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Standing Committee for the Scrutiny of Bills

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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.

Australian Local Power Agency Bill 2021

Purpose	This bill seeks to establish a new corporate Commonwealth entity, the Australian Local Power Agency, which is responsible for driving investment into community energy projects, and for ensuring that regional communities share in the benefits of renewable energy
Sponsor	Dr Helen Haines MP
Introduced	House of Representatives on 22 February 2021

Exemption from disallowance[1]

1.2 The bill proposes to establish a new Commonwealth entity, the Australian Local Power Agency (ALPA), whose functions would include providing financial assistance for the development of community energy projects; investing in community energy projects; and providing technical support to organisations developing such projects.

1.3 The bill also provides that ALPA would have a board whose functions would include the development of a 'general strategy' for ALPA each financial year from 2021–22. Clause 34 of the bill provides that the 'general strategy' must set out:

(a) the provision of financial assistance under the Act;

(b) the collection, analysis, interpretation and dissemination of information and knowledge relating to community energy projects by ALPA;

(c) the provision of technical expertise by ALPA for the purposes of developing community energy projects; and

(d) anything else prescribed in the regulations.

1.4 Subclause 35(2) of the bill provides that the 'general strategy' developed by the ALPA Board and approved by the minister is a non-disallowable legislative

1 Subclause 35(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

instrument. In addition, subclause 37(5) provides that the 'general strategy' may be varied by non-disallowable legislative instrument.

1.5 The committee will have significant scrutiny concerns where a bill includes powers to make delegated legislation which is not subject to parliamentary disallowance. The committee therefore expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within executive control or continues current arrangements does not, of itself, provide an adequate justification.

1.6 The explanatory memorandum states:

> It is considered that the requirement for each general strategy to be approved by the Minister will ensure sufficient accountability in the preparation of these instruments. The exemption is consistent with the position of Ministerial directions to any person or body, which are legislative instruments not subject to disallowance by virtue of item 2 of the table in Section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.
>
> This exemption is also consistent with the ARENA Act which stipulates that general funding strategies approved under that Act are legislative instruments exempt from disallowance.[2]

1.7 While noting this explanation, the committee nevertheless considers that the delegation of legislative power is significant in this instance, in that the ALPA Board and the minister may create a legislative instrument to determine ALPA's 'general strategy' each financial year, guided only by the broad descriptions set out in clause 34 of the bill.

1.8 The committee reiterates the scrutiny position adopted by the Standing Committee for the Scrutiny of Delegated Legislation (Senate Delegated Legislation Committee) that exemptions from disallowance should only be included in legislation in exceptional circumstances. The Senate Delegated Legislation Committee has also consistently raised scrutiny concerns with respect to the broad exemptions from disallowance in section 9 of the Legislation (Exemption and Other Matters) Regulation

2 Explanatory memorandum, pp. 12–13.

2015, including the broad exemption for instruments that are 'a direction by a Minister to any person or body'.[3]

1.9 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of setting out the 'general strategy' of the Australian Local Power Agency in a non-disallowable legislative instrument.

3 See Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, pp. 122–24; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 6–7. That committee has recommended repeal of the LEOM Regulation, with any exemptions in the regulation that remain appropriate to instead be set out in a schedule to the *Legislation Act 2003*. In so recommending, the committee recommended that the broad exemption relating to 'a direction by a Minister to any person or body' should be excluded from the new schedule, see Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, pp. 100–101.

Biosecurity Amendment (Clarifying Conditionally Non-prohibited Goods) Bill 2021

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to clarify the validity of determinations made under the Act in relation to specifying that certain classes of goods are conditionally non-prohibited goods, and specifying the conditions that apply to such goods before they can be brought or imported into Australia
Portfolio	Agriculture
Introduced	Senate on 18 March 2021

Retrospective validation[4]

1.10 Item 1 of the bill seeks to insert section 639A into the *Biosecurity Act 2015* (the Act), which would provide that determinations purportedly made under subsection 174(1) of the Act before the commencement of the bill, and which would be wholly or partly invalid in circumstances set out in paragraphs 639A(1)(a) and (b), will be taken for all purposes to be, and always to have been, valid.

1.11 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as this challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.12 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.13 The explanatory memorandum states:

> The conditionally non-prohibited goods that are specified in such determinations can pose an unacceptable level of biosecurity risk if the specified conditions are not complied with. In a complex trade and regulatory environment, it is important to remove any potential doubt that conditionally non-prohibited goods that may present an unacceptable level

4 Item 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

of risk of pests or diseases reaching Australia must comply with appropriate conditions before they can be brought or imported into Australia.[5]

1.14 While noting this explanation, it remains unclear to the committee whether any persons are likely to be adversely affected by the retrospective validation of the determinations.

1.15 The committee therefore requests the minister's more detailed advice as to whether any persons are likely to be adversely affected by the retrospective validation of determinations purportedly made under subsection 174(1) of the *Biosecurity Act 2015*, and the extent to which their interests are likely to be affected.

5 Explanatory memorandum, pp. 3–4.

Broadcasting Legislation Amendment (2021 Measures No. 1) Bill 2021

Purpose	This bill seeks amend the *Broadcasting Services Act 1992* and the *Radiocommunications Act 1992* to improve the operation of services in the broadcasting sector and simplify regulation by removing redundant and otherwise unnecessary provisions
Portfolio	Communications
Introduced	House of Representatives on 25 March 2021

Significant matters in delegated legislation[6]

1.16 Item 9 of Schedule 2 to the bill repeals Division 3 of part 9D of the *Broadcasting Services Act 1992* (BSA) and replaces it with a proposed new Division 3. Currently, Division 3 of Part 9D sets out the captioning obligations of subscription television licensees. The new Division contains proposed section 130ZV which provides that the minister must prescribe the 'subscription television captioning scheme' by disallowable legislative instrument.

1.17 The committee's view is that significant matters, such as the prescription of a new 'subscription television captioning scheme', should be included 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 removed from the BSA and instead set out in delegated legislation.

1.18 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.19 The committee also notes that allowing the rules to prescribe the 'subscription television captioning scheme' provides the minister with a broad power to determine how and to what extent subscription television providers must provide captioning of their programs. While the committee notes that proposed subsection 130ZV(2) provides that the scheme may provide for or in relation to matters that are currently included in primary legislation such as annual captioning targets and exemptions from the obligations, it is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the bill.

6 Schedule 2, item 9. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

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

- **why it is considered necessary and appropriate to leave the prescription of the 'subscription television captioning scheme' to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding the 'subscription television captioning scheme' on the face of the primary legislation.**

Incorporation of external materials existing from time to time[7]

1.21 Proposed subsection 130ZV(5) provides that the 'subscription television captioning scheme' may make provision in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time. The explanatory memorandum provides one example,[8] but no other explanation as to what type of instruments or documents may need to be applied, adopted or incorporated in a reporting standard and does not explain why it would be necessary for the material to apply as in force or existing from time to time.

1.22 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).

1.23 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.

7 Schedule 2, item 9. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

8 Explanatory memorandum, p. 54.

1.24 Noting the above comments, the committee requests the minister's advice as to:

- **the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 130ZV(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.**

Competition and Consumer Amendment (Motor Vehicle Service and Repair Information Sharing Scheme) Bill 2021

Purpose	This bill seeks to establish a scheme that mandates that service and repair information provided to car dealership and manufacturing preferred repairs be made available for independent repairs and registered organisations to purchase at a fair market price
Portfolio	Treasury
Introduced	House of Representatives on 24 March 2021

Tabling of documents in Parliament[9]

1.25 Item 1 of Schedule 1 seeks to insert proposed section 57FB into the *Competition and Consumer Act 2010*. Proposed section 57FB sets out the functions of the scheme adviser, an office established by proposed section 57FA. These functions include publishing annual reports on the scheme adviser's website about the number and type of inquiries and disputes, the number and types of disputes for which a mediator was appointed, resolution rates for disputes and anything else relating to the operation of the scheme or requested by the minister. Proposed section 57FB also provides that the scheme adviser must report to the minister and to the Australian Competition and Consumer Commission about certain specified matters.

1.26 Proposed subsection 57FB(4) provides that section 34C of the *Acts Interpretation Act 1901* does not apply in relation to a report mentioned in proposed section 57FB. Other than for the operation of proposed subsection 57FB(4), section 34C of the *Acts Interpretation Act 1901* would require these reports to be given to the minister and tabled in Parliament. While reports produced under proposed paragraph 57FB(1)(e) may be published online, the bill proposes to exclude legislative provisions which require that this information be made available to the Parliament.

1.27 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As

9 Schedule 1, item 1, proposed subsection 57FB(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

such, the committee expects there to be appropriate justification for removing a tabling requirement.

1.28 In this instance, the explanatory memorandum does not provide an explanation as to why reports prepared by the scheme adviser are not required to be tabled in Parliament.

1.29 Noting that there may be impacts on parliamentary scrutiny where reports associated with the operation of regulatory schemes are not tabled in the Parliament, the committee requests the Assistant Treasurer's advice as to:

- **why the requirement for these documents to be tabled in Parliament is proposed to be excluded; and**
- **whether documents produced under proposed section 57FB (in addition to reports published under proposed paragraph 57FB(1)(e)) will be made available online (including other legislative provisions, if any, which require the publishing of these documents online).**

Privacy

Significant matters in delegated legislation[10]

1.30 Proposed section 57DB provides that a data provider must not supply scheme information under Part IVE that is, or includes, safety and security information unless the person receiving the information has met the relevant access criteria, including an assessment of personal information relating to the person and whether the person is a fit and proper person.

1.31 Proposed subsection 57DB(4) provides that an individual is a fit and proper person to access and use safety and security information if the individual meets the prescribed safety and security criteria prescribed by the scheme rules. Proposed paragraph 57DB(6)(e) further provides that information, other than sensitive information, prescribed by the scheme rules that is relevant to working out whether the individual is a fit and proper person is a relevant consideration for the purposes of proposed paragraph 57DB(2)(b).

1.32 In addition, proposed subsection 57DB(7) provides that the scheme rules may prescribe matters in relation to the circumstances in which personal information covered by proposed subsection 57DB(6) may be sought or given.

1.33 The committee's view is that significant matters, such as requirements relating to when a person may be considered a fit and proper person or circumstances in which

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10 Schedule 1, item 1, proposed subsection 57DB(4), proposed paragraph 57DB(6)(e) and proposed subsection 57DB(7). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

personal information may be sought or given, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides a broad explanation for the use of legislative rules in the bill:

> The Minister may, by legislative instrument, make rules as enabled by the Bill or where necessary or convenient for the Scheme.
>
> This is appropriate and necessary as it allows the Minister to prescribe technical details about the coverage of the scheme, update the scheme as necessary to ensure that it keeps pace with advances in technology, as well as allowing administrative flexibility to deal promptly with attempts to frustrate the scheme.
>
> The Minister's rule-making power is constrained to certain aspects of the regime that are provided for in the Bill. In addition to this, the rules are a legislative instrument, and therefore, are subject to disallowance under section 42 of the *Legislation Act 2003*, and subject to appropriate parliamentary scrutiny and oversight.[11]

1.34 In relation to proposed subsection 57DB(4), the explanatory memorandum states:

> Treasury will consult stakeholders on the proposed safety and security criteria to be prescribed in scheme rules. This will take into consideration the types of fit and proper person checks that are already used for similar purposes in the motor vehicle industry and relevant licensing arrangements that exist in some states. For example, a criminal records check may also be required to access security information to help prevent vehicle theft and associated crime.[12]

1.35 In relation to proposed subsection 57DB(6), the explanatory memorandum states:

> The scheme rules may limit how often a data provider can seek a criminal records check, the types of offences that are relevant to the assessment and the period for which any other personal information provided remains valid before the data provider can ask for updated information. For example, the scheme rules may only allow a criminal records check to be done every two years with the person required to certify that no changes have occurred to information previously provided. If changes have occurred, the data provider may request updated information in order to reassess if the individual is a fit and proper person.[13]

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11 Explanatory memorandum, p. 41.

12 Explanatory memorandum, p. 28.

13 Explanatory memorandum, p. 28.

1.36 While noting the explanations set out above, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. Nor is it clear how the justification in the explanatory memorandum in relation to technical details and advances in technology relates to personal information or whether a person is a fit and proper person. As such, the explanatory memorandum contains no clear justification regarding why it is necessary to allow these matters to be set out in delegated legislation.

1.37 The committee's scrutiny concerns in this instance are heightened by the potential impact on individual privacy. As the details of delegated legislation are generally not available when Parliament is considering the bill, this considerably limits the ability of Parliament to have appropriate oversight of whether appropriate safeguards are in place to protect personal information.

1.38 In light of the above, the committee requests the Assistant Treasurer's detailed advice as to:

- **why it is considered necessary and appropriate to leave requirements relating to when a person may be considered a fit and proper person, and circumstances in which personal information may be sought or given, to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

Significant penalties[14]

1.39 Item 1 of Schedule 1 seeks to insert proposed section 57GB into the *Competition and Consumer Act 2010*. Proposed section 57GB lists penalties to be specified in infringement notices issued under Part IVB. Item 4 of the table set out at proposed subsection 57GB(2) provides that the penalty for failing to supply scheme information within the period covered by proposed paragraph 57CB(2)(b) is 600 penalty units for a body corporate and 120 penalty units for a person other than a body corporate.

1.40 The committee notes that the Guide to Framing Commonwealth Offences states that '…the amount payable under an infringement notice scheme should not generally exceed 12 penalty units for a natural person or 60 penalty units for a body

14 Schedule 1, item 1, proposed section 57GB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

corporate.'[15] The Guide further states that 'if an amount is too high, it will not provide any incentive for a guilty defendant to avoid the matter going to court.'[16]

1.41 The committee's expectation is that the rationale for the imposition of significant penalties will be fully outlined in the explanatory memorandum. In particular, penalties should be justified by reference to similar offences in 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 similar seriousness. This should include a consideration of…other comparable offences in Commonwealth legislation.'[17]

1.42 In this instance, the explanatory memorandum provides the following explanation of the penalties in proposed item 4 of the table at subsection 57GB(2):

> While this is a higher amount than is recommended in the Guide to Framing Commonwealth Offences, we consider that this is appropriate and necessary for the infringement notice to act as an incentive for large companies to comply with the obligations of the scheme.
>
> It also encourages a competitive market for motor vehicle service and repair as independent repairers will be significantly impacted if data providers do not provide the scheme information quickly as consumers generally expect their vehicles to be returned to them the quickly. Delays caused by repairers waiting for scheme information will not achieve a level playing field as repairers may be at a disadvantage to dealers or preferred networks who may be able to access the information faster.[18]

1.43 The committee acknowledges the importance of encouraging a competitive market and of preventing disadvantage to repairers. However, given the significance of the penalties that may be imposed under proposed table item 4 the committee expects a comprehensive justification for the penalties to be included in the explanatory memorandum, including by reference to similar offences under Commonwealth law. The committee's scrutiny concerns in this instance are heightened, noting that amounts payable in relation to infringement notices issued under other provisions of the *Competition and Consumer Act 2010* do not exceed

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15 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 59.

16 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 59.

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

18 Explanatory memorandum, p. 38.

12 penalty units for persons who are not body corporates or 60 penalty units for body corporates other than listed corporations.[19]

1.44 The committee requests the Assistant Treasurer's more detailed advice as to the justification for the significant penalties that may be imposed via infringement notice under table item 4 of proposed section 57G. The committee's consideration of the Assistant Treasurer's response will be assisted if an explanation is provided that includes reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*, and has particular reference to penalties imposed upon individuals.

19 See, for example, sections 51ACF, 52ZZG, 55J and 60L of the *Competition and Consumer Act 2010*.

Hazardous Waste (Regulation of Exports and Imports) Amendment Bill 2021

Purpose	This bill seeks to amend the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* to implement Australia's international obligations in relation to plastic wastes, align the regulatory powers under the Act with contemporary Commonwealth legislation, and improve administrative efficacy
Portfolio	Environment
Introduced	House of Representatives on 18 March 2021

Significant matters in delegated legislation[20]

1.45 The bill provides for delegated legislation made under the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* (the Act) to include a range of matters:

- Item 18 of Schedule 2 to the bill seeks to insert new audit powers into the Act. Proposed section 53 would set out the requirements for the conduct of an audit and provides that regulations made for the purposes of subsection 53(3) may make provision for, and in relation to, matters relating to the conduct of the audit and the process to be followed after an audit has been completed.
- Schedule 3 seeks to amend the Act to set out requirements relating to record-keeping. Proposed subsection 41D(1) of the Act would allow the regulations to make provision for, and in relation to, requiring records to be made and retained by listed persons, and proposed subsections (3) and (4) would provide that a failure to comply with a requirement to make or retain a record in accordance with the regulations is an offence of strict liability.
- Item 26 of Schedule 5 seeks to insert proposed section 16A into the Act. Proposed subsection 16A(1) would require the minister to notify the competent authorities of the country to which hazardous waste is to be exported, and of each country through which the hazardous waste is to be transported, of information about the relevant permit application as is required by the regulations.
- Item 28 of Schedule 5 seeks to amend section 24 of the Act to clarify the grounds on which a Basel permit may be revoked, including adding a number of new grounds. Proposed paragraph 24(1)(e) would also allow additional grounds for revocation to be prescribed in the regulations. Similarly, item 29

20 Schedule 2, item 18; Schedule 3, item 2; Schedule 5, items 26 and 28. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

of Schedule 5 would insert proposed section 26H into the bill in relation to grounds for variations of a permit, where paragraph 26H(1)(d) would allow for additional grounds to be prescribed in the regulations.

