The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 13 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.

Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2020

Purpose	This bill seeks to amend the *Competition and Consumer Act 2010* to prevent non-First Australians and foreigners from benefitting from the sale of Indigenous art, souvenir items and other cultural affirmations
Sponsor	Mr Bob Katter MP
Introduced	House of Representatives on 31 August 2020

1.2 This bill is identical to a bill that was introduced into the House of Representatives on 11 September 2017, and was removed from the Notice Paper on 22 May 2018. The committee raised a number of scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 12 of 2017*,[1] and reiterates those comments in relation to this bill.

1 Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2017*, pp. 1-4.

Crimes Legislation Amendment (Economic Disruption) Bill 2020

Purpose	This bill seeks to improve and clarify Commonwealth arrangements targeting the criminal business model, ensuring that law enforcement has suitable tools to detect illicit financial flows through effective information-gathering, confiscate relevant assets and prosecute responsible individuals
Portfolio	Home Affairs
Introduced	House of Representatives on 2 September 2020

Significant penalties[2]

1.3 Schedule 1 to the bill seeks to introduce a number of new money laundering offences into Division 400 of the Criminal Code. Maximum custodial penalties for these offences range from imprisonment for four years to imprisonment for life.

1.4 The committee's expectation is that the rationale for the imposition of significant penalties, especially significant custodial penalties, will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in other Commonwealth legislation. This not only promotes consistency, but guards against the risk that liberty of the person is unduly limited through the application of disproportionate penalties. In this regard, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or of a similar seriousness. This should include a consideration of other comparable offences in Commonwealth legislation'.[3]

1.5 In this instance the explanatory memorandum contains only a limited justification for the maximum penalty imposed by the offences in Schedule 1:

> The maximum penalty applying to each offence in Division 400 will depend on: the level of awareness a defendant has as to the link between money or other property and criminal activity; the seriousness of their conduct in relation to this money or other property, and; the value of the money or other property in question.[4]

2 Schedule 1, items 9, 13, 17, 21, 27, 31, 35 and 62. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

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

4 Explanatory memorandum, p. 12.

1.6 The committee requests the minister's more detailed advice as to the justification for the maximum penalties imposed by each of the proposed offences in Schedule 1 to the bill. The committee's consideration of the appropriateness of a penalty is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[5]

Absolute liability offences[6]

1.7 Item 62 of Schedule 1 seeks to amend the *Criminal Code Act 1995* (Criminal Code) to insert proposed subsections 400.9(1AA) and 400.9(1AB) which provide two new offences where a person deals with money or other property and it is reasonable to suspect that the money or property is proceeds of indictable crime and the value of the money or property is $10 million or more (for proposed subsection 400.9(1AA)) or $1 million or more (for proposed subsection 400.9(1AB)).

1.8 Item 67 of Schedule 1 seeks to amend subsection 400.9(4) of the Criminal Code to provide that absolute liability would apply to the following physical elements of the proposed new offences:

- it is reasonable to suspect that the money or property is proceeds of indictable crime; and
- at the time of dealing, the value of the money and other property is $10 million or more (for proposed subsection 400.9(1AA)) or $1 million or more (for proposed subsection 400.9(1AB)).

1.9 Under general principles of the criminal law, for each physical element of an offence a fault (mental) element must be proved before a person can be found guilty of the offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill provides that an offence is one of absolute liability, this removes the requirement for the prosecution to prove the defendant's fault. The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised, a defence that remains available where strict liability is applied.

1.10 As the application of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including outlining whether the

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

6 Schedule 1, item 62, proposed subsections 400.9(1AA) and (1AB), and item 67, subsection 400.9(4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

approach is consistent with the *Guide to Framing Commonwealth Offences*.[7] In this instance, the explanatory memorandum states:

> The *Guide to Framing Commonwealth Offences* (at part 2.2.6) provides that absolute liability may be justified when applied to a particular physical element if requiring proof of fault would undermine deterrence, there are legitimate grounds for penalising persons lacking 'fault' in respect of that element and there are legitimate grounds for penalising a person who made a reasonable mistake of fact in respect of that element.
>
> Applying absolute liability to the circumstance that 'it is reasonable to suspect that the money or other property is proceeds of crime' is necessary to target money laundering networks, which are structured to keep participants at an 'arms-length' from relevant information to avoid criminal liability. This problem is compounded as, even if these structures are not adopted, money laundering is usually conducted separately from the predicate offence and by persons other than the perpetrators of that offence. In this context, members of money laundering networks may only have a reasonable suspicion that money or other property was derived from crime, and may not be able to come to this conclusion with any greater certainty…
>
> Applying absolute liability to the circumstance that 'money or other property is equal or above a certain value' accords with the usual practice where the Criminal Code applies to an offence. Due to the strict requirements of the Criminal Code in relation to proof of fault in relation to all elements of offences, it is necessary to state that it is not necessary for the prosecution to prove that the defendant knew, or was aware of, the value of the dealing for him or her to be convicted of these offences.
>
> This is achieved by providing that absolute liability applies to that element of the offence but providing an exemption where a person has a mistaken but reasonable belief as to the value of money or other property under section 400.10. This is consistent with other offences currently in Division 400.[8]

1.11 In light of the detailed explanation provided, the committee leaves to the Senate as a whole the appropriateness of applying absolute liability to two proposed new offences, which means that the offences will be made out without the need for the prosecution to prove a fault (mental) element for each physical element of the offences.

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

8 Explanatory memorandum, p. 31–32.

Reversal of the legal burden of proof[9]

1.12 It is proposed that the new offences discussed above will be inserted into existing section 400.9 of the Criminal Code. Existing subsection 400.9(5) provides that offences in section 400.9 do not apply if the defendant proves that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity. As a result, this provision reverses the legal burden of proof requiring the defendant to prove this matter on the balance of probabilities.

1.13 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to prove the existence of some fact undermines the right to be presumed innocent until proven guilty because a defendant's failure to prove the fact may permit conviction despite reasonable doubt as to their guilt. As a result, the committee expects there to be a full justification in the explanatory materials accompanying a bill each time the legal burden is reversed.

