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Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Initial scrutiny

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

Coal Prohibition (Quit Coal) Bill 2021

Purpose	This bill seeks to prohibit the mining, burning and the export and importation of thermal coal in Australia by: • prohibiting the establishment of a new coal mine or coal-fired power station or the expansion of existing mines or stations from the date of Royal Assent; • phasing out the export of thermal coal by 2030; • prohibiting the mining or burning of coal after 1 January 2030; • prohibiting the importation of thermal coal to Australia, with the exception of research or heritage purposes; • putting in place significant penalties including up to 7 years imprisonment in some cases for breaches of the Act.
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 25 October 2021

1.2 This bill is identical to a bill introduced into the House of Representatives on 18 February 2019. The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 2 of 2019*.[1] The committee reiterates those comments in relation to this bill.

1 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2019,* pp. 14-15.

Corporations Amendment (Improving Outcomes for Litigation Funding Participants) Bill 2021

Purpose	This bill seeks to amend the *Corporations Act 2001* to establish a new kind of managed investment scheme, a class action litigation funding scheme, and introduce additional requirements for the constitutions of managed investment schemes that are class action litigation funding schemes.
Portfolio	Treasury
Introduced	House of Representatives on 27 October 2021

Henry VIII clause – modification of primary legislation by delegated legislation[2]

1.3 The bill seeks to amend the *Corporations Act 2001* (the Act) to establish a new scheme in relation to litigation funding of class actions. Item 7 of Schedule 1 to the bill seeks to insert proposed section 601LG into the Act to provide that a court may approve a class action litigation funding scheme's claim proceeds distribution method if the method is fair and reasonable. Proposed subsection 601LG(3) sets out the matters the court must have regard to when determining that the method is fair and reasonable. Proposed subsection 601LG(4) provides that the regulations may provide that this section applies as if subsection (3) were omitted, modified or varied as specified in the regulations.

1.4 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

1.5 In this instance, the explanatory memorandum states:

> This modification power is necessary so that the fairness and reasonableness test remains a relevant and appropriate protection for class members into the future. There is a potential for new factors to be relevant to the Court's consideration of the test as the conduct of litigation funding schemes, the types of matters that are funded, and the entities and claimants involved in such schemes evolve to suit commercial

2 Schedule 1, item 7, proposed subsection 601LG(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

> circumstances. The industry evolves rapidly in response to new regulations and standards for litigation funding.
>
> It is necessary for these changes to be made in regulations so that Government can quickly act to recognise new practices and to protect the interests of the members of class action litigation funding schemes.
>
> In order to ensure that the test is always relevant and provides effective protection for members of the scheme, the Government should be able to respond to new developments by modifying the test with respect to factors the Court must consider when conducting the test.
>
> The modification power only operates on the factors that the Court must consider, it does not operate on the rebuttable presumption. The modification power will be exercised through a disallowable instrument, meaning Parliament can maintain control over the use of this modification power. The Court will always determine whether the claim distribution method is fair and reasonable in light of the prescribed factors, which may be modified by regulations, and the rebuttable presumption.[3]

1.6 While noting the explanation in the explanatory memorandum, the committee has not generally accepted a desire for administrative flexibility to be a sufficient justification for allowing delegated legislation to modify the operation of primary legislation. The committee notes that delegated legislation, made by the executive, is not subject to the same level of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. From a scrutiny perspective, it is not clear to the committee that any changes to the factors the court must consider could not be made through primary legislation.

1.7 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing regulations made under proposed subsection 601LG(4) to modify the operation of the fair and reasonable test set out in proposed subsection 601LG(3).

3 Explanatory memorandum, p. 18.

Corporations Amendment (Meetings and Documents) Bill 2021

Purpose	This bill seeks to amend the *Corporations Act 2001* to allow companies and registered schemes to hold hybrid meetings (which give shareholders the option of either attending in person or remotely) and use technology to execute company documents, sign meetings-related documents and provide those documents to their members.
Portfolio	Treasury
Introduced	House of Representatives on 20 October 2021

Power for delegated legislation to modify primary legislation (akin to Henry VIII clause)[4]

1.8 Item 2 of Schedule 2 to the bill seeks to insert proposed Division 2 of Part 1.2AA into Chapter 1 of the *Corporations Act 2001* to provide that certain entities may give listed documents to a person electronically or in physical form. Proposed subsection 110C(1) provides that the Division applies to any listed document that is sent by a company, the responsible entity of a registered scheme, a disclosing entity or an entity of a kind specified in the regulations. Proposed subsection 110C(5) provides that the regulations may modify the operation of the Division for the purpose of giving effect to regulations made under proposed subsection 110C(1).

1.9 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the relevant parent statute). 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. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation. In this instance, the explanatory memorandum states:

> These powers ensure that, in the event of unintended or unforeseen circumstances, the law can be quickly and flexibly adapted to impose the obligations in relation to sending documents on appropriate persons. The powers cannot be used to impose additional obligations on entities in relation to sending documents or to alter the obligations in the primary law.

4 Schedule 2, item 2, proposed subsection 110C(5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

> The modification powers, along with the rest of the regime, will also be reviewed 2 years after the new rules take effect. If the power is used, then the Regulations would be subject to disallowance.
>
> The power to modify the primary law also provides the flexibility to adapt the regime in response to future changes to the law. For example, the Government have announced future primary law changes to further modernise business communications and this power may be used to give effect to these reforms.[5]

1.10 While noting the explanation in the explanatory memorandum, the committee has not generally accepted a desire for administrative flexibility to be a sufficient justification for allowing delegated legislation to modify the operation of primary legislation. The committee notes that delegated legislation, made by the executive, is not subject to the same level of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.11 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing regulations made under proposed subsection 110C(5) to modify the operation of proposed Division 2 of Part 1.2AA (relating to the technology neutral sending of documents).

5 Explanatory memorandum, pp. 12-13.

Electoral Legislation Amendment (Assurance of Senate Counting) Bill 2021

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to strengthen the integrity of Australia's electoral system by increasing the transparency and assurance of Senate counting, including independent assurances of the computer systems and processes used to capture and count votes.
Portfolio	Special Minister of State
Introduced	House of Representatives on 28 October 2021

Tabling of documents in Parliament[6]

Schedule 1

1.12 Item 1 of Schedule 1 seeks to insert proposed section 273AA into the *Commonwealth Electoral Act 1918* (the Act) to provide that the Electoral Commissioner must arrange for an independent person or body to conduct a risk assessment of the security of the computer systems used to scrutinise the votes in a Senate election. Proposed subsection 273AA(3) provides that the accredited assessor must give a written report of the assessment to the Electoral Commissioner. The report may include recommendations to reduce or eliminate any risks that could affect the security of the computer systems. Proposed subsection 273AA(4) provides that as soon as practicable after the Electoral Commissioner receives the report, the Electoral Commissioner must publish a statement of assurance stating that a security risk assessment of the computer systems has been completed.

1.13 Proposed section 273AC provides that the Electoral Commissioner must arrange for statistically significant samples of ballot papers to be checked throughout the scrutiny of votes for the election to assure that the electronic data used in counting the votes reflects the data recorded on the ballot papers. Proposed subsection 273AC(6) provides that, before polling day, the Electoral Commissioner must publish the methodology to be used for the sampling process and the process to be used for reconciling preferences. Proposed subsection 273AC(7) provides that, within 14 days after the return of the writ, the Electoral Commissioner must publish a statement setting out the outcomes of the ballot paper sampling process.

6 Schedule 1, item 1, proposed sections 273AA and 273AC; Schedule 2, item 1, proposed section 273AB. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

Schedule 2

1.14 Additionally, item 1 of Schedule 2, which commences 1 January 2023, seeks to insert proposed section 273AB into the Act to provide that the Electoral Commissioner must arrange for an independent and appropriately qualified person or body to conduct an assessment of whether the counting software used in a Senate election distributes preferences and elects candidates in accordance with the requirements of the Act. Proposed subsection 273AB(3) provides that the assessor must give a written report of the assessment to the Electoral Commissioner, including any recommendations in relation to the accuracy of the counting software and any variations required to improve or ensure its accuracy.

1.15 Proposed subsection 273AB(4) provides that as soon as practicable after the Electoral Commissioner receives the assessor's written report of the assessment, the Electoral Commissioner must publish a statement on the Electoral Commission's website stating that an assessment has been completed and whether the accuracy of the counting software is assured to the appropriate standard.

1.16 Proposed subsection 273AB(5) provides that not earlier than 7 days before the relevant Senate election, the Electoral Commissioner must publish a statement verifying that the version of the counting software to be used is the version that was assessed under proposed subsection 273AB(1).

1.17 Proposed subsection 273AB(6) provides that within 7 days after the return of the writ for the Senate election, the Electoral Commissioner must publish a statement verifying that the version of the counting software used is the version that was assessed under proposed subsection 273AB(1). Proposed subsection 273AB(7) provides that if the version was not the same, the statement must also include a description of the variations and the reasons for the variations.

Committee view

1.18 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. The explanatory materials contain no justification as to why none of the statements published by the Electoral Commissioner are required to be tabled in Parliament. The committee notes that, in relation to proposed subsection 273AB(7), the explanatory memorandum states that the publication of this information is intended to provide public confidence that any late changes would not impact on compliance of the count.[7] The committee considers that amending the bill to require that statements by the Electoral Commissioner made under proposed sections 273AA, 273AC and 273AB are tabled in the Parliament would further promote transparency and accountability.

7 Explanatory memorandum, p. 16.

1.19 The committee also notes that there is no requirement that the Electoral Commissioner publish the reports provided by assessors under proposed subsections 273AA(3) and 273AB(3). In relation to requiring the Electoral Commissioner to publish a statement under proposed subsection 273AA(4), but not the report itself, the explanatory memorandum states:

> Publication of the report can provide the community confidence that there have been expert independent checks to ensure that relevant systems are robust, without disclosing specific details about system defences to potential hostile actors.[8]

1.20 While noting that the reports under proposed subsections 273AA(3) and 273AB(3) may contain sensitive information, it remains unclear to the committee why a copy or summary of the reports, with any sensitive information removed, could not be published or tabled in the Parliament.

1.21 The committee therefore requests the minister's advice as to whether the bill can be amended to provide that:

- **statements published by the Electoral Commissioner under proposed subsections 273AA(4), 273AC(6) and (7) and 273AB(4), (5) and (6) are tabled in the Parliament; and**
- **reports given to the Electoral Commissioner under proposed subsections 273AA(3) and 273AB(3) are published on the Electoral Commission's website and tabled in the Parliament, subject to any redactions genuinely required to ensure that sensitive information is not inappropriately disclosed.**

8 Explanatory memorandum, p. 7.

Electoral Legislation Amendment (Contingency Measures) Bill 2021

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* to enable the Electoral Commissioner to modify the operation of certain aspects of the conduct of elections when a Commonwealth emergency law is in force. These amendments implement recommendations from the Joint Standing Committee on Electoral Matters' *Report of the inquiry on the future conduct of elections operating during times of emergency situations.*
Portfolio	Special Minister of State
Introduced	House of Representatives on 28 October 2021

Henry VIII clause – modification of primary legislation by delegated legislation[9]

1.22 Item 1 of Schedule 1 to the bill seeks to insert proposed section 396 into the *Commonwealth Electoral Act 1918* (the Act). Proposed subsection 396(1) provides that the section will apply if an emergency is declared under a Commonwealth emergency law and the Electoral Commissioner is satisfied on reasonable grounds that the emergency to which the declaration relates would interfere with the due conduct of an election in a geographical area to which the declaration applies. Proposed subsection 396(2) provides that if the Electoral Commissioner is satisfied on reasonable grounds that it is necessary or conducive to ensure the due conduct of the election in the emergency area, the Electoral Commissioner may, by legislative instrument, modify the operation of the Act in certain circumstances, including expanding the grounds on which a person may apply for a postal or pre-poll vote, extending the pre-poll voting period, and amending the number of scrutineers a group of candidates is entitled to have at a counting centre. Additionally, proposed subsection 396(3) provides that the Electoral Commissioner may, by legislative instrument, modify the Act to provide that persons may travel or conduct activities for the election (such as supplying electoral matter to electors) despite a prescribed kind of Commonwealth, state or territory law.

1.23 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may

9 Schedule 1, item 1, proposed section 396. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

subvert the appropriate relationship between the Parliament and the executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum. In relation to proposed subsection 396(3), the explanatory memorandum states:

> Voting, as both a constitutional right and a legislated duty, is fundamental to the concept of Australian citizenship. Subsection 396(3) is designed to ensure core activities that occur as part of in-person voting, such as canvassing for votes are protected, and allow elections to occur as closely as possible to their ordinary conduct, as they should.
>
> This will enable the AEC to conduct an election safely by minimising the risk of harm to electors, employees and contractors when a Commonwealth emergency law is in force, whilst maintaining transparency of the electoral process. If the Commissioner permits such activity under the Act, travel for purposes of that activity is to be permitted by the Commissioner.[10]

1.24 The committee also notes the safeguards in place in relation to the making of a legislative instrument under proposed section 396, including a requirement that the Electoral Commissioner notify the Prime Minister and the Leader of the Opposition and publish the instrument on the Electoral Commission's website. The committee further notes that the instrument will be time limited so that it sunsets at the earlier of the time the relevant emergency declaration is revoked or when the writs for the election to which the instrument relates are returned.

