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Committee for the
Scrutiny of Bills

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Introduction

Terms of reference

Since 1981 the Senate Standing Committee for the Scrutiny of Bills has scrutinised all bills against certain accountability standards to assist the Parliament in undertaking its legislative function. These standards focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary scrutiny. The scope of the committee's scrutiny function is formally defined by Senate standing order 24, which requires the committee to scrutinise each bill introduced into the Parliament as to whether the bills, by express words or otherwise:

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

The committee's long-standing approach is that it operates on a non-partisan and consensual basis to consider whether a bill complies with the five scrutiny principles. In cases where the committee has scrutiny concerns in relation to a bill the committee will correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. If the committee has not completed its inquiry due to the failure of a minister to respond to the committee's concerns, Senate standing order 24 enables Senators to ask the responsible minister why the committee has not received a response.

While the committee provides its views on a bill's level of compliance with the principles outlined in standing order 24 it is, of course, ultimately a matter for the Senate itself to decide whether a bill should be passed or amended.

Publications

It is the committee's usual practice to table a *Scrutiny Digest* each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

General information

Any Senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

Chapter 1

Initial scrutiny

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

Charter of the United Nations Amendment Bill 2021

Purpose	This bill seeks to amend the <i>Charter of the United Nations Act 1945</i> to specify that counter-terrorism financial sanctions listings made under section 15 of the Act and revocations made under section 16 of the Act be made by legislative instrument. The bill will also confirm the validity of action that has been taken, or which may in the future need to be taken, in respect of conduct relating to existing listings that were made but not registered on the Federal Register of Legislation at the time of their making.
Portfolio	Foreign Affairs
Introduced	House of Representatives on 11 August 2021

Retrospective validation¹

1.1 Item 6 of Schedule 1 to the bill seeks to insert proposed section 38A into the *Charter of the United Nations Act 1945* (the Act). Proposed subsection 38A(4) provides that a listing of persons and entities for counter-terrorism financial sanctions is taken to have been registered on the Federal Register of Legislation if that listing would otherwise be invalid because it was not registered. Proposed subsection 38A(5) further provides that anything done, or purported to have been done, by a person that may have been invalid because a listing was not registered is taken to have always been valid. Proposed section 38A applies in relation to civil and criminal proceedings and applies despite any effect on the accrued rights of any person.

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

¹ Schedule 1, item 6, proposed section 38A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

New section 38A does not make unlawful conduct that was lawful at the time it was performed, impose any additional punishment or vary the terms or scope of any previous CT listings made by the authority of the Minister. Rather, it confirms the application and enforceability of CT listings that, although previously not registered on the FRL, were validly made in accordance with the legal and procedural requirements set out in COTUNA. It thereby ensures that the law can be applied and enforced as intended by Parliament in introducing legislation to prevent the financing of terrorism. The new section 38A of the Amendment Bill does not interfere with the exercise of judicial power, as the question as to whether a person's conduct constitutes a breach of counter-terrorism sanctions set out in COTUNA remains a matter for judicial determination. Consequently, there is no interference with the operation of Chapter III of the Constitution.²

1.4 While acknowledging that the stated intention of the bill is to confirm the application and enforceability of listings made under subsection 15(1) or 15(3) of the Act since 2001, the committee notes that, absent any other factor, legislative instruments that are not registered in accordance with the *Legislation Act 2003* will not apply to a person to the extent that they disadvantage or impose liabilities on the person.³ It is generally immaterial whether the instruments were also made in accordance with the enabling Act.

1.5 It therefore remains unclear to the committee whether the retrospective validation of the listings will, or may, have a detrimental effect on any persons. For example, by extinguishing a person's right to seek judicial review on the basis that a listing was not enforceable. The committee notes that, while the intention of the bill may be to restore the legal obligations and rights that were intended to exist when the listings were made, from a rule of law perspective, individuals and entities should not be required to comply with laws that were invalidly made. The committee considers that any departure from this position must be comprehensively justified. This is particularly the case in instances where a provision that is the subject of retrospective validation appears to have a significant impact on individual rights and liberties, as in this instance.

2 Explanatory memorandum, p. 5.

3 See *Legislation Act 2003*, subsection 12(2). In addition, subsection 15K(1) of the *Legislation Act 2003* provides that a legislative instrument is not enforceable by or against any person unless the instrument is registered as a legislative instrument.

1.6 The committee acknowledges the importance of the counter-terrorism financial sanctions regime and is therefore concerned about the significant delay in registering the listings and the impact this may have on the validity of any action that has been taken under the listings prior to their registration on the Federal Register of Legislation on 26 May 2021.