1.46 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee considers that the above matters are likely to be significant in that they concern:

- the conduct of audits and the process to be followed after an audit has been completed;
- record-keeping obligations, where a failure to comply with the obligations will be a strict liability offence;
- matters that the minister must give notice of to export and transit countries; and
- the grounds on which a permit may be revoked or varied.

1.47 In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow these significant matters to be set out in delegated legislation, other than that leaving record-keeping obligations to delegated legislation would allow flexibility to prescribe specific record-keeping requirements for different regulatory regimes.[21] However, the committee has not generally considered flexibility, of itself, to be sufficient justification for including significant matters in delegated legislation.

1.48 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

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

- **why it is considered necessary and appropriate to leave the following matters to delegated legislation:**
  - **the conduct of audits and the process to be followed after an audit has been completed;**
  - **record-keeping obligations, where a failure to comply with the obligations will be a strict liability offence;**
  - **matters that the minister must give notice of to export and transit countries; and**
  - **the grounds on which a permit may be revoked or varied; and**

21 Explanatory memorandum, p. 43.

- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

Retrospective application[22]

1.50 Item 34 of Schedule 5 seeks to insert into section 33 of the Act a new power for the minister to publish details of certain contraventions of the Act and the name of the person concerned. Subitem 35(3) would have the effect that the amendments made by item 34 would allow the publishing of:

- an offence against the Act for which a person is convicted, whether or not the conviction occurred before, on or after the commencement of the bill; and
- an order under Part 3 of the Act that was given to a person by the minister either before, on or after the commencement of the bill.

1.51 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.52 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum states that:

> It is intended that publishing these matters, particularly the relevant person's name, would act as a deterrent to contravention and therefore assist with ensuring the integrity of the regulatory regime. While it is acknowledged that the amendment made by this item would authorise the Minister to publish personal information and also sensitive information within the meaning of the Privacy Act (namely, part of a person's criminal record):
>
> - it is expected that most persons who(se) name would be published will be body corporates, for which the Privacy Act do(es) not apply;
> - to the extent that any information published under new subsection 33(4) constitutes personal or sensitive information under the Privacy Act, the deterrent effect of publishing the information, and the need to ensure the integrity of the regulatory regime,

22 Schedule 5, items 34 and 35. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

outweighs the potential adverse consequences to the individuals concerned; and

- the power in new subsection 33(4) would be discretionary, and as such the Minister would retain the ability to decide not to publish any of the information set out above if they consider that, in the particular circumstances, the potential adverse consequences of publishing the information outweigh the intended deterrence effect.[23]

1.53 However, the explanatory memorandum does not explain why it is necessary or appropriate to publish particulars of offences committed or orders given before commencement of the bill.

1.54 Noting the committee's scrutiny concerns, the committee requests the minister's advice as to why it is considered necessary and appropriate to apply the power to publish compliance related matters to offences committed, and orders given, before the commencement of the bill, and whether there may be any detrimental effect on individuals as a result of this retrospective application.

23 Explanatory memorandum, p. 129.

Migration Amendment (Clarifying International Obligations for Removal) Bill 2021

Purpose	This bill seeks to amend the *Migration Act 1958* to clarify that the Act does not require or authorise the removal of an unlawful non-citizen who has been found to engage protection obligations through the protection visa process unless the decision finding that the non-citizen engages protection obligations has been set aside, the minister is satisfied that the non-citizen no longer engages protection obligations or the non-citizen requests voluntary removal; and ensure that, in assessing a protection visa application, protection obligations are always assessed, including in circumstances where the applicant is ineligible for a visa due to criminal conduct or risks to security
Portfolio	Immigration, Citizenship, Migrant Services and Multicultural Affairs
Introduced	House of Representatives on 25 March 2021

Trespass on personal rights and liberties – indefinite detention[24]

1.55 Sections 189 and 198 of the *Migration Act 1958* (Migration Act) provide for the detention and removal from Australia of 'unlawful non-citizens'. A person is generally considered an 'unlawful non-citizen' if they are in Australia's migration zone without a valid visa and are not an Australian citizen.[25]

1.56 Australia has obligations under the *1951 Convention relating to the Status of Refugees* and its 1967 Protocol (the Refugees Convention), the *International Covenant on Civil and Political Rights* (ICCPR), and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) not to return a refugee to a situation where his or her life or freedom would be threatened, and not to return a person to a country where there are substantial grounds for believing that he or she would be in danger of being tortured. These obligations are also known as *non-refoulement* obligations.

1.57 Currently, section 197C of the Migration Act provides that, for the purposes of removing an 'unlawful non-citizen' from Australia under section 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of that person, and that the person must be removed as soon as reasonably practicable.

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24 Schedule 1, item 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

25 See *Migration Act 1958* sections 13 and 14.

1.58 Two recent Federal Court decisions have considered the effect of section 197C as it relates to the obligation to remove an 'unlawful non-citizen' from Australia as soon as reasonably practicable.[26] In the second of these cases, *AJL20 v Commonwealth* (*AJL20*),[27] the court found that the immigration detention of the applicant was unlawful, noting that detention under the Migration Act must be for a permissible purpose and, because of the obligation on officials to remove the applicant as soon as possible, a failure to pursue or carry into effect the removal as soon as reasonably practicable departed from the permissible purpose for which the applicant was being detained, being the purpose of removal from Australia.

1.59 Items 1 and 3 of the bill seek to modify section 197C following the two Federal Court decisions to provide that the obligation to remove an 'unlawful non-citizen' who has been found to engage protection obligations (for example, because they are a refugee or a person in danger of being tortured) will not be enlivened unless certain conditions are satisfied.

1.60 The statement of compatibility to the bill recognises that these amendments may result in the 'ongoing immigration detention' of a person under section 189 of the Migration Act. Indefinite detention imposes a serious encroachment on the fundamental common law right to liberty, and the committee is therefore concerned that the bill may unduly trespass on personal rights and liberties.

1.61 In this regard, the statement of compatibility notes:

> Immigration detention remains a key component of border management and assists in managing potential threats to the Australian community – including national security and character risks – and ensures people are available for removal.
>
> Unlawful non-citizens who are unable to be removed due to barriers which include, but are not limited to, the situation where the amendments to section 197C made by this Bill will operate to protect them from removal in breach of non-refoulement obligations, may be detained until their removal is reasonably practicable.[28]

1.62 The statement of compatibility relies on the existence of personal discretionary powers of the minister to grant a visa or make a 'residence determination' as helping to ensure that immigration detention will be 'reasonable, necessary and proportionate' to the person's individual circumstances.

1.63 The committee notes, however, that the highly discretionary and non-compellable nature of these powers means that they cannot be relied upon to ensure

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26 See *DMH16 v Minister for Immigration and Border Protection* (2017) 253 FCR 576 and *AJL20 v Commonwealth* [2020] FCA 1305.

27 [2020] FCA 1305.

28 Statement of compatibility, p. 13.

that immigration detention is reasonable, necessary and proportionate in the cases contemplated by the bill. In relation to the granting of a visa, the committee understands the power referred to by the Minister is set out in section 195A of the Migration Act.[29] The statement of compatibility states that the minister may intervene to grant a visa 'if the minister thinks it is in the public interest to do so' and that 'what is and what is not in the public interest is for the minister to decide'.[30]

1.64 To the extent that proportionality of the exercise of the minister's personal non-compellable powers is not a ground for judicial intervention, the effective grounds of judicial review of the immigration detention of 'unlawful non-citizens' are very limited. For example, in relation to section 195A of the Migration Act, the High Court has held that the exercise of this power is not conditioned by an obligation to give a fair hearing.[31] Additionally, as this power is non-compellable, judicial review remedies, such as those that might otherwise require the minister to reconsider a decision, are of little utility. It is therefore not clear to the committee that the powers of the minister outlined in the statement of compatibility are sufficient to safeguard against the serious encroachment on personal rights and liberties imposed by the indefinite detention of a person under section 189 of the Migration Act.

1.65 The committee further notes that, on the interpretation of the relevant provisions in the Migration Act set out by Bromberg J in *AJL20*, should Australia owe *non-refoulement* obligations to a person detained under section 189, the Commonwealth is not left with the sole option to remove that person in breach of *non-refoulement* obligations. Rather, this situation can be avoided through other mechanisms under the Migration Act, including, for example, the grant of a visa, and ensuring that the person is held in administrative detention no longer than is reasonable and proportionate to the purpose for detention.

1.66 Noting the above comments, the committee requests the minister's detailed advice as to the effectiveness of safeguards and other measures contemplated by the bill to ensure that the immigration detention of persons affected by the bill will not trespass unduly on fundamental personal rights and liberties.

1.67 The committee also requests the minister's detailed advice as to any other legislative or non-legislative options considered to address the government's concerns arising from the Federal Court's decisions in *DMH16 v Minister for Immigration and Border Protection*[32] and *AJL20 v Commonwealth*,[33] including any

29 Section 195A of the *Migration Act 1958* establishes the power of the minister to grant a visa to a person in immigration detention under section 189 of the Act.

30 Statement of compatibility, p. 14.

31 See, *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31.

32 (2017) 253 FCR 576.

33 [2020] FCA 1305.

consideration by the minister of the extent to which an alternate option would impact personal rights and liberties.

1.68 To assist the committee in considering the minister's response to the above questions, the committee also requests the minister's advice as to how often current and former ministers have exercised their personal discretionary powers under sections 195A (discretion to grant a detainee a visa) and 197AB (residence determination), and in particular, how many times these discretionary powers have been exercised in relation to persons in immigration detention to whom protection obligations are owed but are ineligible for a grant of a visa on character or other grounds.

Significant matters in delegated legislation[34]

1.69 Proposed subsection 197C(7) provides that, for the purposes of subsection 197C(3), a ***protection finding*** is also made for a non-citizen with respect to a country in circumstances prescribed by the regulations. Proposed subsection 197C(3) would provide that, despite subsections 197C(1) and (2), section 198 does not require or authorise an officer to remove an 'unlawful non-citizen' to a country if:

- the non-citizen has made a valid application for a protection visa that has been finally determined; and
- in the course of considering the application, a 'protection finding' was made for the non-citizen with respect to the country; and
- none of the listed exceptions apply.

1.70 The meanings of 'protection finding' are set out in proposed subsections 197C(4) through (7). In relation to the use of regulations in proposed subsection 197C(7), the explanatory memorandum states:

> A power to prescribe additional circumstances in the Migration Regulations is an appropriate delegation as its effect is such that, were circumstances so prescribed, it would expand the scope of a ***protection finding*** meaning that, were such a finding made as a result of circumstances prescribed in the Migration Regulations, the affected unlawful non-citizen would not be required or authorised to be removed.[35]

1.71 However, noting the potential impact on the personal rights and liberties of a person to whom these provisions apply, including being subject to indefinite immigration detention, the committee considers that the explanation in the explanatory memorandum does not provide sufficient justification for allowing

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

35 Explanatory memorandum, p. 9.

additional situations in which a 'protection finding' is made for a person to be prescribed in delegated legislation.

1.72 Noting the above comments, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to provide for additional situations in which a 'protection finding' will be made in respect of a person in regulations.

Retrospective effect[36]

1.73 Subitem 4(3) provides that a reference in amended section 197C to a 'protection finding' is a reference to a protection finding made before or after the commencement of the bill. The explanatory memorandum explains:

> This ensures that protection findings made for a non-citizen with respect to a country where the Minister or the delegate was satisfied of, however expressed and including impliedly, those matters set out in paragraphs 197C(5)(a)-(f) will include protection findings made before Schedule 1 commences.[37]

1.74 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.75 The committee notes that the amendment to section 197C seeks to remove the basis on which *habeas corpus* was issued in *AJL20*, namely that the detention was unlawful because there was an obligation on officials to remove the applicant as soon as practicable. This ground also forms a basis upon which an action for false imprisonment could be mounted by an affected individual. It is unclear whether the changes made by this bill will have any impact on persons involved in current litigation, or who have been unlawfully detained based on the decision in *AJL20*.

1.76 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum provides no further explanation of the effect of sub-item 4(3).

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36 Schedule 1, item 4. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

37 Explanatory memorandum, p. 10.

1.77 The committee therefore requests the minister's advice as to the impact of this bill on any persons involved in current litigation, or who have been unlawfully detained based on the interpretation of sections 197C and 198 of the *Migration Act 1958* in *AJL20 v Commonwealth*.[38]

38 [2020] FCA 1305.

Mitochondrial Donation Law Reform (Maeve's Law) Bill 2021

Purpose	This bill seeks to amend various legislation to allow for mitochondrial donation to be introduced into Australia for research and human reproductive purposes
Portfolio	Health
Introduced	House of Representatives on 24 March 2021

Significant matters in delegated legislation[39]

1.78 Proposed paragraph 28H(7)(d) provides that an application for a mitochondrial donation licence must be accompanied by the fee, if any, prescribed by the regulations.

1.79 The committee has scrutiny concerns regarding the inclusion of a fee-making power within delegated legislation where the face of the bill contains no cap on the maximum fee amount or any information or guidance as to how a fee will be calculated.

1.80 In this instance, the committee's scrutiny concerns are heightened as the explanatory memorandum also contains no information as to how the fee will be calculated or how it will be ensured that a fee charged to a person will be both necessary and appropriate.

1.81 In these circumstances, the committee considers that, at a minimum, a provision stating that the fee must not be such as to amount to taxation should be included on the face of the bill. In this regard, the committee notes the advice set out at paragraph 24 of the Office of Parliamentary Counsel Drafting Direction No. 3.1.[40]

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

- **how the amount of any fee charged will be calculated and how it will be ensured that a fee charged to a person will be necessary and appropriate; and**

39 Schedule 1, item 17, proposed paragraph 28H(7)(d). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

40 Office of Parliamentary Counsel, *Drafting Direction No. 3.1 Constitutional law issues,* September 2020, para 24.

- **whether the bill can be amended to provide at least high-level guidance regarding how fees will be calculated, including, at a minimum, a provision stating that the fee must not be such as to amount to taxation.**

Significant matters in delegated legislation

Incorporation of external material into the law [41]

1.83 Proposed subsection 28N(8) provides that in Division 4A of Part 2, 'proper consent', in relation to the use of a human egg or a human sperm, means consent:

- obtained in accordance with guidelines issued by the CEO of the National Health and Medical Research Council under the *National Health and Medical Research Council Act 1992* and prescribed by the regulations; and
- in relation to which such other requirements (if any) as are prescribed by the regulations for the purposes of this paragraph are satisfied.

1.84 In addition, proposed subsection 28N(9) states that the regulations may provide in relation to the withdrawal of consent, including that consent cannot be withdrawn in certain circumstances.

1.85 Similarly, proposed subsection 24(9) provides that in Division 4 of Part 2 'proper consent' in relation to the use of an excess ART embryo or a human egg, means consent obtained in accordance with guidelines issued by the CEO of the NHMRC under the *National Health and Medical Research Council Act 1992* and prescribed by the regulations.

1.86 The meaning of proper consent is relevant to items in the bill which seek to set up a framework for issuing general licences and mitochondrial donation licences and for attaching conditions to those licences.

1.87 The committee's view is that significant matters, such as provisions defining the scope of key terms as well as requirements relating to the withdrawal of consent, should be included 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 rely on delegated legislation to determine the scope of the definition of 'proper consent' nor why significant matters such as when, or whether, consent may be withdrawn should be left to delegated legislation.

1.88 The explanatory memorandum provides a general justification for the use of delegated legislation in the explanation provided in relation to item 105. However, while noting this explanation, the explanatory memorandum does not directly address

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41 Schedule 1, item 17, proposed subsections 28N(8) and (9). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

why it is appropriate to leave the matters in subsections 28N(8) and (9) and subsection 24(9) to delegated legislation.

1.89 The committee's scrutiny concerns in this instance are heightened by the incorporation of external material into the law under proposed paragraph 28N(1)(a) and proposed subsection 24(9).

1.90 Item 105 inserts subsection 48(3) into the *Research Involving Human Embryos Act 2002,* which provides for external material to be incorporated as in force from time to time. Item 107 amends the Research Involving Human Embryos Regulations 2017 to apply the ART guidelines,[42] as in force from time to time, while item 20 inserts proposed regulation 7J to prescribe the ART guidelines for the purposes of proposed subsection 28N(8).

1.91 The committee notes that the current definition of 'proper consent' is defined with reference to guidelines issued by the CEO of the National Health and Medical Research Council as existing from the commencement of the Research Involving Human Embryos Regulations 2017.

1.92 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' as it is here 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).

1.93 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. In this regard, the committee notes that the ART Guidelines are available on the NHMRC website, along with other external material incorporated into the regulatory scheme such as the *National Statement on Ethical Conduct in Human Research 2007*.

42 *Ethical guidelines on the use of assisted reproductive technology in clinical practice and researc*h, issued by the CEO of the NHMRC under the *National Health and Medical Research Council Act 1992*.