1.25 In light of the explanation provided in the explanatory memorandum for the inclusion of the Henry VIII clause, and noting the legislative safeguards provided, the committee reiterates its general scrutiny concerns regarding provisions which enable the use of delegated legislation to amend the operation of primary legislation, and leaves the appropriateness of the proposed power to modify electoral law by delegated legislation to the Senate as a whole.

Broad discretionary power

Significant matters in delegated legislation[11]

1.26 As outlined above, proposed subsection 396(1) provides that the proposed power to modify electoral law will apply if an emergency is declared under a Commonwealth emergency law and the Electoral Commissioner is satisfied on reasonable grounds that the emergency to which the declaration relates would

10 Explanatory memorandum, p. 9.

11 Schedule 1, item 1, proposed subsections 396(8) and (9). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

interfere with the due conduct of an election in a geographical area to which the declaration applies. Proposed subsection 396(8) sets out the relevant Commonwealth emergency laws, including the *Biosecurity Act 2015* and the *National Emergency Declaration Act 2020*. Proposed subsection 396(9) provides that the minister may, by legislative instrument, specify additional laws for the definition of Commonwealth emergency laws.

1.27 The committee's consistent scrutiny view is that significant matters, such as the legislation that is a Commonwealth emergency law, should be included in the primary legislation unless a sound justification is provided for the use of delegated legislation. In this instance, the explanatory memorandum contains no justification as to why the list of relevant legislation in proposed subsection 396(8) can be expanded by delegated legislation.

1.28 The committee also considers that the provision provides the minister with a broad discretionary power in circumstances where there is no guidance on the face of the primary legislation in relation to the circumstances where the power can be exercised. 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. Noting the significant nature of the power to modify electoral law in proposed section 396, the committee considers that any additions to the definition of Commonwealth emergency law should be contained in primary legislation or at least high-level guidance should be included as to when additional legislation can be specified by legislative instrument.

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

- **why it is considered necessary and appropriate to provide the minister with a broad discretionary power to add legislation to the definition of Commonwealth emergency law by delegated legislation; and**
- **whether the bill can be amended to provide at least high-level guidance on the face of the bill as to the circumstances when the power in proposed subsection 396(9) should be exercised.**

Electoral Legislation Amendment (Voter Integrity) Bill 2021

Purpose	This bill seeks to amend the *Commonwealth Electoral Act 1918* and *Referendum (Machinery Provisions) Act 1984* to require voters to present acceptable identification documentation prior to receiving a ballot paper at polling places, pre-poll locations, and mobile polling locations.
Portfolio	Special Minister of State
Introduced	House of Representatives on 28 October 2021

Trespass on personal rights and liberties[12]

1.30 The bill seeks to amend the *Commonwealth Electoral Act 1918* and the *Referendum (Machinery Provisions) Act 1984* to introduce voter identification requirements for pre-poll and polling day ordinary votes. Proposed section 200DI provides that for each person seeking to cast a vote at an election, a voting officer must request that the person produce a proof of identity document and ask whether they have voted before in the election. The bill provides for a number of types of identification that can be shown in hard copy or electronic form, including government issued documents, documents from financial institutions and documents from Aboriginal and Torres Strait Islander land councils or bodies.[13]

1.31 The committee has long-standing scrutiny concerns regarding bills which may limit, restrict or alter a person's right to vote. The committee considers that such provisions may trespass on a person's rights and liberties. As a result, the committee considers that such provisions should be extensively justified in the explanatory

12 Schedule 1, item 7, proposed section 200DI. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

13 Proposed section 4AB provides that a 'proof of identity document' is any of: a current Australian driver's licence; a current Australian passport; a current Australian proof of age card; an Australian birth certificate; a notice evidencing a person's Australian citizenship; a current identification card issued by, or on behalf of, the Commonwealth or a state or territory or an authority of the Commonwealth, a state or territory (including a Medicare card, pension card or health care card); an account statement issued by a local government body, utility provider or carriage service in the last twelve months; a credit or debit card issued by an Australian financial institution, or an account statement issued by an Australian financial institution in the last twelve months; a notice of assessment in the last twelve months in respect of a year of income; a notice issued by the Electoral Commissioner notifying a person of their enrolment; a document that relates to the affairs of a particular person, that specifies the person's name and that is issued by an Aboriginal or Torres Strait Islander land council or land trust, or prescribed body corporate.

memorandum and significant safeguards should be contained in the primary legislation to ensure a person's right to vote is protected.

1.32 In this instance, the explanatory memorandum states:

> This will improve public confidence about the integrity of ballot-issuing practices. It will reduce the risk of electoral fraud (in the form of voter impersonation) and, by allowing names and addresses to be checked against documentation, it will reduce inadvertent mistakes where qualified voters are marked off against the wrong name on the Commonwealth Electoral Roll.
>
> The measures in this Bill will bring the Australian electoral system into line with voter identification practices of other liberal democracies such as Canada and Sweden, and with other everyday activities in Australia that require proof of identification, such as driving, opening a bank account, or collecting a parcel from the post office.[14]

1.33 The committee acknowledges that there are safeguards in place to ensure that all eligible voters are able to vote, including providing a broad definition of a proof of identity document, allowing for attesters for persons without identity documents,[15] and allowing for pre-poll declaration votes or provisional votes.[16]

1.34 However, while noting these matters, it remains unclear to the committee that there is currently a significant problem with electoral fraud or that it is necessary to require persons to provide identification when voting in Commonwealth elections. While the explanatory materials state that the bill is designed to reduce the risk of electoral fraud, no evidence is provided to indicate that there is has been significant electoral fraud during previous elections. The committee also has scrutiny concerns that the provisions of the bill may discourage already vulnerable groups, who may be less likely to possess a proof of identity document, from participating in the electoral process. From a scrutiny perspective, the committee does not consider that this matter is adequately addressed in the explanatory materials.

1.35 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of requiring persons to provide identification when voting in Commonwealth elections.

14 Explanatory memorandum, p. 2.

15 See proposed subsection 200DI(4).

16 Proposed subsections 200DG(3) and 229(6).

Financial Accountability Regime Bill 2021

Purpose	This bill introduces a new accountability regime for the banking, insurance and superannuation industries. The new accountability regime will provide for a strengthened accountability framework for financial entities in the banking, insurance and superannuation industries, and for related purposes.
Portfolio	Treasury
Introduced	House of Representatives on 28 October 2021

Broad discretionary power

Significant matters in delegated legislation[17]

1.36 Clause 16 of the bill provides exemptions powers in relation to the obligations under the Financial Accountability Regime set out in Chapter 2 of the bill. Subclause 16(1) provides that the minister may, by written notice, exempt an individual accountable entity from obligations under Chapter 2 while subclause 16(2) provides that the minister may exempt a class of accountable entities by legislative instrument.

1.37 The committee notes that clause 16 would provide the minister with a broad power to provide an exemption to an accountable entity. The committee notes that insufficiently defined administrative powers, such as those granted under clause 16, 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 expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum and that guidance in relation to the exercise of the power should be included within the primary legislation. In this instance, the explanatory memorandum does not provide any explanation for the broad discretionary power and no guidance is included on the face of the bill.

1.38 From a scrutiny perspective, the committee is concerned that without guidance on the face of the bill as to how the exemption power may be exercised it would be possible for broad-ranging exemptions to be made by the minister which would undermine the Financial Accountability Regime enshrined in primary legislation passed by the Parliament.

1.39 In light of the above, the committee requests the Treasurer's advice as to:

17 Clause 16. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

- **why it is considered necessary and appropriate to provide the minister with a broad power to provide exemptions to the Financial Accountability Regime under clause 16; and**
- **whether the bill can be amended to include guidance on the exercise of the power on the face of the primary legislation, noting the potential for a broad, unconstrained exemption power to undermine the Financial Accountability Regime.**

Tabling of documents in Parliament

Significant matters in delegated legislation[18]

1.40 Division 1 of Part 2 of Chapter 3 of the bill deals with administrative arrangements. Clause 37 of the bill provides that APRA and ASIC must enter into an arrangement relating to the administration of the bill within 6 months of commencement. Subclause 37(2) provides that the arrangement must include provisions relating to the matters specified in the Minister rules. Once entered into, the arrangement must be published online. If no arrangement is entered into within 6 months of commencement, the Minister may determine an arrangement by notifiable instrument. A failure to comply with clause 37 does not invalidate the performance or exercise of a function or power by either APRA or ASIC.

1.41 The bill contains no requirement that an arrangement entered into under clause 37 be tabled in the Parliament. The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As such, the committee expects there to be appropriate justification within the explanatory memorandum to the bill for failing to mandate tabling requirements.

1.42 In addition, the committee's view is that significant matters, such as the arrangements for the administration of an Act of Parliament, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.43 In relation to clause 37, the explanatory memorandum states:

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18 Clause 37. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

> To ensure a cohesive approach, APRA and ASIC must enter into an arrangement outlining their general approach to administering and enforcing the Financial Accountability Regime within 6 months of the commencement of the Financial Accountability Regime Bill 2021. If this does not occur, the Minister may determine an arrangement for this purpose.[19]

1.44 It is not clear to the committee from this explanation why a clause 37 arrangement is not required to be tabled in Parliament, nor why it is necessary and appropriate to leave details relating to provisions that must be included within such an arrangement to Minister rules.

1.45 In light of the above, the committee requests the Treasurer's advice as to:

- **whether the bill can be amended to provide that an arrangement entered into under clause 37 of the bill is required to be tabled in each House of the Parliament; and**
- **why it is considered necessary and appropriate to leave details relating to provisions that must be included within a clause 37 arrangement to delegated legislation.**

No-invalidity clause[20]

1.46 As noted above, Division 1 of Part 2 of Chapter 3 of the bill deals with administrative arrangements. Clause 36 of the bill provides that the Financial Accountability Regime will be administered by both APRA and ASIC. Clause 37 of the bill provides that APRA and ASIC must enter into an arrangement relating to administration within 6 months of commencement. Clause 38 of the bill provides that neither APRA nor ASIC may perform a function, or exercise a power, under the bill without the agreement of the other.

1.47 Subclause 36(2) provides that ASIC is only to perform functions and powers in relation to accountable entities that hold a financial services licence, significant related entities, or accountable persons. However, a failure to do so does not invalidate the performance or exercise of the function or power by ASIC. Similarly, subclause 37(5) provides that a failure to comply with requirements relating to entering into an administrative agreement does not invalidate the performance or exercise of a function or power by either APRA or ASIC. Finally, subclause 38(4) provides that a failure by either APRA or ASIC to receive agreement prior to performing or exercising

19 Explanatory memorandum, p. 20.

20 Subclauses 36(2), 37(5), and 38(4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

a function or power does not invalidate the performance or exercise of the function or power.

1.48 A legislative provision that provides that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum to the bill. In this instance, the explanatory memorandum does not contain a justification for the inclusion of any of the no-invalidity clauses in Division 1 of Part 2 of Chapter 3 of the bill.

1.49 In light of the above, the committee requests the Treasurer's advice as to why it is considered necessary and appropriate to include no-invalidity clauses in subclauses 36(2), 37(5), and 38(4) of the bill.

Reversal of evidential burden of proof[21]

1.50 The bill seeks to establish several defences which reverse the evidential burden of proof. Clause 68 of the bill makes it an offence for an accountable entity, significant related entity or accountable person to disclose information that reveals a direction was given by the Regulator to an accountable entity under either clause 64 or 65 of the bill in circumstances where the direction is also covered by a determination made under subclause 67(2). Subclause 68(3) provides an exception to this offence whereby the offence does not apply if the disclosure was authorised by clause 69, 70, 71, 72, 73, 74, or 75 of the bill or was required by the order or direction of a court or tribunal.

1.51 Similarly, subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* currently provides that it is an offence if a person discloses protected information or produces a protected document within the meaning of that Act. Subclause 72(2) seeks to provide that it is a defence to this offence if the disclosure was authorised by clause 69, 70, 71, 73, 74, or 75 of the bill.

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21 Subclauses 68(3) and 72(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.52 The defendant bears an evidential burden of proof in relation to both of the defences listed above. At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.53 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. There is no explanation within the explanatory materials for reversing the evidential burden of proof in relation to the exception set out in subclause 68(3), with the explanatory memorandum merely re-stating the operation of the provision.[22] In relation to the defence set out at subclause 72(2), the explanatory memorandum states:

> Exemptions to the secrecy provisions will allow for the appropriate sharing of information by APRA and ASIC. A defendant bears an evidential burden in relation to sharing of information on the reliance of these exemptions. Shifting the evidential burden to the person who disclosed the information is justified and not unduly onerous as the information subject to the new provisions would be peculiarly within the knowledge and control of the defendant.[23]

1.54 It is not clear to the committee from this explanation why the information would be *peculiarly* within the knowledge and control of the defendant, noting that elements of the defence seem to relate to matters of public fact or to questions of law. For example, it would appear that whether information had already been made lawfully available to the public,[24] whether the Regulator had allowed the disclosure,[25] or whether the disclosure was in accordance with a provision of the *Australian Prudential Regulation Authority Act 1998,*[26] or the *Australian Securities and Investments Commission Act 2001*,[27] would all be matters that are readily ascertainable by the prosecution. In addition, it is not clear to the committee why the exception provided by clause 74, that the disclosure is made in circumstances prescribed by the Minister rules, can be said to be peculiarly in the knowledge of the defendant when there is no indication or guidance within the bill as to the circumstances that may be prescribed within the rules. The committee notes that the

22 Explanatory memorandum, pp. 41-42.

23 Explanatory memorandum, p. 32.

24 See clause 69.

25 See clause 70.

26 See clause 72.

27 See clause 73.

explanatory memorandum to the bill does not discuss clause 74, even to re-state the operation of the provision. It is also unclear to the committee how the fact that an order or direction has or has not been given by a court or tribunal could be said to be a matter that is peculiarly within the knowledge of the defendant.[28]

1.55 As the explanatory materials do not address this issue, the committee requests the Treasurer's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. 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*.[29]

Immunity from liability[30]

1.56 Clause 101 of the bill provides that a person is not subject to any liability to any person in respect of the exercise or performance, in good faith, of powers, functions or duties under the bill. Similarly, clause 102 of the bill provides that a criminal or civil action, suit or proceeding does not lie against a person in relation to things done, or omitted to be done, by that person if they are complying with a direction given by the Regulator, it is reasonable for them to do the thing, and the person is an accountable entity or a member of the accountable entity's relevant group or an employee, agent, officer or senior manager of an accountable entity or relevant group.

