The Senate

Standing Committee for the Scrutiny of Bills

Scrutiny Digest 11 of 2021

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Contents

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 has not considered any new bills introduced into the Parliament, or amendments to bills, since the presentation of the committee's *Scrutiny Digest 10 of 2021* out of sitting on 13 July 2021.

Chapter 2

Commentary on ministerial responses

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

Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021

Purpose	This bill seeks to make a number of administrative amendments to improve the operation and clarity of various legislation relating to courts and tribunals
Portfolio	Attorney-General
Introduced	Senate on 23 June 2021
Bill status	Before the Senate

Power for delegated legislation to modify primary legislation (akin to Henry VIII clause)[1]

2.2 In *Scrutiny Digest 10 of 2021* the committee requested the Attorney-General's advice as to why it is considered necessary and appropriate to allow delegated legislation to modify the operation of the *Legislation Act 2003* as it applies to the Admiralty Rules 1988.[2]

Attorney-General's response[3]

2.3 The Attorney-General advised:

> I note the Committee's concern that the regulation-making power under proposed paragraph 41(5)(b), to be inserted into the *Admiralty Act 1988*

1 Schedule 1, item 72, proposed paragraph 41(5)(b). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 1–2.

3 The Attorney-General responded to the committee's comments in a letter dated 2 August 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> will provide that the *Legislation Act 2003,* as it applies to the Admiralty Rules 1988, is subject to such further modifications or adaptations as prescribed by the regulations.
>
> The proposed amendments to the *Admiralty Act 1988* have been introduced to apply the *Legislation Act 2003* to the Admiralty Rules 1988 so that the Admiralty Rules 1988 are dealt with in the same way as other federal rules of court, including by being registered and published. This is appropriate for reasons of transparency, accessibility and accountability.
>
> Equivalent provisions to proposed paragraph 41(5)(b) are found in other Commonwealth legislation under which federal rules of court are made, including the *Federal Court of Australia Act 1976, Federal Circuit Court Act 1999, Family Law Act 1975* and the *Judiciary Act 1903.* That approach has consistently been considered appropriate in light of the traditional independence of the courts.
>
> I also note that these amendments will not allow any modification to, or affect the operation of, the parliamentary scrutiny provisions in the *Legislation Act 2003* in respect of the Admiralty Rules. This is because proposed paragraph 41(5)(b) expressly limits the power to make regulations modifying the application of Part 2 of Chapter 3 of the *Legislation Act 2003* to the Admiralty Rules, thereby ensuring Parliamentary scrutiny remains in place.
>
> To clarify this matter, I have asked that my department table an addendum to the Explanatory Memorandum for the CATLA Bill noting that proposed paragraph 41(5)(b) is not intended to allow for modifications to the application of relevant Parliamentary scrutiny provisions to the Admiralty Rules.

Committee comment

2.4 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the relevant amendments have been introduced to ensure that the Admiralty Rules 1988 are dealt with in the same way as other rules of court. In this regard, the Attorney-General advised that equivalent provisions to proposed paragraph 41(5)(b) are found in other Commonwealth legislation dealing with federal rules of court, including the *Federal Court of Australia Act 1976, Federal Circuit Court Act 1999, Family Law Act 1975* and the *Judiciary Act 1903*.

2.5 The Attorney-General also noted the limits placed on the power at proposed paragraph 41(5)(b) such that parliamentary scrutiny provisions within the *Legislation Act 2003* will not be modified in respect of the Admiralty Rules 1988.

2.6 The committee thanks the Attorney-General for her proposal to update the explanatory memorandum reflecting the advice provided to the committee and requests that an addendum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable.

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

2.8 In light of the information provided and the Attorney-General's undertaking, the committee makes no further comment on this matter.

Education Services for Overseas Students (Registration Charges) Amendment Bill 2021

Purpose	This bill seeks to amend the *Education Services for Overseas Students (Registration Charges) Act 1997* to update the registration charges to recover the costs for certain regulatory activities under the *Education Services for Overseas Students Act 2000*
Portfolio	Education and Youth
Introduced	House of Representatives on 24 June 2021
Bill status	Before the House of Representatives

Broad discretionary power
Significant matters in delegated legislation[4]

2.9 In *Scrutiny Digest 10 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to give the minister broad discretionary powers to exempt providers from a 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.[5]

Minister's response[6]

2.10 The minister advised:

> It is appropriate to include the capacity to exempt providers, should it 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 international education providers, either as a whole or for particular classes

4 Schedule 1, item 2, proposed subsections 5(9), 6(8) and 7(8). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, p. 3.

6 The minister responded to the committee's comments in a letter dated 29 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> of providers, 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 exemption or refund of the regulatory charges for international education providers from 1 January 2020 to 31 December 2021.
>
> Any such exemption, 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 function should contribute to the cost of regulation through cost recovery unless the Government has decided to fund that activity. A decision to exempt one or more classes of registered providers from a charge or a component of a charge for a period of time, could not be taken lightly or without careful consideration.
>
> The Government does not consider it is necessary to amend the Bill to provide guidance on the application of an exemption provision. As outlined above, any exercise of such a power could only be done after careful consideration and in manner consistent with the legislative intent of the Bill and the Australian Government's overall cost recovery policy.

Committee comment

2.11 The committee thanks the minister for this response. The committee notes the minister's advice that having an exemption power in delegated legislation provides the flexibility necessary for the government to be responsive to the needs of international education providers, either as a whole or for particular classes of providers, and to act quickly if needed.

2.12 The committee also notes the minister's advice that any such exemption, 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.

2.13 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. From a scrutiny perspective, 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.

2.14 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*).

2.15 The committee otherwise 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.

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

Family Assistance Legislation Amendment (Child Care Subsidy) Bill 2021

Purpose	This bill seeks to give effect to a key measure impacting the rate of child care subsidy (CCS) that Australian families are entitled to receive
Portfolio/Sponsor	Education, Skills and Employment
Introduced	House of Representatives on 24 June 2021
Bill status	Before the House of Representatives

Power for delegated legislation to modify primary legislation (akin to Henry VIII clause)[7]

2.17 In *Scrutiny Digest 10 of 2021* the committee requested the minister's more detailed advice as to why it is considered necessary and appropriate to allow the Minister's rules to prescribe different numbers of weeks in relation to proposed paragraphs 67CC(2)(b) and 67CC(2)(d) of the *A New Tax System (Family Assistance) (Administration) Act 1999* and proposed paragraph 3B(1)(d) of the *A New Tax System (Family Assistance) Act 1999*.[8]

Minister's response[9]

2.18 The minister advised:

> *Items 11 and 13*
>
> Item 11 provides additional circumstances when the Secretary may make a cessation of eligibility determination. This includes where no sessions of care have been provided to the child for at least 26 consecutive weeks, or a different number of consecutive weeks as prescribed by Minister's Rules. The purpose of this amendment is to address the risk that a parent makes a claim for CCS for their eldest child aged five years or under, with no

7 Schedule 2, items 10, 11 and 13, proposed paragraphs 67CC(2)(b), 67CC(2)(d) and 3B(1)(d). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 4-5.

