

The Senate

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Committee for the
Scrutiny of Bills

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Contents

Membership of the committee	iii
Introduction.....	vii
Chapter 1 – Initial scrutiny	
Comment bills	
COVID-19 Disaster Payment (Funding Arrangements) Bill 2021	1
Major Sporting Events (Indicia and Images) Protection and Other Legislation Bill 2021.....	4
Ministerial Suitability Commission of Inquiry Bill 2021.....	6
Treasury Laws Amendment (COVID-19 Economic Response) Bill 2021.....	7
Bills with no committee comment.....	9
Australian Organ and Tissue Donation and Transplantation Authority Amendment (Governance and Other Measures) Bill 2021	
Customs Tariff Amendment (Incorporation of Proposals) Bill 2021	
Electric Vehicles Accountability Bill 2021	
National Health Amendment (Decisions under the Continence Aids Payment Scheme) Bill 2021	
Commentary on amendments and explanatory materials	
Transport Security Amendment (Serious Crime) Bill 2020.....	10
Treasury Laws Amendment (More Flexible Superannuation) Bill 2020.....	10
Treasury Laws Amendment (Your Future, Your Super) Bill 2021.....	10
Chapter 2 – Commentary on ministerial responses.....	11
Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021	11
Fuel Security Bill 2021	16
Tertiary Education Quality and Standards Agency (Charges) Bill 2021.....	21
Tertiary Education Quality and Standards Agency Amendment (Cost Recovery) Bill 2021.....	24
Chapter 3 – Scrutiny of standing appropriations	27

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

Initial scrutiny

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

COVID-19 Disaster Payment (Funding Arrangements) Bill 2021

Purpose	This bill seeks to provide time-limited financial assistance to eligible workers who are unable to earn their usual income as a result of public health restrictions, such as public health orders imposed by State or Territory governments, and where the Commonwealth Chief Medical Officer has determined the location to be a COVID-19 hotspot for the purposes of Commonwealth support
Portfolio	Agriculture, Drought and Emergency Management
Introduced	House of Representatives on 16 June 2021

Significant matters in delegated legislation

Parliamentary scrutiny¹

1.2 The bill seeks to establish a special appropriation to draw funds from the Consolidated Revenue Fund for the payment of the COVID-19 disaster payment (the payment). Clause 3 of the bill provides that the meaning of the payment is set out in the Financial Framework (Supplementary Powers) Regulations 1997.

1.3 From a scrutiny perspective, the committee is concerned that the eligibility requirements for the payment are being left to regulations, and the amount of the payment is being left to non-legislative guidelines. The committee's view is that significant matters, such as the amount of, and eligibility requirements for, a payment should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.4 In this instance, the explanatory memorandum does not directly address why it is appropriate to leave these details to delegated legislation and non-legislative guidelines. However, in relation to the amount of public funds that may potentially be

1 Clause 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

payable under the COVID-19 disaster payment scheme, the explanatory memorandum states:

Given the entitlement based and demand driven nature of the COVID-19 disaster payments, together with the unpredictability of the timing and duration of lockdown events which restrict the movement of persons, the amount that may potentially be payable by government cannot be suitably quantified.²

1.5 The explanatory memorandum also refers to the urgency required in making such payments.³

1.6 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 or non-legislative guidelines. While the committee acknowledges that some flexibility may be required, it is unclear why at least high-level guidance in relation to amount of, and eligibility requirements for, the payment cannot be provided on the face of the bill.

1.7 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. Moreover, non-legislative guidelines are not subject to any level of parliamentary scrutiny or oversight.

1.8 The committee acknowledges the requirement for the Coordinator-General of the National Recovery and Resilience Agency to include information in their annual report relating to payments made in the 2021-22 financial year.⁴ The explanatory memorandum explains that the report will include information such as the total amount paid during the reporting period.⁵

1.9 While welcoming this transparency measure, the committee does not consider that this requirement addresses the committee's significant scrutiny concerns in relation to the absence of detail about the scope of the COVID-19 disaster payment on the face of the bill. Despite the reference in the explanatory memorandum to the fact that the nature and scope of required COVID-19 disaster payments cannot be quantified,⁶ it is also unclear to the committee why the high-level guidance at page 6 of the explanatory memorandum in relation to the scope of the annual reporting requirement cannot be included on the face of the bill.