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

- **why it is considered necessary and appropriate to leave provisions defining the scope of the term 'proper consent' (proposed paragraph 28N(8)(b) and proposed subsection 24(9)) and requirements relating to the withdrawal of consent (proposed subsection 28N(9) to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

1.95 The committee also requests the minister's advice as to:

- **why it is considered necessary and appropriate to apply the ART Guidelines as in force or existing from time to time (noting that this means that future changes to the guidelines and therefore the definition of 'proper consent' will be incorporated into the law without any parliamentary scrutiny); and**
- **whether the bill could be amended to provide for the meaning of 'proper consent' on the face of the instrument or the bill, rather than relying on the incorporation of the ART Guidelines.**

Privacy

Significant matters in delegated legislation [43]

1.96 Proposed paragraph 28R(1)(e) provides that the regulations may prescribe information that the holder of a clinical trial licence or a clinical practice licence must collect for a donor. Similarly, proposed paragraph 28R(3)(d) provides that the regulations may prescribe information that the holder of a clinical trial licence or a clinical practice licence must collect for a child born alive as a result of mitochondrial donation.

1.97 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. The committee's view is that significant matters, such as requirements relating to the collection of personal information, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> In relation to [the information collecting powers], this regulation-making power mirrors similar provision that is made in State assisted reproductive

43 Schedule 1, item 17, proposed paragraphs 28R(1)(e), 28R(3)(d), 28S(3)(c) and subsections 28S(4) and 28S(8). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

> technology laws that provide for donor registers. Were this power not to be included, Commonwealth laws would be out of step with similar State laws in this respect. This regulation-making power ensures that there is flexibility as to the sort of information collected for storage on the Mitochondrial Donation Donor Register for eventual provision to children born of the procedures.[44]

1.98 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility or consistency with existing provisions to be sufficient justifications for leaving significant matters to delegated legislation.

1.99 The explanatory memorandum also provides a general justification for the use of delegated legislation in the explanation provided in relation to item 105. However, while noting this explanation, the explanatory memorandum does not directly address why it is appropriate to leave the information-collection powers identified above to delegated legislation. The committee's scrutiny concerns in this instance are heightened by the potential impact on the privacy of donors and children born as a result of mitochondrial donation.

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

- **why it is considered necessary and appropriate to leave the scope of sensitive information-collection powers to delegated legislation; and**
- **whether the bill can be amended to include further guidance regarding these matters on the face of the primary legislation.**

44 Explanatory memorandum, p. 35.

Mutual Recognition Amendment Bill 2021

Purpose	This bill seeks to amend the *Mutual Recognition Act 1992* to introduce a uniform scheme of automatic mutual recognition, which will enable an individual registered for an occupation in their home State to be taken to be registered to carry on, in a second State, the activities covered by their home State registration
Portfolio	Prime Minister
Introduced	House of Representatives on 18 March 2021

Exemption from disallowance[45]

1.101 Item 87 of the bill seeks to insert a new Part 3A into the *Mutual Recognition Act 1992* to provide for automatic mutual recognition for occupational registrations. Proposed Part 3A would allow a Minister of a State to determine or declare by legislative instrument:

- registrations in relation to which a person who intends to carry on the activity covered by the registered occupation must notify the relevant local registration authority before the person begins to carry on the activity;[46]
- registrations that are excluded from automatic deemed registration, if the minister is satisfied of a significant risk;[47] and
- registrations that are excluded temporarily from automatic deemed registration (for a period ending 6 months after the commencement of the bill or until the end of 30 June 2022).[48]

1.102 Legislative notes to each of these subsections state that the determinations or declarations are not subject to disallowance under the *Legislation Act 2003*, with reference to subsection 44(1) of that Act.

1.103 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within executive control or continues current arrangements does not, of itself, provide an adequate justification.

45 Schedule 1, item 87. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

46 Proposed subsection 42J(4).

47 Proposed subsection 42S(1).

48 Proposed subsections 42T(1) and (2).

1.104 In this instance, the explanatory memorandum merely states the effect of the relevant subsections and the operation of subsection 44(1) of the *Legislation Act 2003* to provide that legislative instruments that facilitate the operation of an intergovernmental scheme are not subject to disallowance.

1.105 At a general level, the committee does not consider the fact that subsection 44(1) of the *Legislation Act 2003* applies to an instrument is, of itself, a sufficient justification for excluding parliamentary disallowance.[49] The committee also agrees with the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation that 'any exclusion from parliamentary oversight… requires that the grounds for exclusion be justified in individual cases, not merely stated'.[50]

1.106 The committee therefore expects that the explanatory memorandum to a bill that authorises the making of a legislative instrument that is exempt from disallowance should still specify why the exemption is appropriate in the particular circumstances. In relation to legislative instruments that facilitate the establishment or operation of an intergovernmental body or scheme, the committee also expects any justification provided for exemption from disallowance to include specific reference to the details of the intergovernmental arrangements that relate to the bill.

1.107 In this instance, the committee's concerns are heightened by the fact that the power to make these non-disallowable instruments is conferred on state ministers, without any apparent mechanisms to make the exercise of these powers by state ministers reviewable by state parliaments. It is therefore unclear to the committee whether such decisions will be accompanied by any effective parliamentary accountability or oversight at either the Commonwealth or state level.

1.108 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to leave each of the above matters to delegated legislation which is exempt from parliamentary disallowance and effective parliamentary accountability or oversight at either the Commonwealth or state level.

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49 The committee further notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has recommended that the *Legislation Act 2003* be amended to repeal the blanket exemption of instruments facilitating the establishment or operation of an intergovernmental body or scheme from disallowance and sunsetting. See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, p. 107.

50 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, pp. 75–76.

Sydney Harbour Federation Trust Amendment Bill 2021

Purpose	This bill seeks to address four recommendations from the *Independent Review of the Sydney Harbour Federation Trust 2020*. Technical amendments will also enable both the Act and regulations to be modernised and aligned with current drafting practices
Portfolio	Environment
Introduced	House of Representatives on 18 March 2021

Significant matters in delegated legislation [51]

1.109 The bill seeks to insert a range of powers to prescribe matters in delegated legislation into the *Sydney Harbour Federation Trust Act 2001*.

1.110 Schedule 1 to the bill seeks to insert:

- proposed paragraphs 73(2)(oa)-(oc), which would provide regulation making powers relating to offences against the regulations, including imposing liability, setting evidentiary requirements and setting requirements relating to the provision of documents;
- proposed paragraph 73(2)(od), which would provide a regulation making power to recover, by way of penalty, reasonable costs incurred as a result of a contravention of an order, direction or other requirement; and
- proposed paragraphs 73(2)(ra) and (rb), which would provide regulation making powers to remove and dispose of objects and other matter, including animals and the property of other persons.

1.111 The committee's view is that significant matters, such as requirements in relation to offences and penalties and requirements relating to the removal and disposal of property and animals, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> The Regulations sunset in October 2021 and are anticipated to be remade with minor changes to their operation. The way in which they operate under the Act has been reviewed. The amendments in Part 2 will enable them to be modernised and streamlined. The amendments in Part 2 have minimal

51 Schedule 1, item 10, proposed paragraphs 73(2)(oa)-(od); and item 11, proposed paragraphs 73(2)(ra)-(rb). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

substantive effect on the operation of the Act or Regulations, but rather will clarify the way in which the Act supports the Regulations.[52]

1.112 The committee considers that the explanatory memorandum does not sufficiently address why it is necessary or appropriate to include requirements relating to offences and penalties or requirements relating to the removal and disposal of objects and other matter within delegated legislation.

1.113 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

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

- **why it is considered necessary and appropriate to leave requirements relating to offences and penalties and requirements relating to the removal and disposal of objects and other matter to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

52 Explanatory memorandum, p. 13.

Treasury Laws Amendment (2021 Measures No. 2) Bill 2021

Purpose	Schedule 1 to this bill seeks to amend the *Income Tax Assessment Act 1997* to require a fund, authority or institution to, as a precondition for deductible gift recipient endorsement, be a registered charity, an Australian government agency, or operated by either of these entities Schedule 2 to this bill seeks to amend Australia's offshore banking unit (OBU) regime to remove the concessional tax treatments for OBUs, remove the interest withholding tax exemption, and close the regime to new entrants by removing the Minister's ability to declare or determine an entity to be an OBU
Portfolio	Treasury
Introduced	House of Representatives on 17 March 2021

Significant matters in delegated legislation

Broad discretionary power[53]

1.115 The bill seeks to establish transitional arrangements that will apply to bodies that are currently deductible gift recipients (DGRs), in order to give them a longer period to comply with new requirements for receiving endorsement as a deductible gift recipient as set out in Schedule 1. The transitional rules give existing DGRs at least 12 months after the application date,[54] to become a registered charity or operated by a registered charity before the amendments in Schedule 1 affect their entitlement to DGR endorsement. If an entity needs a longer period to satisfy the new requirements they may apply to the Commissioner for an 'extended application date'.[55]

1.116 Subitem 16(7) provides that the minister, may, by legislative instrument, prescribe the criteria and matters that the Commissioner must be satisfied of, and have regard to, when assessing a request for an extended application date.

1.117 The committee's view is that significant matters, such as the criteria and matters that the Commissioner must be satisfied of and have regard to when assessing

53 Schedule 1, subitem 16(7). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

54 Item 12 of Schedule 1 defines ***application date*** as the day that is 3 months after the day on which the Act receives the Royal Assent.

55 See subitem 16(3) and explanatory memorandum, p. 9.

a request for an extended application date, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> This flexibility is necessary to ensure the relevant criteria and matters remain fit for purpose, as it will allow the Government to respond quickly to evolving industry practices and needs as required.[56]

1.118 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. The committee notes that allowing criteria and matters for assessing an application for an extended application date to be specified in a legislative instrument provides the minister with a broad discretionary power to determine the scope of which existing DGRs may benefit from an extended application date. It is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the bill.

1.119 The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.120 In light of the above, the committee requests the Assistant Treasurer's more detailed advice as to:

- **why it is considered necessary and appropriate to provide the minister with a broad power to determine the criteria and matters that the Commissioner must be satisfied of and have regard to when assessing a request for an extended application date;**
- **why it is considered necessary and appropriate to leave these matters to delegated legislation; and**
- **whether the bill can be amended to include additional guidance regarding the relevant criteria and matters, and the exercise of the power by the minister, on the face of the primary legislation.**

56 Explanatory memorandum, p. 11.

Bills with no committee comment

1.121 The committee has no comment in relation to the following bills which were introduced into the Parliament between 15 – 25 March 2021:

- Archives and Other Legislation Amendment Bill 2021
- Australian Local Power Agency (Consequential Amendments) Bill 2021
- Charter of Budget Honesty Amendment (Rural and Regional Australia Statements) Bill 2021
- Commonwealth Environment Protection Authority Bill 2021
- Education Legislation Amendment (2021 Measures No. 2) Bill 2021
- Family Law Amendment (Federal Family Violence Orders) Bill 2021
- National Health Amendment (Pharmaceutical Benefits Transparency and Cost Recovery) Bill 2021
- Royal Commissions Amendment (Protection of Information) Bill 2021
- Sex Discrimination Amendment (Prohibiting All Sexual Harassment) Bill 2021
- Snowy Hydro Corporatisation Amendment (No New Fossil Fuels) Bill 2021

Commentary on amendments and explanatory materials

Industrial Chemicals Environmental Management (Register) Bill 2020

1.122 On 18 March 2021, the Minister for Education and Youth (Mr Tudge) tabled an addendum to the explanatory memorandum, and the bill was read a third time.

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

Industrial Chemicals Environmental Management (Register) Charge (Customs) Bill 2020
Industrial Chemicals Environmental Management (Register) Charge (Excise) Bill 2020
Industrial Chemicals Environmental Management (Register) Charge (General) Bill 2020

1.124 On 18 March 2021, the Minister for Education and Youth (Mr Tudge) tabled an addendum to the explanatory memorandum, and the bills were read a third time.

1.125 The committee thanks the minister for tabling this addendum to the committee which includes key information previously requested by the committee.[58]

Regulatory Powers (Standardisation Reform) Bill 2020

1.126 On 18 March 2021, the Assistant Minister for Forestry and Fisheries (Senator Duniam) tabled an addendum to the explanatory memorandum, and the bill finally passed both Houses.

1.127 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.[59]

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57 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2021*, 24 February 2021, pp. 19–24.

58 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2021*, 24 February 2021, pp. 25–27.

59 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2021*, 24 February 2021, pp. 28–40.

Treasury Laws Amendment (2020 Measures No. 4) Bill 2021

1.128 On 25 March 2021, the Assistant Treasurer (Mr Sukkar) presented a supplementary explanatory memorandum, the House of Representatives agreed to three Government amendments, and the bill was read a third time.

1.129 In *Scrutiny Digest No. 16 of 2020* and *No. 1 of 2021* the committee raised concerns regarding a power to further extend by legislative instrument the operation of Schedule 5 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*.

1.130 The committee welcomes the amendments that remove the power to, by legislative instrument, extend the operation of the modification power in Schedule 5 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*.[60]

1.131 The committee also notes that amendments to Schedule 4 to the bill reintroduce provisions included in Schedule 5 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*, which were repealed at the end of 31 December 2020. The committee previously commented on these provisions in *Scrutiny Digest 6 of 2020*, noting that the provisions are akin to Henry VIII clauses as they provide for the power for delegated legislation to modify the operation of primary legislation. The amendments to the bill extend these measures to the end of 31 December 2021.

1.132 The committee draws senators' attention to its previous comments in relation to this provision.[61]

1.133 The committee finally notes that the amendments to Schedule 3 to the bill allow an industry code of conduct relating to franchising to prescribe pecuniary penalties of up to $500,000 for a person other than a body corporate. The committee's view is that significant matters, such as civil penalty provisions with high penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The supplementary explanatory memorandum in relation to the amendments provides no such justification.

1.134 The committee therefore requests the advice of the Assistant Treasurer as to why it is considered necessary and appropriate to allow provisions with civil penalties of up to $500,000 for a person who is not a body corporate to be included in delegated, rather than primary legislation.

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60 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2021*, 29 January 2021, pp. 75–77.

61 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2020*, 13 May 2020, pp. 11–12.

1.135 The committee makes no comment on amendments made or explanatory materials relating to the following bills:

- Archives and Other Legislation Amendment Bill 2021;[62]
- Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021.[63]

62 On 25 March 2021, the House of Representatives agreed to one Independent amendment, and the third reading was agreed to.

63 On 18 March 2021, the Senate agreed to 15 Government, two Opposition, 11 Pauline Hanson's One Nation and four Independent and Jacqui Lambie Network amendments, Senator Cash tabled a supplementary explanatory memorandum, and the third reading was agreed to. On 22 March 2021, the House agreed to the Senate amendments, and the bill finally passed both Houses.

Chapter 2

Commentary on ministerial responses

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

Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021

Purpose	This bill seeks to establish a framework for making, varying, revoking, and applying National Environment Standards. It further seeks to establish an Environment Assurance Commissioner to undertake transparent monitoring and/or auditing
Portfolio	Environment
Introduced	House of Representatives on 25 February 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Exemption from disallowance[1]

2.2 In *Scrutiny Digest 5 of 2021*, in relation to national environmental standards, the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to establish national environmental standards by legislative instrument;
- why it is considered necessary and appropriate to exempt the first standards made under section 65C from disallowance, noting that instances of the disallowance procedure resulting in disallowance by the Parliament are very low, and that certainty may also be achieved by having delegated legislation come into effect after the disallowance period has expired; and
- whether the bill can be amended to include at least high-level guidance regarding the content of national environmental standards on the face of the primary legislation, particularly in light of the proposal to exempt first

1 Schedule 1, item 6, proposed sections 65C and 65H, *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

standards made under section 65C from disallowance, which would remove the primary means by which the Parliament could exercise control over this delegated legislation.

2.3 In relation to requirements for decisions or things under the Act, the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the determination of decisions or things that must be consistent with a national environmental standard, or are exempt from requirements to be consistent with a national environmental standard, to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[2]

Minister's response[3]

2.4 The minister advised:

National environmental standards

Why it is considered necessary and appropriate to establish national environmental standards by legislative instrument

The Environment Protection and Biodiversity Conservation Amendment (Standards and Assurance) Bill 2021 (the Bill) establishes a framework to enable national environmental standards to be made and applied.

The ability to establish national environmental standards as a legislative instrument made under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is consistent with good regulatory practice. The Bill requires national environmental standards to undergo regular reviews; the first to be undertaken within 2 years of the commencement of a standard, and then at intervals of not more than 5 years. Over time as more information becomes available, it is intended that new standards will be made and existing standards will be varied to reflect the outcomes that need to be supported by decision-makers. Establishing national environmental standards as a legislative instrument provides the necessary flexibility for the standards to respond to new information and changing circumstances.

Why it is considered necessary and appropriate to exempt the first standards made under section 65C from disallowance

As stated in the Explanatory Memorandum, when a national environmental standard is first made, it will be treated as an 'interim' standard until it has

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 1–4.

3 The minister responded to the committee's comments in a letter dated 13 April 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

undergone its first review. Proposed subsection 65G(2) requires the first review to be undertaken within 2 years of a standard commencing.