9 The minister responded to the committee's comments in a letter dated 30 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

intention of that child ever using child care, in order to receive a higher rate of subsidy for any younger children.

Item 13 requires that in order for a child to receive a higher rate of subsidy, at least one session of care has to have been provided to the 'other child' (that is, an eldest child aged five years or under), in at least one week out of the past 14 weeks, or a different number of weeks as prescribed by Minister's rules. This item is intended to supplement the amendment at item 11 and provide an additional safeguard for the measure.

Including the ability to be able to change the time periods set out in item 11 and 13 is critical to ensure policy integrity is maintained. The intent of the Bill is to provide increased support to families who actively use child care for multiple children aged five years and under. Following implementation, the Department of Education, Skills and Employment and Services Australia will monitor the number of individuals who receive CCS eligibility determinations for their eldest child aged five years and under, but do not enrol or use care for this child. This will allow the Department to identify where the MCS is being paid to families who are not actively using child care for their multiple children, and respond to this through potential changes to the time periods in items 11 and 13. This is appropriate to ensure the Australian Government's investment is spent in line with policy intent.

The ability to change the time periods through Minister's rules will also allow the Government to quickly respond if it becomes evident the provisions are negatively impacting families who are genuinely accessing child care. A contemporary example of when these timeframes may require expeditious adjustment is where, because of an extended COVID-19 related lockdown, or a period of local emergency, no sessions of care have been provided to children enrolled at a service for more than 14 weeks. In such circumstances, it would be essential for the Government to be able to immediately extend the 14 week period via Minister's Rules, to ensure families and child care providers are not adversely affected.

Item 10

Item 10 amends an existing provision in *A New Tax System (Family Assistance) (Administration) Act 1999*, which allows the Secretary to make a cessation of eligibility determination if the individual has not been entitled to be paid CCS for at least 52 weeks. The item will allow the Minister to prescribe a different number of weeks in Minister's rules.

As this provision also affects CCS eligibility, it is appropriate that this period should also be amended by Minister's rules. This will enable the appropriateness of the period to be considered alongside any changes to the time periods in items 11 and 13 of Schedule 2 of the Bill. Looking at these three time periods together will ensure that the cumulative impact on families of the three provisions can be considered and that there is policy consistency around CCS eligibility determinations.

Committee comment

2.19 The committee thanks the minister for this response. The committee notes the minister's advice that including the ability to be able to change the time periods set out in items 11 and 13 is critical to ensure policy integrity of the Child Care Subsidy scheme is maintained. The committee also notes that minister's advice that this will allow the department to identify where the Multi Child Subsidy is being paid to families who are not actively using child care for their multiple children, and respond to this through potential changes to the time periods in items 11 and 13. The minister also advised that the ability to change the time periods through Minister's Rules will also allow the government to quickly respond if it becomes evident the provisions are negatively impacting families who are genuinely accessing child care.

2.20 In relation to item 10 (relating to cessation of eligibility determinations), the committee notes the minister's advice that the approach proposed in the bill will enable the appropriateness of the period to be considered alongside any changes to the time periods in items 11 and 13 of Schedule 2 to the bill.

2.21 The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive, impacting upon Parliament's constitutional role as lawmaker-in-chief. While noting the minister's advice, the committee has generally not accepted a desire for administrative flexibility of itself to be a sufficient justification for allowing delegated legislation to modify the operation of primary legislation. It remains unclear to the committee why any proposed changes required following ongoing monitoring or compliance work could not be made in amendments to the primary legislation. The committee notes that the bill could be amended to allow for the number of weeks to be changed by legislative instrument in emergency situations only.

2.22 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*).

2.23 The committee otherwise draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing delegated legislation to prescribe different numbers of weeks in relation to eligibility for Child Care Subsidy than that set out in the primary legislation.

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

Financial Sector Reform (Hayne Royal Commission Response—Better Advice) Bill 2021

Purpose	This bill seeks to implement recommendation 2.10 of the Financial Services Royal Commission, which recommended the establishment of a single disciplinary body for financial advisers and the requirement that all financial advisers who provide personal financial advice to retail clients be registered
Portfolio	Treasury
Introduced	House of Representatives on 24 June 2021
Bill status	Before the House of Representatives

Strict liability offences[10]

2.25 In *Scrutiny Digest 10 of 2021* the committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole the appropriateness of providing that the offence relating to the publication of restricted material in proposed section 171A is an offence of strict liability subject to a maximum penalty of 120 penalty units.

Minister's response[11]

2.26 The minister advised:

> Proposed section 171A of the Bill provides that a person commits an offence of strict liability if they publish evidence given before, or matters contained in documents lodged with, an FSCP in circumstances where a direction made by the FSCP restricting the publication of that evidence or those matters is in force. The penalty for this offence is 120 penalty units.
>
> The Attorney General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Guide to Framing Commonwealth Offences) recommends that strict liability

10 Schedule 1, item 12, proposed section 171A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

11 The minister responded to the committee's comments in a letter dated 23 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

offences are punishable by a maximum fine of 60 penalty units for an individual and 300 penalty units for a body corporate.

Proposed section 167 of the Bill provides that the panel may, at a hearing of an FSCP, make a written direction restricting the publication of evidence or matters contained in a document lodged with the panel. In determining whether to make a direction, the panel must have regard to the following:

- whether the evidence or matter is of a confidential nature or relates to the commission, or to the alleged or suspected commission, of an offence against an Australian law;
- any unfair prejudice to a person's reputation that would be likely to be caused unless the panel gives a direction restricting the publication of that evidence or those matters;
- whether it is in the public interest that the panel gives a direction restricting the publication of that evidence or those matters; and
- any other relevant matter.

The imposition of a penalty for this strict liability offence that is higher than recommended by the Guide to Framing Commonwealth Offences is considered necessary and proportionate due to the serious implications of non-compliance with this requirement.

Firstly, this penalty is required to promote compliance with the obligation and to support the integrity of FSCP hearings and decisions. This is considered especially important at the inception of the new single disciplinary body regime for financial advisers. This offence provision also complements proposed section 171D of the Bill, which makes it an offence for current or former members of the FSCP to use ordisclose information, except where permitted. The penalty for the unauthorised use or disclosure of information is two years imprisonment, which reflects the seriousness of unauthorised information disclosurewithin this regulatory regime.