1.57 In addition, item 12 of Schedule 1 to the Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021 seeks to insert proposed subsection 58(4) into the *Australian Prudential Regulation Authority Act 1998* to provide that the protection from liability afforded by clauses 101 and 102 does not affect the operation of section 58 of that Act which currently applies an equivalent protection to APRA, APRA members, APRA staff members and their agents.

1.58 The immunities provided for under both clause 101 and 102 of the bill would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve

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28 See paragraph 68(3)(b).

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

30 Clauses 101 and 102. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

personal attack on the honesty of the decision-maker. As such, the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.59 The committee expects that if a bill seeks to provide immunity from civil or criminal liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for these provisions, merely restating the terms of the provisions.[31] The committee's concerns are heightened in relation to clause 102 as immunity is provided for in relation to criminal as well as civil proceedings.

1.60 In light of the above, the committee requests the Treasurer's advice as to why it is considered necessary and appropriate to confer immunity from civil and criminal liability on persons under clauses 101 and 102 of the bill.

Incorporation of external materials existing from time to time[32]

1.61 Subclause 31(5) provides that the Minister rules that prescribe the circumstances in which an accountable entity meets the enhanced notification threshold may incorporate, by reference, any matter published on a website maintained by the Regulator as in force or existing from time to time.

1.62 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach:

- raises the prospect of changes being made to the law in the absence of Parliamentary scrutiny, (for example, where an external document is incorporated as in force 'from time to time' this would mean that any future changes to that document would operate to change the law without any involvement from Parliament);
- can create uncertainty in the law; and
- means that those obliged to obey the law may have inadequate access to its terms (in particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid).

1.63 As a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should

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31 See explanatory memorandum, pp. 50-51.

32 Subclause 31(5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

be freely and readily available to all those who may be interested in the law. While in this case incorporated material must be published on a website maintained by the Regulator there is nothing on the face of the bill to require that this material is freely and readily available.

1.64 In this instance, the explanatory memorandum explains:

> The Minister can make rules to prescribe the threshold for determining which accountable entities will need to comply with the enhanced notification requirements. These rules can incorporate material from non-legislative instruments if that material is published by APRA and ASIC on their websites. This approach ensures consistency among materials produced by the Regulators.[33]

1.65 It is not clear to the committee from this explanation whether the incorporated materials will be freely and readily available, nor why it is necessary to allow the rules to incorporate documents as in force or existing from time to time which may change the circumstances when an accountable entity meets the enhanced notification threshold without any involvement from Parliament.

1.66 In light of the above, the committee requests the Treasurer's further advice as to why it is considered necessary and appropriate to incorporate documents as in force or existing from time to time, noting that such an approach may mean that future changes to an incorporated document could operate to change the circumstances when an accountable entity meets the enhanced notification threshold without any involvement from Parliament.

33 Explanatory memorandum, p. 28.

Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021

Purpose	Schedule 1 and 2 to this bill make consequential amendments to relevant Acts to support the new Financial Accountability Regime. Schedule 3 to this bill is part of a package that seeks to introduce the "compensation scheme of last resort". The scheme will provide compensation where a determination issued by Australian Financial Complaints Authority remains unpaid and the determination relates to a financial product or service within the scope of the scheme. The scheme is intended to support confidence in the financial system's external dispute resolution framework.
Portfolio	Treasury
Introduced	House of Representatives on 28 October 2021

Reversal of evidential burden of proof[34]

1.67 The bill seeks to establish several defences which reverse the evidential burden of proof. Subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* currently provides that it is an offence if a person discloses protected information or produces a protected document within the meaning of that Act. Item 10 of Schedule 1 to the bill seeks to insert a number of new defences to this offence.

1.68 Proposed subsection 56(7G) seeks to provide that it is a defence to the offence set out under existing subsection 56(2) if the disclosure is to an accountable entity and the information that was disclosed was contained in the register of accountable persons kept under clause 40 of the Financial Accountability Regime Bill 2021.

1.69 Proposed subsection 56(7H) seeks to provide that it is not an offence if the disclosure is to an individual and the information that was disclosed was personal information about that person that was contained in the register of accountable persons kept under clause 40 of the Financial Accountability Regime Bill 2021.

1.70 Proposed subsection 56(7J) seeks to provide that it is not an offence if the disclosure is by APRA and the information is about either whether the Regulator has disqualified an accountable person under clause 42 of the Financial Accountability

34 Schedule 1, item 10, proposed subsections 56(7G), (7H), (7J), (7K), (7L); item 17, proposed subsection 127(7A). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

Regime Bill 2021 or any other decision made under Division 2 of Part 3 of Chapter 3 of that bill.

1.71 Proposed subsection 56(7K) seeks to provide that it is not an offence if the disclosure is in accordance with clause 39 of the Financial Accountability Regime Bill 2021. Clause 39 of that bill currently provides for information-sharing arrangements between APRA and ASIC.

1.72 Proposed subsection 56(7L) seeks to provide that it is not an offence if the disclosure is by ASIC for the purposes of the performance or exercise of ASIC's functions or powers and the information had previously been disclosed to ASIC under clause 39 of the Financial Accountability Regime Bill 2021.

1.73 In addition, item 17 of Schedule 1 to the bill seeks to insert proposed subsection 127(7) into the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to make it an offence if an officer who is, or has been, a member or staff member of ASIC or a Commonwealth officer within the meaning of the *Crimes Act 1914* intentionally or recklessly discloses protected information that was acquired in the course of their duties to a person or court and the information was given to ASIC in relation to a function conferred on ASIC under the Financial Accountability Regime. Proposed subsection 127(7A) provides that it is a defence to this offence if the disclosure was an authorised disclosure for the purposes of subsection 127(1) of the ASIC Act.

1.74 The defendant bears an evidential burden of proof in relation to each of the defences outlined above. At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.75 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. In relation to the defences set out under both item 10 and item 17 the explanatory memorandum states:

> Exemptions to the secrecy provisions will allow for the appropriate sharing of information by APRA and ASIC. A defendant bears an evidential burden in relation to sharing of information on the reliance of these exemptions. Shifting the evidential burden to the person who disclosed the information is justified and not unduly onerous as the information subject to the new provisions would be peculiarly within the knowledge and control of the defendant.[35]

35 Explanatory memorandum, p. 32.

1.76 It is not clear to the committee from this explanation why the information would be *peculiarly* within the knowledge and control of the defendant, noting that elements of the defence seem to relate to matters of public fact or to questions of law. For example, it would appear that whether information had been shared between APRA and ASIC in accordance with clause 39 of the Financial Accountability Regime Bill 2021 would be a matter that the prosecution could readily ascertain.

1.77 As the explanatory materials do not adequately address this issue, the committee requests the Treasurer's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. 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*.[36]

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

Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2021

Purpose	This bill seeks to amend the *Health Insurance Act 1973*, the *National Health Act 1953* and the *Dental Benefits Act 2008* to protect the viability of Medicare.
Portfolio/Sponsor	Health
Introduced	House of Representatives on 21 October 2021

Reversal of the evidential burden of proof[37]

1.78 Item 34 of Schedule 1 to the bill seeks to insert proposed section 105AA into the *Health Insurance Act 1973*. Proposed subsection 105AA(1) provides that it is a strict liability offence for an individual under review to fail to appear at a hearing, or to appear at a hearing but refuse or fail to give evidence or to answer questions. The offence carries a maximum penalty of 30 penalty units. Proposed subsection 105AA(2) provides an exception (offence-specific defence) to this offence, if existing paragraphs 104(5)(a), 104(5)(b) and 104(5)(c) apply to the person. These paragraphs relate to situations where the person has notified the Professional Services Review Committee that he or she has a medical condition which prevents him or her from appearing, giving evidence or answering questions.

1.79 Proposed subsection 105AA(4) provides that is a strict liability offence for a body corporate to fail to cause an executive officer to appear at a hearing, give evidence at a hearing, or to answer questions at a hearing. The offence carries a maximum penalty of 150 penalty units. Proposed subsection 105AA(5) provides an exception (offence-specific defence) to this offence, if the body has only one executive officer, and the person has notified the Professional Services Review Committee that he or she has a medical condition which prevents him or her from appearing, giving evidence or answering questions.

1.80 A defendant bears an evidential burden in relation to the defences in proposed subsections 105AA(2) and (5).

1.81 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[38] This is an important aspect of the right to be presumed

37 Schedule 1, item 34, proposed subsections 105AA(2) and 105AA(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

38 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.

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.

1.82 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 subsections 105AA(2) and (5) have not been addressed in the explanatory materials.

1.83 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 this instance. 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*.[39]

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

National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021

Purpose	This bill seeks to amend the *National Disability Insurance Scheme Act 2013* to implement significant improvements for participants, their families and carers by reducing red tape, increasing flexibility and clarifying timeframes for decision-making by providing for the Participant Service Guarantee.
Portfolio	National Disability Insurance Scheme
Introduced	House of Representatives on 28 October 2021

Significant matters in delegated legislation[40]

1.84 Schedule 1 to the bill seeks to make a number of amendments to the *National Disability Insurance Scheme Act 2013* (the Act) in relation to the implementation of a Participant Service Guarantee.

Variation and reassessment of participants' plans

1.85 Item 23 of Schedule 1 to the bill seeks to insert proposed section 47A into the Act to provide that the CEO of the National Disability Insurance Agency (the CEO) may vary a participant's plan, if the variation is:

- a change to the statement of participant supports in the circumstances prescribed by the National Disability Insurance Scheme (NDIS) rules; or
- a correction of a minor or technical error; or
- of a kind prescribed by the National Disability Insurance Scheme rules.

1.86 Proposed subsection 47A(4) also provides that, if a participant requests a variation to their plan, the CEO must, within 21 days, decide to vary, not vary, reassess or inform the participant that additional time is required to make a decision. Proposed subsection 47A(6) provides that the NDIS rules may set out matters to which the CEO must have regard in deciding whether to vary a participant's plan on the CEO's own initiative; or in doing a thing under proposed subsection 47A(4).

1.87 Proposed subsection 48(5) allows for similar matters to be included in the NDIS rules in relation to a reassessment of a participant's plan initiated by the CEO or when requested by the participant.

40 Schedule 1, items 23, 24, 30, 50, 55 and 56, proposed sections 47A, 48, 50J, 204A and paragraphs 209(2A)(c) and (d). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

1.88 In relation to variation by the CEO, the explanatory memorandum states:

> The purpose of a plan variation is to make minor or technical changes to a participant's plan or in circumstances prescribed in the relevant NDIS Rules. Typically, this would occur where the variation does not require a reduction or significant increase to the level of NDIS funding. An example of a variation on the CEO's own initiative would be to correct a technical mistake by the Agency found after the plan had been agreed. Other examples under which a plan variation may be appropriate include:
>
> - if a participant requires crisis/emergency funding as a result of a significant change to their supports;
> - if the participant requests a change to the type of plan management and after an appropriate risk assessment;
> - a minor change in supports; or
> - to implement an AAT decision.[41]

Requirements with which the CEO must comply

1.89 Item 30 of Schedule 1 to the bill seeks to insert proposed section 50J into the Act to provide that the NDIS rules may prescribe requirements with which the CEO must comply in relation to the preparation of plans for participants; plans that have come into effect for participants; and giving effect to decisions of the Administrative Appeals Tribunal in relation to prospective participants or participants. The explanatory memorandum states:

> For example, the NDIS Rules could prescribe timeframes for additional processes, such as the offer of a meeting after the plan is approved to discuss how the participant and their family could implement it and access their NDIS funding. The new section also enables NDIS Rules to prescribe requirements with which the CEO must comply to give effect to decisions of the Administration Appeals Tribunal ('AAT'). It is intended that these NDIS Rules will prescribe the timeframe within which the NDIA must implement AAT decisions. These amendments aim to assist participants, their families and carers gain a greater understanding of the service delivery options they can expect from the Agency.[42]

Report by the Commonwealth Ombudsman

1.90 Item 55 of Schedule 1 to the bill seeks to insert proposed section 204A into the Act to provide that as soon as practicable after the end of each financial year, the Commonwealth Ombudsman must prepare and give to the minister a report about some or all of the matters prescribed by the NDIS rules. The explanatory memorandum states:

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41 Explanatory memorandum, p. 20.