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

- **whether any persons are likely to be adversely affected by the retrospective validation of listings made under subsection 15(1) or 15(3) of the *Charter of the United Nations Act 1945*, and the extent to which their interests are likely to be affected; and**
- **when and how the department became aware that it would be necessary to register the listings on the Federal Register of Legislation to ensure their enforceability.**

Defence Legislation Amendment (Discipline Reform) Bill 2021

Purpose	<p>This bill seeks to amend the <i>Defence Force Discipline Act 1982</i> to:</p> <ul style="list-style-type: none"> • expand the operation of the disciplinary infringement scheme to enhance its effectiveness in dealing with minor breaches of military discipline; • remove the subordinate summary authority, to reduce the number of summary authority levels and therefore simplify the manner in which minor disciplinary issues are enforced; and • introduce several new service offences relating to failure to perform duty or carry out activity; cyber-bullying; and failure to notify change in circumstances (concerning the receipt of a benefit or allowance).
Portfolio	Defence
Introduced	House of Representatives on 12 August 2021

Significant matters in delegated legislation⁴

1.8 Schedule 1 to the bill seeks to amend the *Defence Force Discipline Act 1982* (the Act) to create a new disciplinary infringement framework for prescribed members of the defence force. Proposed section 9FA provides that the procedure followed by a discipline officer in dealing with a prescribed defence member under the disciplinary infringement scheme is to be in accordance with any requirements specified by the Chief of the Defence Force by legislative instrument.

1.9 Additionally, proposed section 9J provides that the Chief of the Defence Force or a service chief may, by legislative instrument, make rules with respect to the consequences that are to flow from the imposition of certain punishments, including the restriction of privileges and the stoppage of leave.

1.10 The committee's consistent scrutiny view is that significant matters, such as the operation of a disciplinary infringement framework, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification as to why the matters in proposed sections 9FA and 9J are left to delegated legislation.

⁴ Schedule 1, item 1, proposed sections 9FA and 9J. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

1.11 It is unclear to the committee why at least high-level guidance in relation to these matters cannot be provided on the face of the primary legislation. The committee's concerns in this instance are heightened noting the potential impact on personal rights and liberties that may flow from how prescribed defence members are to be dealt with under the infringement scheme. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.12 The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave the significant elements of the operation of the disciplinary infringement scheme set out in proposed sections 9FA and 9J to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding the operation of these elements on the face of the primary legislation.**

Reverse evidential burden⁵

1.13 Item 1 of Schedule 3 to the bill seeks to insert proposed section 35A into the Act to provide that a defence member commits an offence if the member is required to perform a duty or carry out an activity and fails to do so. Proposed subsection 35A(3) provides an exception to the offence (offence-specific defence), stating that the offence does not apply if the member has a reasonable excuse.

1.14 Item 2 of Schedule 3 seeks to insert proposed section 48B into the Act to provide that it is an offence if a removal order applies to a member and the member fails to comply with the removal order. Proposed subsection 48B(2) provides an offence-specific defence if it is not reasonably practicable for the member to comply with the order.

1.15 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.⁶ 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, interferes with this common law right.

5 Schedule 1, items 1 and 2, proposed sections 35A and 48B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

6 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.

1.16 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 reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed sections 35A and 48B have not been addressed in the explanatory materials.

1.17 The committee notes that the *Guide to Framing Commonwealth Offences*⁷ 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.⁸

1.18 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that:

An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.⁹

1.19 The committee notes that no explanation has been provided in the explanatory memorandum regarding why an offence-specific defence of 'reasonable excuse' has been used in proposed subsection 35A(3).

1.20 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in proposed sections 35A and 48B. 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*.¹⁰

1.21 The committee also requests the minister's advice as to whether the bill can be amended to provide for a more specific defence in proposed subsection 35A(3).

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

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

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

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

Broad scope of offence provisions¹¹

1.22 Item 2 of Schedule 3 to the bill seeks to insert proposed section 48A into the Act to provide that a defence member commits an offence if the member uses a social media service or relevant electronic service and the member does so in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing or humiliating to another person. The maximum penalty for the offence is 2 years imprisonment.

1.23 The committee notes that there is no guidance on the face of the bill as to what conduct might constitute using a social media service 'in a way that a reasonable person would regard as offensive'. The committee therefore has scrutiny concerns regarding the broad scope of the provision. The committee considers that any offence provision should be clearly drafted and sufficiently precise to ensure that any person may understand what may constitute an offence. In this instance, the explanatory memorandum states:

Section 48A differs from similar civilian criminal legislation in that there is no requirement for the cyber-bullying conduct to be 'serious'. Section 48A provides for the objective test that a reasonable person would regard the conduct as offensive, or as threatening, intimidating, harassing or humiliating another person. The threshold distinction is important as the availability of this service offence supports the maintenance and enforcement of discipline through deterrence of such conduct by members, which is distinct from the civilian criminal law provisions dealing with criminal behaviour.¹²

1.24 While noting this explanation and acknowledging the need for instances of cyber-bullying within the Defence Force to be dealt with appropriately, it remains unclear to the committee why further guidance regarding the scope of the offence in proposed section 48A cannot be included on the face of the bill. The committee's scrutiny concerns in this instance are heightened noting the significant penalty that may be applied.

1.25 The committee therefore requests the minister's advice as to whether the bill can be amended to include further guidance or examples as to what conduct might constitute using a social media service or relevant electronic service 'in a way that a reasonable person would regard as offensive'.