Secondly, a failure to comply with a direction restricting publication or evidence or material may result in significant personal and financial harm to financial advisers, financial services businesses and other parties involved or mentioned in proceedings, as a result of reputational damage, or through the release of confidential or incriminating information.

Finally, I also consider that this penalty is appropriate to ensure legislative consistency by imposing the same penalty as the penalty that currently applies to the publication of evidence or matters restricted by ASIC at anASIC hearing. This is particularly relevant as the FSCP is to be located within ASIC and administered within ASIC's operational arrangements.

Committee comment

2.27 The committee thanks the minister for this response. The committee notes the minister's advice that a penalty of 120 penalty units is required to promote compliance with the obligation not to publish evidence or matters given before a Financial Services and Credit Panel and to support the integrity of Financial Services and Credit Panel hearings and decisions. The committee also notes the minister's advice that a failure to comply with a direction restricting publication or evidence or material may result in significant personal and financial harm to financial advisers, financial services businesses and other parties involved or mentioned in proceedings, as a result of reputational damage, or through the release of confidential or incriminating information.

2.28 The committee further notes the minister's advice that this penalty is appropriate to ensure legislative consistency by imposing the same penalty as the penalty that currently applies to the publication of evidence or matters restricted by the Australian Securities and Investment Commission at a hearing.

2.29 While noting this explanation, the committee continues to have scrutiny concerns about the application of strict liability to an offence carrying a penalty of 120 penalty units and does not consider that the explanation provided adequately justifies why a penalty that is double the amount recommended in the *Guide to Framing Commonwealth Offences* is required in this instance. The committee has also generally not accepted consistency with existing legislation to be a sufficient justification for applying strict liability in circumstances in which the penalty is inconsistent with the recommendations of the *Guide to Framing Commonwealth Offences*.

2.30 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*).

2.31 The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that the offence relating to the publication of restricted material in proposed section 171A is an offence of strict liability subject to a maximum penalty of 120 penalty units.

Reversal of the evidential burden of proof[12]

2.32 In *Scrutiny Digest 10 of 2021* the committee requested the minister's detailed justification as to the appropriateness of including the specified matters as offence-specific defences. The committee considered that it may be appropriate if the bill was amended to incorporate the matters in proposed subsection 171D(2) as elements of the offence and seeks the minister's advice regarding this matter.[13]

Minister's response[14]

2.33 The minister advised:

> Proposed subsection 171D(1) of the Bill provides that a current or former member of an FSCP commits an offence for the use of disclosure of information obtained in connection with the performance or exercise of the panel's functions or powers. Proposed subsection 171D(2) of the Bill specifies exceptions to this offence by setting out the circumstances in which the use or disclosure of this information is permitted.
>
> Proposed section 171D of the Bill supports the establishment of the new single disciplinary body regime for financial advisers by providing that the panel may share information with:
>
> - the Australian Securities and Investments Commission (ASIC);
> - the Tax Practitioners Board (TPB);
> - another FSCP;
> - as required for the performance or exercise of the panel's functions or powers; and
> - as required or permitted by a law of the Commonwealth, state or territory.
>
> Proposed section 171D of the Bill has been modelled on sections 70-35 and 70-40 of the *Tax Agent Services Act 2009* (TAS Act), which provides that a current or former member of the TPB commits an offence for making a record or disclosing information obtained in the course of performing their functions, with specified exceptions.
>
> The purpose of proposed section 171D of the Bill is to prohibit the use or disclosure of information about sensitive disciplinary matters involving

12 Schedule 1, item 12, proposed section 171D. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 7-9.

14 The minister responded to the committee's comments in a letter dated 23 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> financial advisers, except in specified circumstances. This is required to protect individuals and businesses from reputational and financial harm and to deter panel members from misusing their office, particularly as panel members may be drawn from the financial advice industry.
>
> The exceptions listed in proposed subsection 171D(2) are offence-specific defences to the general offence applying to use or disclosure. The exceptions are designed having regard to the principle that the use or disclosure of information obtained in connection with the panel's functions should be permitted only in circumstances where the use or disclosure is required for effective administration of this, and other related regulatory regimes. The authorised disclosures are set out as offence-specific defences as the evidence needed to prove the defence is peculiarly within the knowledge of the defendant (that is, the person making the disclosure), who has specific knowledge of the basis on which they made the decision to use or disclose this information. It would be more significantly more difficult and costly for the prosecution to disprove this, than for the defendant to establish the matter.
>
> In accordance with subsection 13.3(3) of the *Criminal Code Act 1995*, a defendant who wishes to rely on this exception, bears an evidential burden in relation to that matter. I consider it is appropriate to reverse the evidential burden of proof in these circumstances because this burden is limited to the codified exceptions and does not require the defendant to positively prove their innocence of the offence.

Committee comment

2.34 The committee thanks the minister for this response. The committee notes the minister's advice that the authorised disclosures are set out as offence-specific defences as the evidence needed to prove the defence is peculiarly within the knowledge of the defendant (that is, the person making the disclosure), who has specific knowledge of the basis on which they made the decision to use or disclose this information. The minister advised that it would be significantly more difficult and costly for the prosecution to disprove this matter, than for the defendant to establish the matter.

2.35 While noting that the person who made the disclosure would have specific knowledge of that disclosure, it is not apparent that the disclosure of information to another government entity for the performance of that entity's functions would be a matter that is *peculiarly* within the defendant's knowledge. The committee notes that the person or body to whom the information was disclosed would also have knowledge of the disclosure. As such, from a scrutiny perspective, this matter appears to be a matter that would be more appropriately included as an element of the offence.

2.36 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 relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

Broad discretionary power
Significant matters in delegated legislation[15]

2.37 In *Scrutiny Digest 10 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 discretion to create a Code of Ethics by legislative instrument, without any guidance as to the matters that may be included in the Code on the face of the bill; and
- whether the bill can be amended to provide at least high-level guidance on as to the matters that may be included in a Code of Ethics.[16]

Minister's response[17]

2.38 The minister advised:

> Proposed section 921E of the Bill provides that the Minister may, by legislative instrument, make a Code of Ethics. The Committee raised concerns that the Bill fails to provide any guidance as to the matters that maybe included in the Code of Ethics.
>
> The *Financial Planners and Advisers Code of Ethics 2019* was developed by the Financial Adviser Standards and Ethics Authority (FASEA) in consultation with financial services licensees, financial advisers, consumer representatives, industry professional associations, ASIC and Treasury. The Code of Ethics came into force on 1 January 2020.
>
> The Bill provides for FASEA to be wound up and for the power to make a Code of Ethics to be transferred to the Minister responsible for administering the *Corporations Act 2001* on 1 January 2022. To ensure a seamless transition, proposed section 1684P of the Bill provides that the Code of Ethics, as made by FASEA, continues in force on and after 1 January

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15 Schedule 1, item 45, proposed section 921E. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, p. 9.