1.14 In this instance, the statement of compatibility states:

> The new offence provisions will engage existing exceptions. The existing exceptions at subsection 400.9(5) and section 400.10 are justified on the basis that a person's purpose for dealing with money or other property, or causing a dealing to occur, and the extent of their subjective awareness as to its tainted nature or value, are matters peculiarly within the person's knowledge, and the person ought to lead evidence of these facts rather than the prosecution. Requiring the prosecution to establish these subjective matters beyond reasonable doubt is often impossible to achieve in practice, and severely undermines law enforcement's ability to target organised crime networks.
>
> The exception at subsection 400.9(5) must be proven to a legal standard of proof. This is appropriate given the knowledge and information the defendant has regarding the nature of their own dealing with money or other property, or the situation in which they caused this dealing to occur, and the difficulty that law enforcement has in obtaining or proving the existence of this information.

1.15 The committee considers that the statement of compatibility has provided a justification as to why the evidential burden of proof needs to be reversed, but has not established why it is necessary to reverse the legal burden of proof. While the matter in existing subsection 400.9(5) may be peculiarly within the defendant's knowledge, it is not clear why it would not be sufficient to require the defendant to

9 Schedule 1, item 62, proposed subsections 400.9(1AA) and (1AB). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

raise evidence that suggests a reasonable possibility that he or she had no reasonable grounds for suspecting some form of unlawful activity, and the prosecution could then be required, as usual, to disprove the matter that had been raised, beyond reasonable doubt.

1.16 As the explanatory materials do not adequately address this issue, the committee requests the minister's advice as to why it is proposed to reverse the legal burden of proof in this instance and why it is not sufficient to reverse the evidential, rather than legal, burden of proof.

Privilege against self-incrimination[10]

1.17 Existing section 271 of the *Proceeds of Crime Act 2002* provides that a person is not excused from giving information or producing a document to the Official Trustee on the grounds that to do so would tend to incriminate them or expose them to a penalty. This provision thereby abrogates the common law privilege against self-incrimination. Subsection 271(2) currently provides that the information given; the giving of the document; or any information, document or thing obtained as a direct or indirect consequence of giving the information or document is not admissible against the person in criminal proceedings except in limited circumstances. This provides for both a use and a derivative use immunity for information obtained based on an abrogation of the privilege against self-incrimination.

1.18 Item 6 of Schedule 6 seeks to amend the *Proceeds of Crime Act 2002* to remove the derivative use immunity in paragraph 271(2)(c). As a result, information or evidence obtained as a direct or indirect consequence of the production of self-incriminating information or documents to the Official Trustee may be used in criminal proceedings against the person who was compelled to produce the information or documents.

1.19 The committee considers that the privilege against self-incrimination is an important common law right and any abrogation of that right must be fully justified. The committee accepts that the privilege against self-incrimination may be overridden where there is a compelling public benefit in doing so. In general, however, the committee considers that any justification for abrogating the privilege will be more likely to be considered appropriate if accompanied by a use *and* derivative use immunity.

1.20 In this instance, the explanatory memorandum sets out the following justification for removing the derivative use immunity:

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10 Schedule 6, item 16, paragraph 271(2)(c). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

> Derivative use immunity has been removed for operational reasons. As criminal proceedings, proceeds of crime proceedings and the management of restrained or confiscated assets by the Official Trustee are often conducted simultaneously, a defendant could use a derivative use immunity (if it were included in this provision) to frustrate a prosecution.
>
> For example, if a defendant made certain admissions in response to a written notice provided by the Official Trustee under existing section 270 and provided similar information elsewhere, the defendant could claim that the Commonwealth Director of Public Prosecutions (CDPP) or the investigating agency obtained the similar information as the result of a notice under existing section 270.
>
> The investigating agency or CDPP would then face the very onerous task of proving the source of prosecution information (that is, proving it was not derived from the statement). As a consequence, the CDPP and/or investigating agency would be required to quarantine information and set up strict information-sharing protocols with the Official Trustee in anticipation that an application to exclude might be made. This is not desirable and can significantly restrict the Official Trustee from working closely with relevant agencies under the POC Act.[11]

1.21 In light of the detailed explanation provided, the committee leaves to the Senate as a whole the appropriateness of removing the derivative use immunity in paragraph 271(2)(c) of the *Proceeds of Crime Act 2002*, the result of which is that information or evidence obtained as a direct or indirect consequence of the production of self-incriminating information or documents to the Official Trustee may be used in criminal proceedings against the person who was compelled to produce the information or documents.

Parliamentary scrutiny—section 96 grants to the states[12]

1.22 Item 55 of Schedule 7 to the bill seeks to add a new Division 4 to Part 4-3 of the *Proceeds of Crime Act 2002*. Proposed Division 4 of Part 4-3 seeks to establish a regime by which the minister can make grants to the states and territories for crime prevention measures, law enforcement measures, measures relating to the treatment of drug addiction and diversionary measures relating to illegal use of drugs.[13] Proposed subsection 298B(2) provides that the terms and conditions on which financial assistance is granted to a state or territory is to be set out in a written agreement between the Commonwealth and the grant recipient.

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11 Explanatory memorandum, p. 70.

12 Schedule 7, item 55. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

13 Explanatory memorandum, p. 90.

1.23 The committee notes that section 96 of the Constitution confers on the *Parliament* the power to make grants to the states and to determine the terms and conditions attaching to them.[14] Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.24 In this instance, however, the bill contains no guidance as to the terms and conditions on which financial assistance may be granted, other than to specify that the terms and conditions must provide for the circumstances in which the grant recipient must repay amounts to the Commonwealth.[15] In addition, there is no requirement to table the written agreements between the Commonwealth and the states and territories in the Senate to ensure that senators are at least made aware of, and have an opportunity to debate, any agreements made under proposed Division 4 of Part 4-3.