11 Schedule 3, item 2, proposed sections 48A and 9J. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

12 Explanatory memorandum, p. 31.

Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Bill 2021

Purpose	This bill seeks to amend the <i>Commonwealth Electoral Act 1918</i> (the Act) to enable the Electoral Commissioner or their delegate to declare a person to be a 'designated elector', on the basis of a reasonable suspicion that the elector has voted more than once in the same election. The bill also seeks to amend the penalty for the offence of interference with political liberty in section 327 of the Act.
Portfolio	Finance
Introduced	House of Representatives on 12 August 2021

Broad discretionary power¹³

1.26 Item 10 of Schedule 1 to the bill seeks to insert proposed section 202AH into the *Commonwealth Electoral Act 1918* (the Electoral Act) to provide that the Electoral Commissioner may declare that an elector is a 'designated elector' if the Electoral Commissioner reasonably suspects that the elector has voted more than once in an election. Proposed section 202AL provides that a designated elector may only vote by declaration vote, which includes a postal vote, a pre-poll declaration vote, an absent vote, or a provisional vote but does not include an ordinary vote or an ordinary pre-poll vote.

1.27 The committee notes that the bill provides no guidance on its face as to what considerations the Electoral Commissioner may take into account in forming a reasonable suspicion that an elector has voted more than once in an election and making a decision to declare a person as a designated elector. As such, the committee considers that the bill provides the Electoral Commissioner with a broad discretionary power to declare an elector a designated elector. The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, the explanatory memorandum explains that:

a reasonable suspicion can be determined by any means available to the Electoral Commissioner. For example, this may include consideration of records of certified-lists, which contain multiple-marks recorded against an elector's name as having voted more than once in a single election.¹⁴

13 Schedule 1, item 10, proposed section 202AH. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

14 Explanatory memorandum, pp. 6-7.

1.28 While noting this explanation, it is unclear to the committee why additional guidance, including the example set out in the explanatory memorandum, cannot be included on the face of the primary legislation. The committee considers that this would provide legislative guidance as to the appropriate exercise of the power to declare a person a designated elector. As a result, the committee considers that it may be appropriate to, at a minimum, amend the bill to include an inclusive list of considerations that the Electoral Commissioner may take into account when exercising the power set out at proposed section 202AH. The committee's scrutiny concerns in this instance are heightened noting that the power to declare that a person is a designated elector would curtail a person's voting options at an election.

1.29 The committee therefore requests the minister's advice as to whether the bill can be amended to include at least high-level guidance on the factors the Electoral Commissioner may take into account when determining that an elector should be declared a 'designated elector'.

Electoral Legislation Amendment (Party Registration Integrity) Bill 2021

Purpose	This bill seeks to amend the registration eligibility requirements for a federal non-Parliamentary party. These amendments increase the minimum membership requirements for registration from 500 to 1500 unique members. The bill also amends the prohibitions regarding registrable names, abbreviations, and logos.
Portfolio	Finance
Introduced	House of Representatives on 12 August 2021

Administrative power not defined with sufficient precision¹⁵

1.30 Item 6 of Schedule 1 to the bill seeks to amend paragraph 129(1)(b) of the *Commonwealth Electoral Act 1918* (the Electoral Act) to provide that the Electoral Commission shall refuse an application for the registration of a political party if, in its opinion, the party name or the abbreviation of the party name of the applicant is obscene, frivolous or vexatious. Currently, the Electoral Commission may only refuse an application when it is of the opinion that a name or abbreviation is obscene.

1.31 The committee notes that 'frivolous' and 'vexatious' are imprecise terms which, as a result, may confer a broad discretion on the Electoral Commission to refuse or approve applications to register a party name. This expands the application of section 129 from its current, more limited, form. The bill provides no further guidance as to the meaning of these terms or what considerations the Electoral Commission should take into account when forming an opinion in relation to paragraph 129(1)(b).

1.32 Insufficiently defined administrative powers may be exercised arbitrarily or inconsistently and may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles. The committee's concerns in relation to administrative powers that are not defined with sufficient precision will be heightened when the provision will, or might, impact on individual rights, liberties or obligations.

1.33 When an administrative power is not defined with sufficient precision, the committee expects the explanatory memorandum to the bill to provide a sound justification for why it is necessary to set out the power in broad terms, including whether there are appropriate criteria or considerations that limit or constrain the

15 Schedule 1, item 6, paragraph 129(1)(b). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

exercise of the power, and whether these are contained in law or policy. In this case, the explanatory memorandum to the bill notes that the terms 'frivolous' and 'vexatious':

are to be given their ordinary meaning, and are intended to include party names or abbreviations that are nonsensical or are malicious in their application. This would include, for example, an applicant seeking to register 'Australian Electoral Commission', or 'Australian Government' as a political party.¹⁶

1.34 From a scrutiny perspective, the committee considers that relying solely on the ordinary meaning of 'frivolous or vexatious' means that the scope of the power afforded by section 129 is not defined with sufficient precision. The committee notes that the explanatory memorandum to the bill does not contain any justification for why it is necessary to amend section 129 to include broad terms in circumstances in which there is no guidance on the face of the bill as to how to interpret those terms.

1.35 In addition, the committee notes that 'frivolous or vexatious' is a well-established concept within the common law in relation to legal claims which are groundless or instituted to achieve a wrongful purpose. This meaning of the term is used elsewhere in Commonwealth legislation, including within the Electoral Act at sections 72 and 116, but the context in which the term is used in these instances appears to be incongruent with the use of the term in the proposed amendment to paragraph 129(1)(b).