17 The minister responded to the committee's comments in a letter dated 23 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> 2022 until it is amended or re-made by the Minister. It is intended that any Code of Ethics made by the Minister will be informed by the existing Code of Ethics.
>
> In accordance with the requirements for making legislative instruments under the *Legislation Act 2003,* the Minister must be satisfied that appropriate consultation has been undertaken in relation to the proposed instrument and the instrument is required to be subject to Parliamentary scrutiny, disallowance and sunsetting requirements.
>
> For these reasons, I do not think it is necessary to amend the Bill to provide high level guidance on thematters that would be included in the Code of Ethics.

Committee comment

2.39 The committee thanks the minister for this response. The committee notes the minister's advice that the *Financial Planners and Advisers Code of Ethics 2019* was developed by the Financial Adviser Standards and Ethics Authority (FASEA) in consultation with financial services licensees, financial advisers, consumer representatives, industry professional associations, ASIC and Treasury.

2.40 The committee also notes the minister's advice that to ensure a seamless transition following the winding up of FASEA, proposed section 1684P of the bill provides that the Code of Ethics, as made by FASEA, continues in force on and after 1 January 2022 until it is amended or re-made by the minister and that it is intended that any Code of Ethics made by the minister will be informed by the existing Code of Ethics.

2.41 The committee reiterates that proposed section 921E provides the minister with a broad discretionary power to mandate a Code of Ethics in circumstances where there is no guidance on the face of the bill as to how the power should be exercised. Additionally, the committee's consistent scrutiny view is that significant matters, such as the contents of an enforceable Code of Ethics, should be contained in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.42 While noting the minister's advice, the committee does not consider that the minister has provided an adequate justification as to why at least high-level guidance as to the matters to be contained in the Code of Ethics cannot be provided for on the face of the primary legislation.

2.43 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the minister with a broad discretion to create an enforceable Code of Ethics for financial planners and advisers by legislative instrument, without any guidance as to the matters that may be included in the Code on the face of the bill.

No-invalidity clause[18]

2.44 In *Scrutiny Digest 10 of 2021* the committee requested the minister's advice as to why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsection 921M(3) in relation to requirements for notifying providers about instruments made against them.[19]

Minister's response[20]

2.45 The minister advised:

> Proposed section 921M of the Bill provides that an FSCP must provide a copy of an instrument taking administrative action against a financial adviser to the adviser, the adviser's Australian financial services licensee and to ASIC. This notice must be accompanied by a statement of reasons setting out the panel's reason(s) for deciding to make the instrument. The notice given to the financial adviser is also required toinform the adviser of their right to request a variation or revocation of the instrument. Proposed subsection 921M(3) of the Bill provides that a failure to provide these notices does not affect the validity of the instrument.
>
> The no-invalidity clause is intended to ensure that an administrative failure (such as technological or logistical malfunction), which prevents the timely giving of a notice to any of the required recipients, does not affect the validity of administrative action taken against a financial adviser. This is considered important to ensure the integrity of the regulatory regime and to increase certainty for financial advisers where a failureof the notice requirement may be established at some later time.
>
> However, to ensure financial advisers are adequately protected against action being taken without their knowledge, the Bill puts in place a number of important protections.
>
> Firstly, proposed section 921K of the Bill provides that an FSCP cannot take administrative action against a financial adviser without giving the adviser a proposed action notice. The notice is required to set out the details of the alleged contravention or relevant circumstances, the action that the panel proposes to take and the adviser's right to request a

18 Schedule 1, item 49, proposed section 921M. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, p. 10.

20 The minister responded to the committee's comments in a letter dated 23 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

hearing or make a written submission to the panel. If the adviser requests a hearing or makes a submission, the panel must take into account the evidence given at the hearing or contained in the submission. This ensures that, in all cases, the adviser has an opportunity to participate in the disciplinary proceedings against them.

Secondly, proposed subsection 922Q(3) of the Bill provides for regulations to be made prescribing the administrative sanctions that must be listed on the publicly accessible Register of Relevant Providers (Financial Advisers Register) maintained by ASIC. This will enable financial advisers to access the Financial Advisers Register to view the details of a sanction taken against them. In the event of any uncertainty, the adviser could also request this information directly from ASIC.

In the case of sanctions affecting an adviser's right to provide financial advice (orders suspending or cancelling registration), the Bill provides that these sanctions only come into force at a time that is at, or after, a copy of the notice is given to the adviser. This ensures that the adviser does not inadvertently contravene their obligations by providing financial advice while unregistered.

Finally, I note the Committee's concern that a failure to give notice would prevent the adviser from being able to exercise their right to merits review or judicial review. It is expected that this would be addressed through the development of regulatory guidance on FSCP's functions and processes, which will be available on ASIC's website. This guidance will set out an adviser's right to apply to ASIC for a variation or revocation of the instrument, to the Administrative Appeals Tribunal for merits review or the court for judicial review.

In view of the various protections and alternative pathways available for accessing this information and the need for certainty for financial advisers, I consider the use of a no-invalidity clause is appropriate.

Committee comment

2.46 The committee thanks the minister for this response. The committee notes the minister's advice that the no-invalidity clause set out at proposed subsection 921M(3) is intended to ensure that an administrative failure which subsequently prevents the timely giving of a notice does not affect the validity of administrative action taken against a financial adviser. The minister advised that this ensures the integrity of the regulatory regime and increases certainty for financial advisers in cases where a failure of the notice requirement may be established at some later time. Relatedly, the minister advised that the bill puts in place a number of protections to ensure action cannot be taken against a financial adviser without their knowledge.

2.47 The committee also notes the minister's advice that there will be regulatory guidance on Financial Services and Credit Panel's functions and processes, which

will be available on ASIC's website and that this guidance will set out an adviser's right to apply to ASIC for a variation or revocation of the instrument, to the Administrative Appeals Tribunal for merits review or to the courts for judicial review.

2.48 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*).