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

- **include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and**
- **include a requirement that written agreements with the states and territories about grants of financial assistance relating to crime prevention made under proposed Division 4 of Part 4-3 are:**
    - **tabled in the Parliament within 15 sitting days after being made; and**
    - **published on the internet within 30 days after being made.**

14 Section 96 of the Constitution provides that: '…the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

15 Proposed subsection 298B(4).

Defence Legislation Amendment (Enhancement of Defence Force Response to Emergencies) Bill 2020

Purpose	This bill seeks to enhance Defence's capacity to provide assistance in relation to natural disasters and other emergencies
Portfolio	Defence
Introduced	House of Representatives on 3 September 2020

Parliamentary scrutiny[16]

1.26 The bill proposes to make amendments to the *Defence Act 1903* (the Act) to enhance the defence force's capability to provide assistance in relation to natural disasters and other emergencies.

1.27 Among other matters, the bill seeks to amend provisions of the Act relating to calling out the Reserves to provide that call out orders made by the Governor-General are notifiable instruments (currently call out orders are published in the Gazette).[17] In addition, the bill seeks to provide that the minister may, in writing, direct the provision of Defence assistance in relation to a natural disaster or emergency.[18] The minister may delegate this power to direct assistance to the Chief of the Defence Force (CDF) or the secretary,[19] and the direction is not a legislative instrument.[20]

1.28 The committee considers that the calling out of Reserves and the provision of Defence assistance in times of natural disaster or emergency are significant matters that should be subject to effective parliamentary oversight. The committee notes that as call out orders made under proposed subsection 28(1) are notifiable instruments they are not subject to disallowance or tabling in the Parliament. Similarly, directions by the minister, CDF or secretary under proposed subsection 123AA(2) relating to the provision of Defence assistance are also not subject to disallowance or tabling in the Parliament. In addition, there are no time limits on how long a call out order or direction may remain in force, nor any requirement to consult with affected state or territory governments.

16 Schedule 1, item 2, proposed subsection 28(1); Schedule 2, item 4, proposed section 123AA. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

17 Schedule 1, item 2, proposed subsection 28(1).

18 Schedule 2, item 4, proposed subsection 123AA(2).

19 Schedule 1, item 4, proposed subsection 123AA(5).

20 Schedule 1, item 4, proposed subsection 123AA(7).

1.29 In light of the above, the committee requests the minister's advice as to:

- **the scope of powers (including coercive powers and the use of force against members of the public) that may be exercised by reservists subject to a call out order under proposed subsection 28(1) and protected persons subject to a direction relating to the provision of Defence assistance under proposed subsection 123AA(2); and**
- **why it is considered necessary and appropriate to shield call out orders made under proposed subsection 28(1) and directions relating to the provision of Defence assistance under proposed subsection 123AA(2) from all forms of parliamentary scrutiny.**

Immunity from civil and criminal liability[21]

1.30 Item 4 of Schedule 2 seeks to insert proposed section 123AA into the *Defence Act 1903*. This provision would give ADF members, other defence personnel and foreign armed forces and police immunity from civil and criminal liability in relation to acts done in good faith performance of their duties, where the duties are in relation to certain assistance provided in the context of a natural disaster or emergency.[22]

1.31 The committee acknowledges that the immunity does not apply in relation to actions that are not done in good faith, or which are clearly outside the protected person's duties. However, the committee notes that, in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.32 The committee expects that if a bill seeks to provide immunity from civil and criminal liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum describes the intended operation of the provision and that immunity in these circumstances is analogous to provisions in some State and Territory legislation, however a detailed explanation as to why the immunity, particularly immunity from criminal liability, is required is not provided.[23]

1.33 The committee requests the minister's more detailed advice as to why it is considered appropriate to provide protected persons with both civil *and* criminal

21 Schedule 2, item 4, proposed section 123AA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

22 Explanatory memorandum, para [24].

23 Explanatory memorandum, paras [30]-[31].

immunity so that civil and criminal proceedings may only be brought against a protected person in circumstances where lack of good faith is shown.

Higher Education Legislation Amendment (Provider Category Standards and Other Measures) Bill 2020

Purpose	This bill seeks to give effect to the Commonwealth Government's decision to implement recommendations arising from the *Review of the Higher Education Quality and Standards Agency Act 2011*, to give effect to an outstanding recommendation from the *Review of the impact of the TEQSA Act on the higher education sector*, and to improve regulation of Australia's higher education sector
Portfolio	Education
Introduced	House of Representatives on 2 September 2020

Significant matters in delegated legislation[24]

1.34 Item 14 of Schedule 1 seeks to insert proposed subsection 58(1) into the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act) to provide that the minister may, by legislative instrument, make standards that make up the Higher Education Standards Framework. This includes the Threshold Standards and other standards against which the quality of higher education can be assessed.

1.35 Item 15 of Schedule 1 seeks to insert proposed section 59A into the TEQSA Act to provide that if TEQSA is considering the Threshold Standards in relation to certain regulated entities or registered higher education providers, TEQSA must have regard to the quality of research undertaken by the entity or provider. Proposed subsection 59A(4) provides that TEQSA may, in writing, determine matters relating to the quality of research for the purpose of proposed section 59A. These matters must be approved by the minister and will be a legislative instrument (see proposed subsection 59A(7)).

1.36 The committee's view is that significant matters, such as the standards making up the Higher Education Standards Framework and how the quality of research undertaken by higher education providers will be assessed, should be in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

24 Schedule 1, items 14 and 15, proposed subsection 58(1) and proposed section 59A. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

1.37 The committee notes that since the Higher Education Standards Framework (Threshold Standards) 2011 were made on 22 December 2011 following the passage of the TEQSA Act, the Threshold Standards have only been amended twice.[25] It is therefore unclear to the committee why these important standards, which are central to the regulation and reputation of the higher education sector in Australia, cannot be included on the face of the primary legislation. Similarly, it is unclear to the committee why it would not be possible to set out in primary legislation matters relating to how the quality of research undertaken by higher education providers will be assessed, rather than leaving these matters to be determined in a legislative instrument made under proposed subsection 59A(7).