2 Explanatory memorandum, p. 2.

3 Explanatory memorandum, p. 2.

4 Clause 5.

5 Explanatory memorandum, p. 6.

6 Explanatory memorandum, p. 6.

1.10 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 amount of, and eligibility requirements for, the COVID-19 Disaster Payment to delegated legislation and non-legislative guidelines; and**
- **whether the bill can be amended to include at least high-level guidance regarding the payment and the associated annual reporting obligation on the face of the primary legislation.**

Major Sporting Events (Indicia and Images) Protection and Other Legislation Bill 2021

Purpose	This bill seeks to amend the <i>Major Sporting Events (Indicia and Images) Protection Act 2014</i> to provide protection against ambush marketing by association for the Fédération Internationale de Football Association Women's World Cup Australia New Zealand 2023 and International Cricket Council T20 World Cup 2022. It also seeks to remove the historical Schedule related to the Gold Coast 2018 Commonwealth Games as this Schedule has ceased to have effect, and to make a minor technical amendment to the <i>Sport Integrity Australia Act 2020</i>
Portfolio	Sport
Introduced	Senate on 16 June 2021

Significant matters in delegated legislation⁷

1.11 Item 1 of Schedule 1 seeks to amend the definition of 'event body' in the *Major Sporting Events (Indicia and Images) Protection Act 2014* (the Act) to provide that additional event bodies may be prescribed in the rules. Currently, event bodies must be listed in the Schedules to the Act for the relevant major event. An event body is authorised to use a major sporting event's protected indicia and images for commercial purposes and can authorise other persons to use the relevant indicia and images.⁸

1.12 The committee's consistent scrutiny view is that significant matters, such as the scope of definitions or concepts central to the operation of a scheme established by an Act, should be included in primary legislation unless a sound justification is provided for the use of delegated legislation. In this instance, the explanatory memorandum states:

This function may be used should an 'authorising body' wish to recognise an additional body as an 'event body' for events listed in Schedules of the Act.⁹

1.13 It is unclear to the committee why it is appropriate to allow the minister to prescribe additional event bodies in the rules in circumstances where there is no guidance on the face of the primary legislation as to the types of bodies that may be prescribed. The committee notes that the other amendments made by the bill are to

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

⁸ *Major Sporting Events (Indicia and Images) Protection Act 2014*, section 16.

⁹ Explanatory memorandum, p. 7.

list events occurring in 2022 and 2023 as major sporting events. The committee considers that, given the nature of the relevant events and the amount of planning generally undertaken, there would be time for any additional event bodies to be included by amendments to the primary legislation.

1.14 The committee therefore requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to allow the definition of 'event bodies' to be amended to allow additional event bodies to be prescribed in the rules; and**
- **whether the bill could be amended to include at least high-level guidance on the face of the primary legislation as to the circumstances in which it would be appropriate to prescribe additional event bodies in the rules.**

Ministerial Suitability Commission of Inquiry Bill 2021

Purpose	This bill seeks to establish an inquiry into whether Christian Porter is a fit and proper person to be a Minister of State, and for related purposes
Sponsor	Senator Larissa Waters
Introduced	Senate on 16 June 2021

General comment

1.15 The committee notes that this bill was negatived at the first reading in the Senate on 16 June 2021. The bill therefore did not proceed, and no explanatory materials were tabled relating to the bill. As such the committee provides no comment on the bill at this stage.