42 Explanatory memorandum, p. 16.

It is intended the NDIS Rules will prescribe the following matters:

- collective performance against one or more of the proposed engagement principles and service standards;
- performance against one or more of the timeframes that apply to the Agency or CEO in accordance with the timeframes prescribed as part of the Guarantee; and
- other matters relating to the experience of participants, or prospective participants, relating to decisions by the Agency or CEO under the Act or NDIS Rules made in relation to the Guarantee.[43]

Qualitive elements of the Participant Service Guarantee

1.91 Item 56 of Schedule 1 to the bill seeks to amend subsection 209(2A) of the Act to provide that the NDIS rules may provide for matters relating to how the Agency, the CEO, and other specified persons are to engage with participants or prospective participants and to provide for matters relating to how participants or prospective participants are to engage with the Agency, the CEO, and other specified persons. The explanatory memorandum states that 'this approach is consistent with the structure of the NDIS Practice Standards for registered providers managed by the NDIS Commission'.[44]

Committee view

1.92 The committee has consistently drawn attention to framework provisions, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the scheme. The committee considers that such an approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes. Consequently, the committee's consistent scrutiny view is that significant matters, such as key details in relation to the implementation of the Participant Service Guarantee, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided.

1.93 While noting the explanations provided in the explanatory memorandum, it is unclear to the committee why there could not be additional high-level guidance on the face of the primary legislation in relation to these matters. For example, the circumstances in which a plan variation may be appropriate listed in the explanatory memorandum could be included in proposed subsection 47A(1). Similarly, the detail about matters for inclusion in reports by the Commonwealth Ombudsman listed in the explanatory memorandum could be included in proposed subsection 204A(1). The committee notes that a legislative instrument, made by the executive, is not subject

43 Explanatory memorandum, p. 18.

44 Explanatory memorandum, p. 16.

to the same level of parliamentary scrutiny inherent in bringing any changes in the form of an amending bill.

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

- **why it is considered necessary and appropriate to leave key details in relation to the implementation of the Participant Service Guarantee to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.**

National Health Amendment (Enhancing the Pharmaceutical Benefits Scheme) Bill 2021

Purpose	This bill seeks to amend Part VII of the *National Health Act 1953* to implement a range of measures, including changes to the operation of Statutory Price Reductions, changed price disclosure arrangements and a new stockholding requirement for certain medicines that are more susceptible to global medicines shortages.
Portfolio	Health
Introduced	House of Representatives on 28 October 2021

Broad discretionary power

Instruments not subject to parliamentary disallowance[45]

1.95 The bill seeks to make amendments to Part VII of the *National Health Act 1953* (the Act), which regulates the Pharmaceutical Benefits Scheme (PBS). These amendments include a number of alterations to the size, timing and application of statutory price reductions currently contained in the Act as well as changed price disclosure arrangements and a new stockholding requirement for certain medicines. The bill contains a number of provisions that would give the minister the power to determine not to apply, or to reduce, a statutory price reduction to brands of pharmaceuticals in certain circumstances. The bill would also allow the minister to determine how statutory price reductions would apply to particular brands categorised under the PBS in certain circumstances or to provide that price increases do not apply. The bill would also allow the minister to determine minimum stockholding amounts for certain medicines.

1.96 In granting these powers to the minister the bill provides that the minister may make the determinations by 'written instrument' or by 'notifiable instrument'. The committee notes that neither written instruments nor notifiable instruments will be subject to the tabling, disallowance or sunsetting requirements that typically apply to legislative instruments. As such there is no parliamentary scrutiny of these instruments. In addition, the committee's scrutiny concerns are heightened given the

45 Schedule 1, item 28, proposed subsection 99ACB(6A); item 33, proposed subsection 99ACC(5C); item 51, proposed subsection 99ACD(7A); item 76, proposed subsection 99ACR(6); item 80, proposed subsection 99ADHB(6); item 82, proposed subsection 99ADHC(2); item 85, proposed subsection 104B(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

high level of discretion afforded to the minister to determine matters in relation to statutory price reductions and minimum stockholding obligations under the Act.

1.97 Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why these determinations are not legislative in character and why it is proposed to allow such ministerial discretion to be exercised by way of written or notifiable instruments, which are not subject to parliamentary scrutiny and disallowance. In this instance, the explanatory memorandum does not provide a justification for providing a broad discretionary power to make ministerial determinations by written or notifiable instrument.

1.98 The committee therefore requests the minister's advice as to why the bill proposes to provide the minister with a broad discretionary power to apply statutory price reductions and amend minimum stockholding obligations and to do so by way of written or notifiable instrument (noting that such instruments are not subject to disallowance).

Offshore Electricity Infrastructure (Consequential Amendments) Bill 2021

Purpose	This bill seeks to amend the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* to enable the construction, installation, commissioning, operation, maintenance, and decommissioning of offshore electricity infrastructure projects, including transmission and generation projects in the Commonwealth offshore area.
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 21 October 2021

Strict liability offence[46]

1.99 Currently, existing subsection 280(2) of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act) provides that a person carrying on offshore activities must not interfere with certain activities to a greater extent than is necessary for the reasonable exercise of the rights and performance of their duties. Subsections 280(3) and (4) provide that it is an offence of strict liability for a person subject to a requirement under subsection 280(2) to engage in conduct that breaches this requirement. Existing section 460 replicates this offence in relation to persons holding relevant greenhouse gas permits. The maximum penalty for both of the existing strict liability offences is 100 penalty units.

1.100 Items 2 and 3 of Schedule 1 to the bill seek to insert proposed subparagraph 280(2)(d)(iii) and proposed subparagraph 460(2)(d)(iii) into the OPGGS Act to add any activities of another person being lawfully carried on by way of offshore infrastructure activities to the types of activities that must not be interfered with. As a result, a person who interfered with offshore infrastructure activities would be subject to the strict liability offences in subsections 280(3) and 460(3) of the OPGGS Act.

1.101 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have). When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the

46 Schedule 1, items 2 and 3, subparagraphs 280(2)(d)(iii) and 460(2)(d)(iii). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

defendant intended this, or was reckless or negligent. The *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[47]

1.102 In this instance, the explanatory memorandum provides no explicit justification as to why it is appropriate to expand existing requirements on relevant permit holders in circumstances where a breach of these requirements may subject the person to a strict liability offence with a penalty that is above the maximum limit set out in the *Guide to Framing Commonwealth Offences*.

1.103 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of inserting additional elements into existing strict liability offences in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* which are subject to penalties that are inconsistent with the *Guide to Framing Commonwealth Offences*.

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

Offshore Petroleum (Laminaria and Corallina Decommissioning Cost Recovery Levy) Bill 2021

Purpose	This bill seeks to introduce a temporary levy on offshore petroleum production to recover the Commonwealth's costs of decommissioning the Laminaria and Corallina oil fields and associated infrastructure.
Portfolio	Treasury
Introduced	House of Representatives on 20 October 2021

Modified disallowance procedures[48]

1.104 This bill forms part of a package, along with the Treasury Laws Amendment (Laminaria and Corallina Decommissioning Cost Recovery Levy) Bill 2021, seeking to establish a temporary levy on offshore petroleum production. Subclause 7(2) of the bill provides that the Resources Minister may make a determination, by legislative instrument, in relation to the termination of the levy. Similarly, subclause 8(2) of the bill provides that the Resources Minister may make a determination, by legislative instrument, in relation to the Commonwealth's unrecovered costs for a levy year.

1.105 Clause 12 of the bill sets out when instruments made under subclauses 7(2) and 8(2) take effect. Subclause 12(2) provides that an instrument takes effect on the day immediately after the last day upon which such a disallowance resolution could have been passed by a House of Parliament, or a later day specified in the instrument. Subclause 12(3) provides that if either House of Parliament passes such a resolution, the instrument does not take effect.

1.106 While the committee welcomes the inclusion of clause 12 which will allow each House of Parliament to have an opportunity to disallow an instrument made under subclause 7(2) or 8(2) before it takes effect, the committee notes that the bill does not explicitly cover a circumstance in which a motion to disallow an instrument is unresolved at the end of the disallowance period. Normally, subsection 42(2) of the *Legislation Act 2003* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'*

48 Clause 12. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.[49]

1.107 It is unclear to the committee whether it is intended that clause 12 of the bill overrides, or is intended to override, the usual operation of subsection 42(2) of the *Legislation Act 2003*. In practice, there may be occasions where no time is made available to consider a disallowance motion within 15 sitting days after the motion is lodged. As a result, the operation of clause 12 of the bill could serve to undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider a motion within 15 sitting days. Given the significance of the usual parliamentary disallowance process to Parliament's scrutiny over delegated legislation, the committee has scrutiny concerns in relation to any provision which introduces legislative ambiguity into the disallowance process. The explanatory memorandum to the bill provides no explanation for clause 12 or its intended scope.

1.108 Noting the potential impact of this measure on parliamentary scrutiny, the committee requests the Treasurer's advice as to whether the bill can be amended to clarify that an instrument made under subclause 7(2) or 8(2) will not take effect in circumstances where there is an unresolved motion to disallow the instrument at the end of the 15 sitting day disallowance period.

49 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

Telstra Corporation and Other Legislation Amendment Bill 2021

Purpose	This bill seeks to amend legislation relating to Telstra Corporation Limited (Telstra) to ensure regulatory equivalency of obligations across the restructured Telstra group, as suggested in Telstra's proposed Scheme of Arrangement pursuant to the *Corporations Act 2001*.
Portfolio	Communications, Urban Infrastructure, Cities and the Arts
Introduced	House of Representatives on 21 October 2021

Significant matters in delegated legislation[50]

1.109 Item 1 of Schedule 4 to the bill seeks to insert proposed Part 34B into the *Telecommunications Act 1997* in relation to access to supplementary facilities and telecommunications transmissions towers.

1.110 Proposed section 581Y provides that an eligible company must, if requested to do so by a carrier, give the carrier access to facilities owned or operated by the eligible company. Proposed subsection 581Z(1) provides that an eligible company must comply with subsection 581Y on such terms and conditions as are either agreed by the parties or determined by an arbitrator. Proposed subsection 581Z(2) provides that the regulations may make provision for and in relation to the conduct of an arbitration.

1.111 Proposed section 581ZA provides that the minister may, by legislative instrument, make a determination setting out principles dealing with price-related terms and conditions relating to the obligations imposed by proposed subsection 581Y(1).

1.112 Proposed section 581ZD provides that an eligible company must, if requested to do so by a carrier, give the carrier access to a telecommunications transmission tower owned or operated by the eligible company. Proposed subsection 581ZE(1) provides that an eligible company must comply with subsection 581ZD on such terms and conditions as are either agreed by the parties or determined by an arbitrator. Proposed subsection 581ZE(2) provides that the regulations may make provision for and in relation to the conduct of an arbitration.

1.113 Proposed section 581ZF provides that the ACCC may, by legislative instrument, make a Code setting out conditions that are to be complied with in relation to the

50 Schedule 4, item 1, proposed sections 581Z, 581ZA, 581ZE, 581ZF. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

provision of access under Division 3 of Part 34B. There is no guidance on the face of the primary legislation as to the types of matters the Code may contain.

1.114 The committee's consistent scrutiny view is that significant matters, such as the details regarding how arbitration will be conducted and the details of pricing determinations and codes, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow these significant matters to be set out in delegated legislation.

1.115 It is unclear to the committee why at least high-level guidance regarding a number of these matters could not be provided on the face of the primary legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.116 The committee requests the minister's advice regarding:

- **why it is considered necessary and appropriate to leave details regarding how arbitration will be conducted, the setting out of principles dealing with price-related terms and conditions, and the scope of conditions that may be included in the proposed Code relating to access to delegated legislation; and**
- **whether the bill could be amended to provide at least high-level guidance in relation to these matters on the face of the primary legislation.**

Exemption from sunsetting[51]

1.117 Item 1 of Schedule 5 to the bill seeks to amend the Legislation (Exemptions and Other Matters) Regulation 2015 to provide that a declaration under proposed section 581F or 581G of the *Telecommunications Act 1997* is exempt from the sunsetting requirements in the *Legislation Act 2003*. These provisions allow the minister to declare that a company is a 'Telstra successor company' or 'designated Telstra successor company'.

1.118 The regime for sunsetting of legislative instruments in the *Legislation Act 2003* is an important safeguard which facilitates regular parliamentary scrutiny of the legislative power that the Parliament has delegated to the executive. Where a bill exempts delegated legislation from sunsetting, the committee expects the explanatory memorandum to address why it is appropriate to provide for such an

51 Schedule 5, item 1. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

exemption, noting the importance of sunsetting to effective and regular parliamentary scrutiny. In this instance, the explanatory memorandum states:

> This provides certainty for relevant companies as to the legislative framework that applies to it, by removing the risk that the instrument determining its status as a Telstra successor company or a designated Telstra successor company would not sunset and need to be remade.
>
> This is critically important in the context of Telstra's restructure. If, at some point, a ministerial exemption was provided in right of a certain regulatory obligation, Telstra may seek to attract capital and investment in that entity. In the event that exempting instruments were subject to sunsetting, this would dissuade investment and add to uncertainty, not in the public interest, especially given that some of the assets in question are long term assets, with an investment cycle of 20 – 30 years.[52]

1.119 In light of the explanation provided in the explanatory memorandum, the committee leaves to the Senate as a whole the appropriateness of exempting instruments made under proposed sections 581F and 581G (relating to the declaration of Telstra successor companies) from sunsetting.