1.38 In light of the above, the committee requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave the standards making up the Higher Education Standards Framework, and matters relating to how the quality of research undertaken by higher education providers will be assessed, to delegated legislation;**
- **whether the bill can be amended to include the standards and matters relating to how the quality of research undertaken by higher education providers will be assessed on the face of the primary legislation; and**
- **if it is not considered appropriate to include the standards and matters relating to the quality of research on the face of the primary legislation, whether at least high-level guidance in relation to what may be included in the standards made under proposed subsection 58(1) and instruments made under proposed subsection 59A(7) can be set out in the primary legislation.**

25 See Amendment No. 1 to the Higher Education Standards Framework (Threshold Standards) 2011 [F2013L00194]; Higher Education Standards Framework (Threshold Standards) 2015 [F2015L01639].

Bills with no committee comment

1.39 The committee has no comment in relation to the following bills which were introduced into the Parliament between 31 August – 3 September 2020:

- Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Bill 2020
- Franchising Laws Amendment (Fairness in Franchising) Bill 2020
- Health Insurance Amendment (Administration) Bill 2020
- Treasury Laws Amendment (Self Managed Superannuation Funds) Bill 2020

Commentary on amendments and explanatory materials

1.40 The committee has not considered any amendments or explanatory materials since the tabling of *Scrutiny Digest 12 of 2020*.

Chapter 2

Commentary on ministerial responses

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

Civil Aviation Amendment (Unmanned Aircraft Levy Collection and Payment) Bill 2020

Purpose	This bill seeks to amend the *Civil Aviation Act 1998* to establish arrangements for the Civil Aviation Safety Authority to collect an unmanned aircraft levy
Portfolio	Infrastructure, Transport, Regional Development and Communications
Introduced	House of Representative on 27 August 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation[1]

2.2 In *Scrutiny Digest 11 of 2020* the committee requested the minister's advice as to why it is necessary and appropriate to leave the circumstances in which the proposed unmanned aircraft levy is payable, and the collection of the levy payments, to delegated legislation, and whether the bill can be amended to prescribe at least broad guidance in relation to these matters on the face of the primary legislation.[2]

Minister's response[3]

2.3 The minister advised:

> The Bill intends to ensure that Australia's unmanned aircraft (also known as drones) management systems remains flexible and adaptable to effectively respond to this relatively new and rapidly developing sector of aviation. The Bill will enable the Governor-General to determine, by a

1 Schedule 1, item 4, proposed paragraph 98(3)(w). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 11 of 2020*, pp. 1-2.

3 The minister responded to the committee's comments in a letter dated 17 September 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest.

legislative instrument (regulations), the circumstances in which unmanned aircraft levy is payable and the collection of the unmanned aircraft levy.

In 2018, the Government agreed to support a mandatory scheme of registration for unmanned aircraft, as recommended by the Senate Standing Committee on Rural and Regional Affairs and Transport in its report – *Current and future regulatory requirements that impact on the safe use of remotely piloted aircraft systems, unmanned aerial systems and associated systems*, (31 July 2018). The Civil Aviation Safety Authority has, therefore developed an unmanned aircraft registration scheme, which provide for the registration of commercial, utility and similar remotely piloted aircraft (RPA) – voluntarily from 30 September 2020 but compulsorily from 28 January 2021. Government policy requires that the costs of this registration scheme is recovered from its users.

At this stage, the potential number of unmanned aircraft registrants is volatile and very difficult to predict over anything other than the very short term. The nature of RPAs is highly varied and changing rapidly, with different weight and size classes, each operated for a wide range of purposes - this highlights the difficulty with developing an appropriate and targeted cost recovery scheme for such a diverse industry. The registration scheme will provide further information on the scope and size of the industry, inform the development of the cost recovery scheme, and the circumstances in which unmanned aircraft levy is payable and the collection of the levy.

It is necessary, therefore, to have a regulatory mechanism for setting a cost recovery levy in a way that allows for greater responsiveness than would be the case if the cost recovery levy were set as a fixed amount in an Act of the Parliament that would require relatively frequent amendment. The need for such amendments would arise because the fixed amount of cost recovery levy is likely to be quickly superseded by expansion in the numbers of commercial unmanned aircraft, and changes in the regulations and services the levy is being collected to fund.

Due to the rapidly changing nature of the industry, it is likely that the manner in which the levy is collected will similarly need to be updated and adjusted over time to ensure the levy may continue to be collected in a fair an appropriate manner. The use of regulations avoids these logistical problems, and is appropriate because it will allow administrative and technical details of the schemes to be adjusted relatively quickly.

Further, the regulations are disallowable by a single House acting alone, placing the circumstances of oversight and control over what level the cost recovery levy should be set at within Parliament. Once the cost recovery levy is set in the levy regulations, it may be disallowed if a House of the Parliament thinks fit. If, through amending regulations, the cost recovery levy is raised, those amending regulations may be disallowed and the previous cost recovery levy automatically restored by virtue of relevant provisions in the *Legislation Act 2003*.

> Given the complex and dynamic nature of this industry, and noting the oversight mechanisms available to Parliament, the use of delegated legislation remains appropriate. Accordingly, I do not consider it necessary to amend the legislation to place additional guidance in relation to these matters on the face of the primary legislation.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the levy scheme has been established in accordance with government policy, which requires that the costs of the unmanned aircraft registration scheme are recovered from its users. The committee also notes the minister's advice that the registration scheme will provide further information on the scope and size of the industry, which is difficult to predict beyond the short term.

2.5 The committee further notes the minister's advice that flexibility is necessary to allow the regulatory scheme to respond to an evolving industry and to ensure that quick adjustments to the administrative and technical details of the scheme can be made to ensure that the levy is collected in a fair and appropriate manner. Finally, the committee notes the minister's advice that the regulations may be disallowed by a single House acting alone.

2.6 While noting this explanation, the committee emphasises its long-standing scrutiny view that it does not consider administrative flexibility or convenience to be sufficient justification for leaving significant elements of a regulatory scheme, such as the proposed unmanned aircraft levy scheme, to delegated legislation.