Treasury Laws Amendment (COVID-19 Economic Response) Bill 2021

Purpose	Schedule 1 to the bill seeks to amend the income tax law to extend the concessional tax treatment of payments received by eligible businesses under eligible COVID-19 recovery grant programs administered by a State or Territory Government (or a State or Territory authority) Schedule 2 to the bill seeks to amend the tax secrecy provisions in the <i>Taxation Administration Act 1953</i> to allow protected information to be disclosed to Services Australia for the purposes of administering the COVID-19 Disaster Payment
Portfolio	Treasury
Introduced	House of Representatives on 16 June 2021

Reverse evidential burden¹⁰

1.16 Section 355-25 in Schedule 1 to the *Taxation Administration Act 1953* currently provides that it is an offence for a taxation officer to disclose or record protected information. Section 355-65 provides that this offence does not apply if an item in the table at subsection 355-65(2) covers the disclosure. The defendant bears an evidential burden in relation to this defence. Item 1 of Schedule 2 to the bill inserts a new item into the table at subsection 355-65(2) to provide that it is not an offence for a taxation officer to disclose protected information to the Chief Executive Officer of Services Australia where the information is disclosed for the purposes of administering the COVID-19 Disaster Payment.

1.17 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.18 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such

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

reversal of the evidential burden of proof to be justified. In this instance the explanatory memorandum states:

It is appropriate that the evidential burden be reversed in this situation. Matters relating to the disclosure of protected information and for which purposes (such as what information is being disclosed and for what purpose the disclosure is being made) are peculiarly within the knowledge of the person making the disclosure and can be raised in making their defence. It would be significantly more difficult and costly for the prosecution to disprove these facts.¹¹

1.19 The committee notes that the *Guide to Framing Commonwealth Offences*¹² provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.¹³

1.20 In this case, it is not apparent that the disclosure of information is a matter *peculiarly* within the defendant's knowledge, or that it would be difficult or costly for the prosecution to establish the matters. In this instance, the CEO of Services Australia would be aware of the disclosure of information. As a result, this matter appears to be more appropriate to be included as an element of the offence.

1.21 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

11 Explanatory memorandum, p. 8.

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

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

Bills with no committee comment

1.22 The committee has no comment in relation to the following bills which were introduced into the Parliament between 15 – 17 June 2021:

- Australian Organ and Tissue Donation and Transplantation Authority Amendment (Governance and Other Measures) Bill 2021
- Customs Tariff Amendment (Incorporation of Proposals) Bill 2021
- Electric Vehicles Accountability Bill 2021
- National Health Amendment (Decisions under the Continence Aids Payment Scheme) Bill 2021

Commentary on amendments and explanatory materials

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

1.23 On 15 June 2021, Senator Colbeck tabled a revised explanatory memorandum, and debate was adjourned till the next day of sitting. On 17 June 2021, the Senate agreed to eight Government amendments, the Minister for Superannuation, Financial Services and the Digital Economy (Senator Hume) tabled two supplementary explanatory memoranda relating to the Government amendments, and the bill was read a third time. On 17 June 2021 the House agreed to the Senate amendments, and the bill finally passed both Houses.

1.24 The committee welcomes these amendments, which appear to partially address scrutiny concerns regarding the inclusion of significant matters in delegated legislation by removing provisions which would have allowed the regulations to prescribe additional requirements where failure to comply with the additional requirements would be a contravention of the best financial interests duty.¹⁴

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

- Transport Security Amendment (Serious Crime) Bill 2020;¹⁵
- Treasury Laws Amendment (More Flexible Superannuation) Bill 2020.¹⁶

14 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2021*, 21 April 2021, pp. 95–99.

15 On 16 June 2021, the Senate Committee of the Whole agreed to one Opposition amendment, and the third reading was agreed to.

16 On 17 June 2021, the Senate agreed to four Pauline Hanson's One Nation amendments, and the bill was read a third time. On 17 June 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.

Aged Care and Other Legislation Amendment (Royal Commission Response No. 1) Bill 2021

Purpose	Schedule 1 to the bill seeks to amend the <i>Aged Care Act 1997</i> and the <i>Aged Care Quality and Safety Commission Act 2018</i> to further strengthen legislation on the use of restrictive practices in aged care Schedule 2 to the bill seeks to amend the <i>Aged Care Act 1997</i> to allow the Secretary to conduct reviews (assurance reviews) to assure the arrangements for the delivery and administration of home care are effective and efficient Schedule 3 to the bill seeks to remove the requirement for the minister to establish a committee known as the Aged Care Financing Authority
Portfolio	Aged Care
Introduced	House of Representatives on 27 May 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Broad discretionary power¹