52 Explanatory memorandum, p. 65.

Veterans' Affairs Legislation Amendment (Exempting Disability Payments from Income Testing and Other Measures) Bill 2021

Purpose	This bill seeks to amend the *Social Security Act 1991* to exempt certain Department of Veterans' Affairs payments known collectively as Adjusted Disability Pension (ADP) from the social security income test. This bill also seeks to repeal the collective definition of ADP from the *Veterans' Entitlements Act 1986* and as a result of the social security income test exemption removes the need for the Defence Force Income Support Allowance as social security payments will increase as a result of the exemption. This bill also repeals the operation and definition of the DFISA and DFISA Bonus from the *Veterans' Entitlements Act 1986* and consequentially removes all references to it from Commonwealth primary legislation.
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 21 October 2021

Significant matters in delegated legislation[53]

1.120 Schedule 5 to the bill seeks to insert proposed Part 2A of Chapter 3 into the *Military Rehabilitation and Compensation Act 2004* to establish a pilot for non-liability rehabilitation for current or former members of the Defence Force. Proposed section 53D provides that the Military Rehabilitation and Compensation Commission may, by legislative instrument, determine a number of matters in relation to the program. This includes classes of persons to whom Part 2A applies, the conditions in relation to the provision of a rehabilitation program and the limits (whether financial or otherwise) in relation to the provision of a rehabilitation program.

1.121 The committee's consistent scrutiny view is that significant matters, such as the key details of rehabilitation programs, should be included in primary legislation unless a sound justification for the use of delegated legislation has been provided. In this instance, the explanatory memorandum states:

> This enables a flexible and responsive mechanism for the MRCC to set out relevant considerations in the provision of rehabilitation support under the

53 Schedule 5, item 5, proposed section 53D. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

pilot to meet the rehabilitation needs of relevant members and former members without delay.[54]

1.122 The committee has generally not accepted a desire for administrative flexibility as a sufficient justification of itself for leaving significant matters to delegated legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. It is unclear to the committee why at least high-level guidance regarding these matters could not be provided on the face of the primary legislation.

1.123 The committee notes that the explanatory memorandum states that the pilot program is intended to operate for two years. However, this is not provided for on the face of the primary legislation. From a scrutiny perspective, the committee considers that it would be more appropriate if the bill provided that the provisions only operate for the intended length of the pilot program. In this regard, the committee notes that if it were necessary to extend the pilot program, or to make it ongoing, it would be appropriate for this to be achieved through future amendments to the primary legislation.

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

- **why it is considered necessary and appropriate to leave the key details of the non-liability rehabilitation pilot program to delegated legislation; and**
- **whether the bill could be amended to:**
  - **include at least high-level guidance regarding these matters on the face of the primary legislation; and**
  - **provide that proposed Part 2A of Chapter 3 is repealed after two years.**

54 Explanatory memorandum, p. 22.

Bills with no committee comment

1.125 The committee has no comment in relation to the following bills which were introduced into the Parliament between 18 – 29 October 2021:

- Aged Care Amendment (Making Aged Care Fees Fairer) Bill 2021
- Climate Change (National Framework for Adaptation and Mitigation) Bill 2021
- Climate Change (National Framework for Adaptation and Mitigation) (Consequential and Transitional Provisions) Bill 2021
- Commonwealth Electoral Amendment (Disclosure of Political Donations) Bill 2021
- Commonwealth Electoral Amendment (Stop the Lies) Bill 2021
- COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2021
- Financial Services Compensation Scheme of Last Resort Levy Bill 2021
- Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2021
- Migration Amendment (Temporary Visa Extensions and Reinstatements) Bill 2021
- National Redress Scheme for Institutional Child Sexual Abuse Amendment (Funders of Last Resort and Other Measures) Bill 2021
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Stopping PEP11) Bill 2021
- Privacy (COVID Check-in Data) Bill 2021
- Protecting Pensioners from the Cashless Debit Card Bill 2021
- Social Media (Basic Expectations and Defamation) Bill 2021
- Spam Amendment (Unsolicited Political Communications) Bill 2021
- Statute Law Amendment (Prescribed Forms) Bill 2021
- Superannuation Guarantee (Administration) Amendment Bill 2021
- Treasury Laws Amendment (Enhancing Superannuation Outcomes For Australians and Helping Australian Businesses Invest) Bill 2021
- Treasury Laws Amendment (Laminaria and Corallina Decommissioning Cost Recovery Levy) Bill 2021
- Unsolicited Political Communications Legislation Amendment Bill 2021

Commentary on amendments and explanatory materials

Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

1.126 On 25 October 2021, 14 government amendments were made to the bill in the House of Representatives.

1.127 The amendments include proposed Schedule 9 to the bill, which seeks to insert proposed section 54-11 into the *Aged Care Act 1997* to provide civil and criminal immunity in relation to the use of restrictive practices in certain circumstances. Proposed subsection 54-11(1) provides that the section will apply if an approved provider provides aged care of a kind specified in the Quality of Care Principles and a restrictive practice is used in relation to an aged care recipient who lacked capacity to give informed consent.

1.128 Proposed subsection 54-11(2) provides that a protected entity is not subject to any civil or criminal liability for, or in relation to, the use of the restrictive practice in relation to the care recipient if informed consent to the use of the restrictive practice was given by a person or body specified in the Quality of Care Principles and the restrictive practice was used in the circumstances set out in the Quality of Care Principles.

1.129 The committee's view is that significant matters, such as key details relating to who may give informed consent in relation to the use of restrictive practices, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.130 The supplementary explanatory memorandum states:

> To address issues raised by the interaction with current State and Territory consent and guardianship laws, Item 1 to new Schedule 9 will allow for the Quality of Care Principles to authorise a person or body to consent to the use of restrictive practices where it is not clear that State and Territory laws currently provide for this authorisation. It is proposed that the Quality of Care Principles will include a hierarchy of people who would be authorised to provide consent to the use of a restrictive practice in relation to a care recipient where the care recipient lacks the requisite capacity to consent to the use of the restrictive practice themselves. It is intended that this will be an interim solution to apply while State and Territory Governments establish new legislative arrangements to address the current issues, and will ensure that appropriate individuals are authorised to consent to the use of restrictive practices nationally.

> It is appropriate that these matters be dealt with in delegated legislation as they will deal with operational matters and will be co-located with the existing restrictive practices framework. Including these matters in delegated legislation will also ensure flexibility for prompt modifications should the arrangements have any unintended consequences that may impact the health, safety and well-being of care recipients. The Government will continue to monitor these arrangements and will review whether they should be included in primary legislation as part of the current project to introduce new aged care legislation.
>
> In response to the recommendations of the Royal Commission's Final Report, the Government committed to immediately commence work on a new consumer-focused Aged Care Act. The new Act will replace the existing aged care legislative framework and is intended to commence from 1 July 2023, subject to parliamentary processes. As part of the project, the Government will consider how existing aged care arrangements should be dealt with under the new legislative structure, including whether certain arrangements should be included on the face of the Act, rather than in delegated legislation.[55]

1.131 While noting the justification in the explanatory memorandum, 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. In this instance, the committee's scrutiny concerns are heightened noting the potentially significant impact of the provision and the highly vulnerable nature of the persons affected.

1.132 The committee has also previously raised significant scrutiny concerns regarding the Quality of Care Principles.[56] Additionally, the committee has consistently raised scrutiny concerns regarding provisions that provide persons with immunity from civil or criminal liability. It is unclear to the committee why, at a minimum, an inclusive list of the persons who can provide informed consent cannot be included on the face of the primary legislation. Additionally, noting the information set out in the supplementary explanatory memorandum, the committee considers that the bill could be amended to provide that the amendments made by Schedule 9 to the bill will sunset on 1 July 2023.

1.133 The committee therefore requests the minister's advice in relation to whether the bill can be amended to:

- **include at least-high level guidance regarding the matters to be included in the Quality of Care Principles on the face of the primary legislation, such as an inclusive list of the persons who can provide informed consent; and**

55 Supplementary explanatory memorandum, p. 17.

56 *Scrutiny Digest 8 of 2021*, pp. 1-4.

- **provide that the amendments made by Schedule 9 to the bill will sunset on 1 July 2023.**

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

- Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020[57]
- Major Sporting Events (Indicia and Images) Protection and Other Legislation Amendment Bill 2021[58]
- Migration Amendment (Strengthening the Character Test) Bill 2019[59]
- Security Legislation Amendment (Critical Infrastructure) Bill 2021[60]

57 On 19 October 2021, the Assistant Treasurer (Mr Sukkar) presented a supplementary explanatory memorandum to the bill, and 79 government amendments were agreed to in the House of Representatives. On 21 October 2021, Senator Seselja tabled a revised explanatory memorandum relating to the bill.

58 On 25 October 2021, the Assistant Minister for Road Safety and Freight Transport (Mr Buchholz) presented a revised explanatory memorandum to the bill.

59 On 20 October 2021, a supplementary explanatory memorandum was tabled in the Senate.

60 On 20 October 2021, Mrs K. L. Andrews (Minister for Home Affairs) presented a supplementary explanatory memorandum to the bill, and 59 government amendments were agreed to in the House of Representatives. On 21 October 2021, Senator Seselja tabled a revised explanatory memorandum relating to the bill.

Chapter 2

Commentary on ministerial responses

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

Aged Care and Other Legislation Amendment (Royal Commission Response No. 2) Bill 2021

Purpose	This bill seeks to amend the *Aged Care Act 1997*, the *Aged Care Quality and Safety Commission Act 2018,* the *Aged Care (Transitional Provisions) Act 1997*, the *National Health Reform Act 2011*, the *Veterans' Entitlements Act 1986*, the *Military Rehabilitation and Compensation Act 2004*, and the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988* to implement eight measures in response to recommendations of the Royal Commission into Aged Care Quality and Safety.
Portfolio	Health
Introduced	House of Representatives on 1 September 2021
Bill status	Before the Senate

Broad delegation of administrative powers[1]

2.2 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow for the delegation of any or all of the Secretary's functions or powers under Part 2.3; and
- whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.[2]

1 Schedule 1, item 51. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 1-2.

Minister's response[3]

2.3 The minister advised:

> Section 96-2 of the *Aged Care Act 1997* (Act) deals with delegation of the Secretary's powers and functions. Item 51 of Schedule 1 of Bill No.2 repeals and substitutes subsection 96-2(14) (except the heading) to provide that the Secretary may, in writing, delegate all or any of the Secretary's powers and functions under Part 2.3 to a person making an assessment for the purposes of section 22-4. The effect is to omit a former reference to delegation of the Secretary's powers and functions in relation to respite supplement and is consequential to repeal of provisions for respite supplement {see item 35 of Schedule 1).
>
> We further note that Part 2.3 of the Act deals with approval of a person as a recipient of one or more of residential care, home care, and flexible care. Under section 22-4, before deciding whether to approve a person under Part 23, the Secretary must ensure the care needs of the person have been assessed.
>
> The assessment, and the subsequent decision about whether a person is eligible to be approved as a recipient of care, is a highly specialised task requiring health professional expertise. Since the commencement of the Aged Care Act, this task has appropriately been performed, under delegation, by the personnel of Aged Care Assessment Teams (ACAT) within Aged Care Assessment Organisations. Delegates are health sector employees of state or territory governments. This continues an arrangement that pre-dates the Aged Care Act itself.
>
> The delegation is currently set out in the Aged Care Act (Secretary) Delegation (No.3) 2021, which limits the subsection 96-2(14) delegation to a Medical Practitioner, Registered Nurse, Social Worker, Occupational Therapist, Physiotherapist, Other Health Professional or Psychologist employed by a listed ACAT. A copy of the delegation is at **Attachment A**.
>
> The assessment tools and procedures that delegates rely on are developed by the Department of Health. Delegates undertake role-specific training when commencing in the role and subsequent annual refresher training.
>
> In response to the recommendations of the final report of the Royal Commission into Aged Care Quality and Safety, the Australian Government has committed $228.2 million to establishing a single assessment workforce capable of performing, under delegation, the Secretary's current assessment powers and functions under both Part 2.3 and Part 2.4A (classification of care recipients) of the Act. To allow for maximum flexibility

3 The minister responded to the committee's comments in a letter dated 4 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

while current arrangements continue and future arrangements are being finalised, we do not propose to amend item 51.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the assessment under section 22-4, and the subsequent decision about whether a person is eligible to be approved as a recipient of care, is a highly specialised task requiring health professional expertise. The minister also advised that since the commencement of the *Aged Care Act 1997*, this task has appropriately been performed, under delegation, by the personnel of Aged Care Assessment Teams within Aged Care Assessment Organisations. The minister also advised that this continues an arrangement that pre-dates the commencement of the Act and that delegates undertake role-specific training when commencing in the role and subsequent annual refresher training.

2.5 While noting the minister's advice, the committee reiterates its long-standing scrutiny concerns regarding the broad delegation of administrative powers in circumstances where there is little guidance on the face of the bill as to the types of persons a power may be delegated to. The committee has generally not accepted consistency with existing legislation or a desire for administrative flexibility to be a sufficient justification for the broad delegation of administrative powers. As the current delegation seems to be a long-standing practice, it remains unclear to the committee why the bill could not be amended to include more guidance regarding the delegations on the face of the primary legislation.