National Cabinet has committed to implement single touch environmental approvals under the EPBC Act. A single touch environmental approval system reduces duplication which speeds up projects, supports economic recovery and creates jobs while maintaining environmental protections. An efficient and effective single touch environmental approval system will be facilitated by the negotiation of approval bilateral agreements with each state and territory, underpinned by national environmental standards.

Exempting the first made 'interim' national environmental standards facilitates single touch environmental approvals by providing necessary certainty for the benchmarking of state and territory processes, the commitment states and territories must make to not act inconsistently with the standards and agreement to the terms of approval bilateral agreements. The disallowance of a first standard made in relation to a particular matter would undermine the collaborative efforts of all jurisdictions to move to a single touch environmental approval system underpinned by national environmental standards.

As stated above, a standard will no longer be considered 'interim' after it has undergone its first review. Any variation to a standard will be subject to disallowance, ensuring appropriate scrutiny.

Whether the bill can be amended to include at least high-level guidance regarding the content of national environmental standards on the face of the primary legislation

Subsection 65C(1) of the Bill enables national environmental standards to be made for the purposes of the EPBC Act. However, the initial suite of national environmental standards will only be developed after working through the full detail of the recommendations of the EPBC Act review with stakeholders. Furthermore, over time as new information becomes available and as circumstances change, it is expected that new standards will be required to reflect the outcomes that need to be supported by decision-makers. As such it is not possible to include high-level guidance in the Bill regarding their content.

Requirements for decisions or things under the Act

Why it is considered necessary and appropriate to leave the determination of decisions or things that must be consistent with a national environmental standard, or are exempt from requirements to be consistent with a national environmental standard, to delegated legislation

Enabling the Minister to determine which decisions or things under the EPBC Act must not be inconsistent with a national environmental standard, or are subject to the public interest exception, provides necessary flexibility to apply the standards to different decisions or things gradually as standards are developed and made over time. It also avoids the need to amend the

EPBC Act each time a new decision or thing is determined to be subject to the national environmental standards or the public interest exception.

A determination that a decision or thing under the EPBC Act must not be inconsistent with a national environmental standard, and a determination that a decision or thing is subject to the public interest exception will be a legislative instruments for the purposes of the *Legislation Act 2003*. The determinations will be subject to parliamentary scrutiny and the disallowance regime of that Act.

Whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation

It is not considered appropriate to include guidance in the EPBC Act as to the decisions or things that must not be inconsistent with a national environmental standard or subject to the public interest exception. This is because the content of such a determination will be dependent on the nature and purpose of the standards to be made.

Committee comment

National environmental standards

2.5 The committee thanks the minister for this response. The committee notes the minister's advice that establishing national environmental standards as a legislative instrument provides flexibility for the standards to respond to new information and changing circumstances. The committee also notes that the bill requires the standards to undergo regular reviews, including that the first review of a standard is to be undertaken within two years of a standard commencing.

2.6 The minister advised that a national environmental standard will be treated as an 'interim' standard until it has undergone its first review, and that exempting 'interim' standards from disallowance provides certainty for processes involving agreements with the Commonwealth and states and territories to support the implementation of single touch environmental approvals. The committee further notes the minister's advice that the disallowance of a first standard made in relation to a particular matter would undermine the collaborative efforts of jurisdictions to move to this approval system, which would be underpinned by national environmental standards.

2.7 While noting this advice, the committee reiterates its scrutiny view that a desire for certainty is unlikely to be sufficient justification for exempting delegated legislation from the parliamentary disallowance process. The committee notes that instances of the disallowance procedure resulting in disallowance are low, and that mechanisms are available to overcome any remaining uncertainty, such as having the delegated legislation come into effect after the disallowance period has passed.

2.8 The committee's scrutiny concerns in this regard are heightened by the absence of legislative guidance as to the content of national environmental standards. While noting the minister's advice that the range of initial standards will only be

developed after working through the full detail of the recommendations of the EPBC Act review with stakeholders, it appears that these standards are intended to be a core element of future decision-making around environment and heritage, such that the potential absence of any parliamentary involvement or oversight of the content of the standards is significant and may be an inappropriate delegation of the legislative power of the Parliament.

2.9 While also noting the minister's advice that standards will no longer be considered 'interim' following their first review, and that variations to a standard will be subject to disallowance, there is no requirement in the bill that standards must be varied or remade following a first review. Without such a requirement, 'interim' national environmental standards could continue in existence indefinitely without ever being subject to parliamentary oversight. The committee also notes that, while a subsequent variation of the standards may be subject to parliamentary disallowance, this will only provide an opportunity to examine the matters that are included in the instrument of variation, rather than the standards as a whole.

2.10 In light of the above, the committee requests the minister's further advice as to whether the bill can be amended to provide certainty in relation to the first standards made under proposed section 65C by:

- **requiring the positive approval of each House of the Parliament before the first standards come into effect;[4] or**
- **providing that the first standards do not come into effect until a disallowance period of five sitting days has expired.[5]**

2.11 If such an amendment is not considered appropriate, the committee also requests the minister's further advice as to whether, at a minimum, the bill can be amended to provide for the automatic repeal of the first standards following the first review of a standard undertaken in accordance with proposed subsection 65G(2).

Requirements for decisions or things under the Act

2.12 The committee notes the minister's advice that enabling the determination by legislative instrument of decisions or things under the EPBC Act that must be consistent with a national environmental standard, or that are subject to the public interest exception, provides flexibility to apply the standards to different decisions or things gradually, as standards are developed and made over time. The minister also advised that it is not considered appropriate to include guidance in the primary legislation as to these matters, as the content of the determinations will be dependent on the nature and purpose of the standards to be made.

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

5 See, for example, section 79 of the *Public Governance, Performance and Accountability Act 2013*.

2.13 While noting this advice, the committee reiterates its consistent scrutiny view that a desire for administrative flexibility is generally not, of itself, sufficient justification for the inclusion of significant matters in delegated legislation. The committee's concerns with respect to this issue are significantly heightened due to the proposal to exempt the first national environmental standards made in relation to a matter from parliamentary disallowance.

2.14 The committee considers that the establishment of national environmental standards by legislative instrument, along with the determination by legislative instrument of decisions or things that must be consistent with a national environmental standard, or that may be subject to a public interest exception, provides the minister with broad discretion to determine the scope and operation of the proposed scheme for environmental approvals. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over this scheme.

2.15 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the determination of decisions or things that must be consistent with a national environmental standard, or are exempt from requirements to be consistent with a national environmental standard, to delegated legislation.

2.16 The committee also 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 [6]

2.17 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to incorporate documents as in force or existing from time to time, noting that such an approach may mean that future changes to an incorporated document could operate to change important aspects of the national environment standards without any involvement from Parliament.[7]

Minister's response

2.18 The minister advised:

> It is necessary and appropriate to enable national environmental standards to incorporate documents as in force or existing from time to time to ensure standards remain contemporary as those documents evolve over time.

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6 Schedule 1, item 6, proposed subsection 65C(4), *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 4–6.

> As stated in the Explanatory Memorandum, a national environmental standard may make reference to Commonwealth instruments, such as conservation advices approved by the Minister under section 2668 of the EPBC Act. Conservation advices provide guidance on immediate recovery and threat abatement activities that can be undertaken to ensure the conservation of a listed threatened species or ecological community. Conservation advices are required for each listed threatened species or listed threatened ecological community and can be updated regularly as new information becomes available. The ability to incorporate documents such as conservation advices as they exist from time to time ensures the protections in the national environmental standards reflect the latest scientific information. This is consistent with the current operation of the EPBC Act, which requires the Minister to have regard to any approved conservation advice for a listed threatened species before deciding whether to approve the taking of an action relating to the species. This requirement applies to all relevant approved conservation advices that exist at any the time the approval decision is being made.
>
> Enabling national environmental standards to incorporate documents as in force or existing from time to time ensures the standards will remain commensurate with changing environmental management processes by allowing them to adapt with changing circumstances. Without this, the ability of the standards to achieve their stated environmental outcomes will be diminished over time.

Committee comment

2.19 The committee thanks the minister for this response. The committee notes the minister's advice that the ability to incorporate documents such as conservation advices as they exist from time to time ensures the protections in the national environmental standards reflect the latest scientific information, and will ensure that the standards remain commensurate with changing environmental management processes. The committee also notes the minister's advice that this approach is consistent with the current operation of the EPBC Act, which requires the minister to have regard to any approved conservation advice for a listed threatened species before deciding whether to approve the taking of an action relating to the species.

2.20 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

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

Tabling of reports[8]

2.22 In *Scrutiny Digest 5 of 2021*, noting the impact on parliamentary scrutiny of not providing for review reports to be tabled in Parliament, the committee requested that proposed section 65G of the bill be amended to provide that the report of a review must be tabled in each House of the Parliament.[9]

Minister's response

2.23 The minister advised:

> The Committee has commented that not providing for the review report to be tabled in Parliament reduces the scope for parliamentary scrutiny, and that tabling provides opportunities for debate that are not available where documents are not made public or are only published online.
>
> Proposed subsection 65G(5) of the Bill imposes an obligation on the Minister to cause the report of the review to be published on the Department's website as soon as practicable after the report is given to the Minister. Publication of the report on the Department's website ensures the widest possible access.
>
> It is not necessary for a report of a review into a national environmental standard to be tabled in Parliament in order to provide opportunities for parliamentary scrutiny of the findings of the report. Furthermore, if a standard is varied as a result of the review, then the instrument of variation will be subject to parliamentary scrutiny and the disallowance regime of the *Legislation Act 2003* (as the exemption from the disallowance process only applies to the first standard made in relation to a particular matter under proposed subsection 65C(3)) thereby ensuring parliamentary scrutiny of the more substantive matter.

Committee comment

2.24 The committee thanks the minister for this response. The committee notes the minister's advice that it is not necessary for a report of a review into a national environmental standard to be tabled in Parliament in order to provide opportunities for parliamentary scrutiny of the findings of the report. The minister advised that parliamentary scrutiny of substantive matters would be ensured by the ability of parliament to review variations to standards as a result of a review.

2.25 While noting this advice, the committee considers that the approach set out in the minister's response is not an adequate substitute for a legislative tabling requirement, noting that there is no requirement that environmental standards be

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8 Schedule 1, item 6, proposed section 65G, *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, p. 6.

varied as a result of a review. The committee reiterates its consistent scrutiny view that an absence of a tabling requirement reduces the scope for parliamentary scrutiny as the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online.

2.26 The committee's concerns in this regard are heightened by the exemption from disallowance of the first standards made in relation to a particular matter, which further significantly reduces the scope for parliamentary scrutiny of these matters.

2.27 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not providing for review reports to be tabled in Parliament.

Privacy

Significant matters in delegated legislation[10]

2.28 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave additional persons and bodies to whom personal information may be disclosed or provided, and purposes for which the information may be disclosed or provided, to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[11]

Minister's response

2.29 The minister advised:

> ***Why it is considered necessary and appropriate to leave additional persons and bodies to whom personal information may be disclosed or provided, and purposes for which the information may be disclosed or provided, to delegated legislation***
>
> Proposed section 501U sets out the persons or bodies to whom the Environment Assurance Commissioner may disclose information (including personal information) or provide a document (which may contain personal information) that the Commissioner obtains in the course of performing their functions. At the time of drafting the Bill, the persons or bodies listed

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10 Schedule 2, item 1, proposed section 501U, *Environment Protection and Biodiversity Conservation Act 1999*. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, p. 7.

in proposed paragraphs 501U(1)(a)–(e) were considered appropriate. However, once the Commissioner has been established and is exercising its functions, it was recognised that it may become necessary for the Commissioner to disclose information or provide a document to a person or body not listed in those paragraphs. The ability for the regulations to prescribe additional persons or bodies to whom information may be disclosed or documents provided ensures the necessary level of flexibility as additional persons or bodies are identified over time.

It should also be noted that any such regulations would be a legislative instruments for the purposes of the *Legislation Act 2003*, and therefore subject to parliamentary scrutiny and the disallowance regime of that Act.

Whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation

For the reasons specified above, it is not possible at this time to provide additional high-level guidance on the face of the primary legislation regarding the additional persons or bodies that may be prescribed in the regulations to whom the Environment Assurance Commissioner may disclose information or provide documents.

Committee comment

2.30 The committee thanks the minister for this response. The committee notes the minister's advice that, following the establishment of the Commissioner, it may become necessary to disclose information or provide a document to a person or body in addition to those considered appropriate at the time of drafting the bill. The minister advised that the ability for the regulations to prescribe additional persons or bodies to whom information may be disclosed, or documents provided, ensures the necessary level of flexibility as additional persons or bodies are identified over time.

2.31 While noting this advice, the committee reiterates its consistent scrutiny view that a desire for administrative flexibility is not, of itself, sufficient justification for including significant matters, such as additional persons to whom personal information may be disclosed by the Commissioner and purposes for which information may be disclosed, to delegated legislation.

2.32 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving additional persons and bodies to whom personal information may be disclosed or provided, and purposes for which the information may be disclosed or provided, to delegated legislation.

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

Northern Australia Infrastructure Facility Amendment (Extension and Other Measures) Bill 2021

Purpose	This bill seeks to amend the *Northern Australia Infrastructure Facility Act 2016* to: • extend the investment time period of the Northern Australia Infrastructure Facility by five years to 30 June 2026; • strengthen the Facility's governance; and • enhance the scope, speed and flexibility for the Facility to provide financial assistance to support the development of Northern Australia economic infrastructure
Portfolio	Resources, Water and Northern Australia
Introduced	House of Representatives on 24 February 2021
Bill status	Before the House of Representatives

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

2.34 In *Scrutiny Digest 5 of 2021* the committee requested 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 are:
  - tabled in the Parliament within 15 sitting days after being made; and
  - published on the internet within 30 days of being made.[13]

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

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 8–9.

Minister's response[14]

2.35 The minister advised:

> Under s7(1) of the *Northern Australia Infrastructure Facility Act 2016* (NAIF Act), the NAIF is conferred the power to "grant financial assistance to the States and Territories for the construction of Northern Australia economic infrastructure" and determine the terms and conditions of the financial assistance. While the Bill adjusts the language of s7(1)(a) to allow the NAIF to consider a wider scope of economic infrastructure projects by substituting 'construction' for 'development', the provision of assistance under s96 is expected to continue as per current arrangements.
>
> The terms and conditions attached to the provision of s96 assistance under s7(1)(b) are enshrined in Master Facility Agreements (MFAs) with each jurisdiction. These MFAs set out the key principles and arrangements agreed between the NAIF, the Commonwealth and the State or Territory to facilitate the delivery of financial assistance to projects.
>
> The MFAs with the Queensland, Western Australian and Northern Territory Governments were tabled in the Senate on 5 February 2018. These agreements will remain in place following passage of the Bill. On the basis that the terms and conditions associated with grants of financial assistance are already in place and tabled in the Parliament, I do not consider it necessary to amend the Bill.

Committee comment

2.36 The committee thanks the minister for this response. The committee notes the minister's advice that while the change to the language of proposed paragraph 7(1)(a) of the *Northern Australia Infrastructure Facility Act 2016* (NAIF Act), substituting 'construction' for 'development', will allow the NAIF to consider a wider scope of economic infrastructure projects, it will not change the arrangements related to the provision of assistance under section 96 of the Constitution.

2.37 In addition, the committee notes the minister's advice that the terms and conditions of financial assistance under proposed paragraph 7(1)(b) are enshrined in Master Facility Agreements (MFAs) with each jurisdiction, which have been tabled in the Senate and will remain in place following passage of the bill.

2.38 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic

14 The minister responded to the committee's comments in a letter dated 1 April 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Broad discretionary powers[15]

2.40 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to provide the minister with a broad power to terminate the appointment of a board member; and
- whether the bill can be amended to include additional guidance on the exercise of the power on the face of the primary legislation.[16]

Minister's response

2.41 The minister advised:

> The power provided for in 21(1)(d) permits the Minister for Northern Australia the flexibility to adjust the skills mix of the NAIF Board. This power is necessary for effective governance of the NAIF. The NAIF's Investment Mandate closely affects the NAIF's organisational focus, and can be changed at the discretion of the Minister for Northern Australia and the Minister for Finance. In contrast, NAIF Board Members are appointed for terms of up to three years.
>
> The power provided for in 21(1)(d) is necessary for the Minister to configure the Board for optimal delivery. For example, if the responsible Ministers were to materially change the Investment Mandate to deliver a specific policy objective, the power provided in 21(1)(d) ensures the Minister for Northern Australia also has the discretion to configure the Board for optimal implementation of the new Investment Mandate, rather than waiting long periods of time for Board terms to expire. This practice allows the collective skills of the Board to be closely matched to the specific requirements of the Investment Mandate, and maximise the effectiveness of the NAIF.
>
> The current NAIF Act does not permit the responsible Minister to terminate Board members in these circumstances, and only allows for the termination of Board members for misbehaviour, impairment to perform duties, unsatisfactory performance, absenteeism, and bankruptcy considerations. The power in s21(1)(d) provides the responsible Minister with the flexibility

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15 Schedule 1, item 38. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 9–10.

to ensure the NAIF Board is well equipped to perform its functions as they change over time. As such I do not consider it necessary to amend the Bill.

Committee comment

2.42 The committee thanks the minister for this response. The committee notes the minister's advice that the power provided for in proposed paragraph 21(1)(d) is necessary for the Minister to configure the Board for optimal delivery.