1.36 The committee considers that it would be appropriate to further define the power provided to the Electoral Commission under section 129 by providing additional guidance as to when the power should be appropriately used.

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

- **replace 'frivolous or vexatious' with alternate terms, such as 'nonsensical', 'malicious' or 'misleading', which more appropriately define the scope of the power at section 129; or**
- **alternatively, whether the bill can be amended to:**
 - **include examples of frivolous or vexatious party names; or**
 - **include an inclusive definition of the phrase 'frivolous or vexatious'; or**
 - **set out matters that the Electoral Commission may consider in determining whether a party name or abbreviation is frivolous or vexatious.**

16 Explanatory memorandum, p. 7.

Ransomware Payments Bill 2021 (No. 2)

Purpose	This bill seeks to establish a mandatory reporting requirement for Commonwealth entities, State or Territory agencies, corporations, and partnerships who make ransomware payments in response to a ransomware attack
Sponsor	Senator Kristina Keneally
Introduced	Senate on 12 August 2021

Reverse evidential burden of proof¹⁷

1.38 The bill seeks to require entities who make a ransomware payment to notify the Australian Cyber Security Centre (ACSC), part of the Australian Signals Directorate, key details of the attack, the attacker, and the payment.¹⁸ Subclause 9(4) of the bill provides that the ACSC may disclose the information contained in notifications to a Commonwealth entity, or a state or territory, or an agency of a state or territory, for purposes relating to law enforcement. Subclause 9(5) provides that a person commits an offence if information is disclosed to the person under subclause 9(4) and the person discloses any of the information. The maximum penalty for this offence is 500 penalty units.

1.39 Subclause 9(6) provides an exception (offence-specific defence) where the information is disclosed in certain circumstances, for example to a court. At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty.¹⁹ 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, interferes with this common law right.

1.40 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 reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in subclause 9(6) have not been addressed in the explanatory materials.

17 Subclause 9(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

18 Explanatory memorandum, p. 2.

19 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.

1.41 The committee also notes that the *Guide to Framing Commonwealth Offences*²⁰ 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.²¹

1.42 In this case, it is not apparent that the matters listed in subclause 9(6) are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. As a result, these matters appear to be matters more appropriate to be included as an element of the offence.

1.43 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 the matters listed in subclause 9(6) which do not appear to be peculiarly within the knowledge of the defendant.

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

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

Treasury Laws Amendments (2021 Measures No. 6) Bill 2021

Purpose	<p>Schedule 1 to the bill amends the <i>Income Tax Assessment Act 1997</i> to make refunds of large-scale generation shortfall charges non-assessable non-exempt income for income tax purposes.</p> <p>Schedule 2 to the bill amends the <i>Competition and Consumer Act 2010</i> by increasing the maximum amount of penalty units that can be included in regulations that prescribe an industry code, with specific amendments for industry codes relating to the industry of franchising.</p> <p>Schedule 3 to the bill amends the <i>Income Tax Assessment Act 1997</i> to remove the requirement for superannuation trustees to provide an actuarial certificate when calculating exempt current pension income using the proportionate method, where all members of the fund are fully in retirement phase for all of the income year.</p> <p>Schedule 4 to the bill seeks to amend the <i>Competition and Consumer Act 2010</i> to provide regulatory certainty for industry participants that are governed by industry codes prescribed by regulations made under Part IVB of the Act.</p> <p>Schedule 5 to the bill amends the <i>Taxation Administration Act 1953</i> and the <i>Family Law Act 1975</i> to create a new mechanism for sharing superannuation information for family law proceedings.</p>
Portfolio	Treasury
Introduced	House of Representatives on 11 August 2021

Significant matters in delegated legislation²²

1.44 Item 4 of Schedule 4 to the bill seeks to insert proposed subsection 51AE(1A) into the *Competition and Consumer Act 2010* to provide that an industry code may confer certain functions and powers on persons or bodies. These functions or powers include, among other things, the power to monitor compliance with a code, to conduct investigations in relation to a code and to provide exemptions from a code.

1.45 In addition, item 2 of Schedule 4 to the bill seeks to amend the definition of 'industry code' such that, where the Act provides, the regulations may prescribe

²² Schedule 4, item 4, proposed subsection 51AE(1A). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

provisions that regulate conduct of a kind other than between industry participants or towards industry customers.

1.46 Industry codes are legislative instruments prescribed by regulations under section 51AE of the *Competition and Consumer Act 2010*. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.47 The committee's view is that significant matters, such as investigation, monitoring or exemption powers, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

Regulations that prescribe industry codes are frequently reviewed and are often updated. To ensure a consistent approach to codes across industries, amendments to the industry codes framework are required to clarify the range of powers and functions that can be conferred on the regulators, Minister(s), and other relevant third parties.²³

1.48 While the committee acknowledges that the amendments set out in Schedule 4 to the bill are intended to clarify the range of powers and functions that may be prescribed within an industry code, it is not clear to the committee why further guidance in relation to these matters could not be included within the primary legislation. For instance, by including examples of when it may be appropriate to exercise investigation powers or by including high-level guidance in relation to the circumstances in which an exemption may be granted. In this case, the committee's concerns are heightened given the expanded meaning of 'industry code' provided by proposed section 51ACAA at item 2 of Schedule 4 to the bill.