2.6 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*).

2.7 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing for the delegation of any or all of the Secretary's functions or powers under Part 2.3.

Legislative instrument not subject to disallowance[4]

2.8 In *Scrutiny Digest 16 of 2021* the committee requested the minister's more detailed advice regarding:

4 Schedule 2, item 4, proposed section 7A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

- why it is considered necessary and appropriate to provide that determinations made under proposed section 7A are not subject to disallowance; and
- whether the bill could be amended to provide that these determinations are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.[5]

Minister's response[6]

2.9 The minister advised:

> It is proposed that the passage of state and territory 'aged care screening laws' will provide the basis for state and territory governments to conduct 'aged care screening checks', which involve making an assessment about whether an aged care worker or governing person of an approved provider, or someone seeking to become an aged care worker or governing person, poses a risk to care recipients. Bill No.2 provides for the results of aged care screening checks to be included in the Aged Care Screening Database, which is to be maintained by the Aged Care Quality and Safety Commissioner (Commissioner).
>
> In making a determination under new section 7A, the Minister must have the agreement of the state or territory that has passed the law being specified. It is necessary and appropriate to provide that determinations made under new section 7A not be subject to disallowance as this recognises that it is undesirable for Parliament to disallow instruments that have been made for the purpose of a multi-jurisdictional body or scheme; as disallowance would affect jurisdictions other than the Commonwealth. This is also consistent with the approach taken under the National Disability Insurance Scheme (NDIS).
>
> Further, if a determination made under new section 7A were open to disallowance, there would be a risk of having no legislative basis in place to give effect to aged care worker screening, including providing for the results of worker screening checks conducted under a particular state or territory's legislation to be included in the Aged Care Screening Database. Among other things, if such a determination were disallowed, this would severely limit the Commissioner's ability to ensure compliance with new paragraph 63-1(1)(la) of the Act.
>
> As anticipated by new paragraph 63-1(1)(la), the Accountability Principles 2014 will be amended to include requirements relating to the screening of aged care workers and governing persons. It is intended that these requirements will include screening in accordance with any 'aged care

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 2-4

6 The minister responded to the committee's comments in a letter dated 4 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> screening laws'. Should a determination under new section 7A be disallowed, there would be no legislative basis under the Accountability Principles for requiring approved providers operating in a particular state or territory jurisdiction to ensure their aged care workers and governing persons had been screened in accordance with the applicable state or territory legislation. This could negatively impact the safety, health and well-being of care recipients.
>
> Based on the above, it is not considered appropriate to amend Bill No.2 to allow a determination made by the Minister under new section 7A to be open to disallowance.

Committee comment

2.10 The committee thanks the minister for this response. The committee notes the minister's advice that it is necessary and appropriate to provide that determinations made under proposed section 7A not be subject to disallowance as this recognises that it is undesirable for Parliament to disallow instruments that have been made for the purpose of a multi-jurisdictional body or scheme, as disallowance would affect jurisdictions other than the Commonwealth.

2.11 The minister also advised that if a determination made under new section 7A were open to disallowance, there would be a risk of having no legislative basis in place to give effect to aged care worker screening, including providing for the results of worker screening checks conducted under a particular state or territory's legislation to be included in the Aged Care Screening Database.

2.12 While noting this advice, the committee reiterates that the issue of exemption from disallowance has been highlighted recently in the committee's review of the *Biosecurity Act 2015*,[7] the inquiry of the Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[8] and a resolution of 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.[9]

2.13 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

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7 *Scrutiny Digest 7 of 2021*, chapter 4, pp. 33-34.

8 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.

9 Senate Resolution 53B. See *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

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*).

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

Significant matters in delegated legislation[10]

2.15 In *Scrutiny Digest 16 of 2021* the committee requested the minister's more detailed advice as to:

- why it is considered necessary and appropriate to leave the making of a Code of Conduct for approved providers and aged care workers, and how information in relation to a failure to comply with the Code of Conduct will be dealt with, to delegated legislation; and
- whether the bill could be amended to include at least high-level guidance regarding these matters, including in relation to the content of the Code of Conduct, on the face of the primary legislation.[11]

Minister's response[12]

2.16 The minister advised:

> The Code of Conduct (Code) will be based on the NDIS Code of Conduct, with modifications to ensure it is relevant to the aged care sector. Bringing the Code into effect through subordinate legislation is consistent with the approach taken in the NDIS, whereby the NDIS Code of Conduct is specified in the National Disability Insurance Scheme (Code of Conduct) Rules 2018.
>
> The Code is being developed in consultation with stakeholders. Stakeholder input will be sought into the content and operation of the draft Code. A consultation paper will be released in the latter part of 2021, with targeted stakeholder forums to be hosted in November 2021. There will be opportunities for aged care providers, aged care workers and consumers, as well as stakeholders from the broader care and support sector, to

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10 Schedule 3, item 9, proposed section 18A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 4-5.

12 The minister responded to the committee's comments in a letter dated 4 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

contribute. It is therefore expected that the final draft Code will reflect a broad consensus view of the types of matters that should be included.

Bill No.2 provides that the Aged Care Quality and Safety Commission (ACQSC) Rules 2018 (Rules) may establish a scheme for dealing with information given to the Commissioner relating to a failure by an approved provider, or an aged care worker or governing person of an approved provider, to comply with the Code. This approach is consistent with the approach taken in relation to equivalent functions and powers of the Commissioner under the ACQSC Act, including with respect to the procedural aspects of the Commissioner's complaints functions (see, for example, Part 2 of the Rules).

It is appropriate that the scheme for dealing with suspected breaches of the Code is dealt with in subordinate legislation as the arrangements will expand upon the operational detail of processes and procedures to deal with suspected breaches of the Code. While the implementation of the Code is in its initial stages, it is also appropriate to include these matters in delegated legislation to ensure there is the ability to promptly respond to unforeseen implementation issues and sector feedback and ensure there are timely responses to matters affecting the safety, health and wellbeing of care recipients.

Based on the above, it is not considered necessary to amend Bill No.2 to include high-level guidance regarding these matters, including in relation to the content of the Code, in primary legislation.

Committee comment

2.17 The committee thanks the minister for this response. The committee notes the minister's advice that the Code of Conduct (the Code) will be based on the NDIS Code of Conduct, with modifications to ensure it is relevant to the aged care sector. The minister also advised bringing the Code into effect through subordinate legislation is consistent with the approach taken in the NDIS, whereby the NDIS Code of Conduct is specified in the National Disability Insurance Scheme (Code of Conduct) Rules 2018.

2.18 The committee also notes the minister's advice that it is appropriate that the scheme for dealing with suspected breaches of the Code is dealt with in subordinate legislation as the arrangements will expand upon the operational detail of processes and procedures to deal with suspected breaches of the Code. The minister further advised that it is also appropriate to include these matters in delegated legislation to ensure there is the ability to promptly respond to unforeseen implementation issues and sector feedback.

2.19 The committee's consistent view is that significant matters, such as the details of a Code of Conduct and how information in relation to a failure to comply with the Code of Conduct will be dealt with, should be included in primary legislation unless a sound justification for the use of delegated legislation has been provided.

2.20 The committee does not consider consistency with existing legislation or a desire for administrative flexibility to be a sufficient justification for leaving significant matters to delegated legislation in circumstances where there is limited guidance on the face of the primary legislation. The committee also notes that it has raised similar concerns in relation to the NDIS Code of Conduct.[13]

2.21 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*).

2.22 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the making of a Code of Conduct for approved providers and aged care workers, and how information in relation to a failure to comply with the Code of Conduct will be dealt with, to delegated legislation.

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

Broad discretionary power

Significant penalties[14]

2.24 In *Scrutiny Digest 16 of 2021* the committee requested the minister's more detailed advice as to:

- why it is considered necessary and appropriate to provide the Commissioner with a broad discretion to impose specified conditions on a banning order;
- whether the bill can be amended to provide at least high-level guidance as to the conditions that may be placed on a banning order; and
- why it is considered necessary and appropriate to apply a significant civil penalty to breaches of specified conditions on banning orders.[15]

13 *Scrutiny Digest 6 of 2017*, pp. 51-52.

14 Schedule 3, item 25, proposed section 74GC and proposed subsection 74GD(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 5-6

Minister's response[16]

2.25 The minister advised:

> The Government is seeking to align worker regulation arrangements across the care and support sectors where it is reasonable and practical to do so. The proposed provision enabling a banning order to be made subject to specified conditions aligns with the NDIS and is based on Item 32 of the National Disability Insurance Scheme Amendment (Improving Supports For At Risk Participants) Bill 2021. Item 32 inserts new paragraph 73ZN(3)(c) into the National Disability Insurance Scheme Act 2013. It does not limit nor specify in the legislation the kinds of conditions that may be included in a banning order.
>
> The ability to impose conditions allows a more targeted regulatory response to ensure the most appropriate measures are in place to safeguard the health, safety and well-being ·or care recipients. The decision to subject an approved provider or aged care worker or governing person to a banning order is one of the most serious regulatory actions the Commissioner can take.
>
> The discretion to impose conditions on a banning order will allow for a more nuanced approach and enable the Commissioner to be flexible and tailor banning orders to the specific circumstances of each case. In some cases, it would be beneficial if the Commissioner could require the subject of the banning order to undertake action to remedy identified deficits in the way they have provided care or services to care recipients. This could be skill development or training in a particular area, such as medication management.
>
> The imposition of conditions can also provide greater safeguards where a banning order restricts a person only from providing particular types of care, for example, from providing direct care but not from providing indirect care services, such as working in an administrative or clerical role which involves no direct contact with care recipients. The condition might be that the aged care worker provides a copy of the banning order with this restriction to each prospective employer. In these circumstances, this will provide greater certainty for care recipients and approved providers that the person subject to the banning order will not be working in a direct care role.
>
> It is appropriate not to specify the nature of the conditions in the primary legislation to allow for flexibility and appropriate tailoring to the specific circumstances of the banning order. It is therefore not considered necessary to amend Bill No.2 to include high-level guidance regarding the conditions that may be placed or a banning order in primary legislation.

16 The minister responded to the committee's comments in a letter dated 4 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> A banning order will be one of the most serious compliance actions the Commissioner can take in response to conduct by an aged care worker and will only be imposed after other possible compliance responses have been considered. The imposition of a civil penalty for breach of a banning order or condition under the banning order is intended both to act as a deterrent and safeguard the safety and well-being of care recipients. Although it is acknowledged that often a breach of a banning order is more serious than breach of a condition, there are instances in which a breach of a condition can be very serious and could justify the imposition of a significant civil penalty.
>
> It is understood that in applying any civil penalty for a breach of a condition of a banning order, a court would impose a penalty that is commensurate with the overall impact of the breach in question, with due regard to circumstances around the breach.
>
> The application of a civil penalty is necessary as a further deterrent for an aged care worker who has a banning order in place to meet any conditions and to re-enforce that there is no tolerance for behaviour or actions that pose an unacceptable risk of harm to care recipients. Protecting and safeguarding care recipients from the risk of harm is the highest priority.

Committee comment

2.26 The committee thanks the minister for this response. The committee notes the minister's advice that the proposed provision enabling a banning order to be made subject to specified conditions aligns with the NDIS and is based on item 32 of the National Disability Insurance Scheme Amendment (Improving Supports For At Risk Participants) Bill 2021.

2.27 The committee also notes the minister's advice that the discretion to impose conditions on a banning order will allow for a more nuanced approach and enable the Commissioner to be flexible and tailor banning orders to the specific circumstances of each case. The minister also advised that in some cases, it would be beneficial if the Commissioner could require the subject of the banning order to undertake action to remedy identified deficits in the way they have provided care or services to care recipients and that this could be skill development or training in a particular area, such as medication management. The minister advised that it is appropriate not to specify the nature of the conditions in the primary legislation to allow for flexibility and appropriate tailoring to the specific circumstances of the banning order.

2.28 While noting this advice, the committee reiterates that there is no guidance on the face of the bill as to what types of conditions could be imposed, how long any condition will be imposed for, or the criteria the Commissioner will use when determining whether the imposition of a condition is appropriate. The committee has generally not accepted a desire for administrative flexibility to be a sufficient justification for the inclusion of broad discretionary powers in circumstances where there is no guidance on the face of the primary legislation as to how those powers

should be exercised. It remains unclear to the committee why at least high-level guidance regarding the types of conditions that may be imposed could not be included on the face of the primary legislation. The committee also notes that it has raised similar scrutiny concerns in relation to the National Disability Insurance Scheme Amendment (Improving Supports For At Risk Participants) Bill 2021.[17]

2.29 The committee further notes the minister's advice that although it is acknowledged that often a breach of a banning order is more serious than breach of a condition, there are instances in which a breach of a condition can be very serious and could justify the imposition of a significant civil penalty. The minister advised that the application of a civil penalty is necessary as a further deterrent for an aged care worker who has a banning order in place to meet any conditions and to re-enforce that there is no tolerance for behaviour or actions that pose an unacceptable risk of harm to care recipients.