2.2 In [Scrutiny Digest 8 of 2021](#) the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the details of when restrictive practices can be used in an aged care setting, including what would constitute an emergency, to delegated legislation;

¹ Schedule 1, item 1, proposed paragraph 54-1(1)(f) and item 3, proposed sections 54-09 and 54-10. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- whether the bill could be amended to include additional high-level guidance about when restrictive practices can be used on the face of the primary legislation; and
- whether the bill could be amended to include:
 - at least an inclusive definition of 'emergency'; and
 - limits around which considerations set out in proposed subsection 54-10(1) can be overridden in an emergency.²

Minister's response³

2.3 The minister advised:

Use of restrictive practices

The Royal Commission Response Bill No. 1 provides that a restrictive practice in relation to a care recipient is any practice or intervention that has the effect of restraining the rights or freedom of movement of the care recipient. This directly responds to the recommendations made by the independent review of legislative provisions governing the use of restraint in residential aged care undertaken in 2020.

These amendments also align with the intent of recommendation 17 of the Royal Commission into Aged Care Quality and Safety (Royal Commission) final report that further legislative amendments be made in aged care line following the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability to ensure that the treatment of people receiving aged services is consistent with the treatment of other members in the community.

The Royal Commission Response Bill No. 1 sets the limited circumstances in which a restrictive practice can be used and strengthens the responsibilities of approved providers of residential aged care (approved providers) in relation to the use of these restrictive practices.

The Royal Commission Response Bill No. 1 identifies the use of a restrictive practice as a last resort to prevent harm to the care recipient or other persons. A restrictive practice may only be used following the approved provider's consideration of the likely impact of the use of the practice on the care recipient and only used in the least restrictive form and for the shortest time possible.

Additionally, approved providers are required to consider and use alternative strategies before the restrictive practice is used and must obtain

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 1–4.

3 The minister responded to the committee's comments in a letter dated 22 June 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 9 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

informed consent for the use of the restrictive practice. These requirements ensure that the use of restrictive practice is a proportionate response to the circumstances of a particular care recipient and ensure the rights of the care recipient are given primary consideration and protection.

The Royal Commission Response Bill No. 1 also requires that any use of a restrictive practice needs to be consistent with the User Rights Principles 2014, and appropriately enables the *Quality of Care Principles 2014* to provide detail on the requirements and define when a practice or intervention is a restrictive practice in relation to a care recipient. This will enable unforeseen risks, concerns, omissions and emerging trends to be addressed, aligns with community expectations in relation to restrictive practices and is the key aim of regulating restrictive practices, which is to protect older Australians from use of such practices.

The exposure draft of the principles, the Aged Care Legislation Amendment (Royal Commission Response No. 1) Principles 2021 is now publicly available on the Department of Health's website and should be read in conjunction with the Royal Commission Response Bill No. 1. The proposed principles are a disallowable instrument and also subject to scrutiny through parliamentary processes.

As part of broader legislative reform in response to the Royal Commission the restrictive practice requirements will also be considered in drafting the new aged care act as recommended by the Royal Commission.

Emergency use of restrictive practices

The term 'emergency' in new subsection 54-10(2) is not expressly defined, and therefore has its ordinary meaning. In aged care the scope of emergency situations can be quite broad and adopting a prescriptive definition is likely to result in unintended consequences and may exclude situations of genuine emergency. This could foreseeably have the impact of placing the safety, health and wellbeing of care recipients and others at risk.

An emergency situation only applies while there is an immediate risk or harm to a care recipient or other person. Once this risk has ceased the emergency situation has passed. Emergencies are not intended to last for long periods of time and are not a mechanism for approved providers to justify the continuous use of a restrictive practice.

If a restrictive practice is required after the immediate risk of harm has passed, this would be considered ongoing use and is not subject to emergency exemption. Additionally, ongoing use of a restraint requires informed consent prior to its use.