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

- **why it is considered necessary and appropriate to leave the matters set out at proposed subsection 51AE(1A) to delegated legislation; and**
- **whether the bill can be amended to include further guidance regarding those matters on the face of the primary legislation, particularly in relation to the conferral of functions and powers relating to monitoring compliance with**

23 Explanatory memorandum, pp. 67-68.

industry codes,²⁴ conducting investigations,²⁵ granting exemptions,²⁶ and reviewing the operation of industry codes.²⁷

Retrospective validation²⁸

1.50 Part IVB of the *Competition and Consumer Act 2010* currently provides the framework for the making of industry codes. Current section 51AE provides that the regulations may prescribe an industry code, which may be mandatory or voluntary. Schedule 4 to the bill seeks to amend section 51AE to confirm that if the regulations prescribe an industry code, the code may include a number of matters including how disputes or complaints are to be dealt with, the conduct of investigations and the provision of exemptions. Item 10 of Schedule 4 to the bill seeks to retrospectively validate earlier regulations prescribing industry codes that were made, or purported to be made, prior to the commencement of the bill. The bill also seeks to retrospectively validate acts or things done, or purportedly done, under the earlier regulations.

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

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

No persons are adversely affected by the retrospective validation of determinations or exemptions purportedly made under section 51AE nor should their interests be affected given that the amendments are aimed at clarifying the current state of the law as it was intended and has been understood.

24 Schedule 4, item 4, proposed paragraph 51AE(1A)(a).

25 Schedule 4, item 4, proposed paragraph 51AE(1A)(d).

26 Schedule 4, item 4, proposed paragraph 51AE(1A)(e).

27 Schedule 4, item 4, proposed paragraph 51AE(1A)(f).

28 Schedule 4, item 10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

...

The Schedule does not create new consequences or obligations under existing determinations or exemptions. Any persons who were not affected by such decisions remain unaffected upon commencement of these amendments. Likewise, persons who were affected continue to be affected in the same way. This approach ensures that determinations and exemptions under Part IVB continue to operate as they have always been intended and understood to operate.²⁹

1.53 While noting this explanation, it remains unclear to the committee whether the retrospective validation of the earlier regulations will, or may, have a detrimental effect on any persons. The committee notes that while the intention of the bill may be to restore the legal obligations and rights that were intended to exist when the earlier regulations were made, from a rule of law perspective, individuals and entities should not be required to comply with laws that were invalidly made. The committee considers that any departure from this position must be comprehensively justified. This is particularly the case in instances where the effect of a bill is to retrospectively validate legislative instruments that may include significant penalties or may otherwise impact on individual rights and liberties. For example, industry codes made under section 51AE of the *Competition and Consumer Act 2010* may include civil penalty provisions of up to 300 penalty units.

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

- **why it is considered necessary and appropriate to retrospectively validate industry codes made, or purportedly made, under Part IVB of the *Competition and Consumer Act 2010*; and**
- **whether any persons are likely to be adversely affected by the retrospective validation of the industry codes, and the extent to which their interests are likely to be affected, noting that individuals and entities should not be required to comply with laws that were invalidly made.**

29 Explanatory memorandum, p. 71.

Bills with no committee comment

1.55 The committee has no comment in relation to the following bills which were introduced into the Parliament between 9-12 August 2021:

- Electoral Legislation Amendments (Counting, Scrutiny and Operational Efficiencies) Bill 2021
- Electoral Legislation Amendments (Political Campaigners) Bill 2021
- Human Rights (Children Born Alive Protection) Bill 2021
- Human Rights (Targeted Sanctions) Bill 2021

Commentary on amendments and explanatory materials

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

1.56 On 10 August 2021, the Minister for Resources and Water (Mr Pitt) tabled an addendum to the explanatory memorandum relating to the bill.

1.57 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.³⁰

Family Assistance Legislation Amendment (Child Care Subsidy) Bill 2021

1.58 On 9 August 2021, the Assistant Minister to the Attorney-General (Senator Stoker) tabled an addendum to the explanatory memorandum to the bill.

1.59 On 12 August 2021, the Senate agreed to two government amendments and one government request for an amendment.

1.60 The committee thanks the assistant minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.³¹

30 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2021*, 4 August 2021, pp. 5-7.

31 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 11 of 2021*, 4 August 2021, pp. 8-10.

Tertiary Education Quality and Standards Agency (Charges) Bill 2021

1.61 On 9 August 2021, the Minister for Government Services (Senator Reynolds) tabled an addendum to the explanatory memorandum to the bill.

1.62 The committee thanks the minister for tabling an addendum to the explanatory memorandum which includes key information previously requested by the committee.³²

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

- Treasury Laws Amendment (2021 Measures No. 1) Bill 2021³³

32 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021*, 4 August 2021, p. 45.