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

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

Purpose	This bill seeks to amend the *Major Sporting Events (Indicia and Images) Protection Act 2014* 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 *Sport Integrity Australia Act 2020*
Portfolio	Sport
Introduced	Senate on 16 June 2021
Bill status	Before the Senate

Significant matters in delegated legislation[21]

2.50 The committee initially scrutinised this bill in *Scrutiny Digest 9 of 2021* and requested the minister's advice.[22] The committee considered the minister's response in *Scrutiny Digest 10 of 2021* and requested the minister's further advice to whether the bill could be amended to:

- prescribe the new FIFA entity (FWWC2023 Pty Ltd) as an event body for the FIFA Women's World Cup Australia New Zealand 2023; and
- 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.[23]

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

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 09 of 2021*, pp. 4-5.

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 36-38.

Minister's response[24]

2.51 The minister advised:

> As previously indicated, to support the delivery of the FIFA Women's World Cup Australia New Zealand 2023 (FWWC), FIFA established a wholly owned entity in Australia. However, this entity was not yet established at the time the Bill was introduced. The timing of introduction was necessary to provide appropriate lead-time to operationalise protections for another event (T20 World Cup 2022). Taking on board the Committee's reiterated concern on this matter, the Bill will be amended to prescribe the FIFA entity in the primary legislation as an event body for the FWWC.
>
> As proposed by the Committee, the Bill will also be amended to include high-level guidance as to the circumstances in which it would be appropriate to prescribe additional event bodies through the rules. This specific amendment will maintain the desired flexibility to prescribe new event bodies through the rules to accommodate unforeseen or delayed requests from event owners to add new event bodies (as experienced with the delayed establishment of the FIFA entity). Additionally, it allows the option to address an event body undergoing a formal change of name (a genuine possibility given the number of sporting events postponed as a result of the COVID-19 pandemic).

Committee comment

2.52 The committee thanks the minister for this response. The committee welcomes the minister's advice that the bill will be amended to prescribe the FIFA entity in the primary legislation as an event body for the FIFA Women's World Cup Australia New Zealand 2023.

2.53 The committee also welcomes the minister's advice that the bill will be amended to include high-level guidance as to the circumstances in which it would be appropriate to prescribe additional event bodies through the rules. The committee notes the minister's advice that this will maintain the desired flexibility to prescribe new event bodies through the rules to accommodate unforeseen or delayed requests from event owners to add new event bodies as well as addressing an event body undergoing a change of name.

2.54 The committee thanks the minister for his constructive engagement with the committee and welcomes his undertaking to amend the bill to:

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24 The minister responded to the committee's comments in a letter dated 28 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

- **prescribe the new FIFA entity (FWWC2023 Pty Ltd) as an event body in the primary legislation; and**
- **include high-level guidance as to when it will be appropriate to prescribe additional event bodies in the rules.**

2.55 In light of this undertaking, the committee makes no further comment on this matter.

Migration Amendment (Tabling Notice of Certain Character Decisions) Bill 2021

Purpose	This bill amends the *Migration Act 1958* to provide that if the minister makes certain character decisions under the existing Migration Act in relation to a person, the minister must table this decision before each House of Parliament within 15 sitting days of the decision being made
Portfolio	Immigration, Citizenship, Migration and Multicultural Affairs
Introduced	12 May 2021
Bill status	Act

Tabling of documents in Parliament[25]

2.56 In *Scrutiny Digest 8 of 2021* the committee requested the minister's advice regarding why notice of the making of certain decisions by the minister is not required to be tabled in both Houses of the Parliament under proposed subsection 501(4A).[26]

Minister's response[27]

2.57 The minister advised:

> Subsections 501(3) and (4) of the Act provide that the Minister, acting personally, may refuse to grant or cancel a visa if the Minister reasonably suspects that the person does not pass the character test (defined in subsection 501(6) of the Act). In exercising the power under subsection 501(3), the Minister must be satisfied that the refusal or cancellation is in the national interest.
>
> Section 501(4B) states that the requirement under section 501(4A) will not apply to decisions made on the basis that the Minister reasonably suspects the person does not pass the character test under subsection 501(6) of the Act because the person:

25 Schedule 1, item 1, proposed subsections 501(4A) and 501(4B). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

26 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 32–33.

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

- has a substantial criminal record (paragraph 501(6)(a)); or
- has been convicted or found guilty of sexually based offences involving a child (paragraph 501(6)(e)); or
- has been assessed by the Australian Security Intelligence Organisation (ASIO) as directly or indirectly a risk to security (paragraph 501(6)(g)).

The requirement also will not apply if the person was the subject of an adverse security assessment or a qualified security assessment under the *Australian Security Intelligence Organisation Act 1979* when the decision was made.

The *Migration Amendment (Tabling Notice of Certain Character Decisions) Act 2021* thus strikes an appropriate balance between transparency before the Parliament in relation to decisions made by the Minister personally under subsection 501(3), and sensitivities in relation to national security, serious and organised crime and related matters (including the operations and capabilities of Australia's law enforcement and intelligence agencies).

Committee comment

2.58 The committee thanks the minister for this response. The committee notes the minister's advice that the bill strikes an appropriate balance between transparency before the Parliament in relation to decisions made by the minister personally under subsection 501(3), and sensitivities in relation to national security, serious and organised crime and related matters (including the operations and capabilities of Australia's law enforcement and intelligence agencies).

2.59 While noting this advice, the committee reiterates its consistent scrutiny view 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. From a scrutiny perspective, the committee does not consider that the response provided by the minister adequately justifies why the minister is not required to notify Parliament about the making of the relevant decisions.

2.60 As the minister's response has not adequately addressed this matter, the committee continues to have scrutiny concerns regarding why notice of the making of certain decisions by the minister to refuse or cancel a visa on character grounds is not required to be tabled in both Houses of the Parliament under proposed subsection 501(4A). In light of the fact that the bill has already passed both Houses of Parliament, the committee makes no comment on this matter.

Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021

Purpose	This bill seeks to modernise and streamline social security law to support the New Employment Services Model, which will operate from July 2022
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 27 May 2021
Bill status	Before the House of Representatives

Instruments not subject to parliamentary disallowance[28]

2.61 The committee initially scrutinised this bill in *Scrutiny Digest 8 of 2021* and requested the minister's advice.[29] The committee considered the minister's response in *Scrutiny Digest 10 of 2021* and requested the minister's further advice regarding:

- why it is considered necessary and appropriate that all determinations made under proposed section 40T are not legislative instruments; and
- whether the bill could be amended to provide that these determinations are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.[30]

Minister's response[31]

2.62 The minister advised:

> In relation to proposed section 40T of the *Social Security (Administration) Act 1999*, I note the Committee's comments about commencement and disallowance issues and its view that urgency is not generally a sufficient reason for instruments to be non-legislative, with 'minimal exceptions'. However, notwithstanding the Committee's points about commencement

28 Schedule 1, item 123, proposed sections 40T and 40U. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

29 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 40-41

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 53-55.