2.7 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving virtually all of the details of the operation of the proposed unmanned aircraft levy scheme to delegated legislation.

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

Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020

Purpose	This bill seeks to establish the Grid Reliability Fund Special Account to appropriate $1 billion for the Clean Energy Finance Corporation in order to invest in additional energy generation, storage, transmission and distribution infrastructure and grid stabilising technologies
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 27 August 2020
Bill status	Before the House of Representatives

Significant matters in non-disallowable delegated legislation[4]

2.9 In *Scrutiny Digest 11 of 2020* the committee requested the minister's advice as to:

- why it is considered appropriate to leave criteria for which investments can be funded from the Grid Reliability Fund to non-disallowable delegated legislation; and
- whether the bill could be amended to:
  - set out the criteria that an investment must meet relating to 'its role in supporting the security or reliability of the energy system' on the face of the primary legislation, rather than leaving these criteria to be set out in non-disallowable delegated legislation; or
  - at least provide that directions by the minister setting out these criteria (i.e. the Investment Mandate) are subject to the usual disallowance process.[5]

Minister's response[6]

2.10 The minister advised:

4 Schedule 1, item 32, proposed section 58A. 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 11 of 2020*, pp. 5-6.

6 The minister responded to the committee's comments in a letter dated 17 September 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

The non-disallowable Investment Mandate has been a feature of the *Clean Energy Finance Corporation Act 2012* (the Act) since it was introduced by the former Labor government. As set out in section 63 of the Act, a direction may set out the policies to be pursued by the Corporation in relation to technologies, projects and businesses that are eligible for investment and the allocation of investments between the various classes of clean energy technologies. The use of the Investment Mandate for the proposed GRF replicates the existing role of the Investment Mandate in relation to the CEFC's original $10 billion allocation. The legislative concept of a 'grid reliability fund investment' is also bounded by the definition of 'clean energy technologies' and the Investment Mandate cannot be used to expand that statutory limitation.

It is long-standing practice that Ministerial directions to Government bodies are not disallowable. This is the basis for section 9 of the *Legislation (Exemptions and Other Matters) Regulation 2015* and the previous inclusion of this exemption in section 44 of the then *Legislative Instruments Act 2003*.

Investment Mandate directions provided under a wide range of similar Commonwealth legislation are not disallowable. These include the:

- *Future Fund Act 2006;*
- *Future Drought Fund Act 2019;*
- *Medical Research Future Fund Act 2015;*
- *DisabilityCare Australia Fund Act 2013;*
- *Aboriginal and Torres Strait Islander Land and Sea Future Fund Act 2018;*
- *Northern Australia Infrastructure Facility Act 2016;* and
- *Nation-building Funds Act 2008.*

It is important that the GRF is targeted to current and emerging challenges to grid reliability and security. These challenges necessarily evolve over time with the emergence of new technologies, changes in energy demand, network investments and locational considerations (for example, the challenges and needs differ across Australia, such that the characteristics of Western Australia's South West Interconnected System differ from those in the South Australian region of the National Electricity Market).

The use of the Investment Mandate ensures that these issues can be considered and updated as required, without returning to Parliament to amend the Act. It allows for a targeted approach to be taken to maximise the public benefits of deploying the GRF.

Importantly, the Investment Mandate cannot override the operational independence of the CEFC as set out in the Act. An Investment Mandate direction cannot direct the CEFC to make, or not make, a particular investment.

The ability for the executive government to direct statutory agencies is an important element of the principle of responsible government in Australia.

> The Investment Mandate is an essential tool for the Government to give important direction to the CEFC in the performance of its legislative functions.

Committee comment

2.11 The committee thanks the minister for this response. The committee notes the minister's advice that the non-disallowable Investment Mandate has been a feature of the *Clean Energy Finance Corporation Act 2012* since its introduction, and that the use of the Investment Mandate for the proposed Grid Reliability Fund replicates the existing role of the Investment Mandate in relation to the Clean Energy Finance Corporation's (CEFC) original $10 billion allocation. The committee also notes the advice that the Investment Mandate cannot be used to expand the legislative concept of a 'grid reliability fund investment,' which is bounded by the definition of 'clean energy technologies.'

2.12 The committee further notes the minister's advice that it is long-standing practice that ministerial directions to government bodies are not disallowable, and that Investment Mandate directions provided under a wide range of similar Commonwealth legislation are not disallowable. While acknowledging this advice, the committee notes that not all ministerial directions to government bodies are exempt from the usual parliamentary disallowance process.[7]

2.13 The committee also notes the minister's advice that flexibility is required in order to meet current and emerging challenges to grid reliability and security. Finally, the committee notes the minister's advice that the Investment Mandate cannot override the operational independence of the CEFC, and that it is an essential tool for the government to give important direction to the CEFC in the performance of its legislative functions.

2.14 While the committee welcomes this advice, from a scrutiny perspective, it remains concerned that criteria for which investments can be funded from the Grid Reliability Fund (that is, criteria relating to an investment's role in supporting the security or reliability of the energy system in Australia) is being left to be determined in non-disallowable delegated legislation. The committee considers that this prevents crucial details regarding how public money will be spent or invested from being subject to effective parliamentary oversight.

2.15 In addition, while noting the minister's advice that flexibility is required to meet current and emerging challenges, the committee has generally not considered that a desire for administrative flexibility is, of itself, is a sufficient justification for leaving significant matters to delegated legislation, particularly delegated legislation that is not subject to disallowance.

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7 See, for example, the Operating Mandate for the Regional Investment Corporation made under section 11 of the *Regional Investment Corporation Act 2018*.

2.16 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of leaving criteria for which investments can be funded from the Grid Reliability Fund to be determined in non-disallowable delegated legislation.

Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020

Purpose	This bill seeks to amend various Acts to implement the expansion of the Australia Government's Tuition Protection Service to include domestic up-front fee paying higher education students
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 26 August 2020
Bill status	Before the House of Representatives

Significant matters in delegated legislation[8]

2.17 In *Scrutiny Digest 11 of 2020* the committee requested the minister's advice as to:

- why it is necessary and appropriate to leave significant elements of the tuition protection scheme to delegated legislation; and
- whether the bill could be amended to include at least high-level guidance regarding matters to be contained in the Up-front Payments Guidelines on the face of the primary legislation.[9]

Minister's response[10]

2.18 The minister advised:

> The committee expresses valid concerns about whether the Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020 ('the TP Bill') should include high-level guidance in relation to matters to be contained in the Up-front Payments Guidelines ('the Guidelines'). In this instance however, it is not desirable, or necessary to includes such explicit guidance. In developing the legislation, it was intended that the primary legislation would contain the key substance and shape of the scheme, and that subordinate legislation would only deal with procedural issues, administrative matters and other matters that may need to be prescribed from time to time to deal with necessarily unforeseen circumstances.

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8 Schedule 1, item 7, proposed section 26A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 11 of 2020*, pp. 9–10.

10 The minister responded to the committee's comments in a letter dated 21 September 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

> The reliance on the Guidelines for the purposes of proposed subsections 26A(5), 26A(6), and 26A(7) in the TP Bill is appropriate because it will allow administrative and technical details of the up-front payments tuition protection scheme (such as the issue of notices) to be adjusted relatively quickly in comparison to the provisions of primary legislation, in the event that changes in policy give rise to the need for changes in the administration of the scheme.
>
> The use of delegated legislation also allows the Minister, with appropriate parliamentary scrutiny, to work out the application of the law as it applies to administrative details of the scheme. For instance, it is desirable that the Guidelines are able to be made relating to the refund, remission and waiver of the up-front tuition protection levy, in order to provide greater flexibility in responding beneficially to circumstances where this may be appropriate (such as during an emergency that was unforeseen at the time the Bill was drafted).
>
> In addition, the administration of new tuition protection arrangements is dependent on current and accurate record keeping by higher education providers. It is important at the time of provider default that the Higher Education Tuition Protection Director has current and correct information from the provider for the purposes of assisting affected students. Information collection and record keeping processes quickly change over time and thus setting out record keeping requirements in the Guidelines rather than primary legislation is appropriate and necessary to keep pace with record keeping changes in the sector, to ensure the requirements do not become outdated. Accurate and timely information collection is critical to support the effective administration of tuition protection to quickly and effectively assist students when a provider defaults, enabling students to continue their studies.

Committee comment

2.19 The committee thanks the minister for this response. The committee notes the minister's advice that, in developing the bill, it was intended that the primary legislation would contain the key substance and shape of the scheme, and that subordinate legislation would only deal with procedural issues, administrative matters and other matters that may need to be prescribed from time to time to deal with necessarily unforeseen circumstances.

2.20 The committee also notes the minister's advice that the use of delegated legislation allows the minister, with appropriate parliamentary scrutiny, to work out the application of the law as it applies to administrative details of the scheme. The committee further notes the minister's advice that it is desirable that Guidelines are able to be made relating to the refund, remission and waiver of the up-front tuition protection levy, in order to provide greater flexibility in responding beneficially to circumstances where this may be appropriate (such as during an emergency that was unforeseen at the time the bill was drafted).

2.21 While the committee acknowledges that some of the matters to be set out in the Up-front Payments Guidelines may be administrative and technical in nature, the committee notes that other more significant matters, such as review of decisions in relation to the collection or recovery of the up-front payments tuition protection levy, have also been left to be set out in delegated legislation. The committee takes this opportunity to reiterate that it has generally not accepted a desire for administrative flexibility to be a sufficient justification for leaving significant details of how a new legislative scheme will operate to be set out in delegated legislation.

2.22 The committee draws this matter to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving significant elements of the up-front payments tuition protection scheme to be set out in delegated legislation.

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

Environment Protection and Biodiversity Conservation Amendment (Streamlining Environmental Approvals) Bill 2020

Purpose	This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* to facilitate the devolution of environmental approvals to the states and territories, making technical amendments to the existing provisions of the Act relating to bilateral agreements to support the efficient, effective and enduring operation of bilateral agreements
Portfolio	Environment
Introduced	House of Representatives on 27 August 2020
Bill status	Before the Senate

Incorporation of materials as in force from time to time[11]

2.24 In *Scrutiny Digest 11 of 2020* the committee requested the minister's advice as to the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed section 48AA and, in particular, whether these documents will be made freely available to all persons interested in the law.[12]

Minister's response[13]

2.25 The minister advised:

> Under section 46AA of the *Acts Interpretation Act 1901* (the AI Act), instruments made under Commonwealth Acts (other than legislative instruments within the meaning of the *Legislation Act 2003* or rules of court):
>
> - May apply, adopt or incorporate the provisions of a Commonwealth Act or legislative instrument as in force at a particular time, or as in force from time to time; and
> - May only apply, adopt or incorporate the provisions of any other instrument or writing as in force at a particular time, unless the

11 Schedule 5, item 9, proposed section 48AA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

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

13 The minister responded to the committee's comments in a letter dated 16 September 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

Commonwealth Act under which the instrument is made allows otherwise.

Section 46AA of the AI Act applies to bilateral agreements made under the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBC Act). Due to the operation of section 46AA of the AI Act and the current provisions of the EPBC Act, bilateral agreements may only apply, adopt or incorporate a document or other instrument (other than Commonwealth Acts or legislative instruments) that is in force at a particular time (for example, at the time of, or before, the making of a bilateral agreement). Bilateral agreements may not apply, adopt or incorporate documents or other instruments as in force from time to time.

The intention of proposed section 48AA is to enable bilateral agreements to apply, adopt or incorporate instruments or other writings either as in force at a particular time, or as in force or existing from time to time. This may include, for example:

- Commonwealth legislative instruments such as recovery plans or threat abatement plans prepared for listed threatened species and ecological communities. As these documents are legislative instruments, they are freely available on the Federal Register of Legislation.
- Commonwealth instruments such as approved conservation advices prepared for listed threatened species or ecological communities. While conservation advices are not legislative instruments, they must be published on the internet (section 266B of the EPBC Act).
- Commonwealth policies such as the Significant Impact Guidelines or the EPBC Environmental Offsets Policy. Documents such as this are freely available on the Department's internet site.
- State or territory Acts and subordinate legislation. These documents are freely available through the repositories of legislation published on state or territory government internet sites.