2.43 The committee also notes the minister's advice that that the Investment Mandate closely affects the NAIF's organisational focus, and can be changed at the discretion of the Minister for Northern Australia and the Minister for Finance.

2.44 In addition, the committee notes the minister's advice that if the responsible Ministers were to materially change the Investment Mandate to deliver a specific policy objective, the power provided in proposed paragraph 21(1)(d) ensures the Minister for Northern Australia also has the discretion to configure the Board for optimal implementation of the new Investment Mandate, rather than waiting long periods of time for Board terms to expire.

2.45 Noting the broad discretionary power of responsible ministers to materially change the Investment Mandate, which is a non-disallowable legislative instrument, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the Minister for Northern Australia with a further broad power to terminate the appointment of a member of the board of the Northern Australia Infrastructure Facility.

Online Safety Bill 2021

Purpose	This bill seeks to create a modern, fit for purpose regulatory framework that builds on the strengths of the existing legislative scheme for online safety
Portfolio	Communications, Urban Infrastructure, Cities and the Arts
Introduced	House of Representatives on 24 February 2021
Bill status	Before the Senate

Broad discretionary power

Merits review[17]

2.46 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to provide the Commissioner with a broad discretion to determine whether to investigate complaints and the manner in which investigations will be undertaken;
- whether the bill can be amended to include additional guidance on the exercise of this discretion on the face of the primary legislation or, at a minimum, in the explanatory memorandum; and
- why merits review will not be available in relation to decisions made by the Commissioner under clauses 31, 34, 37, 42 and 43.

2.47 The committee's noted that its consideration of the appropriateness of excluding merits review would be assisted if the minister's response identifies established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What Decisions Should be Subject to Merit Review?*.[18]

17 Clauses 31, 34, 37, 42, 43 and 220. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iii).

18 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 11–12.

Minister's response[19]

2.48 The minister advised:

> The provisions relating to the Commissioner's power to conduct investigations are based on equivalent provisions in the *Enhancing Online Services* [sic] *Act 2015* and Schedules 5 and 7 of the *Broadcasting Services Act 1992* (the existing legislation). It is appropriate to provide the Commissioner, as an independent statutory officer, with discretion as to the manner of investigating complaints. This is intended to support the development of sound intelligence gathering techniques and assist in administering the complaints scheme efficiently. The Commissioner is expected to apply sound investigatory principles including procedural fairness in the conduct of investigations.
>
> The committee's concern about the lack of merits review for decisions of the Commissioner under clauses 31, 34, 37, 42 and 43 to not investigate complaints is acknowledged. However this lack of review is proportionate and does not have the effect of making rights, liberties or obligations unduly dependent upon insufficiently defined administrative power. In addition, rights, liberties or obligations are not unduly dependent upon non-reviewable decisions. It is not considered necessary to amend the Bill in the way suggested by the Committee.
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> Clauses 31, 34, 42 and 43 are consistent with equivalent provisions in the existing legislation relating to cyber-bullying, image-based abuse and the online content scheme and clause 37 relates to the new adult cyber-abuse scheme. None of the existing schemes have review powers for not proceeding with an investigation. It should be noted that the Bill proposes to include an internal review scheme at clause 220A and merits based review of a decision of the Commissioner to refuse to issue removal notices at subclause 220(4). It is considered that these review processes are adequate to address the concern about the impact on complainants of the Commissioner not taking the requested action in relation to complaints. As noted in the Explanatory Memorandum, there are also opportunities to seek procedural review under the *Administrative Decisions (Judicial Review) Act 1977*.
>
> We have reviewed the Administrative Review Council's guidance on *What Decisions Should be Subject to Merit Review?* [What decisions should be subject to merit review? 1999, Attorney-General's Department (ag.gov.au) available at https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisionsshould-be-subject-merit-review-1999] and consider that decisions for not proceeding with an investigation would fall into the category of preliminary or procedural

19 The minister responded to the committee's comments in a letter dated 7 April 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

decisions which in the Administrative Review Council's view are not suitable for review.

Committee comment

2.49 The committee thanks the minister for this response. The committee notes the minister's advice that providing the Commissioner with discretion as to the manner of investigating complaints is appropriate and is intended to support the development of intelligence gathering techniques and assist in administering the complaints scheme efficiently.

2.50 The committee notes the minister's advice that decisions for not proceeding with an investigation would fall into the category of preliminary or procedural decisions which, in the Administrative Review Council's view, are not suitable for review. The committee also notes the minister's advice about equivalent provisions in the existing legislation, and that the bill proposes to include an internal review scheme and merits based review of a decision to refuse to issue removal notices.[20] The minister advised that it is considered that these processes adequately address the committee's concerns about the impact on complainants of the Commissioner not taking the requested action in relation complaints.

2.51 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

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

Broad discretionary power[21]

2.53 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to provide the Commissioner with a broad discretionary power to determine that material which has not previously been classified will be 'class 1' or 'class 2' material; and

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20 The committee notes that, at the time of drafting, the proposed internal review scheme was set out in government amendments to the bill which had been circulated but not yet considered by either House of the Parliament.

21 Part 9. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

- whether the bill can be amended to include additional guidance on the exercise of the power on the face of the primary legislation; and
- why it is considered necessary and appropriate to provide that the Commissioner and their delegates are not liable for damages for acts done in good faith in the performance or exercise of powers or functions conferred by the bill.[22]

Minister's response

2.54 The minister advised:

> The Bill maintains the current consistency in standards between the classification regime and the online safety regime – the definitions of class 1 and class 2 rely on the categories in the *Classification (Publications, Films and Computer Games) Act 1995* (Classification Act). The Bill empowers the Commissioner to assess and act on content reported to it without referring material to the Classification Board. The Bill allows the Commissioner to seek advice from the Classification Board. Material captured by class 1 and class 2 material generally violates the community standards of most major social media services.
>
> The rationale behind this approach is to streamline the process for removal of illegal or harmful material from the internet and to reduce unnecessary administrative costs; each routine application for the Classification Board to assess online content is charged at the rate of $550 and can take up to 28 days to complete (priority applications, which attract an additional $420 fee, are concluded in five days). The nature of the material the Commissioner deals with under the Bill differs to the material the Classification Board deals with under the Classification Act (i.e. produced films, publications or computer games). It also differs in the way it is created (particularly usergenerated), the way it is distributed and the way it can go viral in an instant and therefore a rapid response is necessary.
>
> Provisions in the Bill limiting the liability of the Commissioner and delegates of the Commissioner for any damage resulting from acts done in good faith in the performance or exercise of powers of functions conferred on the Commissioner by the Bill are similar to provisions in the *Broadcasting Services Act 1992* (BSA) and the *Enhancing Online Safety Act 2015* (EOSA). Under the BSA, the following persons are protected from criminal proceedings:
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> - the Commissioner
> - a member of the staff of the ACMA
> - a consultant engaged under section 69 of the EOSA

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 13–14.

- an officer or employee whose services are made available to the ACMA under paragraph 55(1)(a) of the *Australian Communications and Media Authority Act 2005*
- a member or temporary member of the Classification Board
- a member of staff assisting the Classification Board or
- a consultant engaged to assist in the performance of the functions of the Classification Board or the functions of the Classification Review Board
- an officer whose services are made available to the Classification Board under subsection 54(3) of the Classification Act
- a member of the Classification Review Board.

The BSA currently provider that criminal proceedings do not lie against a protected person above for or in relation to the collection, possession, distribution, delivery, copying of content or materials or the doing of any other thing in relation to content or material in connection with the exercise of a power, or the performance of a function, conferred on the Commissioner, the Classification Board or the Classification Review Board by schedule 5 or schedule 7 of the BSA.

Part 10 of the *Enhancing Online Safety Act 2015* similarly protects the Commissioner and delegates from liability for damages for, or in relation to, an act or matter in good faith done or omitted in the performance of functions and exercise of powers conferred on the Commissioner under that Act (section 90). It also protects the Commissioner, ACMA staff, consultants and delegates from criminal proceedings for or in relation to the handling of material in connection with the powers and functions conferred on the Commissioner under that Act (section 91).

Committee comment

2.55 The committee thanks the minister for this response. The committee notes the minister's advice that the approach of empowering the Commissioner with broad discretion to assess and act on content under the proposed online content scheme is intended to streamline the process for removal of illegal or harmful content from the internet, and to reduce administrative costs associated with applications to the Classification Board. The committee also notes the minister's advice that the nature of the material to be dealt with under the bill differs to the information dealt with by the Classification Board, including the ability for material to quickly 'go viral'.

2.56 While noting that this advice provides some rationale as to why a process such as that undertaken by the Classification Board may not be appropriate in situations where quick decision-making is required, the minister's response does not address the question of whether it would be appropriate to provide further guidance on the face of primary legislation to guide the exercise of the Commissioner's discretion. The committee considers that the ways in which online content differs from content

considered under the *Classification (Publications, Films and Computer Games) Act 1995*, including the virtually unlimited range of possible content creators, audiences, material, and purposes for which material is created, indicate that this is an area that should be subject to legislative guidance for decision-making and appropriate oversight.

2.57 Finally, the committee notes the minister's advice with respect to existing protections from liability in the *Broadcasting Services Act 1992* and the *Enhancing Online Safety Act 2015*. While noting this advice, the committee does not generally consider that consistency with existing provisions is, of itself, sufficient explanation for why an exclusion from or limitation of liability is necessary and appropriate. Rather, the committee expects explanatory material to provide an explanation of why the provisions are appropriate in the specific context outlined in the proposed legislation. In this instance, the committee is concerned about the limitation of liability for actions by the Commissioner or their delegates in the context of the considerably broad discretion to determine the scope of content that may be subject to removal or restriction under the proposed online content scheme.

2.58 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.59 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of:

- **providing the Commissioner with a broad discretionary power to determine that material which has not previously been classified will be 'class 1' or 'class 2' material and therefore may be subject to removal or restrictions on access under the provisions of the bill; and**
- **providing that the Commissioner and their delegates are not liable for damages for acts done in good faith in the performance or exercise of powers or functions conferred by the bill.**

Exclusion of liability[23]

2.60 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- the intended purpose and operation of subclause 235(1), which relates to the effects of the law of a State or Territory, or a rule of common law or equity on liability of Australian hosting service providers or internet service providers;
- examples of the types of liability that may be excluded; and
- what rights and obligations may be affected by the exclusion of liability in subclause 235(1).[24]

Minister's response

2.61 The minister advised:

> Clause 235 is based on the existing exclusion from State and Territory Law for internet content hosts and internet service providers in clause 91 of schedule 5 to the *Broadcasting Services Act 1992*. It has been updated to refer to definitions of service providers used in the Online Safety Bill to replace "content hosts" with "hosting service providers". These types of services are not generally responsible for the provision of content on their services; rather content is provided by other parties. Internet service providers enable end-users to have access to the content and hosting services store the content.
>
> This clause is intended to work in conjunction with clause 234 (about the concurrent operation of State and Territory laws) to give practical effect to the principle that in general the Commonwealth will provide a nationally consistent framework for the activities of hosting service providers and internet service providers without intruding on the power of the States in such areas as defamation or criminal law.
>
> This is a fine-tuning mechanism intended to deal with a situation where a State or Territory law has the direct or indirect effect of regulating these service providers in a way that that is inconsistent with the principles that these types of service providers are not generally aware of the content on their services and do not monitor the content on their services.
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> An example of rights that may be excluded are the powers for an individual to seek damages from an internet service provider for defamatory comments posted on a designated internet service or a social media service.

Committee comment

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23 Clause 235. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 14–15.

2.62 The committee thanks the minister for this response. The committee notes the minister's advice that clause 235 is based on an existing provision in the *Broadcasting Services Act 1992* and that the types of service providers covered by the provision are not generally responsible for the provision of content on their services, with content provided by other parties. The committee further notes the minister's advice that the provision is a fine-tuning mechanism intended to deal with a situation where a state or territory law has the direct or indirect effect of regulating these service providers in a way that that is inconsistent with the principle that these types of service providers are not generally aware of the content on their services and do not monitor the content on their services.

2.63 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Procedural fairness[25]

2.65 In *Scrutiny Digest 5 of 2021* the committee requested the minister's more detailed justification regarding why it is considered necessary and appropriate to remove the requirement to observe any requirements of procedural fairness in relation to issuing a blocking notice under subclause 99(1).[26]

Minister's response

2.66 The minister advised:

> It is acknowledged that the Explanatory Memorandum does not address the issue of bias rule specifically. There is an expectation that the eSafety Commissioner would act in accordance with the rule of bias, that is, to act impartially, and in a way that can be objectively assessed as not having prejudged a decision [Consistent with the obligation identified by the Australian Law Reform Commission 2016 Procedural fairness: the duty and its content available at: https://www.alrc.gov.au/publication/traditional-rights-and-freedoms-encroachments-bycommonwealth-laws-alrc-report-

25 Clause 99. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

26 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 15–16.

129/14-procedural-fairness-2/procedural-fairness-the-duty-and-its-content/].

The exclusion of natural justice requirements is consistent with the complementary powers of the eSafety Commissioner under s474.35 and 474.36 of the *Criminal Code Act 1995* to issue notices to providers of content services and hosting services of the presence of Abhorrent Violent Material. The exclusion of natural justice requirements in these sections of the Criminal Code and in part 8 of the Online Safety Bill is necessary and proportionate in order to allow the eSafety Commissioner to issue notices as quickly as possible to protect the Australian community from seriously harmful material, such as the livestreaming of terrorist attacks.

Committee comment

2.67 The committee thanks the minister for this response. The committee notes the minister's advice that, while the explanatory memorandum does not address the issue of the bias rule, there is an expectation that the Commissioner would act in accordance with this rule. The committee also notes the minister's advice that the exclusion of natural justice requirements is consistent with complementary powers of the Commissioner under the *Criminal Code Act 1995*.

2.68 However, noting the minister's expectation for the Commissioner to act in accordance with the rules against bias in decision-making, it remains unclear to the committee why the exclusion from procedural fairness requirements in the bill cannot be limited to only those elements of the rules of procedural fairness that might reasonably be expected to prevent the Commissioner's ability to quickly issue notices.

2.69 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister, in particular, that there is an expectation that the Commissioner would act in accordance with the rule of bias, be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.70 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of removing the requirement to observe *any* elements of procedural fairness in relation to issuing a blocking notice under subclause 99(1).

Privacy

Significant matters in delegated legislation[27]

2.71 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave conditions to be complied with in relation to the disclosure of information to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding conditions which will be imposed on the face of the primary legislation.[28]

Minister's response

2.72 The minister advised:

> To ensure adequate protection of privacy, the Bill empowers the Commissioner to impose conditions to be complied with in relation to information disclosed under clause 211 (disclosure to a Royal Commission), clause 212 (certain authorities), clause 213 (schools or principals), and clause 214 (parents or guardians). Such conditions may include a requirement preventing secondary disclosures to third parties. An instrument made under subclause (2) of clause 211, 212, 213 and 214 is a legislative instrument unless it imposes conditions relating to one particular disclosure.
>
> It is appropriate that any conditions imposed by the Commissioner on information, including sensitive personal information, disclosed to third parties under these clauses be specified in delegated legislation. The nature of complaints dealt with by the Commissioner under the Bill are varied and the Commissioner requires the flexibility and ability to use discretion in imposing any conditions. It would be impractical to list all conditions for every circumstance in the primary legislation. We do not consider it necessary to amend the Bill to include high-level guidance regarding conditions which will be imposed on the face of the primary legislation.
>
> Part 15 of the Bill also authorises disclosure of information by the Commissioner to the Minister responsible for administration of the Bill (clause 208), the Secretary of the Department and APS employees in the Department who are authorised by the Secretary, for the purposes of advising the Minister (clause 209), members of the staff of the ACMA, etc. (clause 210). Disclosure under these provisions is not arbitrary and is a

27 Clauses 211 to 214. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 16–17.

necessary aspect of the constitutional principle of responsible government and all parties are bound by the *Privacy Act 1988*.

Other provisions of Part 15 also ensure adequate protection of privacy. Clause 215 permits disclosure of information relating to the affairs of a person, so long as that person has consented to that disclosure, and clause 216 authorises the disclosure of information that is already publicly available. Clause 217 authorises the disclosure of summaries and statistics, but these are only authorised if they are summaries of, or statistics prepared from, "de-identified" information. This ensures that the right to privacy is preserved when information is disclosed under this provision.

Committee comment

2.73 The committee thanks the minister for this response. The committee notes the minister's advice that the nature of complaints dealt with by the Commissioner under the bill are varied and the Commissioner requires flexibility and discretion in imposing conditions in relation to information disclosed under the relevant clauses. The minister advised that it would be impractical to list all conditions for every circumstance in the primary legislation, and that it was not considered necessary to amend the bill to include high-level guidance as suggested by the committee.

2.74 The committee further notes the information provided by the minister in relation to additional disclosures authorised by the bill, that all parties are bound by the *Privacy Act 1988*, and the information provided about the additional privacy protections in the bill.