The proposed amendments to the Quality of Care Principles 2014 detail the responsibilities that must be met following the emergency use of restrictive practices. This includes:

- informing the restrictive practices substitute decision maker about the use of the restrictive practice, if the care recipient lacked capacity to consent to the use of the restrictive practice
- documenting the reasons for the restrictive practice and the alternative strategies that were considered or used prior.

These responsibilities must be met as soon as practicable after the restrictive practice starts to be used.

Approved providers should be actively engaged in care recipients' behaviour support planning, which should significantly reduce the occurrence of emergencies. Approved providers must consider and manage triggers for care recipients' behaviour to prevent an emergency in the care planning for care recipients.

In practice, the Aged Care Quality and Safety Commission will be able to question the circumstances in which emergency use of a restrictive practice was activated and, its oversight of restrictive practices is being strengthened through the appointment of a Senior Practitioner. Additionally, the Royal Commission Response Bill No. 1 expands the Commission's powers with the ability to impose civil penalties where an approved provider is not meeting its restrictive practice obligations.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that any use of a restrictive practice needs to be consistent with the User Rights Principles 2014, and that the bill appropriately enables the Quality of Care Principles 2014 to provide detail on the requirements and define when a practice or intervention is a restrictive practice in relation to a care recipient. The committee notes the minister's advice that this approach will enable unforeseen risks, concerns, omissions and emerging trends to be addressed, aligns with community expectations in relation to restrictive practices and is the key aim of regulating restrictive practices, which is to protect older Australians from use of such practices.

2.5 The committee has generally not accepted a desire for administrative flexibility to be a sufficient justification for leaving significant elements of a legislative scheme to delegated legislation. The committee reiterates that its concerns in this instance are heightened noting the potentially significant impact of the inappropriate use of restrictive practices and the vulnerable nature of the persons to whom the Quality of Care Principles would apply. The committee notes that a legislative instrument is not subject to the same level of parliamentary scrutiny as amendments to primary legislation.

2.6 In relation to the definition of emergency, the committee notes the minister's advice that the term 'emergency' in proposed subsection 54-10(2) is not expressly defined, and therefore has its ordinary meaning. The committee also notes the minister's advice that in aged care the scope of emergency situations can be quite broad and adopting a prescriptive definition is likely to result in unintended

consequences and may exclude situations of genuine emergency and that this could foreseeably have the impact of placing the safety, health and wellbeing of care recipients and others at risk.

2.7 The committee acknowledges that a prescriptive definition of 'emergency' may not be appropriate in this instance, however it remains unclear to the committee why an inclusive definition of 'emergency' cannot be included in the bill.

2.8 The committee considers that the bill provides the minister with a broad discretionary power to determine, in delegated legislation, when the requirements for the use of a restrictive practice no longer apply. The committee continues to have significant scrutiny concerns in relation to this ability to override *any* of the requirements in the Quality of Care Principles in circumstances where there is no guidance on the face of the primary legislation as to what may be considered an emergency.

2.9 **The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the details of when restrictive practices can be used in an aged care setting, including what would constitute an emergency, to delegated legislation.**

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

Fuel Security Bill 2021

Purpose	This bill seeks to establish a minimum stockholding obligation to ensure industry holds minimum qualities of key transport fuels to guarantee a baseline level of stock at all times, and to enable a production payment for refinery operators to provide an adjustable payment to refineries in return for a commitment to continue refining until at least 30 June 2027
Portfolio	Energy
Introduced	House of Representatives on 26 May 2021
Bill status	Finally passed both Houses

Significant matters in delegated legislation⁴

2.11 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave significant matters related to the requirements of the minimum stockholding obligation 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.⁵

Minister's response⁶

2.12 The minister advised:

The Fuel Security Bill 2021 establishes two important measures that aim to improve Australia's national fuel security into the future: the Fuel Security Services Payment (FSSP) and the minimum stockholding obligation (MSO).

Australia's fuel market is susceptible to global events, international oil conditions, as well as natural disasters and market disruptions that can directly impact Australia's fuel security. As the global reliance on liquid fuels is dynamic, fluctuating as result of major events such as the COVID-19

⁴ Subclause 10(3), clause 12, subclauses 15(3) and 18(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

⁵ Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 25–27.