31 The minister responded to the committee's comments in a letter dated 28 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> and disallowance, this case falls within the category of cases where an exception is warranted.
>
> An example of a situation where the power in proposed section 40T may be needed is if a bushfire is spreading on a Sunday night. If the instrument is legislative, it would need to be drafted, signed and registered, with an accompanying explanatory statement. This would not physically be possible in time to provide job seekers in the bushfire affected areas the certainty they need that they would not risk their payments being affected by not complying with their requirements the next morning. This is not an uncommon scenario. During the 2019–20 bushfires, for example, there were 22 instances where requirements needed to be urgently paused for some job seekers.
>
> The Committee also noted the role of Parliament in scrutinising 'possible encroachments on personal rights and liberties'. I can reassure the Committee that it would not be possible for an instrument under proposed section 40T to encroach on personal rights and liberties because the only purpose of such an instrument would be to exempt persons from needing to comply with mutual obligation requirements under the social security law in order to receive their social security payment.

Committee comment

2.63 The committee thanks the minister for this response. The committee notes the minister's advice that this case falls within the category of cases where an exception to the usual position that instruments should be subject to disallowance is warranted, noting that instruments may be required to be made during an emergency situation. The committee also notes the minister's advice that it would not be possible for an instrument under proposed section 40T to encroach on personal rights and liberties.

2.64 While acknowledging the minister's advice, the committee considers that it would be possible to put in place administrative processes to draft, sign and register determinations urgently if necessary. The committee therefore reiterates its view that instruments that may be legislative in nature should be legislative instruments to ensure that appropriate parliamentary scrutiny is available. This issue has been highlighted recently in the committee's review into the *Biosecurity Act 2015,*[32] the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[33] and a resolution of

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32 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-44.

33 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Interim report*, December 2020; and *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, March 2021.

the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunsetting to permit appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.[34]

2.65 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in his responses to the committee 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*).

2.66 Noting that a determination under proposed section 40T can only be beneficial to affected persons by providing an exemption from mutual obligation requirements and that the secretary must be satisfied that exceptional circumstances exist before making a determination, the committee makes no further comment on this matter.

Broad discretionary powers

Instruments not subject to parliamentary disallowance[35]

2.4 The committee initially scrutinised this bill in *Scrutiny Digest 8 of 2021* and requested the minister's advice.[36] The committee considered the ministers' response in *Scrutiny Digest 10 of 2021* and requested the minister's further advice as to:

- why it is considered appropriate that instruments made under proposed subsection 8(8AC) and proposed subsection 40(3) are not legislative instruments; and
- whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.[37]

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34 Journals of the Senate, 16 June 2021, pp. 3581–3582.

35 Schedule 4, item 2, proposed subsection 8(8AC) and Schedule 6, item 1, proposed subsection 40(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 43-44.

37 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 59-60.

Minister's response[38]

2.67 The minister advised:

> Similarly, the power in proposed subsection 8(8AC) can only be used to specify that payments and benefits from employment programs are not to be considered income for social security law purposes, benefitting job seekers by allowing them to keep their full income support payments in addition to assistance from programs.
>
> I note the Committee's concerns about the power to make notifiable instruments in proposed subsection 40(3). In this instance, a notifiable instrument is preferred to a legislative instrument due to its technical nature, and because the Secretary already has the power to achieve the same effect, but with less benefit to job seekers, by requiring employment programs to be entered into a Job Plan under existing provisions, for example section 631C. The power to make a notifiable instrument means that job seekers can benefit more fully from the Points Based Activation System under the new employment services model. Under the new model, job seekers may have only a points requirement in their Job Plan, rather than specific activities.

Committee comment

2.68 The committee thanks the minister for this response. The committee notes the minister's advice that the power in proposed subsection 8(8AC) can only be used to specify that payments and benefits from employment programs are not to be considered income for social security law purposes, benefitting job seekers by allowing them to keep their full income support payments in addition to assistance from programs.

2.69 The committee also notes the minister's advice that, in relation to instruments made under proposed subsection 40(3), a notifiable instrument is preferred to a legislative instrument due to its technical nature, and because the Secretary already has the power to achieve the same effect, but with less benefit to job seekers, by requiring employment programs to be entered into a Job Plan under existing provisions, for example, section 631C.

2.70 While noting the minister's advice, the committee does not consider the fact that an instrument may have a beneficial effect or that similar powers are available in existing legislation to be a sufficient justification for not providing that instruments will be subject to disallowance. The committee also does not consider the fact that an

38 The minister responded to the committee's comments in a letter dated 28 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

instrument may be technical in nature will be a sufficient justification of itself for providing that an instrument will be notifiable rather than legislative.

2.71 The committee again reiterates that Schedule 5 to the bill seeks to amend subsection 28(1) of the *Social Security Act 1991* to provide that declarations by the Secretary that particular programs of work are approved programs of work for income support payment will be legislative instruments. Noting the similarity in the types of determinations being made, it remains unclear to the committee why determinations made under proposed subsection 8(8AC) and proposed subsection 40(3) cannot be legislative instruments. The committee notes that neither the explanatory memorandum nor either of the minister's responses have addressed this issue.

2.72 The committee therefore does not consider that the minister has provided information that adequately justifies why instruments made under proposed subsection 8(8AC) and proposed subsection 40(3) are not legislative instruments and therefore subject to disallowance.

2.73 From a scrutiny perspective, the committee considers that the bill should be amended to provide that instruments made under proposed subsection 8(8AC) and proposed subsection 40(3) are legislative instruments to ensure that they are subject to appropriate parliamentary oversight. The committee otherwise draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that these instruments are not legislative instruments.

Broad discretionary powers

Parliamentary scrutiny – section 96 grants to the states[39]

2.74 The committee initially scrutinised this bill in *Scrutiny Digest 8 of 2021* and requested the minister's advice.[40] The committee considered the ministers' response in *Scrutiny Digest 10 of 2021* and left to the Senate as a whole the appropriateness of:

- conferring on the Employment Secretary a broad power to make arrangements and grants relating to assisting persons to obtain and maintain paid work in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised; and

39 Schedule 2, item 2, proposed sections 1062A and 1062B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (v).

40 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 41-43.

- not including a requirement that written agreements with the states and territories about arrangements or grants made under proposed section 1062A be tabled in the Parliament.[41]

Minister's response[42]

2.75 The minister advised:

> In relation to the Committee's comment on guidance related to grants, I confirm my advice of 26 June 2021 that grants are made in accordance with the *Public Governance, Performance and Accountability Act 2013*, and with value for money and other requirements in the Commonwealth procurement and grants frameworks. The department also ensures that arrangements or grants are subject to robust conditions proportionate to the amounts and issues involved.
>
> The Committee has questioned whether there should be a requirement for grants made under proposed section 1062A to be tabled in Parliament. This is met in effect by proposed section 1062D that requires that the number and amount of grants or arrangements made under proposed section 1062A be published in the department's annual report. As the Committee would be aware, annual reports are tabled in Parliament.