2.75 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

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

Significant matters in delegated legislation[29]

2.77 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave a range of powers for the minister or Commissioner to prescribe matters in delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.[30]

Minister's response

2.78 The minister advised:

> The legislative rule power as contained in the Online Safety Bill 2021 is based on the existing provision (section 108) in the current legislation, the *Enhancing Online Safety Act 2015*.
>
> The power to make legislative rules provides flexibility to address new and emerging harms in a timely manner and deal quickly and efficiently with administrative matters crucial to the functioning of the Bill.
>
> The Minister's ability to make legislative rules is limited to prescribing matters required or permitted by the Act, or necessary or convenient to give effect to the Act.
>
> Subclause 240(2) of the Bill places further limits on the making of legislative rules by specifying that the rules may not be used to, among other things, create an offence, provide powers relating to arrest, search and seizure or impose a tax. Significantly, paragraph 240(2)(e) provides the final limitation that the legislative rule may not directly amend the text of the Act.
>
> Any legislative rules will be made by way of legislative instrument and as such will also be subject to the requirements of making such an instrument.
>
> Based on the limitations inherent in the legislative rule power it is not proposed to amend the Bill.

Committee comment

2.79 The committee thanks the minister for this response. The committee notes the minister's advice that the general power to make legislative rules provides flexibility to address the matters covered in the bill in a timely manner, and to deal quickly and efficiently with administrative matters crucial to the functioning of the bill. While noting this advice, the committee reiterates its consistent scrutiny view that a

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29 Clauses throughout the bill as listed. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 17–19.

desire for administrative flexibility is not, of itself, sufficient justification for leaving significant matters to delegated legislation.

2.80 While also noting the minister's advice about the operation of subclause 240(2) to limit the making of legislative rules, the committee notes that this provision is a standard provision that the committee expects to be included as a minimum standard for general legislative rule-making powers. While the provision protects against matters that are particularly significant being included in legislative rules, especially with respect to matters that are likely to trespass unduly on personal rights and liberties or involve significant delegations of legislative power, the significance of other matters that are proposed to be dealt with in legislative rules will depend on the context of individual legislative proposals.

2.81 In this regard, the committee reiterates that the explanatory material to this bill has inadequately explained why it is necessary and appropriate to include each of the matters identified by the committee in its initial comment in legislative rules.

2.82 The committee therefore reiterates its request for the minister's detailed advice as to why it is considered necessary and appropriate to leave matters contained in each of the following provisions to delegated legislation:

- **Clauses 6 and 7 – in relation to conditions to be met for material to be considered cyber-bullying or cyber abuse material;**
- **Clause 13 – in relation to the definition of 'social media service';**
- **Clause 13A – in relation to the definition of 'relevant electronic service';**
- **Clause 14 – in relation to the definition of 'designated internet service' and 'exempt services';**
- **Clause 27 – in relation to the commissioner's functions, which may include such other functions as are specified in the legislative rules;**
- **Clause 45 – in relation to basic online safety expectations;**
- **Clauses 52 and 59 – in relation to periodic and non-periodic reporting obligations for service providers;**
- **Clause 86 – in relation to exempt provisions of an intimate image;**
- **Clause 108 – in relation to the restricted access system;**
- **Subclause 145(1) – in relation to industry standards;**
- **Clause 151 – in relation to service provider determinations;**
- **Clause 152 – in relation to exemptions from service provider determinations; and**
- **Subclause 235(2) – in relation to an exemption of a specified law of a State or Territory, or a specified rule of common law or equity, from the operation of subsection 235(1).**

2.83 The committee also requests the minister's detailed advice as to whether the bill can be amended to include at least high-level guidance in relation to the determination by the Commissioner of the following matters on the face of primary legislation:

- **the 'restricted access system' under clause 108;**
- **'industry standards' under subclause 145(1); and**
- **'service provider determinations' under clause 151 and exemptions from such determinations under clause 152.**

Significant matters in non-disallowable delegated legislation[31]

2.84 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the following matters to delegated legislation which is exempt from disallowance:
  - directions about the exercise of powers or performance of functions of the Commissioner;
  - directions about the provision by the ACMA of assistance to the Commissioner; and
  - determinations of amounts to be credited to the online safety special account; and
- whether the bill can be amended to:
  - provide that these directions and determinations are subject to parliamentary disallowance; and
  - provide at least high-level guidance regarding what may be included in the directions on the face of the primary legislation.[32]

Minister's response

2.85 The minister advised:

> The Online Safety Bill retains the existing governance arrangements for the eSafety Commissioner drawn from the *Enhancing Online Safety Act 2015*, which have existed since the creation of the role. These include sections relating to the functions and powers of the Commissioner, assistance

31 Clauses 145, 184, 188 and 191. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 19–21.

provided to the eSafety Commissioner by the ACMA and the operation of the special account.

It is acknowledged that these arrangements include the potential for delegated legislation which is exempt from disallowance. This is both necessary and appropriate due to the nature of the online environment which is characterised by rapid technological change, new online service offerings and the emergence of new ways in which these can be exploited to cause harm to Australians. In such an environment it is not possible to anticipate all the harms that may emerge so that they may be addressed in primary legislation. Providing for delegated legislation provides flexibility for the Government to direct the eSafety Commissioner and provides much-needed certainty and authority to take action in this environment.

Importantly, these powers do not allow the Minister to direct the eSafety Commissioner without limit. Directions by the Minister to the eSafety Commissioner about the performance of the Commissioner's functions or the exercise of the Commissioner's powers (Clause 188 (2)) 'must be of a general nature only'. Such a direction may be issued to authorise the eSafety Commissioner to commence work in response to a new online harm not addressed by the Commissioner's primary legislation. However it does not allow the Minister to direct the Commissioner to make a specific regulatory decision.

The Bill retains the power for the Minister to direct the ACMA (Clause 184(5)). This directions power relates specifically to assistance provided by the ACMA to the Commissioner. This is a necessary and appropriate approach needed to ensure the eSafety Commissioner is appropriately resourced and enjoys the maximum level of autonomy to perform their functions and powers within the current organisational arrangement where the eSafety Commissioner is a statutory office holder supported by staff of the ACMA. This directions power would only be used as a matter of last resort, in the event that the eSafety Commissioner and the ACMA could not reach agreement on assistance being or to be provided.

Clause 191(2) allows the Minister to specify amounts to be debited from the appropriation for the ACMA, to be credited to the Online Safety Special Account. The explanatory memorandum for the Online Safety Bill explains that exclusion from disallowance is appropriate in this instance to provide certainty of funding for the eSafety Commissioner. Allowing for the possibility that a legislative instrument providing funding for the eSafety Commissioner may be disallowed would create sufficient uncertainty, and could undermine an urgent response to a newly emerged online harm.

The committee's request that high-level guidance be included in primary legislation is noted. It is not intended to amend the Bill, due to the need to retain maximum flexibility and certainly in responding to the rapidly evolving nature of online harms. Proving high-level guidance as to the matters to be included in the directions would risk the new Online Safety Bill falling quickly out of date.

Committee comment

2.86 The committee thanks the minister for this response. The committee notes the minister's advice that the bill retains existing governance arrangements drawn from the *Enhancing Online Safety Act 2015*, and that the use of non-disallowable delegated legislation is necessary and appropriate due to the nature of the online environment. The committee, however, reiterates its consistent scrutiny view that the continuation of current arrangements is not, of itself, an adequate justification for the inclusion of significant matters in delegated legislation that is exempt from parliamentary oversight and disallowance.

2.87 The committee also notes the minister's advice in relation to limitations on the power for the minister to the direct the Commissioner, including that a direction 'must be of a general nature only'. While noting this advice, the committee's concerns are heightened by the potential for a direction to 'authorise the eSafety Commissioner to commence work in response to a new online harm not addressed by the Commissioner's primary legislation'. Such a direction would appear to provide the minister with a significant broad power to expand the scope of the bill in situations where the direction would not be subject to any parliamentary oversight.

2.88 With respect to the power for the minister to direct the ACMA, the committee notes the minister's advice that this power is necessary and appropriate and needed to ensure the appropriate resourcing and autonomy of the Commissioner. The committee also notes the minister's advice that this power would only be used as a matter of last resort, in the event that the Commissioner and the ACMA could not reach agreement on assistance being or to be provided.

2.89 With respect to clause 191, the committee notes that the minister's response refers to the explanation provided in the explanatory memorandum that exclusion from disallowance is required to provide certainty of funding for the Commissioner. However, as highlighted in the committee's initial comments, the committee does not generally accept a desire to provide certainty, of itself, to be sufficient justification for exempting an instrument from the parliamentary disallowance process.

2.90 The committee also reiterates the scrutiny position adopted by the Senate Standing Committee for the Scrutiny of Delegated Legislation (Senate Delegated Legislation Committee) that exemptions from disallowance should only be included in legislation in exceptional circumstances, and that any such exemptions should be provided for in primary legislation. The Senate Delegated Legislation Committee has also consistently raised scrutiny concerns with respect to the broad exemptions from disallowance in section 9 of the Legislation (Exemption and Other Matters) Regulation

2015, including the broad exemption for instruments that are 'a direction by a Minister to any person or body'.[33]

2.91 The committee requests that an addendum to the explanatory memorandum containing a statement that outlines the exceptional circumstances that would justify the exemptions from parliamentary disallowance be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.92 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving to delegated legislation which is exempt from disallowance:

- **directions about the exercise of powers or performance of functions of the Commissioner;**
- **directions about the provision by the ACMA of assistance to the Commissioner; and**
- **determinations of amounts to be credited to the online safety special account.**

Parliamentary scrutiny—section 96 grants to the states[34]

2.93 In *Scrutiny Digest 5 of 2021* the committee requested 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 online safety for Australians made under clause 27 are:
    - tabled in the Parliament within 15 sitting days after being made; and

33 See Senate Standing Committee on Regulations and Ordinances, *Parliamentary scrutiny of delegated legislation*, 3 June 2019, pp. 122–24; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, 2 December 2020, pp. 6–7; Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, pp. 100–101.

34 Clause 27. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

- published on the internet within 30 days of being made.[35]

Minister's response

2.94 The minister advised:

> The Committee's concern about the delegation of grant-making power to the Commissioner and the limited opportunity for Parliamentary scrutiny of the agreements with States and Territories establishing the grants is acknowledged.
>
> The provisions at clause 27 are identical to the provisions in section 15 of the *Enhancing Online Safety Act 2015* and it is considered appropriate for these provisions to continue. It is not considered necessary to specify in detail the purpose of all grants programs in the future as this might constrain the ability of the Commissioner to provide grants to assist in response to emerging online harms for all Australians.
>
> The Commissioner would be provided with funding for grants through the Budget process and the Senate has the ability to scrutinise this expenditure, including during Estimates hearings. The 2019-20 Budget included funding for a $10 million online safety grant program over four years. The eSafety Commissioner currently administering this program in accordance with the Commonwealth's grants guidelines. Information about the guidelines, the standard grants agreement and the grant recipients is published on the Commissioner's website [Online Safety Grants Program, eSafety Commissioner https://www.esafety.gov.au/about-us/what-we-do/our programs/online-safety-grants-program] and will also be included in future annual reports.
>
> The grants-making power in clause 27 is general and includes States, Territories and persons other than States or Territories. The current grants program is limited to applications from nongovernment organisations. However for future grants programs it may be appropriate for State and Territory government agencies to be eligible to apply.
>
> It is therefore not considered necessary to amend the Bill as suggested by the Committee.

Committee comment

2.95 The committee thanks the minister for this response. The committee notes the minister's advice that clause 27 would continue arrangements established in the *Enhancing Online Safety Act 2015*, and that specifying detail about the range of grants programs in primary legislation may constrain the ability of the Commissioner to provide grants to assist in response to emerging online harms.

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35 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 21–22.

2.96 The committee also notes the minister's advice with respect to opportunities for Senate scrutiny of expenditure on grants through the Budget process, and the minister's advice with respect to the publication of information on Commonwealth grants guidelines, the standard grants agreement and grant recipients on the Commissioner's website.

2.97 While acknowledging the minister's advice, the committee reiterates that section 96 of the Constitution confers on the Parliament the power to make grants to the states and to determine the terms and conditions attaching to them. Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

2.98 While the committee acknowledges that the current grants program is limited to applications from non-government organisations, the minister's response recognises that the bill allows for future grants programs to be open to state and territory government organisations. The committee remains concerned that the bill contains no guidance as to the terms and conditions on which financial assistance may be granted.

2.99 In addition, while the minister advised that the standard grants agreement will be published on the Commissioner's website, this is not a statutory requirement and there is no requirement to table the agreements in the Senate. In this regard, the committee notes that the process of tabling documents in the Senate alerts senators to their existence and provides opportunities for debate that are not available where documents are only published online.

2.100 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.101 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of:

- **leaving the terms and conditions on which financial assistance relating to online safety may be granted to the states to be determined by the executive; and**
- **not including a requirement that written agreements with the states and territories about grants of financial assistance must be published online and tabled in the Parliament.**

Reversal of evidential burden of proof[36]

2.102 In *Scrutiny Digest 5 of 2021*, the committee requested the minister's advice as to the appropriateness of reversing the evidential burden of proof in offence-specific defences in clause 205 and exceptions in clause 75, noting that its consideration of the appropriateness of a provision which reverses the burden of proof would be assisted if it explicitly addressed relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[37]

Minister's response

2.103 The minister advised:

> Subclause 205(1) makes it an offence for a person required to answer questions, give evidence or produce documents under this Part, to refuse or fail to take the oath or make the affirmation when required; refuse or fail to answer a question that the person is required to answer; or refuse or fail to produce a document that the person is required to produce. Subclause 205(3) provides that subclauses 205(1) and 205(2) do not apply if the person has a reasonable excuse for noncompliance.
>
> The defendant bears an evidential burden in relation to these matters, which is consistent with the provisions of the *Regulatory Powers (Standard Provisions) Act 2014* and subsection 13.3(3) of the Criminal Code in respect of matters in which a defendant seeks to rely on an exemption or excuse provision.
>
> It is appropriate to reverse the evidential burden of proof in the offence-specific defence in clause 205, with reference to the relevant principles set out in the Guide to Framing Commonwealth Offences [Attorney-General's Department, *A Guide to Framing Commonwealth Offences*, Infringement Notices and Enforcement Powers, September 2011, pp. 50-52.], because the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.
>
> Clause 75 of the Bill prohibits of the non-consensual sharing of intimate images. Subclause 75(2) provides that the prohibition does not apply if the person depicted in the intimate image consented to the sharing of the image. If the person consented to the sharing of the intimate image, the prohibition would not be contravened. The person claiming the prohibition did not apply would be required to provide evidence that consent for the sharing of the image was given.

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36 Clauses 75 and 205. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

37 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 22–24.

> Subclause 75(3) states the prohibition does not apply in relation to an intimate image of a person without attire of religious or cultural significance where the person who shared the image did not know that the person who is depicted in the image consistently wore that attire whenever the person is in public. The person who posted or threatened to post the image bears an evidential burden in relation to showing that they were not aware that the person depicted in the image consistently wore attire of religious or cultural significance in public.
>
> Subclause 75(4) provides that the prohibition does not apply if the posting or threat to post of the intimate image is, or would be, an exempt provision of the intimate image. The person who posted or threatened to post the image bears an evidential burden in relation to showing that the sharing of an image was an exempt provision.
>
> The defendant bears an evidential burden in relation to these matters, which is consistent with the provisions of the Regulatory Powers (Standard Provisions) Act 2014. It is appropriate to reverse the evidential burden of proof in the offence-specific defence in clause 75, with reference to the relevant principles set out in the Guide to Framing Commonwealth Offences, because the matter is peculiarly within the knowledge of the defendant, and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.
>
> The reversal of the evidential burden of proof on the defendant by creating an offence-specific defence is clear on the face of the legislation, in clauses 75 and 205 of the Bill. The reversal also exists in current legislation. Clause 75 of the Online Safety Bill 2021 is based on the existing section 44B of the *Enhancing Online Safety Act 2015* and clause 205 is based on the existing section 202 of the *Broadcasting Services Act 1992*.

Committee comment

2.104 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate to reverse the evidential burden of proof in the offence-specific defence in clause 205 and the exceptions in clause 75, because the matters are peculiarly within the knowledge of the defendant, and would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish.

2.105 While noting this advice, the committee generally expects a justification with respect to the appropriateness of reversing the evidential burden of proof to explain how and why the matters contained in an offence-specific defence are peculiarly within the knowledge of the defendant, and how and why they are significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. In this instance, the minister's response merely declares that the matters to be established by the defendant in relation to subclauses 205(3) and 75(2)-(4) comply with these principles set out in the *Guide to Framing Commonwealth Offences*, without providing the committee an explanation or context as to why.

2.106 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.107 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in the offence-specific defence in clause 205 and the exceptions in clause 75.

Incorporation of external materials existing from time to time[38]

2.108 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to whether material that may be applied, adopted or incorporated by reference under subclause 230(2) will be made freely available to all persons interested in the law and why it is necessary to apply this material as in force or existing from time to time, rather than when the instrument is first made.[39]

Minister's response

2.109 The minister advised:

> The ability to incorporate material as in force or existing from time to time is necessary to allow the Minister to reference in instruments certain technical and industry standards that may be updated frequently due to rapid technological change or the evolution of online services, and capture these updates without the need to update the instrument itself.
>
> The flexibility provided by clause 230 of the Bill is intended to reduce the administrative burden, so that it would not be required to amend a relevant determination every time instruments or writings referred to in that determination change. It is also important to be able to incorporate other instruments by reference (including international technical standards and relevant Australian industry standards) as in force or existing from time to time. Similar flexibility is provided in the *Telecommunications Act 1997* (section 589).
>
> Guidance on material that may be incorporated as in force or existing from time to time is provided in subclause 230(3), which lists examples such as

38 Subclause 230(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 24–25.

regulations made under an Act, a Territory law or State Act or an international technical standard.