⁶ The minister responded to the committee's comments in a letter dated 22 June 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 9 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

pandemic, the liquid fuel market in Australia and the policy settings in this legislation must also be able to withstand an evolving security environment.

The Bill strikes a balance between setting policy parameters in the primary legislation and giving sufficient flexibility in subordinate legislation. This balance will allow the Government to quickly respond to emerging shifts in the global and domestic fuel markets to protect our national security.

Notwithstanding the requirement to maintain this administrative flexibility, I am of the view this Bill provides an appropriate level of clarity to industry and the public about its measures.

Holding stocks of diesel, gasoline and jet fuel is crucial to addressing future fuel security challenges. At times of a threat or disruption, the release of MSO fuel to the market may be needed depending on the specific situation at the time and this flexibility has been built into the policy.

The Bill sets out a clear framework for regulated entities (importers or refiners) to become subject to the MSO and be set an MSO quantity for different fuel types. Clause 14 clearly sets out the process for the Minister to set the target cover of days for each fuel type, including with reference to Australia's international obligations.

The powers of suspension and exemption need to be flexible to deal with security issues as they emerge. The powers must also be able to address any unintended competition impacts. This flexibility will ensure that the exemption process can work effectively, for example, by ensuring an entity can be quickly exempt without needing to amend the primary legislation.

The detail around these provisions are being developed in consultation with industry. Any necessary legislative rules on these matters are disallowable by Parliament in accordance with the ordinary processes. Importantly, merits review is also available for key decisions.

While I note the matters raised by the Committee, I consider the Bill adequately defines the key components of the MSO framework and provides certainty of how the scheme would operate.

Committee comment

2.13 The committee thanks the minister for this response. The committee notes the minister's advice that the approach set out in the bill is necessary to respond to a dynamic, fluctuating market in liquid fuels. The minister advised that flexibility is needed to ensure that the release of minimum stockholding obligation (MSO) fuel to the market can be ensured at times of threat or disruption.

2.14 In relation to the calculation of MSO quantities, the committee notes the minister's advice that the bill sets out a clear framework for importers or refiners to become subject to the MSO and be set an MSO quantity for different fuel types.

2.15 In relation to the powers of suspension and exemption, the committee notes the minister's advice that these provisions are necessary to ensure flexibility so as to

deal with security issues and to deal with potential unintended competition impacts. The minister advised that the flexibility provided by including the relevant matters within delegated legislation will ensure that the exemption process can work effectively, for example, by ensuring an entity can be quickly exempt without needing to amend the primary legislation.

2.16 The committee also notes the minister's advice that the details to be prescribed in the rules are being developed in consultation with industry, that any instrument made under the relevant provisions would be disallowable, and that merits review is available for key decisions made under the bill.

2.17 While acknowledging the minister's advice, the committee reiterates its view that a desire for administrative flexibility is generally not a sufficient justification for including significant matters in delegated legislation. In this context, the committee does not consider that sufficient guidance in relation to the determination of these significant matters is set out on the face of the primary legislation.

2.18 The committee continues to have scrutiny concerns regarding provisions of the bill that allow for the inclusion of significant matters in delegated legislation. However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on these matters.

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

Fees in delegated legislation⁷

2.20 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to whether the bill can be amended to provide at least high-level guidance regarding how the application fee in paragraph 74(2)(c) will be calculated, including, at a minimum, a provision stating that the fee must not be such as to amount to taxation.⁸

Minister's response

2.21 The minister advised:

The application for reconsideration provision is a standard template provision that is used in a number of Commonwealth schemes. The Government does not have any plans to prescribe any fees for reconsideration of decisions and no money has been budgeted in relation to such fees. Should a future government decide to impose fees, the power

7 Clause 26. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2021*, pp. 27–28.

in the Bill to set the fees would only allow for such fees to be a fee for service.

There are a number of legal constraints on the imposition of fees for service that would need to be met should the government wish to consider this, as well as taking into account the *Australian Government Cost Recovery Guidelines*. Because of these safeguards, I do not consider it necessary to amend the Bill to state that the fees must not be such as to amount to taxation.