Committee comment

2.76 The committee thanks the minister for this response. The committee notes the minister's advice that grants are made in accordance with the *Public Governance, Performance and Accountability Act 2013*, and with value for money and other requirements in the Commonwealth procurement and grants frameworks.

2.77 The committee also notes the minister's advice that, in relation to the tabling of grants, proposed section 1062D requires that the number and amount of grants or arrangements made under proposed section 1062A be published in the department's annual report.

2.78 While noting this advice, the committee reiterates that it has generally not accepted consistency with existing legislation or the existence of non-legislative policy guidelines to be sufficient as a justification for the conferral of broad powers in circumstances where there is limited guidance on the face of the bill as to how those powers are to be exercised.

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41 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 56-58.

42 The minister responded to the committee's comments in a letter dated 28 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

2.79 It remains unclear to the committee why at least high-level guidance cannot be included on the face of the bill as to the exercise of powers under proposed sections 1062A and 1062B.

2.80 The committee also notes that including information regarding the number or amount of grants in the department's annual report is not equivalent to tabling the written agreements with the states or territories themselves. The committee considers that tabling the written agreements would allow Parliament, and particularly the Senate, to exercise appropriate scrutiny over the grant of money to the states and territories.

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

- **conferring on the Employment Secretary a broad power to make arrangements and grants relating to assisting persons to obtain and maintain paid work in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised; and**
- **not including a requirement that written agreements with the states and territories about arrangements or grants made under proposed section 1062A be tabled in the Parliament.**

Treasury Laws Amendment (2021 Measures No. 3) Bill 2021

Purpose	Schedule 1 to the bill seeks to increase the Medicare levy low-income thresholds for singles, families, and seniors and pensioners, consistent with increases in the consumer price index Schedule 2 to the bill seeks to amend the *National Housing Finance and Investment Corporation Act 2018* to establish the Family Home Guarantee Schedule 3 to the bill seeks to exempt eligible payments made by the Australian government to thalidomide survivors from income tax and from the social security and veterans' entitlement income test Schedule 4 to the bill seeks to provide an income tax exemption for qualifying grants in relation to the February and March 2021 storms and floods Schedule 5 to the bill seeks to amend the *Income Tax Assessment Act 1997* to include a number of organisations on the list of deductible gift recipients
Portfolio	Treasury
Introduced	House of Representative on 13 May 2021
Bill status	Assent

Significant matters in non-disallowable delegated legislation[43]

2.82 In *Scrutiny Digest 8 of 2021* the committee requested the Assistant Treasurer's advice as to:

- why it is considered necessary and appropriate to leave nearly all of the elements of the proposed Family Home Guarantee to non-disallowable delegated legislation; and
- whether the bill can be amended to set out the core elements of the Family Home Guarantee on the face of the primary legislation, or to at least provide

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

that directions given to the NHFIC regarding the scheme be subject to the usual parliamentary disallowance process.[44]

Assistant Treasurer's response[45]

2.83 The Assistant Treasurer advised:

Issue 1: Use of delegated legislation

The Treasury Laws Amendment (2021 Measures No. 3) Bill 2021 (the Bill) amends the *National Housing Finance and Investment Corporation Act 2018* (the Act) to expand the objects of the Act. The amendment provides that an object of the Act is to establish the National Housing Finance and Investment Corporation (the NHFIC) to improve housing outcomes for Australians by assisting earlier access to the housing market by single parents with dependants. This amendment enables the Minister to issue directions to the NHFIC concerning the proposed Family Home Guarantee through the *National Housing Finance and Investment Corporation Investment Mandate Direction 2018* (the Investment Mandate).

The amendment is consistent with the current framework of the Act. The Act provides that the Minister may give the NHFIC Board directions about the performance of the NHFIC's functions, one of which is for the NHFIC to issue guarantees to improve housing outcomes. The Act further provides that the Investment Mandate may include directions about strategies and policies the NHFIC is to follow, decision-making criteria and limits on the making of guarantees by the NHFIC.

In reliance of the current framework, the Government is preparing amendments to the Investment Mandate to outline key criteria for the Family Home Guarantee for example, eligibility criteria for borrowers, limits on the number of Family Home Guarantees issued and how the Family Home Guarantee interacts with other guarantee types administered under the Investment Mandate. I note that the approach for establishing the proposed Family Home Guarantee is consistent with the approach taken in relation to the establishment of the First Home Loan Deposit Scheme and the New Home Guarantee.

It is appropriate for the Government's expectations for the proposed Family Home Guarantee to be included in the Investment Mandate to ensure the scheme promotes consistency with the existing legislative framework already approved by the Parliament and in place under the Act.

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44 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 48–49.

45 The Assistant Treasurer responded to the committee's comments in a letter dated 13 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Issue 2: Possibility of amending the bill to set out core elements in primary legislation

Providing the core elements of the Family Home Guarantee in the Investment Mandate rather than the primary legislation allows the legislative framework to be flexible and responsive to the changing needs of lenders and eligible borrowers. Consistent with the First Home Loan Deposit Scheme and the New Home Guarantee, it allows refinements to be made, within the scope of the Minister's power under the Act, to reflect new information and changes in market conditions.

Making the Investment Mandate subject to disallowance would be inconsistent with regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003* which provide that an instrument that is a direction by a Minister to any person or body is not subject to disallowance.

For these reasons, I consider that it would not be appropriate to amend the Bill such that the core elements of the Family Home Guarantee are set out in the primary legislation or to provide that directions given to the NHFIC regarding the Family Home Guarantee are subject to a parliamentary disallowance process.

Committee comment

2.84 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that it is appropriate for the government's expectations in relation to the proposed Family Home Guarantee to be included in the Investment Mandate to ensure the scheme promotes consistency with the existing legislative framework already approved by the Parliament and in place under the *National Housing Finance and Investment Corporation Act 2018*.

2.85 The committee also notes the Assistant Treasurer's advice that providing the core elements of the Family Home Guarantee in the Investment Mandate rather than within primary legislation allows the legislative framework to be flexible and responsive to the changing needs of lenders and eligible borrowers.