2.30 Noting the broad discretionary nature of the Commissioner's power to impose conditions on a banning order and the lack of guidance on the face of the bill as to the types of conditions that can be imposed, the committee has scrutiny concerns regarding the imposition of a significant civil penalty for persons who breach conditions of banning orders. As such, from a scrutiny perspective, the committee does not consider that the minister's response adequately justifies why it is appropriate to provide a civil penalty of up to 1,000 penalty units for the breach of a condition of a banning order.

2.31 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*).

2.32 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the Commissioner with a broad discretion to impose specified conditions on a banning order, contravention of which is subject to significant civil penalties.

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17 *Scrutiny Digest 8 of 2021*, pp. 34-36.

Significant matters in delegated legislation

Privacy[18]

2.33 In *Scrutiny Digest 16 of 2021* the committee requested the minister's more detailed advice as to:

- why it is considered necessary and appropriate to leave significant matters, such as what personal information can be included on the register of banning orders, to delegated legislation, noting the potential impact on a person's privacy; and
- whether the bill can be amended to set out further details as to the information that can be included, or not included, on the register on the face of the primary legislation.[19]

Minister's response[20]

2.34 The minister advised:

> In order to ensure that the register of banning orders (Register) functions properly, it is considered necessary for the personal information of banned individuals to be made public. This is due to the importance of preventing banned individuals from working in the aged care sector and the potential significant consequences for public health if this does not happen. It is important to note that this would only extend to personal information that is reasonably necessary to identify the individual concerned to ensure they are not employed in roles within the aged care sector that may cause harm to care recipients. It is appropriate to retain flexibility in this regard as such a register has not been created or used previously in the aged care sector and this would allow the Register to adapt to the needs of the Commissioner over time.
>
> This is also consistent with the approach taken in the NDIS. Having regard to the purpose of the Register in seeking to protect care recipients from the risk of harm, the information to be included in the Register will be limited to information that will meet this objective.
>
> It is therefore not considered necessary to amend Bill No. 2 to include high-level guidance regarding what details will and will not be included on the Register in primary legislation.

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18 Schedule 3, item 25, proposed section 74GI. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 7-8.

20 The minister responded to the committee's comments in a letter dated 4 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Committee comment

2.35 The committee thanks the minister for this response. The committee notes the minister's advice that in order to ensure that the register of banning orders functions properly, it is considered necessary for the personal information of banned individuals to be made public. The minister also advised that this would only extend to personal information that is reasonably necessary to identify the individual concerned to ensure they are not employed in roles within the aged care sector that may cause harm to care recipients.

2.36 The committee also notes the minister's advice that it is appropriate to retain flexibility in this regard as such a register has not been created or used previously in the aged care sector and this would allow the Register to adapt to the needs of the Commissioner over time. The minister also advised that the approach is consistent with the approach taken in the NDIS.

2.37 While noting this advice, the committee reiterates that there is nothing on the face of the bill which would prevent the inclusion of highly sensitive or highly personal information about persons on the Register. As a result, the committee notes that the potential disclosure of information regarding persons subject to banning orders will not be subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. The committee has generally not accepted a desire for administrative flexibility or consistency with existing legislation to be a sufficient justification for including significant matters in delegated legislation. As a result, from a scrutiny perspective, the committee does not consider that the minister's advice has provided an adequate justification in this instance.

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

2.39 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving significant matters, such as what personal information can be included on the register of banning orders, to delegated legislation, noting the potential impact on a person's privacy.

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

Reversal of the evidential burden of proof[21]

2.41 In *Scrutiny Digest 16 of 2021* the committee requested the minister's detailed justification as to the appropriateness of including the specified matters as an offence-specific defence. The committee suggests that it may be appropriate if proposed subsection 215A(3) were amended to provide that the relevant matters are elements of the offence. The committee requests the minister's advice in relation to this matter.[22]

Minister's response[23]

2.42 The minister advised:

> Item 78 of Schedule 8 of Bill No.2 deals with new section 215A that sits within Part 4.14 of the *National Health Reform Act 2011* (NHR Act). Part 4.14 of the NHR Act deals with secrecy provisions relating to protected Pricing Authority information.
>
> We note that new section 215A is consistent with existing section 213 of the NHR Act. Under section 213, a person commits an offence if that person is or has been an official of the Pricing Authority, has obtained protected Pricing Authority information in the course of their work and discloses or uses the information, except where the disclosure or use is authorised by Part 4.14 or is compliant with another law of the Commonwealth or a prescribed. law of a State or Territory (subsections 213(1) and (2)).
>
> A defendant being prosecuted for an offence under section 213 or section 213A who wishes to rely on an exception is required to demonstrate that disclosure was covered by one of the exceptions to the offence. This is because it would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions. whereas a person disclosing information should reasonably be aware of the basis for their disclosure.
>
> We also note that the Aged Care Advisory Committee or other committees established under section 205 of the NHR Act will handle protected Pricing Authority information that is aged care information. Such aged care information may include protected information within the meaning of Division 86 of the Aged Care Act.

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21 Schedule 8, item 78, proposed section 215A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

22 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 8-9.

23 The minister responded to the committee's comments in a letter dated 4 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

The relevant offence provision in the Act (s86-2) is similar to the approach proposed to be taken in new section 215A of the NHR Act, with a defendant bearing an evidential burden in relation to exceptions.

For the reasons set out the Government does not propose to further amend new section 215A of the NHR Act.

Committee comment

2.43 The committee thanks the minister for this response. The committee notes the minister's advice that that proposed section 215A is consistent with existing section 213 of the *National Health Reform Act 2011*.

2.44 The minister also advised that it is appropriate to include an offence-specific defence in proposed subsection 215A(3) because it would be difficult for the prosecution to bear the burden of demonstrating that the disclosure was not covered by one of the exceptions, whereas a person disclosing information should reasonably be aware of the basis for their disclosure.

2.45 The committee reiterates that the *Guide to Framing Commonwealth Offences*[24] 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.[25]

2.46 The committee does not consider that the minister's response has adequately justified why the matters at proposed subsection 215A(3) are appropriate to be included in an offence-specific defence. From a scrutiny perspective, the committee considers that these matters appear to be matters more appropriate to be included as an element of the offence.

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

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

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

Biosecurity Amendment (Enhanced Risk Management) Bill 2021

Purpose	This bill seeks to amend the *Biosecurity Act 2015* (the Biosecurity Act) to enhance the ability to manage the risk of pests and diseases entering, emerging, establishing or spreading in Australian territory and causing harm to animal, plant and human health, the environment and the economy. It would strengthen the management of biosecurity risks posed by maritime and aviation arrivals, improve the efficiency and effectiveness of the administration of the Biosecurity Act, and increase a range of civil and criminal penalties to deter non-compliance and provide proportionate penalties.
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives on 1 September 2021
Bill status	Before the House of Representatives

Coercive powers

Instruments not subject to parliamentary disallowance[26]

2.48 The committee initially scrutinised this bill in *Scrutiny Digest 15 of 2021* and requested the minister's advice.[27] The committee considered the minister's response in *Scrutiny Digest 16 of 2021* and requested the minister's further advice as to whether the bill can be amended to include at least high-level guidance in relation to proposed sections 108N (requiring body examinations) and 108P (requiring body samples for diagnosis), including guidance in relation to:

- what examinations or sampling procedures may be included within a human biosecurity group direction;
- in what circumstances it is appropriate to require an examination or body sample;
- when consent must be given and how consent is to be given; and
- what medical and professional standards will, or may, apply when undertaking a procedure under proposed sections 108N or 108P.

26 Schedule 1, Part 2. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i), (iv) and (v).

27 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2021*, pp. 7–11.

2.49 The committee further requested whether the bill can be amended such that guidance is included as to:

- whether an individual can be required to undergo invasive procedures, such as a procedure that involves breaking through the skin, including blood tests or biopsies;
- when and how consent must be given under a group direction, particularly in relation to the circumstances in which a direction to undergo an examination under section 108N does not need to be accompanied by a requirement to give consent;
- when consent is validly given, including that consent is not validly given if the person giving consent does not have capacity; and
- how examinations or sampling procedures must be carried out including, at a minimum, that they be carried out in a way that respects an individual's dignity and privacy.

2.50 In addition, from a scrutiny perspective, the committee considered that it would be appropriate to include similar guidance in relation to human biosecurity control orders set out under Part 3 of Chapter 2 of the *Biosecurity Act 2015*. The committee requested the minister's advice in relation to including this further guidance within the bill.

2.51 Noting that it is unclear how publication of human biosecurity group directions could infringe on individuals' privacy and that, in any event, safeguards to protect privacy could be included within the bill, the committee also requested the minister's further advice as to whether the bill can be amended to include requirements that:

- human biosecurity group directions made under proposed section 108B must be published online, and
- information about human biosecurity group directions and human biosecurity control orders imposed under Part 3 of Chapter 2 of the *Biosecurity Act 2015*, such as the total number of directions made and the total number of orders imposed in a year and high-level details as to the nature and contents of each direction and order, must be set out in the department's annual report prepared under section 46 of the *Public Governance, Performance and Accountability Act 2013*.[28]

Minister's response[29]

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28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 52-63.

29 The minister responded to the committee's comments in a letter dated 3 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

2.52 The minister advised:

(a) whether the bill can be amended to include at least high-level guidance in relation to proposed sections 108N (requiring body examinations) and 108P (requiring body samples for diagnosis), including guidance in relation to:

- *what examinations or sampling procedures may be included within a human biosecurity group direction;*
- *in what circumstances it is appropriate to require an examination or body sample;*
- *when consent must be given and how consent Is to be given; and*
- *what medical and professional standards will, or may, apply when undertaking a procedure under proposed sections 108N or 108P.*

(b) whether It would be possible to Include high-level guidance in relation to safeguards protecting an individual's right to bodily autonomy and an Individual's right to provide and withdraw consent.

After carefully considering the matters raised by the Committee, I remain of the view expressed in my initial advice that it is not necessary for high-level guidance to be included as a requirement in the Bill itself. The inclusion of such guidance would duplicate existing medical and professional standards detailed in various other legislation, policies and requirements at the state, territory and Commonwealth level, with the attendant risks of obsolescence, inconsistency, or unintended legislative consequences. It would also reduce the flexibility necessary to ensure the Australian Government remains able to respond to future listed human diseases which may have different testing and diagnostic methods.

The matters suggested to be set out in high-level guidance in the primary legislation regarding consent, bodily autonomy and dignity, medical and professional standards for health professionals, and examination and sampling procedures are of a type already provided for in the Commonwealth health regulatory framework and appropriately engaged by the provisions of this Bill and existing safeguards in Chapter 2 of the Biosecurity Act. As detailed in my initial advice, this includes subsection 34(2) of the Biosecurity Act which sets out general protections requiring that Chapter 2 powers be carried out in the least intrusive and restrictive way possible; proposed section 108R which provides that a biosecurity measure set out in section 108N or 108P must be carried out in a manner consistent with appropriate medical and other relevant professional standards; and proposed section 108S which provides that there be no use of force against an individual to require the individual to comply with a biosecurity measure.

Subject to passage of the Bill, and consistent with other human biosecurity frameworks, further guidance will be provided through regulations and

policies that will support implementation of the human biosecurity group direction. Any regulations made in relation to human biosecurity group directions would be subject to parliamentary oversight through the usual disallowance processes.

The development of these regulations and policies is to be led by the Department of Health in consultation with the states and territories through the Chief Human Biosecurity Officer Forum chaired by the Chief Medical Officer, and with the Department of Agriculture, Water and the Environment, and other relevant stakeholders.

(c) whether the bill can be amended such that guidance is included as to:

- *whether an individual can be required to undergo invasive procedures, such as a procedure that involves breaking through the skin, Including blood tests or biopsies;*
- *when and how consent must be given under a group direction, particularly in relation to the circumstances in which a direction to undergo an examination under section 108N does not need to be accompanied by a requirement to give consent;*
- *when consent is validly given, including that consent is not validly given if the person giving consent does not have capacity; and*
- *how examinations or sampling procedures must be carried out including, at a minimum, that they be carried out in a way that respects an Individual's dignity and privacy.*

(d) whether it is appropriate to include similar guidance in relation to human biosecurity control orders set out under Part 3 of Chapter 2 of the Biosecurity Act 2015.

As set out in my initial advice, the Bill already provides guidance in relation to when consent must be given and how it is to be given for examinations and obtaining body samples for the purpose of determining the presence of listed human diseases. Decisions to impose such a biosecurity measure and to determine how consent is to be given will be made by the· chief human biosecurity officer or human biosecurity officer and informed by clinical knowledge and expertise.

Such decisions will also be subject to the safeguards set out in the Bill, such as in proposed subsection 108B(6), and the general protections under section 34 of the Biosecurity Act. Where a person is not capable of giving consent, section 40 of the Biosecurity Act provides an additional mechanism for an accompanying person (such as a family member or guardian) to provide consent on the person's behalf.

Proposed section 108R provides that a biosecurity measure under proposed sections 108N or 108P must be carried out in a manner consistent with appropriate medical or other relevant professional standards. Relevant medical and professional standards would require examinations or

sampling procedures to be carried out in a way that protects bodily autonomy and respects the individual's dignity and privacy.

The safeguards provided by the general protections under section 34 of the Biosecurity Act also apply to human biosecurity control orders, and I do not consider it necessary to insert further guidance into the Biosecurity Act as suggested by the Committee in relation to human biosecurity control orders.