The passage of this Bill before 1 July 2021 is critical. The Morrison Government has secured in-principle agreement from the Ampol refinery in Brisbane and the Viva Energy refinery in Geelong to operate until at least mid-2027. This agreement is conditional on the Bill's passage, as the temporary refinery production payment will cease on 30 June 2021. Without this Bill, it is very likely that Australia's remaining refineries will close within the next five years, leaving our country 100 per cent dependent on international oil supply chains, risking our national security.

Committee comment

2.22 The committee thanks the minister for this response. The committee notes the minister's advice that there is currently no intention to prescribe any fees for reconsideration of decisions and that no money has been budgeted in relation to such fees.

2.23 The committee further notes the minister's advice that, should a fee be prescribed, the power to set the fees would only allow for such fees to be a fee for service. The minister also advised that the prescription of any fee will take into account the Australian Government Cost Recovery Guidelines.

2.24 While noting this advice, the committee reiterates its scrutiny concerns regarding the inclusion of a fee-making power within delegated legislation where no guidance is included on the face of the bill as to how a fee will be calculated.

2.25 The committee reiterates its comments that it is common for bills allowing for the charging of fees within delegated legislation to include a provision noting that the fee must not be such as to amount to taxation.⁹ While there is no legal need to include such a provision, the committee considers that it is nonetheless important to include to avoid confusion and to emphasise the point that the amount calculated under the regulations will be a fee and not a tax. In addition, as set out in OPC Drafting

9 See, for example, subsection 399(3) of the *Export Control Act 2020* and subsection 32(4) of the *Hazardous Waste (Regulation of Exports and Imports) Act 1989*.

Direction No. 3.1,¹⁰ such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.

2.26 The committee continues to have scrutiny concerns regarding the appropriateness of allowing delegated legislation to prescribe the amount of a fee in circumstances where there is no guidance on the face of the bill as to how the amount of any fee will be calculated. However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on these matters.

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

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

Tertiary Education Quality and Standards Agency (Charges) Bill 2021

Purpose	This bill seeks to establish a new registered higher education provider charge to recover the costs of the Tertiary Education Quality and Standards Agency's sector risk monitoring and regulatory oversight activities
Portfolio	Education
Introduced	House of Representatives on 13 May 2021
Bill status	Before the Senate

Broad discretionary power

Significant matters in delegated legislation¹¹

2.28 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to give the minister a broad discretionary power to provide for exemptions from the proposed registered higher education provider charge in delegated legislation; and
- whether the bill can be amended to include at least high-level guidance on the face of the primary legislation regarding when it will be appropriate provide for such exemptions.¹²

Minister's response¹³

2.29 The minister advised:

Broad discretionary power

It is appropriate to include the capacity for exemptions, should they be necessary, in the instrument that defines the parameters of the charge. Having an exemption power in delegated legislation provides the flexibility necessary for the Government to be responsive to the needs of higher education providers, either as a whole or for particular classes of providers,

¹¹ Clause 8. The committee draws senators' attention to this provision pursuant to Senate Standing Orders 24(1)(a)(ii) and (iv).

¹² Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, p. 45.

¹³ The minister responded to the committee's comments in a letter dated 22 June 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 9 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

and to act quickly if needed. The COVID-19 pandemic has provided numerous examples where the Government needed to respond quickly to provide targeted financial relief to particular groups. This included, for example, the waiver or refund of all of TEQSA's regulatory fees for existing higher education providers from 1 January 2020 to 31 December 2021.

Any such waiver, should it be instituted, would necessarily be consistent with the legislative intent outlined in the Bill and the Government's overarching policy framework, including the Australian Government Charging Framework. The latter requires that entities that create the demand for a regulatory function should contribute to the cost of regulation through cost recovery unless the Government has decided to fund that activity. A decision to waive collection of the annual charge for a period of time or for a particular class of higher education providers, could not be taken lightly or without careful consideration.