2.86 The committee reiterates its consistent concerns regarding the lack of parliamentary oversight of Investment Mandates.[46] The committee concurs with the view of the Senate Standing Committee for the Scrutiny of Delegated Legislation that exemptions from disallowance are unlikely to be acceptable unless exceptional circumstances can be demonstrated.[47] While noting the minister's advice, the

46 See for example, Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2019*, pp. 14–16.

47 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Exemption of Delegated Legislation from Parliamentary Oversight: Final Report*, March 2021, p. 115.

committee has generally not accepted consistency with existing legislation or a desire for administrative flexibility to be a sufficient justification for exempting instruments from the usual parliamentary disallowance process. From a scrutiny perspective, the committee does not consider that the Assistant Treasurer's response has adequately justified why the core details of the Family Home Guarantee will be left to non-disallowable delegated legislation.

2.87 The committee considers that the bill should have been amended to provide that directions made by the NFHIC in relation to the Family Home Guarantee scheme are subject to the usual parliamentary disallowance process. However, as the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

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

Treasury Laws Amendment (2021 Measures No. 5) Bill 2021

Purpose	Schedule 1 to this bill seeks to increase the producer offset for films that are not feature films released in cinemas to 30 per cent of total qualifying Australian production expenditure, and to make various threshold and integrity amendments across the three screen tax offsets Schedule 2 to the bill seeks to makes consequential amendments to integrate the corporate insolvency reforms across the Commonwealth statute book
Portfolio	Treasury
Introduced	House of Representatives on 24 June 2021
Bill status	Before the House of Representatives

Reverse evidential burden of proof[48]

2.89 In *Scrutiny Digest 10 of 2021* the committee requested the Assistant Treasurer's detailed justification as to the appropriateness of including the matter in proposed subsection 496-10(2A) as an offence-specific defence. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[49]

Assistant Treasurer's response[50]

2.90 The Assistant Treasurer advised:

> Schedule 2 to the Bill makes consequential amendments necessary to integrate the new debt restructuring and simplified liquidation processes established by the corporate insolvency reforms within the special administration process for Aboriginal and Torres Strait Islander corporations. The proposed amendments to the CATSI Act ensure that

48 Schedule 2, item 11, proposed subsection 496-10(2A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

49 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 14-16.

50 The Assistant Treasurer responded to the committee's comments in a letter dated 30 July 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 11 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

arrangements already made through a restructuring plan are preserved to give creditors certainty that their rights under the plan are not affected by the commencement of a special administration.

Relevantly, the proposed new subsection 496-10(2A) ensures that a restructuring practitioner can continue to exercise their functions and powers in relation to a restructuring plan while an Aboriginal and Torres Strait Islander corporation is under special administration. It operates as an offence-specific defence to subsection 496-10(1), which makes it an offence for a person, other than the special administrator, to perform or purport to perform an exercise, function or power as an officer of an Aboriginal and Torres Strait Islander corporation while the corporation is under special administration.

Peculiarly within the knowledge of the defendant

The evidential burden of demonstrating that a person was performing or exercising their functions and powers as a restructuring practitioner in relation to a restructuring plan falls on the defendant. In other words, the defendant must point to the relevant evidence that suggests a reasonable possibility that they were exercising their powers and functions as a restructuring practitioner for a plan. Once the defendant discharges this burden, the onus is on the prosecution to disprove the matters beyond reasonable doubt.

The reversal of the evidential burden of proof is appropriate in this instance as the defendant is best placed to raise evidence of actions taken in relation to their status as a restructuring practitioner for a restructuring plan. In particular, the defendant will have the requisite knowledge as to why they had exercised certain functions or powers in their capacity as a restructuring practitioner, and therefore justify that those actions were taken to give effect to a restructuring plan. As the restructuring practitioner for a plan may do anything incidental to their functions and powers as well as anything that is necessary or convenient for the purpose of administering the plan, the reasons behind disputed actions may not always be available to the prosecution and could be easily and readily provided by the defendant. As such, whether a defendant's actions were undertaken to give effect to a restructuring plan in their capacity as a restructuring practitioner will be peculiarly within the knowledge of the defendant, and significantly more difficult and costly for the prosecution to disprove.

This approach is consistent with the principle in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* and section 13.3 of the *Criminal Code Act 1995*, both of which establish the general rule that a defendant should only bear an evidential burden of proof for an offence-specific defence.

Consistency with the current CATSI Act framework

The reversal of the evidential burden of proof in proposed subsection 496-10(2A) is appropriate as it is consistent with the existing legislative

framework of the CATSI Act. In particular, it is consistent with the existing offence-specific defence in subsection 496-10(2), which provides that a person may exercise a power or function as an officer of the corporation if they first seek written approval from the special administrator. Here, the evidential burden of proof is also imposed on the defendant. The Act itself contains multiple offences wherein exceptions to the offence have also reversed the evidential burden of proof (see for example, subsections 279-1(3) - (4), 175-10(2) and 183-1(2), among others).

As stated in the Explanatory Memorandum, the purpose of Schedule 2 to the Bill is to provide a smooth integration of the corporate insolvency reforms into existing Commonwealth legislation. This is achieved by ensuring that any consequential amendments remain consistent with the existing legislative framework of each Act. Given that the existing offence in section 496-10 of the CATSI Act already contains an exception which reverses the evidential burden of proof (in relation to actions taken with the approval of the special administrator), it is appropriate to mirror this requirement when creating a second exception to that offence (in relation to actions taken by the restructuring practitioner). In contrast, not placing a reverse evidential burden in this case would depart from the current CATSI Act framework and would not align with the intention of Schedule 2 to the Bill.

Committee comment

2.91 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the reversal of the evidential burden of proof is appropriate in this case because the defendant is best placed to raise evidence of actions taken in relation to their status as a restructuring practitioner. In particular, the Assistant Treasurer advised that the defendant will be best placed to adduce evidence demonstrating that their actions were taken to give effect to a restructuring plan. The Assistant Treasurer also advised that whether a defendant's actions were undertaken to give effect to a restructuring plan in their capacity as a restructuring practitioner will be peculiarly within the knowledge of the defendant, and significantly more difficult and costly for the prosecution to disprove.

2.92 The Assistant Treasurer further advised that the reversal of the evidential burden of proof brought about by proposed subsection 496-10(2A) is appropriate because it ensures consistency with the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

2.93 The committee requests that the key information detailing why the relevant matters would be peculiarly within the knowledge of the defendant, and why these matters would be significantly more difficult and costly for the prosecution to disprove, be included in the explanatory memorandum, noting the importance of this document as a point of access to understanding the law and, if needed, as

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

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

Senator Helen Polley
Chair

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1 The Consolidated Revenue Fund is appropriated for expenditure for the purposes of special accounts by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*.

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills *Fourteenth Report of 2005*.