33 On 9 August 2021, the Senate agreed to 12 government amendments.

Chapter 2

Commentary on ministerial responses

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

Appropriation Bill (No. 1) 2021-2022

Appropriation Bill (No. 2) 2021-2022

Purpose	Appropriation Bill (No. 1) 2021-2022 seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government Appropriation Bill (No. 2) 2021-2022 seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure
Portfolio	Finance
Introduced	House of Representatives on 11 May 2021
Bill status	Act

Parliamentary scrutiny—appropriations determined by the Finance Minister¹

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

- whether the additional transparency measures applying in relation to AFM determinations made since the 2020-2021 supply bills will continue in relation to AFM determinations made under Appropriation Bill (No. 1) 2021 2022 and Appropriation Bill (No. 2) 2020 2021; and
- whether information about AFM transparency measures can be included in the explanatory materials to future appropriation bills.²

1 Clause 10 of Appropriation Bill (No. 1) 2021-2022; Clause 12 of Appropriation Bill (No. 2) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 8–11.

Minister's response³**2.2 The minister advised:**

The transparency measures have worked well and will apply to allocations from the Advance to Finance Minister provisions in the 2021-22 Appropriation Acts.

Detail on the transparency measures applying to Advance to the Finance Minister provisions will be included in the Explanatory Memoranda to future Appropriation Bills. Particular transparency approaches that were introduced following the onset of the COVID-19 pandemic began as undertakings between the Government and the Opposition. The new information that will be added to the Explanatory Memorandum will give clarity that relevant transparency measures are appropriately considered as undertakings to the Parliament and will be continuing practices.

Committee comment

2.3 The committee thanks the minister for this response. The committee welcomes the minister's advice that details of the transparency measures applying to Advance to the Finance Minister provisions will be added to explanatory memoranda to future appropriation bills. The minister advised that this information will clarify that the relevant transparency measures should be considered as undertakings to the Parliament and will be continuing practices.

2.4 **The committee thanks the minister for his proposal to include details of the transparency measures applying to Advance to the Finance Minister provisions in explanatory memoranda to future appropriation bills.**

2.5 **In light of the information provided and the minister's undertaking, the committee makes no further comment on this matter.**

Parliamentary scrutiny—measures marked 'not for publication'⁴

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

3 The minister responded to the committee's comments in a letter dated 3 August 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 12 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

4 Clauses 4 and 6 and Schedule 1 to Appropriation Bill (No. 1) 2021-2022; Clauses 4 and 6 and Schedule 2 to Appropriation Bill (No. 2) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

- any of the items marked as nfp in Budget Paper No. 2 or the PBS are included in the summary of appropriations at clause 6 of the bills or in the appropriation items in Schedule 1 to Appropriation Bill (No. 1) 2021-2022 and Schedule 2 to Appropriation Bill (No. 2) 2021-2022; and
- if so, why it is considered necessary and appropriate to ask the Parliament to authorise appropriations without clear information about the amounts that are to be appropriated under each individual Budget measure.⁵

Minister's response

2.7 The minister advised:

Items are included in the summary of appropriations at clause 6 of Appropriations Bills (Nos. 1 and 2) 2021-2022.

It is longstanding practice to identify measures in Budget Paper No. 2 as 'not for publication' where disclosure of amounts would be prejudicial to national security, legal sensitivities or for commercial-in-confidence reasons. The relevant Appropriation Act introduced with the Budget will reflect the amount for such a measure within an outcome against the particular agency responsible for its delivery.

It is necessary to include amounts in the Appropriation Bills to ensure agencies are resourced to implement these measures. Excluding these items from the Bills could result in funding not being available until the next set of Appropriation Bills commenced. Due to the biannual timing of the Appropriation Bills, this could result in many months passing between a specific event and funding being available.

Committee comment

2.8 The committee thanks the minister for this response. The committee notes the minister's advice that at least some of the items marked as 'not for publication' within the portfolio budget statements are included within the summary of appropriations at clause 6 of Appropriations Bills (Nos. 1 and 2) 2021-2022.

2.9 The minister further advised that it is a longstanding practice to identify certain budget measures as not for publication where disclosure of amounts would be prejudicial to national security, legal sensitivities or for commercial-in-confidence reasons. The minister advised that excluding items marked as 'not for publication' from the bills could result in funding not being available until the next set of Appropriation Bills commenced.

2.10 While acknowledging that marking measures as 'not for publication' is a longstanding practice, from a scrutiny perspective, the committee is concerned that the Parliament is being asked to authorise appropriations without clear information

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 11–12.

about the amounts that are to be appropriated under each individual Budget measure. In this context, the committee notes that the appropriation process is intended to 'give expression to the foundational principle of representative and responsible government that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself'.⁶ The committee is concerned that the inclusion of 'not for publication' measures in the proposed appropriations set out in appropriation bills undermines this foundational principle.

2.11 The committee notes that the explanations for why measures are marked as 'not for publication' are usually quite limited, for example, that funding for a measure is not for publication due to commercial sensitivities. Noting the importance of appropriate parliamentary scrutiny of proposed appropriations, the committee considers that more detailed reasons for marking measures as 'not for publication' should be included in future Budget papers accompanying Appropriation Bills.