Material incorporated by reference into the law will be freely and readily available.

Committee comment

2.110 The committee thanks the minister for this response. The committee notes the minister's advice that the ability to incorporate material as in force or existing from time to time is necessary to allow the minister to reference in instruments certain technical and industry standards that may be updated without the need to update the instrument itself.

2.111 The committee also welcomes the minister's advice that material incorporated by reference into the law will be freely and readily available, although notes that this is not a requirement set out on the face of the bill.

2.112 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.113 The committee reiterates its consistent scrutiny view that provisions in legislation which allow incorporation of legislative provisions by reference to other documents raise the prospect of changes being made to the law in the absence of parliamentary scrutiny.

2.114 The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing instruments made under the bill to incorporate matter contained in other documents, including technical and industry standards and written agreements, as in force or existing from time to time.

Broad delegation of administrative powers[40]

2.115 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow any or all of the Commissioner's functions and powers to be delegated to members of the staff

40 Clauses 181 and 182. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

of the ACMA or persons whose services are made available to the ACMA who hold Executive Level 1 or 2, or APS 6 level positions;

- why it is considered necessary and appropriate to allow the Commissioner's functions and powers that are not listed in subclause 182(4) to be delegated to a contractor; and
- whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated to members of the staff of the ACMA or persons whose services are made available to the ACMA.[41]

Minister's response

2.116 The minister advised:

> Clause 181 of the Online Safety Bill mirrors the existing provision in the *Enhancing Online Safety Act 2015* allowing the Commissioner to delegate functions and powers to members of staff of the ACMA. This provision is retained as the Commissioner is a statutory appointee that is supported by staff of the ACMA. It is necessary and appropriate that the Commissioner be able to delegate functions and powers to appropriately qualified staff to provide necessary flexibility while reducing the administrative burden on the Commissioner. The Commissioner's legislative functions and powers are quite broad ranging from conducting research and promoting online safety for Australians, to administering complaints schemes and issuing take down notices. While noting the committee's concern, the delegation to members of staff that are SES or acting SES employees or APS employees that hold Executive Level 1 or 2 or APS 6 level positions, is appropriate. This is because it is expected that in delegating relevant functions and powers the Commissioner will have regard to the required accountability, skills, expertise and experience required to exercise the particular function or power.
>
> Clause 182 was included in the Bill to mitigate any risk in the *Enhancing Online Safety Act 2015* that the Commissioner cannot explicitly engage contract staff in support of their functions and powers. It is the intent to use APS staff where possible. However at times the Commissioner must use contract staff in specialist positions for discrete time periods due to the specialist and at times sensitive nature of the Commissioner's work, in order to fulfil their statutory functions and powers. Clause 182 provides clarity and certainty regarding the use of contract staff, while subclause 182(4) appropriately limits the delegation to those functions and powers that do not carry civil penalty provisions.
>
> While the Bill does not contain legislative guidance as to the scope of powers that might be delegated, it is expected that eSafety will develop clear guidelines and procedures for decision making processes carried out

41 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 25–26.

by all staff (including contract staff) having regard to appropriate administrative decisions and processes. It is also expected, as noted above, that the Commissioner will use discretion when delegating functions and powers, and the delegate must comply with written directions from the Commissioner (subclauses 181(2) and 182(2) refer). It is not considered necessary to amend the Bill in the way suggested by the Committee.

Committee comment

2.117 The committee thanks the minister for this response. The committee notes the minister's advice that delegation to APS employees that hold Executive Level 1 or 2 or APS 6 level positions is appropriate because it is expected that, in delegating relevant functions and powers, the Commissioner will have regard to the required accountability, skills, expertise and experience required to exercise the particular function or power. The minister advised that the ability to delegate functions and powers to staff provides the necessary flexibility while also reducing the administrative burden on the Commissioner.

2.118 While noting this advice, the committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials below the Senior Executive Service level.

2.119 The committee also notes the minister's advice that, in order to fulfil their statutory functions and powers, the Commissioner must, at times, use contract staff in specialist positions for discrete time periods due to the specialist and sometimes sensitive nature of the Commissioner's work. The minister advised that clause 182 provides clarity and certainty regarding the use of contract staff, while subclause 182(4) appropriately limits delegation to those functions and powers that do not carry civil penalty provisions. The minister also advised that it is expected that guidelines in relation to procedures for decision-making processes will be developed and that the Commissioner will exercise discretion when delegating functions and powers.

2.120 The committee reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or, alternatively, that a limit is set on the scope and type of powers that may be delegated. While the committee notes the minister's advice as to how it is intended these powers will be exercised, there is nothing on the face of the bill to limit the exercise of delegation powers in the way set out in the minister's response, other than the limitations on delegations to contractors set out in subclause 182(4).

2.121 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.122 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing:

- **any or all of the Commissioner's functions and powers to be delegated to members of the staff of the ACMA or persons whose services are made available to the ACMA who hold Executive Level 1 or 2, or APS 6 level positions; and**
- **the Commissioner's functions and powers that are not listed in subclause 182(4) to be delegated to a contractor.**

Private Health Insurance Legislation Amendment (Age of Dependents) Bill 2021

Purpose	This bill seeks to amend the *Private Health Insurance Act 2007* and associated legislation to: • change the maximum allowable age for people to be covered under a family private health insurance policy as a dependent up to 31 years old; and • allow people with a disability, regardless of their age, to be covered under family private health policy as a dependent
Portfolio	Health and Aged Care
Introduced	House of Representatives on 25 February 2021
Bill status	Before the Senate

Significant matters in delegated legislation[42]

2.123 In *Scrutiny Digest 5 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the definition of 'person with a disability' to delegated legislation;
- whether the bill can be amended to include on the face of the primary legislation:
  - at least high-level guidance regarding this definition, and
  - the requirement that private health insurer rules may not apply a narrower definition of 'person with a disability' than that in the rules; and
- why it is considered necessary and appropriate to apply definitions set out in rules of a private health insurer to the definitions of 'person with a disability', 'dependent non-student' and 'dependent student'.[43]

42 Items 14, 16 and 20. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2021*, pp. 29–31.

Minister's response[44]

2.124 The minister advised:

Definition of Person with a Disability

This Bill does not require any of the over 35 private health insurers in Australia to cover dependent people with a disability. Instead, the Bill allows a private health insurer to offer this type of coverage by exempting this type of coverage from the community rating requirements of private health insurance legislation. Without this exemption it would be illegal for insurers to offer coverage specific to dependent people with a disability.

In order to encourage insurers to offer cover for dependent people with a disability while still providing affordable insurance to their current policyholders, it is important the definition of people with a disability is set at a level that does not expose them to prudential risks that they cannot mitigate. If the definition of dependent people with a disability is too broad, private health insurers have advised they will not offer coverage for dependents with a disability as it would not be financially viable. If the definition of dependent people with a disability is too narrow, only a small number of people with a disability would be able to be covered.

The Bill addresses these issues in two ways:

- by establishing a minimum standard for the definition of people with a disability, to be specified in the Private Health Insurance (Complying Product) Rules (Rules), that must be used if a private health insurer chooses to offer coverage for dependent people with a disability
- by allowing a private health insurer to offer coverage beyond the minimum standard. This allows an insurer to offer broader coverage for dependent people with a disability if it chooses to offer coverage for dependent people with a disability, and it decides it is prudent to offer coverage beyond the minimum standard. An insurer may decide to offer coverage beyond the minimum standard when it first chooses to offer this type of coverage, or more likely after it has assessed the viability of offering coverage for dependent people with a disability at the minimum standard.

Accordingly, it is necessary to have the minimum standard defined in delegated legislation in order to allow for adjustments in a timely manner, particularly should there be an opportunity to expand the minimum standard as insurers offer increased coverage as financial viability concerns

44 The minister responded to the committee's comments in a letter dated 11 April 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

are quantified. Without this flexibility people with a disability would be disadvantaged.

Private Health Insurer Rules May Not Narrow the Definition

The Bill defines a dependent person with a disability as:

- dependent person with a disability means a person:

  (a) who is aged 18 or over; and

  (b) who is:

  (i) a person with a disability within the meaning of the expression person with a disability as defined by the Rules; or

  (ii) a person with a disability within the meaning of the expression person with a disability as defined by the rules of the private health insurer that insures the person.

The definition of a dependent person with a disability in the Bill is already structured in such a way as to prevent private health insurers from narrowing the definition of a person with a disability as defined by the Rules. It only allows insurers to broaden the definition of a person with a disability as defined by the Rules.

Definition of Dependent Non-students and Dependent Students in Insurer's Rules

The current categories of dependent child are listed in the table below and include:

- dependent children who are 0-17 years
- dependent children who are students and aged 0-24 years
- dependent child non-students who are aged 18-24 years.

'Dependent child non-student' is the only category of dependent child specifically named in the *Private Health Insurance Act 2007*.

Existing Dependent Child Categories

Dependent Child Categories names	Age Range	Defined by Insurer Rules	*Private Health Insurance Act 2007* Reference
Defined but not named in the *Private Health Insurance Act 2007*	0 - 17	not allowed	Schedule 1 – Dictionary, Dependent child (a)(i)
Defined but not named in the *Private Health Insurance Act 2007*	0 - 24	allowed	Schedule 1 – Dictionary, Dependent child (a)(ii), (b) and subsection 63-5(5)
Dependent child non-student	18 - 24	allowed	Subsection 63-5(5)

Insurers already have flexibility under the *Private Health Insurance Act 2007* to define the age range and other characteristics of dependent children who are students and dependent child non-students they will cover. For example, an insurer may decide to only cover dependent child non-students that live with their parents up to the age of 21.

The Bill does not alter in substance the ability for insurers to define dependent child non-students and dependent child students in their rules as this is already permitted under the *Private Health Insurance Act 2007*. The Bill only uses newer and clearer terminology for these categories of dependent child.

This is explained in the first three paragraphs in the notes on clauses for items 18, 19 and 20 in the explanatory statement for the Bill:

- Schedule 1 forms the dictionary of definitions used in the *Private Health Insurance Act 2007*. These items unify, name and define, and expand the current categories of 'dependent child'.
- They replace the term of' dependent child' which covered three categories of 'dependent child' with 'dependent person' which covers four categories of 'dependent persons'.
- The new category of' dependent person' is a 'dependent person with a disability'.

Two of the current categories of 'dependent child' which were not individually defined have been named 'dependent child' and 'dependent student' and are individually defined. The current categories of 'dependent child' which was individually defined has had its name changed from to 'dependent child nonstudent' to 'dependent non-student'.

Committee comment

2.125 The committee thanks the minister for this response. The committee notes the minister's advice that the bill provides private health insurers with the choice to cover dependent people with a disability by exempting that particular type of coverage from the community rating requirements. The minister advised that without this exemption it would be illegal for insurers to offer coverage specific to dependent people with a disability.

2.126 The committee notes the minister's advice that it is necessary to define a minimum standard for the definition of 'person with a disability' in delegated legislation in order to allow for adjustments to be made in a timely manner, with particular consideration being given to potential amendments to the definition should insurers offer increased coverage in the future as financial viability concerns are quantified. The minister advised that, without this flexibility, people with a disability would be disadvantaged.

2.127 The committee also notes the minister's advice that the bill does not alter the substantive effect of the terms 'dependent students' and 'dependent non-students'

but, rather, is intended to unify, name, define, and expand categories of dependent children.

2.128 Generally, the committee does not consider that either a desire for administrative flexibility, or the fact that a provision continues or is consistent with existing arrangements, are likely to be, of themselves, sufficient justification for including significant matters in delegated legislation.

2.129 The committee notes that the minister has advised that the structure of the bill is such that private health insurers are prevented from narrowing the definition of 'person with a disability' as defined by the Private Health Insurance (Complying Product) Rules 2015. However, the committee remains concerned that leaving the definition of 'person with a disability' to delegated legislation subjects this definition to an insufficient level of parliamentary oversight. The committee's scrutiny concerns in this instance are heightened due to the potential impact on the ability of affected persons to access health insurance and the broad discretion afforded to the minister and to private health insurers to prescribe the definition of 'person with a disability'.

2.130 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister, particularly in relation to the definition of 'persons with a disability', be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.131 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing delegated legislation to prescribe the meaning of 'dependent non-student', 'dependent student' and 'person with a disability'.

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

Social Services and Other Legislation Amendment (Student Assistance and Other Measures) Bill 2021

Purpose	Schedules 1 and 2 to the bill seek to amend the *Student Assistance Act 1973* to make the Act more consistent with social security law relating to Tax File Number collection and use, and information management. It also seeks to improve the effective administration schemes of the ABSTUDY and Assistance of Isolated Children schemes Schedule 3 to the bill makes technical amendments to social services legislation relating to the definition of 'social security law'
Portfolio	Social Services
Introduced	4 February 2021
Bill status	Before the House of Representatives

Inappropriate delegation of legislative powers[45]

2.133 In *Scrutiny Digest 3 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate for legislative instruments made under Acts expressed to form part of the 'social security law' to be included in the new definition of 'social security law' in proposed subsection 23(17), and the practical impact of this change.[46]

Minister's response[47]

2.134 The minister advised:

> As noted by the Committee, the current definition of 'social security law' under subsections 23(17) and (18) of the *Social Security Act 1991* (the Act) provides that 'a reference in the [Act] to the social security law is a reference to a provision of this Act, the Administration Act or any other Act that is expressed to form part of the social security law'. However, the definition

45 Schedule 3, items 1 and 2. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

46 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2021*, pp. 1–2.

47 The minister responded to the committee's comments in a letter dated 12 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

of 'social security law' does not expressly include legislative instruments made under an Act or a provision referred to in any of those Acts.

The Act and the *Social Security (Administration) Act 1999* include frequent references to the 'social security law' in a variety of contexts, including but not limited to review of decisions, delegation of powers, obligations, offences and confidentiality provisions. Legislative instruments, such as the Social Security (Public Interest Certificate Guidelines) (DSS) Determination 2015 also include references to the 'social security law'. While it may be that an instrument made under the power in any of these Acts is, in effect, part of the 'social security law', there is some doubt that it may not fall within the definition, or it may not do so in some legislative contexts.

The amendments are intended to clarify and achieve certainty that the references to 'social security law' include legislative instruments made under the authority of the Acts referenced in the new subsection 23(17). It also provides clarity to tribunals and courts when deliberating on appeals before them that involve decisions made under legislative instruments.

The practical impact of this change.

The practical impact of this change is negligible. The measure clarifies current practice.

Committee comment

2.135 The committee thanks the minister for this response. The committee notes the minister's advice that the amendments are intended to clarify and achieve certainty that the references to 'social security law' include legislative instruments made under the authority of the Acts referenced in the new subsection 23(17). In addition, it provides clarity to tribunals and courts when deliberating on appeals before them that involve decisions made under legislative instruments.

2.136 The committee also notes the minister's advice that the measure clarifies current practice, and that the practical impact of the change is negligible.

2.137 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

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

Treasury Laws Amendment (Your Future, Your Super) Bill 2021

Purpose	Schedule 1 to this bill seeks to amend the *Superannuation Guarantee (Administration) Act 1992* to limit the creation of multiple superannuation accounts for employees who do not choose a superannuation fund when they start a new job Schedule 2 to this bill seeks to amend the *Superannuation Industry (Supervision) Act 1993* to require the Australian Prudential Regulation Authority to conduct an annual, objective performance test for MySuper products and other products Schedule 3 to this bill seeks to amend the existing best-interests duty to clarify that this duty requires the superannuation trustee to act in the best financial interests of the member
Portfolio	Treasury
Introduced	House of Representatives on 17 February 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[48]

Stapled funds

2.139 In *Scrutiny Digest 4 of 2021* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to leave basic requirements for a fund to be a stapled fund for an employee to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding these basic requirements on the face of the primary legislation, such as the requirement that the fund is an existing fund of the employee.[49]

Treasurer's response[50]

48 Schedule 1, item 18; Schedule 2, item 9; Schedule 3, items 6, 10 and 14. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

49 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2021*, pp. 10–11.