  The incorporation of state or territory Acts or subordinate legislation into bilateral agreements as in force or existing from time to time will also be subject to the processes set out in proposed sections 46A and 47A. Proposed sections 46A and 47A facilitate minor amendments to a bilaterally accredited management arrangement or authorisation process for the purposes of an approval bilateral agreement, or the specified manner in which actions are assessed for an assessment bilateral agreement.
- State or territory policies and plans. Generally speaking, states and territories will have policies and/or plans that are specifically relevant to their assessment and approval processes. It is my

> expectation that these documents would be made freely available.
>
> As stated in the Explanatory Memorandum, the ability to allow documents of this nature to be applied, adopted or incorporated into a bilateral agreement either as in force at a particular time, or as in force or existing from time to time, will ensure that environmental assessment and approval decisions are based on the best scientific information so that actions assessed and approved by the state or territory under the bilateral agreement will not have unacceptable or unsustainable impacts on matters of national environmental significance.

Committee comment

2.26 The committee thanks the minister for this response. The committee notes the minister's advice that proposed section 48AA is intended to enable bilateral agreements to apply, adopt or incorporate instruments or other writings either as in force at a particular time, or as in force or existing from time to time.

2.27 The committee also notes the minister's advice regarding the types of documents that may be incorporated into bilateral agreements, such as Commonwealth legislative instruments, Commonwealth policies, state or territory Acts and subordinate legislation, and State or territory policies and plans. The committee notes the minister's advice that these writings are either freely available, or are expected to be made freely available.

2.28 The committee further notes the minister's advice that the ability to incorporate documents as in force from time to time will ensure that environmental assessment and approval decisions are based on the best scientific information.

2.29 The committee takes this opportunity to reiterate that it is a fundamental principle of the rule of the law that every person subject to the law should be able to freely and readily access its terms. As a result, the committee will have scrutiny concerns when external materials that are incorporated into the law are not freely and readily available to persons to whom the law applies, or who may otherwise be interested in the law. The committee's scrutiny concerns are heightened by the potentially significant matters relating to environmental protection that may be incorporated by reference in this instance.

2.30 While the committee welcomes the minister's advice that it is expected that Commonwealth and state and territory policies and plans that are incorporated into bilateral agreements will be made freely available, the committee notes that there is no requirement for such documents to be made freely available on the face of the primary legislation.

2.31 In light of the committee's scrutiny concerns and the minister's advice that it is expected that incorporated documents will be made freely available, the committee requests the minister's further advice as to whether the bill could be

amended to require, on the face of the primary legislation, that any document incorporated into a bilateral agreement must be made freely available.

Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020

Purpose	This bill seeks to impose the up-front payments tuition protection levy, specify the amounts that are payable by providers and prescribe the levy components and the manner in which, and by whom, they will be determined each year
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 26 August 2020
Bill status	Before the House of Representatives

Charges in delegated legislation[14]

2.32 In *Scrutiny Digest 11 of 2020* the committee drew its scrutiny concerns to the attention of senators, and left to the Senate as a whole the appropriateness of allowing the Higher Education Tuition Protection Director to determine core elements of the up-front payments tuition protection levy in delegated legislation, with only limited guidance as to the amounts of levy that may be imposed. The committee also drew this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.[15]

Minister's response[16]

2.33 The minister advised:

> I consider there are sufficient checks and balances and guidance provided in the Higher Education (Up-front Payments Tuition Protection Levy) Bill 2020 ('the Levy Bill') to ensure the core elements of the levy are appropriately determined. I explain this below for each of the three components to the up-front payments tuition protection levy: administrative fee, risk rated premium component and the special tuition protection component.
>
> The Levy Bill provides for the administrative fee to be calculated having regard to the amounts determined in a legislative instrument made by the

14 Clause 14. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

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

16 The minister responded to the committee's comments in a letter dated 21 September 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

Minister. However, the Bill specifically provides for an upper limit beyond which the administrative fee cannot exceed. Both the legislated upper limit and the methodology for calculating the proposed annual limit were determined in consultation with the Australian Government Actuary.

The risk rated premium component of the levy is calculated according to a detailed methodology provided for in the Bill (see proposed section 11 of the Levy Bill), which was developed by the Australian Government Actuary. This methodology takes into consideration the provider's level of exposure under the relevant scheme in terms of total student numbers and tuition fee amounts paid up-front, as well as the provider's risk of default based on certain risk factors such as course completion rates, financial strength and non-compliance history by way of example.

The Higher Education Tuition Protection Director ('the Director') is responsible for determining in a legislative instrument certain amounts necessary to calculate a provider's risk rated premium. In making this instrument, the Director is required to have regard to the advice of the Higher Education Tuition Protection Fund Advisory Board as well as the sustainability of the Higher Education Tuition Protection Fund. Notably, members of the Advisory Board are required to include, amongst others, representatives from the Department of Finance, the Australian Prudential Regulatory Authority and the Australian Government Actuary (see section 55C ESOS Act). The Treasurer is also required to approve the legislative instrument before the Director makes the instrument, providing an extra measure of scrutiny to the legislative instrument.

The Director is similarly responsible for determining in the same legislative instrument (and so with the same checks and guidance) the percentage to multiply the providers' total up-front tuition fee amounts by, in order to calculate the special tuition protection component. This component of the levy is intended to be imposed on providers to enable the Higher Education Tuition Protection Fund to reach a level of sustainability.

Similar levy components apply under the *Education Services for Overseas Students (TPS Levies) Act 2012*, the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*, and the *VET Student Loans (VSL Tuition Protection Levy) Act 2020* with the Minister and the TPS Director (who also holds the office of the existing HELP Tuition Protection Director, and the VET Student Loans Tuition Protection Director) making the relevant legislative instruments. This approach towards the handling of the levy in respect to providers with international students has been operating successfully since 2012.