2.12 The committee therefore requests the minister's further advice as to whether, in the future, Budget Paper No. 2 and the portfolio budget statements can contain:

- **more thorough explanations for why funding for measures are marked as 'not for publication'; and**
- **where appropriate, at least a high-level indication of the amount of funding that is allocated to a measure (for example, 'not more than \$50 million').**

Parliamentary scrutiny—debit limits⁷

2.13 In [Scrutiny Digest 8 of 2021](#) the committee requested the minister's advice as to the level of expected expenditure in 2021-22 under the grants programs specified at clause 13 of Appropriation Bill (No. 2) 2021-2022. The committee also requested that future explanatory memoranda to appropriation bills containing debit limit provisions include this information to assist in ensuring meaningful parliamentary oversight of the debit limits for these grant programs.⁸

Minister's response

2.14 The minister advised:

6 *Wilkie v Commonwealth* (2017) 263 CLR 487, 523 [61].

7 Clause 13 of Appropriation Bill (No. 2) 2021-2022. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 14–16.

Details of expenditure for this item is shown in the Department of the Treasury's Portfolio Budget Statements (PBS) for the 2021-22 Budget. The estimated expenditure levels under these programs were:

- *General purpose financial assistance*: \$2.7 billion, compared with the debit limit of \$5.0 billion;
 - See page 29 of the PBS – this figure is the sum of all items listed under the COAG Reform Fund in Program 1.4;
- *National partnership payments*: \$17.1 billion, compared with the debit limit of \$25.0 billion;
 - See pages 33-41 of the PBS – Table 2.2.

These debit limits are set higher to ensure the Government has appropriate provisions in place to fund existing undertakings to the states, new programs that may be required between estimates updates, and to respond to major unexpected events such as large-scale natural disasters. Generally the debit limits are set for the financial year in Appropriation Bill No. 2, with no further updates throughout the financial year. If necessary these limits can be reset in Appropriation Bill No. 4 through the Additional Estimates process.

Additional information about the expected level of expenditure against debit limits can be included in the Explanatory Memoranda to future Appropriation Bills where appropriate.

Committee comment

2.15 The committee thanks the minister for this response. The committee notes the minister's advice that the expected level of expenditure in 2021-22 in relation to general purpose financial assistance payments is \$2.7 billion (compared with the debit limit of \$5 billion) and, in relation to national partnership payments, is \$17.1 billion (compared with a debit limit of \$25 billion). The minister advised that debit limits are set higher to ensure the government has appropriate provisions in place to fund existing undertakings and to respond to major unexpected events. The minister also advised that, if necessary, debit limits can be reset in Appropriation Bill No. 4 through the additional estimates process.

2.16 The committee welcomes the minister's advice that additional information about the expected level of expenditure against debit limits can be included in the explanatory memoranda to future Appropriation Bills where appropriate.

2.17 In order to clarify this matter, the committee requests the minister's further advice as to the circumstances, if any, in which the expected level of expenditure against debit limits will not be included in the explanatory memoranda to future Appropriation Bills.

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
Bill status	Act

Significant matters in delegated legislation

Parliamentary scrutiny⁹

2.18 In [Scrutiny Digest 9 of 2021](#) the committee requested the minister's 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.¹⁰

Minister's response¹¹

2.19 The minister advised:

The COVID-19 Disaster Payment (the Payment) was established in recognition that extended periods of public health measures restricting the movement of people (lockdowns) can have serious financial implications for

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

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 9 of 2021*, pp. 1-3.

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

workers who are unable to go to work and earn their usual income. The Payment was to encourage workers to comply with the health orders and prevent them from taking any unnecessary risks as a result of financial stress, thereby controlling the spread of COVID-19.

The Payment was provided in the first instance to Greater Melbourne, which was subject to a two week lockdown in June 2021 due to an outbreak of the Delta variant of COVID-19. Given the need to implement a rapid solution, as well as the absence of a readily available legislative mechanism to make the Payments, placing the authority for making the Payment in delegated legislation was considered the most appropriate mechanism.

It is standard practice for grant programs to set the eligibility criteria in grant guidelines, in accordance with the *Commonwealth Grant Rules and Guidelines*. The longer that lockdowns are required to contain COVID-19 outbreaks, the greater the economic strain experienced by people in the lockdown areas. In response to the current extended outbreak and resulting original payment amount to ensure that those subjected to continued lockdown restrictions are supported. The multiple variables associated with the COVID-19 pandemic mean that it is necessary that the payment amount remain flexible and not enshrined in primary legislation.

The Australian Government intends to introduce primary legislation to support the Payment as soon as possible in the spring sitting period. The primary legislation will include the scope and broad eligibility parameters for disaster payments made available in response to pandemics.

The COVID-19 Disaster Payment (Funding Arrangements) Bill 2021 (the Bill) was introduced urgently to provide for a special appropriation from the Consolidated Revenue Fund to pay eligible claims for the Payment for the 2021-22 financial year. Due to the urgent introduction of this Bill to establish the special appropriation prior to the end of financial year and its scope, the Bill was not considered an appropriate mechanism to provide for the Payment in primary legislation.

As mentioned above, the Government intends introducing primary legislation to support the Payment in the spring sitting period.