50 The Treasurer responded to the committee's comments in a letter dated 25 March 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

2.140 The Treasurer advised:

> Schedule 1 to the Treasury Laws Amendment (Your Future, Your Super) Bill 2021 (the Bill) sets out the new choice of fund rules relating to stapled funds. As stapled funds are a new concept in the *Superannuation Guarantee (Administration) Act 1992*, flexibility about the definition of a 'stapled fund', including in relation to the basic requirements, is needed to ensure the definition can remain responsive to changing practices, particularly as the reforms are implemented by industry.
>
> The explanatory memorandum to the Bill provides that the regulations prescribing the requirements for a fund to be a stapled fund for an employee will cover basic requirements. This will include the requirement that the fund is an existing fund of the employee.
>
> I note that although this requirement could also be explicitly included in the primary law, it is already implicit through the various references in Schedule 1 to the Bill that refer to a stapled fund being a 'stapled fund *for* an employee' (as this indicates there must be an existing connection between the stapled fund and the employee). It should also be noted that in practice, an employer will only ever be able to make contributions to a fund that is an existing fund of an employee.
>
> It is also envisaged that the regulations will also include other requirements to ensure that the rules are appropriately targeted. In particular, I am proposing that an existing fund will not be a stapled fund for an employee if the employee's only interest in that existing fund is a defined benefit interest. This approach reflects that if the employee only has a defined benefit interest in an existing fund, a new employer is unlikely to be able to make contributions to that fund.
>
> The regulations are also expected to include tie-breaker rules for determining which fund is to be an employee's stapled fund where they have multiple existing funds. I note that a similar approach to tie-breaker rules is included in subregulation 14(2) of the *Superannuation (Unclaimed Money and Lost Members) Regulations 2019*, which applies for the purposes of identifying an 'active account' where a person has more than one eligible fund for receiving payments of lost and unclaimed money from the Commissioner under the *Superannuation (Unclaimed Money and Lost Members) Act 1999*.
>
> Prescriptive detail of this kind is consistent with the legislative framework established by the Bill. In my view, it is entirely appropriate that detail of this kind be included in subordinate legislation such as regulations. In line with usual government processes, the regulations prescribing the requirements that need to be met for a fund to be a stapled fund for an employee will be open to stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

Committee comment

2.141 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that flexibility about the definition of 'stapled fund' is needed as stapled funds are a new concept in the Act, and such flexibility is required to ensure the definition is responsive to changing practices. The committee also notes the Treasurer's advice that the requirement that the fund is an existing fund of the employee could be explicitly included in primary law, but that the requirement is already implicit through references to a stapled fund being a 'stapled fund *for* an employee', indicating that there must already be an existing connection between the stapled fund and the employee.

2.142 The committee further notes the additional matters outlined by the Treasurer that are expected to be included in the regulations, including that an existing fund will not be a stapled fund for an employee if the employee's only interest in that existing fund is a defined benefit interest and the inclusion of tie-breaker rules for determining which fund is to be an employee's stapled fund in circumstances where they have multiple existing funds.

2.143 While welcoming this additional information, it remains unclear to the committee why at least high-level guidance regarding these basic requirements cannot be included on the face of primary legislation. While the Treasurer notes that similar approaches have been used in other legislation in relation to superannuation, the committee does not consider this explanation to be, of itself, sufficient justification for leaving significant matters to delegated legislation.

2.144 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Treasurer be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.145 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving basic requirements for a fund to be a stapled fund for an employee to delegated legislation.

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

Significant matters in delegated legislation

Retrospective application[51]

Part 6A – annual performance assessments

2.147 In *Scrutiny Digest 4 of 2021* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to leave the following matters to delegated legislation:
  - the definition of 'part 6A product';[52]
  - the requirements for the annual performance test;[53]
  - requirements for lifting a prohibition on accepting new beneficiaries into superannuation funds that have received two consecutive failure assessments;[54]
- whether the proposed scheme for annual performance assessments may have a retrospective application and, if so, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected; and
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.

2.148 The committee also requested that the explanatory memorandum be amended to include specific information about the intended operation of the annual performance testing scheme, as set out in Budget documents published by the Treasury.[55]

Treasurer's response

2.149 The Treasurer advised:

> The legislation introduces an annual performance test that initially only applies for Part 6A products that are MySuper products. The legislation allows regulations to define additional Part 6A products which will be subject to the annual performance test. This regulation making power allows the test to be expanded, where appropriate, to existing products

51 Schedule 1, item 18; Schedule 2, item 9; Schedule 3, items 6, 10 and 14. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

52 Section 60B.

53 Section 60D.

54 Subsection 60F(4).

55 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2021*, pp. 11–14.

(other than MySuper products), as well as new superannuation products that may emerge in the future.

In contrast to MySuper products (which are prescriptively defined in primary legislation), such products may vary significantly in their structure and form, and new products are regularly being offered to the market. As such, the flexibility to capture these is best achieved by placing the definition in the regulations. Regulations are considered appropriate to deal with more technical details and can be amended more quickly than legislation to respond to a changing marketplace and keep closer pace with progressive product innovation. This approach is designed to allow timely future refinements to the definitions to ensure that the scope of additional products are defined correctly, providing certainty for industry on which products are in scope, over time.

The legislation ensures that products specified in the regulations cannot be subject to the annual performance test until 1 July 2022 at the earliest.

The specific requirements for the annual performance test involve setting out various technical matters including specifying complex mathematical formula and assumptions that are to be applied in performing the calculations. It is considered that regulations are the appropriate mechanism for setting out such technical details. Regulations provide flexibility to refine the technical details and formula to ensure the test operates as intended both initially and over time, as regulations may be amended more quickly than primary legislation. Regulations will enable the Government to be more responsive to update relevant assumptions to be used in the calculations, where there is a change in the investment environment that makes updates appropriate or necessary.

If a Part 6A product does not meet the requirements of the performance test in two consecutive financial years, the trustee cannot accept any new members into that product. The legislation seeks to introduce a provision whereby APRA may make a determination to lift this prohibition (that is, re-open the Part 6A product to new members).

Regulations will provide for requirement that need to be met for APRA to make such a determination. It is anticipated that the requirements would be of a technical nature, similar to the requirements for the annual performance test. That is, the requirements would likely involve specifying complex mathematical formula and assumptions to be used in the calculations. As outlined above, it is considered that details of this nature are most appropriately dealt with in regulations.

Any regulations dealing with the matters outlined above would, in line with usual government processes, be open to stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

The annual performance test is designed to assess performance against, tailored benchmark for each Part 6A product. In order to carry out the

calculation, it is necessary to look back at a product's performance in past years, which could be viewed as having retrospective application. The intent is that the performance test is to be calculated over a time period that allows funds to target long-term returns, rather than having one or two years of poor performance result in a failure of the test.

To begin looking at long-term product performance in a timely manner, it is necessary and appropriate to take into account a product's performance prior to the making of the regulations prescribing the formula for the test Not doing so would mean that the first performance tests could not be conducted until many years after the regulations are made.

It is unlikely that any individual will be adversely affected by this approach. This approach ensures the annual performance test can begin to apply.in a timely manner after the regulations are made. This is likely to promote the interests of superannuation members, as members will be notified if they are in an underperforming product sooner, and not wait many years into the future, which could have an adverse effect on their retirement outcomes. The approach of assessing long-term returns seeks to prevent trustees being adversely affected by having one or two years of poor performance.

I believe the Bill provides guidance on the core framework for the new annual performance test, setting out matters such as the consequences that flow for trustees when, a product they offer is considered to be underperforming.

The matters raised by the Committee are best provided for in regulations as they relate to matters that may change or are very technical in nature. Having these matters prescribed in regulations allows for quicker reactions to these changes in the superannuation sector than would be available if these matters were prescribed in the primary law.

Guidance on the intended operation of the, annual performance testing scheme will be provided in the explanatory statement to the regulations. It is appropriate that this guidance accompany the regulations, which will set out the detailed requirements for the annual performance test.

Committee comment

2.150 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the additional Part 6A products may vary significantly and that regulations are considered more appropriate to deal with more technical details and can be amended more quickly than primary legislation to respond to changes in the marketplaces and to account for product innovation.

2.151 The committee also notes the Treasurer's advice that regulations are appropriate for setting out the specific requirements for the annual performance test, as these requirements involve setting out various technical matters, including specifying mathematical formula and assumptions to be applied in performing

calculations. The committee further notes the Treasurer's advice as to the technical nature of the requirements to be set out in regulations relating to determinations that may be made by APRA to lift a prohibition on accepting new members into a Part 6A product as a result of two consecutive failures by that product to meet the performance test.

2.152 The Treasurer further advised that the bill provides guidance on the core framework for the new annual performance test.

2.153 In relation to the committee's questions regarding retrospective application of the annual performance test, the committee notes the Treasurer's advice that, in order to carry out the calculation for the performance test, it is necessary to look back at a product's performance in past years, which could be viewed as having retrospective application. The Treasurer, however, advised that the intent of the bill is that the performance test is to be calculated over a time period that allows funds to target long-term returns, rather than having one or two years of poor performance result in a failure of the test. The Treasurer considered that it is necessary and appropriate to consider a superannuation product's performance prior to the making of the relevant regulations in order to begin looking at long-term product performance in a timely manner.

2.154 The Treasurer also advised that it is unlikely that any individual would be adversely affected by this approach, and that ensuring that the annual performance test can begin to apply in a timely manner is likely to promote the interests of superannuation members, allowing members to be notified sooner if they are in an underperforming superannuation product.

2.155 Finally, while the committee notes the Treasurer's advice that guidance on the intended operation of the annual performance testing scheme will be provided in the explanatory statement to the regulations, it is unclear to the committee why such information cannot also be included in the explanatory memorandum to the bill. The committee considers that it is important for this information to be available to parliamentarians currently considering the bill to enable them to properly consider the appropriateness of inserting provisions into the law which will allow the regulations to set out the requirements for the annual performance test. In addition, the committee notes that these explanatory materials are an important point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation. As such, the committee considers that it is inappropriate for details in relation to the operation of the proposed annual performance test to be set out in promotional materials,[56] but not in explanatory materials tabled in the Parliament.

56 Treasury, *Your Future, Your Super: Reforms to make your super work harder for you*, October 2020, pp. 22–24, available at https://treasury.gov.au/sites/default/files/2020-10/p2020-super_0.pdf.

2.156 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Treasurer be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials 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*).

2.157 In light of the information provided in relation to the matters to be included in delegated legislation and potential retrospective application of the annual performance tests, the committee makes no further comment on these matters.

2.158 The committee draws its scrutiny concerns in relation to the inclusion of specific information about the intended operation of the annual performance testing scheme in the explanatory memorandum to the bill to the attention of senators and leaves to the Senate as a whole the appropriateness of including this information in promotional materials and explanatory statements to the relevant regulations, rather than in the explanatory memorandum to the bill.

2.159 The committee also draws these matters to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Significant matters in delegated legislation[57]

Content of offences and civil penalties in regulations

2.160 In *Scrutiny Digest 4 of 2021* the committee requested the Treasurer's advice as to:

- why it is considered necessary and appropriate to leave the following significant matters to delegated legislation:
  - record keeping standards that must be complied with by trustees of superannuation entities;
  - additional requirements in relation to the 'best financial interests' duty that must be complied with by trustees and directors of trustee companies; and
  - prohibited payments or investments;
- whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation; and
- whether specific consultation obligations (beyond those in the *Legislation Act 2003*) could be included in the bill (with compliance with such obligations a

57 Schedule 1, item 18; Schedule 2, item 9; Schedule 3, items 6, 10 and 14. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

condition of the validity of regulations made under paragraphs 52(2)(c) and 52A(2)(c) and proposed subsection 117A(1)).[58]

Treasurer's response

2.161 The Treasurer advised:

> Schedule 3 to the Bill does not delegate the specification of record keeping standards to delegated legislation. This is already a feature of the existing law. Existing sections 31, 32 and 33 of the *Superannuation Industry (Supervision) Act 1993* (SIS Act) expressly authorise regulations to prescribe record keeping standards that must be compiled with by trustees and directors of trustee companies. This allows the regulations to establish record keeping obligations that trustees must already comply with under the existing law. This is part of a broader framework already set out in the SIS Act outlining which matters can be prescribed in operating standards made via regulations (see paragraphs 31(2)(a) to (u), 32(2)(a) to (n) and 33(aa) to (k) of the SIS Act).
>
> The Bill does not seek to vary those matters (record keeping or otherwise) that can be prescribed via operating standards. The Bill only creates a strict liability offence for these record keeping requirements to enhance and expand the enforcement and compliance options available to the regulators. The strict liability offence is designed to apply to any offence of this kind that may arise under the existing law. The explanatory memorandum explains why it is considered appropriate to apply strict liability to this kind of offence.
>
> Schedule 3 to the Bill seeks to ensure that trustee actions are in the best financial interests of members. Regulating superannuation entities and their actions is important to protect the retirement savings of Australians.
>
> The record keeping standards, additional requirements in relation to the 'best financial interests' duty, and the prohibition of certain payments ·or investments target the application of the legislative regime so that it focuses on the kinds of trustee actions where risks are likely to arise while minimising impact for areas of lower risk. As industry practices may change over time, the record keeping standards, additional requirements and the kinds of prohibited payments or investments may also need to change to reflect this.
>
> Allowing the regulations to prescribe additional requirements in relation to the 'best financial interests' duty and to prohibit certain payments or investments will provide the Government with the necessary flexibility to make timely amendments. This essential flexibility to adapt to changing risks is best achieved by placing the detail. in the regulations which may be amended more quickly than primary legislation. In line with usual

58 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2021*, pp. 14–16.

government processes, the regulations regarding these matters will be open to stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

It is unlikely that any person will be adversely affected by this approach. The regulations cannot apply retrospectively to disadvantage a person. The intention is to address circumstances where there is a heightened risk of trustees avoiding their obligations under the best financial interests duty. This approach ensures the additional requirements and the prohibition on particular kinds of payments or investments can be designed to target circumstances where trustee behaviour that is not in members' best financial interests has. been identified, and can begin to apply in a timely manner after the regulations are made. This approach is designed to allow timely future refinements to ensure that the circumstances that trigger additional requirements and the scope of prohibited payments and investments are defined correctly, providing certainty for. industry over time.

The high level guidance is provided in the explanatory memorandum to the Bill and further guidance will be provided in the explanatory statement to any regulations made. For the same reason that these matters need to be included in the regulations (flexibility to be promptly amended in response to evolving industry practices), the primary legislation should not excessively constrain the scope of these matters that may be prescribed by the regulations.

The *Legislation Act 2003* includes a requirement to consult before making any legislative instruments to ensure that proposed instruments are appropriate and reasonably practicable to undertake. Consultation should ensure that persons likely to be affected by the proposed instrument have an adequate opportunity to comment; and that persons with expertise in the relevant field or representative bodies of persons likely affected by the proposed instrument are invited to make submissions. In line with such usual government processes, any proposed regulations regarding the matters outlined above will be open to stakeholder input during consultations and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

Committee comment

2.162 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the specification of record keeping standards is a feature of the existing law, and that the bill only creates a strict liability offence for the record keeping requirements to enhance and expand the enforcement and compliance options already available to regulators. While noting this advice, and the explanation provided in the explanatory memorandum in relation to the application of this strict liability offence, the committee's concerns with respect to the imposition of a strict liability offence in this instance are heightened because matters that are central to the commission of the offence are included in delegated legislation. From a scrutiny

perspective, the committee expects that the explanatory material to a bill that takes this approach will provide a clear justification both for the imposition of strict liability, and why it is appropriate that elements of the strict liability offence are set out in delegated legislation.

2.163 The committee also notes the Treasurer's advice that the record keeping standards, additional requirements in relation to the 'best financial interests' duty, and the prohibition of certain payments or investments are intended to target the application of the legislative regime so that it focuses on the kinds of trustee actions where risks are likely to arise while also minimising impact for areas of lower risk. The Treasurer advised that including these matters in regulations provides flexibility to make timely amendments to reflect changes in industry practices in these areas. In this respect, the committee reiterates its consistent scrutiny view that a desire for administrative flexibility will not generally be accepted as a sufficient justification, of itself, for leaving significant matters to delegated legislation.

2.164 The Treasurer further advised that the desire for flexibility was also the reason that the primary legislation should not excessively constrain the scope of the matters that may be prescribed by the regulations. The committee remains concerned, however, that including prohibited payments, prohibited investments and additional requirements in relation to the 'best financial interests' duty in the regulations without also including guidance on the face of primary legislation, provides considerably broad discretion to the executive to determine the scope and content of the 'best financial interests' duty, and to dictate which payments or investments are permitted to be made by trustees. The committee's concerns in this regard are heightened by the significant civil and criminal consequences that flow from the breach of the 'best financial interests' duty. In this regard, the committee also notes that the explanatory material does not demonstrate that this approach is consistent with the advice set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, which states:

> The content of an offence set out in an Act or regulation should be clear from the offence provision itself, although the offence may rely on the Act or regulation, or another instrument, to define terms used or give context to the offence. The content of the offence should not be provided in another instrument unless there is a demonstrated need to do so.[59]

2.165 Finally, while noting the Treasurer's advice that delegated legislation made under provisions in the bill would be subject to consultation requirements in the *Legislation Act 2003*, the committee's scrutiny view is that these requirements may not be sufficient to ensure that fulsome consultation takes place in the absence of specific consultation requirements. This is because the *Legislation Act 2003* provides

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

that consultation may not be undertaken if the instrument-maker considers that consultation is unnecessary or inappropriate, and the fact that consultation has not occurred will not affect the validity of the regulations.[60]

2.166 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the following significant matters to delegated legislation:

- **record keeping standards, where failure to comply with the standards will be a strict liability offence;**
- **additional requirements in relation to the 'best financial interests' duty that must be complied with by trustees and directors of trustee companies; and**
- **prohibited payments or investments.**

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

60 See, *Legislation Act 2003*, subsection 17(1) and section 19.

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*.