Consistent with other delegated legislation, the Minister and the Higher Education Tuition Protection Director will consult with the higher education sector as part of the annual levy setting process and similarly both instruments will be subject to Parliamentary scrutiny through the disallowance process after tabling in both Houses of Parliament.

Committee comment

2.34 The committee thanks the minister for this response. The committee notes the minister's advice that the bill specifically provides for an upper limit beyond which the administrative fee cannot exceed and that both the legislated upper limit and the methodology for calculating the proposed annual limit were determined in consultation with the Australian Government Actuary.

2.35 The committee also notes the minister's advice that the risk rated premium component of the levy is calculated according to a detailed methodology provided for in the bill which takes into consideration the provider's level of exposure under the relevant scheme as well as the provider's risk of default.

2.36 The committee further notes the minister's advice that, consistent with other delegated legislation, the minister and the Higher Education Tuition Protection Director will consult with the higher education sector as part of the annual levy setting process and that the instruments will be subject to Parliamentary scrutiny through the disallowance process after tabling in both Houses of Parliament.

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

Broad discretionary powers

Significant matters in delegated legislation[17]

2.38 In *Scrutiny Digest 11 of 2020* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to provide the minister with a broad discretionary power to exempt providers from paying aspects of the up-front payments tuition protection levy in delegated legislation; and
- whether the bill could be amended to include at least high-level guidance as to the circumstances where it is appropriate to exempt providers from the requirement to pay the levy on the face of the primary legislation.[18]

Minister's response

2.39 The minister advised:

> The power for the Minister to prescribe classes of leviable providers to be exempt from paying one or more components of the up-front payments tuition protection levy ('the levy') in the Up-front Payments Guidelines

17 Clause 14. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

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

('the Guidelines'), enables the Minister to react to changes in the dynamic higher education sector, while retaining the discretion to consider the relevant and unique circumstances of classes of leviable providers. Similar powers to exempt also already apply under the *Education Services for Overseas Students (TPS Levies) Act 2012*, the *Higher Education Support (HELP Tuition Protection Levy) Act 2020*, and the *VET Student Loans {VSL Tuition Protection Levy) Act 2020*, referred to above.

An exemption is beneficial to a provider by nature. Noting this, prescriptive statutory criteria, which might have been suited to a power to impose an obligation or liability, was not considered essential to limit the exercise of this beneficial power.

Provider funding and governance structures, historical arrangements, existing and emerging compliance risks, and other characteristics vary widely across the sector, and continue to evolve. In recognition of this, the Minister can provide in the Guidelines that the administrative fee component, the risk rated premium component, and/or the special tuition protection component of the levy (provided in proposed section 8, 11 and 12 respectively of the Levy Bill) do not apply to a class of providers based on that class of providers' circumstances. Requiring the Minister to anticipate, through legislation, factors that must be considered before determining a class of providers to be exempt from one or more of the levy's components in delegated legislation risks restricting the Minister's ability to consider current circumstances surrounding classes of providers.

Further, it is desirable to allow the delegated legislation maximum flexibility to exempt classes of providers. This is because the circumstances and classes of providers for which it may be appropriate to exempt are not certain and cannot necessarily be foreseen. Specifying this detail in the delegated legislation may avoid the need to amend the primary legislation in order to exempt a class of provider not currently contemplated for an exemption. For example, to make provision for reduced levies for providers who have significantly reduced their risk factor to minimal risk of default, and/or have the capability to protect students in the event of a default.

It is impractical and restrictive to anticipate the factors that the Minister may consider when determining whether to exempt a class of providers. Therefore, it is not appropriate to amend the Bill to provide guidance as to the circumstances where it is appropriate to exempt providers from the requirement to pay one or more of the levy's components under proposed section 14.

Committee comment

2.40 The committee thanks the minister for this response. The committee notes the minister's advice that the power to prescribe classes of leviable providers to be exempt from paying one or more components of the up-front payments tuition protection levy (the levy) in the Up-front Payments Guidelines (the Guidelines),

enables the minister to react to changes in the dynamic higher education sector, while retaining the discretion to consider the relevant and unique circumstances of classes of leviable providers.

2.41 The committee also notes the minister's advice that requiring the minister to anticipate, through legislation, factors that must be considered before determining a class of providers to be exempt from one or more of the levy's components in delegated legislation risks restricting the minister's ability to consider current circumstances surrounding classes of providers.

2.42 The committee further notes the minister's advice that it is desirable to allow the delegated legislation maximum flexibility to exempt classes of providers because the circumstances and classes of providers for which it may be appropriate to exempt are not certain and cannot necessarily be foreseen.

2.43 The committee reiterates its scrutiny view that clause 14 provides the minister with a broad discretionary power to exempt providers from the requirement to pay the up-front payments tuition protection levy 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, and the inclusion of significant matters in delegated legislation, should be thoroughly justified.

2.44 In this instance, the committee does not consider that the explanation provided by the minister adequately justifies the inclusion of a broad rule making power to exempt providers from the payment of the levy. The committee has generally not accepted administrative flexibility alone as a sufficient justification for providing a minister with broad discretionary powers in circumstances where there is no guidance on the face of the bill regarding how the power should be exercised.

2.45 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the minister with a broad discretionary power to exempt providers from paying aspects of the up-front payments tuition protection levy in delegated legislation.

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

- Civil Aviation Amendment (Unmanned Aircraft Levy Collection and Payment) Bill 2020 — Schedule 1, item 2, subsection 46A(4);
- Clean Energy Finance Corporation Amendment (Grid Reliability Fund) Bill 2020 — Schedule 1, item 23, subsection 51A(1) and (Special Account: CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*); and

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*.

- Education Legislation Amendment (Up-front Payments Tuition Protection) Bill 2020 – Schedule 2, item 25, subsection 167-10(1).

Senator Helen Polley
Chair