Committee comment

2.20 The committee thanks the minister for this response. The committee notes the minister's advice that given the need to implement a rapid solution, as well as the absence of a readily available legislative mechanism to make COVID-19 Disaster Payments payments, placing the authority for making the payment in delegated legislation was considered the most appropriate mechanism. The committee also notes the minister's advice that it is standard practice for grant programs to set the eligibility criteria in grant guidelines, in accordance with the *Commonwealth Grant Rules and Guidelines*.

2.21 The committee also notes the minister's advice that multiple variables associated with the COVID-19 pandemic mean that it is necessary that the payment amount remain flexible and not enshrined in primary legislation.

2.22 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 remains 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.

2.23 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.

2.24 The committee welcomes the minister's advice that the government intends to introduce primary legislation to support the COVID-19 Disaster Payment as soon as possible in the spring sitting period and that the primary legislation will include the scope and broad eligibility parameters for disaster payments made available in response to pandemics.

2.25 However, from a scrutiny perspective, the committee considers that this bill should have included additional high-level guidance regarding the amount of, and eligibility requirements for, the Payment on the face of the primary legislation.

2.26 The committee also draws this matter to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation and the Senate Select Committee on COVID-19.

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

Offshore Petroleum and Greenhouse Gas Storage Amendment (Titles Administration and Other Measures) Bill 2021

Purpose	This bill seeks to amend <i>the Offshore Petroleum and Greenhouse Gas Storage Act 2006</i> (the OPGGS Act) to provide for increased government oversight and scrutiny of entities throughout the life of an offshore project, from exploration through to development and eventual decommissioning
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 26 May 2021
Bill status	Before the Senate

Fees in delegated legislation¹²

2.28 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 fees under proposed section 566ZD and proposed subsections 566ZE(1) and (3) will be calculated, including, at a minimum, a provision stating that the fees must not be such as to amount to taxation.¹³ The committee considered the minister's response in [Scrutiny Digest 10 of 2021](#) and expressed its continuing scrutiny concerns.¹⁴

Minister's response¹⁵

2.29 The minister advised:

In *Scrutiny Digest 8 of 2021*, the Committee requested advice as to whether the Bill could be amended to provide at least high-level guidance regarding how fees under proposed section 566ZD and proposed subsections 566ZE(1) and (3) will be calculated, including, at a minimum, a provision stating that the fees must not be such as to amount to taxation.

12 Schedule 1, item 1, proposed section 566ZD and proposed subsections 566ZE(1) and (3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2021*, pp. 38-39.

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2021*, pp. 47-52.

15 The minister 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 13 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

I responded to the Scrutiny Committee by letter dated 24 June 2021. My response states that I do not consider it necessary to amend the Bill to provide statutory guidance as to how fees under proposed sections 566ZD and 556ZE are to be calculated. It also provides reasons for this view.

In *Scrutiny Digest 10 of 2021*, the Scrutiny Committee requested that an addendum to the Explanatory Memorandum to the Bill, containing the key information set out in my response, be tabled in the Parliament as soon as practicable. The Committee also drew its concerns to the attention of senators, and left to the Senate as a whole the appropriateness of allowing regulations to prescribe how fees under proposed sections 566ZD and 566ZE will be calculated, without a provision on the face of the Bill stating that the fees must not amount to taxation.

In making its comments, the Scrutiny Committee noted that certain provisions in the Bill-and the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGGS Act) specify that fees in delegated legislation must not be such as to amount to taxation, while others do not. The Committee expressed the view that all relevant provisions of the OPGGS Act should specify that fees prescribed in delegated legislation must not be such as to amount to taxation.

In my view, the Explanatory Memorandum to the Bill already makes it clear that fees payable under proposed sections 556ZD and 556ZE will only amount to cost recovery. An addendum to the Explanatory Memorandum, setting out the information provided in my initial response, adds complexity without increasing the Explanatory Memorandum's utility as a point of access to understanding the law or to assist with interpretation. Consequently, I do not propose to table an addendum to the Explanatory Memorandum.

Committee comment

2.30 The committee thanks the minister for this response. The committee notes the minister's advice that the explanatory memorandum to the bill makes it clear that fees payable under proposed sections 556ZD and 556ZE will only amount to cost recovery. The minister advised that any further addendum to the explanatory memorandum would add complexity without increasing utility and that, therefore, no amendment will be made.

2.31 While acknowledging this advice, the committee notes that explanatory memoranda are a key point of access in understanding the law for parliamentarians, officials and members of the public and serve as an important tool in assisting to interpret legislation. The committee considers that information that assists in explaining the intent and effect of a bill should be included in its explanatory memorandum as a matter of course. In this case, the information previously provided by the minister significantly expands on the statement within the explanatory memorandum that the fees will only amount to cost-recovery, in circumstances in which this is not clear on the face of the primary legislation. The committee considers

that the additional information provided by the minister provides further context which assists in better understanding the intent behind the fee-making powers set out in the bill.

2.32 The committee also reiterates its view that guidance as to how a fee should be calculated should be included within the primary legislation itself, rather than merely the explanatory memorandum.

2.33 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not including guidance as to the calculation of fees payable under proposed sections 556ZD and 556ZE within the primary legislation and of not updating the explanatory memorandum to include the key information previously provided by the minister.

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

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](#).