Whether the bill can be amended

The Government does not consider it is necessary to amend the bill to provide guidance on the application of a waiver provision. As outlined above, any exercise of such a power could only be done after careful consideration and consistent with the legislative intent and the Australian Government's overall cost recovery policy.

Committee comment

2.30 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate to include the capacity for exemptions, should they be necessary, in the instrument that defines the parameters of the charge as it provides the flexibility necessary for the government. The committee also notes the minister's advice that a waiver would necessarily be consistent with the legislative intent outlined in the bill and the government's overarching policy framework, including the Australian Government Charging Framework.

2.31 The committee has generally not accepted a desire for administrative flexibility or a reliance on non-legislative policy guidance to be a sufficient justification to provide broad discretionary powers in circumstances where there is no guidance on the face of the primary legislation as to how the power should be exercised. It remains unclear to the committee why at least high-level guidance could not be provided on the face of the primary legislation regarding when it will be appropriate to provide for exemptions from the proposed registered higher education provider charge. Additionally, the committee does not consider that providing this additional guidance would prevent an exemption from being made quickly if necessary.

2.32 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of giving the minister a broad discretionary power to provide for exemptions from the proposed registered higher education provider charge in delegated legislation.

2.33 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*).

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

Tertiary Education Quality and Standards Agency Amendment (Cost Recovery) Bill 2021

Purpose	This bill seeks to amend the <i>Tertiary Education Quality and Standards Agency Act 2011</i> to reflect the introduction of the new registered higher education provider charge under the Tertiary Education Quality and Standards Agency (Charges) Bill 2021
Portfolio	Education
Introduced	House of Representatives on 13 May 2021
Bill status	Before the Senate

Significant matters in delegated legislation¹⁴

2.35 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave key aspects of the operation of the proposed Registered Higher Education Provider Charge to delegated legislation; and
- whether the bill could be amended to include at least high-level guidance on the face of the primary legislation regarding matters to be contained in the Registered Higher Education Provider Charge Guidelines.¹⁵

Minister's response¹⁶

2.36 The minister advised:

Leaving key aspects of the charge to delegated legislation

The matters to be included in delegated legislation are purely administrative in nature. It is appropriate for these matters to be detailed in subordinate legislation as they will likely need to adapt over time to changing circumstances.

¹⁴ Schedule 1, Item 2, proposed subsection 26C(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

¹⁵ Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2021*, pp. 46–47.

¹⁶ The minister responded to the committee's comments in a letter dated 22 June 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 9 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Whether the bill could be amended

High-level guidance on the content of the Registered Higher Education Provider Charge Guidelines is already specifically included in the bill at Item 2, Section 26C(2). This outlines the matters that can be included in the guidelines, including the issuing of notices about charges payable, due dates for payment, extension of payment timeframes, penalties for late payment and review of decisions related to payment of the annual charge.

Committee comment

2.37 The committee thanks the minister for this response. The committee notes the minister's advice that the matters to be included in delegated legislation are purely administrative in nature and that it is appropriate for these matters to be detailed in subordinate legislation as they will likely need to adapt over time to changing circumstances. The committee also notes the minister's advice that high-level guidance on the content of the Registered Higher Education Provider Charge Guidelines (the Guidelines) is already specifically included in the bill.

2.38 The committee reiterates its consistent scrutiny view that significant matters relating to the collection and administration of new charges and the review of related decisions should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided.

2.39 The committee does not consider that all of the matters listed in proposed subsection 26C(2) are purely administrative in nature. Some matters that may be provided in the Guidelines are significant to how the charge will operate. For example, proposed paragraph 26C(2)(g) allows the Guidelines to provide for the review of decisions made under the Guidelines. In addition, paragraph 26C(2)(h) allows the Guidelines to provide for 'any other matters' relating to the collection or recovery of the charge.

2.40 It is difficult for the Parliament to adequately scrutinise the operation of the charge when there are limited details regarding these matters being included on the face of the primary legislation. 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.

2.41 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key aspects of the operation of the proposed Registered Higher Education Provider Charge to delegated legislation.

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

- COVID-19 Disaster Payment (Funding Arrangements) Bill 2021—clause 4.

Senator Helen Polley
Chair

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*](#).