more broadly what my expectations are concerning the operation of the Fund.

The direction provides for the ways in which investment strategies, policies, decision-making criteria, risk and return for the Fund may be implemented by my delegate. For example, the direction requires the prioritisation of investments that, among other things, provide support to smaller lenders that have lost access to reasonably priced funding due to the economic effects of the COVID-19 pandemic. As a further example, the direction requires the CEO of the AOFM to ensure that investments of the Fund have an acceptable level of risk (noting that credit losses may be higher in the short to medium term due to the economic effects of the COVID-19 pandemic).

I have also made rules under section 20 of the Act. The rules are in the *Structured Finance Support (Coronavirus Economic Response Package) Rules 2020*, which is a disallowable legislative instrument registered on the Federal Register of Legislation (FRL ID: F2020L00309). The purpose of the rules is to prescribe matters relating to the administration of the Fund. This includes prescribing limits on the investments of the Fund. In particular, the rules prescribe a restriction that a debt security must not be a first loss security if it is to be an authorised debt security for investment under the Act. This reduces risk for the Commonwealth, including by ensuring that smaller lenders continue to undertake an appropriate level of risk assessment before extending credit to households or small businesses.

The CEO of the AOFM, as the delegate, is responsible for approving all investment proposals for the Fund. An analysis of each proposal is undertaken by the internal investment team prior to delegate approval, which includes a review of compliance with the Act and the rules, an assessment against the priorities, criteria and other requirements set out in the direction, an investment analysis that includes an assessment of the structure of the transaction, a deal documentation review and a credit assessment. The AOFM also leverages existing elements of its governance

framework, for example its enterprise risk management framework and conflicts of interest policy, to identify and manage the risks of the Fund.

Why are determinations to credit amounts to the Account not subject to disallowance?

A determination under subsection 13(2) of the Act is not a disallowable legislative instrument because that would frustrate the purpose of the provision. Subsection 13(2) is intended to allow me to credit additional amounts to the Account beyond the initial $15 billion that may be used to make investments of the Fund.

Due to the nature of the COVID-19 pandemic, investments made by the Fund are likely to be made on an urgent basis. If a determination under subsection 13(2) were made disallowable, waiting for the expiry of the disallowance period would mean the opportunity to make the investment had long passed, preventing the investment from being made and frustrating the achievement of the objects of the Act set out in section 3 of the Act. Alternatively, making an investment during the disallowance period would carry risk, and could undermine commercial certainty in the investment.

We also note that the approach taken to the drafting of this provision is similar to other special account crediting provisions in Commonwealth legislation, such as exist in the *Australian Business Securitisation Fund Act 2019* and the *Medicare Guarantee Act 2017*.

What are the types of matters likely to be included in the rules?

As noted above, I have made rules prescribing restrictions on the debt securities that are authorised debt securities in which investments may be made under the Act. In addition, the rules also prescribe the AOFM as a listed entity whose officials may be delegated powers under the Act.

Committee comment

2.71 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the account for the Structured Finance Support (Coronavirus Economic Response) Fund has been credited with an initial balance of $15 billion for the Australian Office of Financial Management (AOFM) to invest in wholesale funding markets used by small ADIs and non-ADI lenders. The committee also notes the advice that assets being purchased by the AOFM will include residential mortgage backed securities as well as securities backed by a range of other assets, and that this will enable customers of smaller lenders to continue to access affordable credit despite the significant challenges presented by the COVID-19 pandemic.

Determinations to credit amounts to the Fund Account

2.72 In relation to determinations under subsection 13(2) to credit additional amounts to the Fund Account beyond the initial $15 billion, the committee notes the

Treasurer's advice that such determinations are not disallowable because providing for disallowance would frustrate the purpose of the provision. In this respect, the Treasurer advised that due to the nature of the COVID-19 pandemic, investments made by the Fund are likely to be made on an urgent basis and that if a determination were made disallowable, waiting for the expiry of the disallowance period would mean the opportunity to make the investment had long passed, preventing the investment from being made. The committee further notes the Treasurer's advice that making an investment during the disallowance period would carry risk, and could undermine commercial certainty in the investment.

2.73 In light of this detailed information, and the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment in relation to determinations under subsection 13(2) to credit additional amounts to the Fund Account being exempt from disallowance.

Operation of the Fund

2.74 The committee notes that fundamental details about how the Fund will operate have been left to both non-disallowable and disallowable instruments. In particular, the investment strategies and policies, investment decision-making criteria and considerations relating to investment risk and return for the Fund have all been set out in a notifiable instrument that is not subject to parliamentary disallowance, while certain matters relating to the administration of the Fund have been set out in a disallowable legislative instrument.

2.75 The committee reiterates its view 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.

2.76 The committee considers that the matters relating to the operation of the Fund that have been set out in non-disallowable and disallowable instruments (including the investment strategies and policies, investment decision-making criteria and considerations relating to investment risk and return for the Fund) should have been included on the face of the primary legislation, particularly noting the significant amount of public money that has been set aside for the Fund.

2.77 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.

Therapeutic Goods Amendment (2020 Measures No. 1) Bill 2020

Purpose	This bill seeks to amend the *Therapeutic Goods Act 1989* to: • align certain device-related definitions with the equivalent definition in the European Union; • enable the Secretary to provide early scientific advice to a sponsor about the safety, quality or efficacy of a registrable medicine before they apply for marketing approval; • introduce a data protection regime for assessed listed medicines; and • make minor amendments and corrections
Portfolio	Health
Introduced	House of Representatives on 4 March 2020
Bill status	Before the House of Representatives

Incorporation of external materials existing from time to time [34]

2.78 In *Scrutiny Digest 4 of 2020* the committee commented on provisions in the bill which would allow medical device standards orders to apply, adopt or incorporate (with or without modification) any matter contained in an instrument or other writing as in force or existing from time to time. The committee noted the detailed explanation provided in the explanatory memorandum, and drew its scrutiny concerns to the attention of the Senate as a whole, and to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.[35]

Minister's response[36]

2.79 The Minister advised:

> As you note, the explanatory memorandum to the Bill records the policy reasons for the proposed inclusion in the ministerial power to make a

34 Schedule 1, items 24 and 25, proposed subsections 41CB(3) and 41DC(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

35 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2020*, pp. 12-14.

36 The minister responded to the committee's comments in a letter dated 23 April 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 4 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

> medical device standards order under section 41CB of the *Therapeutic Goods Act 1989* by (broadly) incorporating a matter in another instrument or writing as in force or existing from time to time. This is appropriate having regard to the fact that the vast majority of medical devices are imported, manufactured in accordance with standards operative in the exporting country. The power of incorporation, therefore, not only assists with clarity, it has the effect that imported medical devices complying with those standards will necessarily comply with domestically imposed standards.
>
> In accordance with the guideline of the Committee, an explanatory statement for a ministerial order will include information as to where a relevant incorporated instrument or writing may be readily and freely accessed. I also note, however, the information in the explanatory memorandum to the Bill that persons affected by any ministerial order are, separately, likely to know this information.

Committee comment

2.80 The committee thanks the minister for this response. The committee notes the minister's advice that the incorporation of matters in a medical device standards order is appropriate having regard to the fact that the vast majority of medical devices are imported, manufactured in accordance with standards operative in the exporting country.

2.81 The committee also notes the minister's advice that an explanatory statement for a ministerial order will include information as to where a relevant incorporated instrument or writing may be readily and freely accessed.

2.82 **In light of the information provided, the committee makes no further comment on the matter.**

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 notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

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*.