Further guidance relating to the application of human biosecurity group directions will be provided through the regulations and supporting policies, such as guidance on exploring all relevant avenues to obtain informed consent. For example, where appropriate, this may include seeking translators and/or psychological support. It is critical that flexibility is provided in the primary legislation to respond to emerging diseases and to apply new diagnostic methods, ensuring the most appropriate biosecurity measures are applied in the circumstances of each case. Any regulations made in relation to human biosecurity group directions would be subject to parliamentary oversight through the usual disallowance processes.

Over time, there will be advances in medical technology and diagnostic measures may change. In this context, it would be inappropriate for the Bill to seek to include guidance in the primary legislation as to the kinds of procedures that may be required under section 108N and the circumstances in which they will need to be undertaken. To do so would inappropriately limit the options of medical professionals in the kinds of settings in which this direction would be used, reducing the flexibility of the Biosecurity Act in response environments to deal with human biosecurity risks.

Under a human biosecurity group direction, biosecurity measures for examination or sampling would apply the relevant testing standards and available technologies of the day to meet the human biosecurity risk of an identified or suspected listed human disease. For example, in the context of COVID-19, the current kinds of testing could include nasal pharyngeal swabs, however in the future, if a suitable alternative examination could be used for diagnostic purposes that was less invasive, for example a saliva test, then the appropriate test that is no more invasive or restrictive than necessary could be required. The regulations and operational policies will provide suitably flexible guidance for these measures to be carried out with regard to an individual's circumstances.

Subject to passage of the Bill, the regulations and supporting policies will serve to provide suitable guidance and certainty for the exercise of the human biosecurity group direction mechanism without impeding the exercise of clinical discretion and application of relevant contemporary medical and professional standards.

Consistent with the underlying policy objectives of this Bill, the human biosecurity group direction would be well suited to addressing the risk of contagion of a listed human disease in the context of a large cruise ship, due to the unique disease risk profiles associated with this form of travel and

the large numbers of passengers and crew on-board. For example, on a large passenger vessel with thousands of passengers, where the vessel operator submits a pre-arrival report declaring that there are travellers on-board with COVID-19 signs and symptoms, a group direction could be made to apply to a specified class of individuals, including a biosecurity measure requiring individuals in the class to undergo a COVID-19 diagnostic test, subject to consent. That specified class may be considered by the chief human biosecurity officer or human biosecurity officer as being at a high risk of contagion of COVID-19 because, for example, they were showing signs and symptoms of the virus or had been near other travellers showing such signs and symptoms.

(e) whether the bill can be amended to include requirements that:

- *human biosecurity group directions made under proposed section 108B must be published online, and*
- *information about human biosecurity group directions and human biosecurity control orders imposed under Part 3 of Chapter 2 of the Biosecurity Act 2015, such as the total number of directions made and the total number of orders imposed in a year and high-level details as to the nature and contents of each direction and order, must be set out in the department's annual report prepared under section 46 of the Public Governance, Performance and Accountability Act 2013.*

As detailed in my initial advice, the time-limited nature of human biosecurity group directions means that, in practice, if a direction were published, this would likely occur sometime after the direction ceased to be in effect. It is not clear what additional benefit online publishing would provide, noting these practical challenges and that the individuals affected by the direction will already be notified of the contents of the direction and how it applies.

There are protections for the use and disclosure of information collected in the exercise of functions or powers under the Biosecurity Act, including the kind of sensitive information that would be collected during the making of a group direction. While measures could be taken to provide that an individual would not be named in the published material, the group direction may still include information that could be personally identifiable or would risk the privacy of individuals subject to that direction or may indicate information about the person's health status.

The privacy concerns with publication of information about human biosecurity group directions, and the pragmatic issues with the online publication of such directions, mean that it is not suitable to insert a requirement in the Biosecurity Act to publish the information requested by the Committee. In any event, there is nothing in the Biosecurity Act that would affect the ability of an individual to voluntarily disclose their personal information to other persons or organisations, including information about

a human biosecurity group direction that applies to the individual, if they wish to do so.

As noted in my initial response, publication of the nature and contents of human biosecurity group directions in the annual report of either the Department of Agriculture, Water and the Environment or the Department of Health would be inconsistent with existing provisions of the Biosecurity Act and raise privacy concerns identified above.

Further, both human biosecurity control orders and the proposed human biosecurity group direction mechanism are underpinned by sensitive personal information and, when such information is used, this could be captured by existing annual reporting requirements under section 590 of the Biosecurity Act. This provision requires the Director of Biosecurity and Director of Human Biosecurity to each prepare a report on the use by the Commonwealth of protected information to be included in the annual reports of the Department of Agriculture, Water and the Environment and the Department of Health respectively. Protected information, which is defined in section 9 of the Biosecurity Act, includes personal information that is obtained under or in accordance with the Biosecurity Act, or derived from a record of personal information or from a disclosure or use of personal information that was made under or in accordance with the Biosecurity Act. Including a further requirement for reporting would be duplicative and could lead to inconsistency.

I therefore do not consider it necessary to include a specific requirement for information about human biosecurity group directions to be published in the annual report.

Committee comment

Whether the bill can be amended to include high-level guidance in relation to requiring body examinations and body samples for diagnosis and to introduce safeguards protecting bodily autonomy and an individual's right to consent

2.53 The committee thanks the minister for this response. The committee notes the minister's advice that including further guidance in relation the use of coercive powers would duplicate existing medical and professional standards detailed in legislative and non-legislative documents at the state, territory and Commonwealth level. The minister also advised that introducing further guidance in relation to the use of coercive powers would reduce the flexibility needed to respond to the risks of listed human diseases.

2.54 In particular, the minister advised that the matters suggested to be set out in high-level guidance at paragraphs 2.74, 2.75 and 2.76 of *Scrutiny Digest 16 of 2021* are of a type already provided for in the Commonwealth health regulatory framework and engaged by the bill. The minister provided examples of high-level guidance already provided in the bill and the *Biosecurity Act 2015* (Biosecurity Act), such as subsection 34(2) of the Biosecurity Act which sets out general protections requiring

that Chapter 2 powers be carried out in the least intrusive and restrictive way possible or section 40 of that Act which provides that in certain circumstances an accompanying person (such as a family member or guardian) may provide consent on a person's behalf.

2.55 Finally, the minister advised that further guidance in relation to the exercise of these powers will be included within regulations and departmental policy documents following the passage of the bill through the Parliament. The minister advised that due to expected advances in medical technology relevant diagnostic measures may change and that, therefore, guidance is more appropriately included within regulations and departmental guidance. The minister advised that, in this context, including such guidance within the bill would inappropriately limit the options of medical professionals in the kinds of settings in which this direction would be used.

2.56 The committee considers that the minister's advice is somewhat contradictory in that, on the one hand, the minister has advised that introducing further guidance in relation to the use of coercive powers within a human biosecurity group direction or a human biosecurity control order would be duplicative, restrictive and unnecessary when, on the other hand, the minister has also advised that further guidance is expected to be introduced following passage of the bill through the Parliament. While the committee acknowledges the need for flexibility in responding to changes in medical technology and changing risk profiles relating to listed human diseases, the committee considers that it would be possible to introduce further high-level guidance into the bill which does not compromise the level of flexibility needed and which is not unnecessarily duplicative.

Whether human biosecurity group directions can be published online and whether information about human biosecurity group directions can be set out in the department's annual report

2.57 The committee notes the minister's advice that it is not clear what benefit would be provided by publishing group directions online when the direction would likely be published after it had ceased to have effect. In this context the minister also advised that individuals affected by the direction will already be notified of the contents of the direction and how it applies.

2.58 The minister also advised that while measures could be taken to provide that an individual would not be named in published human biosecurity group directions, the group direction may still include information that could be personally identifiable or would risk the privacy of individuals subject to that direction or may indicate information about the person's health status.

2.59 The minister also advised that there is nothing in the Biosecurity Act that would affect the ability of an individual to voluntarily disclose their personal information to other persons or organisations, including information about a human biosecurity group direction that applies to the individual, if they wish to do so.

2.60 Further, the minister advised that including high-level information about human biosecurity group directions in the annual reports of either the Department of Agriculture, Water and the Environment or the Department of Health would be inconsistent with existing provisions of the Biosecurity Act and would raise the same privacy concerns identified above in relation to publishing group directions online. The minister also advised that some of the information relation to group directions may already be required to be published under section 590 of the Biosecurity Act. The minister advised that including a further reporting requirement would be duplicative and could lead to inconsistency.

2.61 The committee reiterates its view that publishing the contents of human biosecurity group directions online, regardless of whether they have ceased to have effect or not, would afford a higher degree of parliamentary and public scrutiny over the exercise of the coercive powers included within the directions. The fact that it may be open to an individual to publish this information of their own accord does not preclude the need to ensure robust transparency and accountability mechanisms over the use of significant coercive powers. The committee notes that it is not uncommon to publish information in relation to compliance activities undertaken by the executive, including, as previously noted by the committee, information currently published by departments administering the Biosecurity Act.[30]

2.62 The committee also reiterates its view that consistency with existing legislation is not a sufficient justification for failing to provide for sufficient parliamentary scrutiny over the exercise of coercive powers. It is not clear from the minister's advice why publishing high level details in relation to the use of such powers, such as the total number of directions made in a year and high-level details as to the nature and contents of each direction would infringe on an individual's privacy. The committee notes that it is common to include this kind of information within annual reports prepared under section 46 of the *Public Governance, Performance and Accountability Act 2013*, as demonstrated by the minister's advice in relation to section 590 of the Biosecurity Act. It is not clear what inconsistency could be introduced by including additional reporting requirements into the Biosecurity Act.

2.63 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of including within the bill a power to make directions containing coercive powers without including targeted safeguards protecting an individual's right to bodily autonomy and an individual's right to provide and withdraw consent within the primary legislation.

30 Information in relation to records and reports made by accredited veterinarians or authorised officers in this context is currently published on the Department of Agriculture Water and the Environment's website at: https://www.agriculture.gov.au/export/controlled-goods/live-animals/livestock/regulatory-framework/compliance-investigations/independent-observations-livestock-export-sea.

2.64 From a scrutiny perspective, the committee considers that it would be appropriate to amend the bill to include requirements that:

- **human biosecurity group directions made under proposed section 108B must be published online; and**
- **information about human biosecurity group directions and human biosecurity control orders imposed under Part 3 of Chapter 2 of the *Biosecurity Act 2015*, such as the total number of directions made and the total number of orders imposed in a year and high-level details as to the nature and contents of each direction and order, must be set out in the department's annual report prepared under section 46 of the *Public Governance, Performance and Accountability Act 2013*.**

Broad discretionary power

Parliamentary scrutiny—section 96 grants to the states[31]

2.65 The committee initially scrutinised this bill in *Scrutiny Digest 15 of 2021* and requested the minister's advice.[32] The committee considered the minister's response in *Scrutiny Digest 16 of 2021* and welcomed his intention to progress amendments to the bill to:

- include at least high-level guidance as to the terms and conditions on which financial assistance may be granted to a state or territory; and
- include a requirement that written agreements with the states and territories made under proposed section 614C are tabled in the Parliament within 15 sitting days after the agreement is made and published on the internet within 30 days after the agreement is made.[33]

Minister's response

2.66 The minister advised:

> I indicated in my initial advice that I would give consideration to moving an amendment to the Bill to provide a framework for setting out high-level guidance in relation to the terms and conditions on which financial assistance may be granted to a state or territory, and to include a requirement that written agreements with the states and territories be tabled in Parliament and published on the internet. I have now considered

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31 Schedule 4, item 6, proposed sections 614B and 614C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (v).

32 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2021*, pp. 7–11.

33 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 66–69.

these proposals further, and the Department of Agriculture, Water and the Environment has also consulted with relevant Commonwealth agencies.

I consider the Bill provides appropriate guidance as to how the power to make arrangements and grants may be exercised. Under the Bill, the Agriculture Minister or the Health Minister (the Ministers) may, on behalf of the Commonwealth, make, vary or administer an arrangement for the making of payments by the Commonwealth, or make, vary or administer a grant of financial assistance only in relation to one or more specified activities.

The exhaustive list of particular activities the Ministers may make arrangements or grants of financial assistance in relation to is listed in proposed subsection 614B(1), and are directly referrable to identifying, preventing, preparing for and managing biosecurity risks.

Further restrictions are set out in proposed subsection 614B(2) which outlines the types of risks posed by disease and pests that are intended to be covered by the activities set out in proposed subsection 614B(1). This limitation would ensure that arrangements or grants must have a direct link to addressing the likelihood of pests or diseases emerging or spreading and the potential for harm to human, animal and plant health, the environment and the economy.

Whilst guidance as to the terms and conditions of an agreement is not provided on the face of this Bill, financial relations between the Commonwealth and states and territories are governed by the *Federal Financial Relations Act 2009* and the *COAG Reform Fund Act 2008*. Further, the Council on Federal Financial Relations (CFFR) comprising the Commonwealth Treasurer as Chair and all state and territory treasurers, is responsible for overseeing the financial relationship between the Commonwealth and state and territory governments. I consider that this existing framework provides appropriate guidance for all grants between the Commonwealth and states and territories under the Biosecurity Act and any additional high-level guidance in the Bill in relation to the terms and conditions on which financial assistance may be granted to a state or territory would add unnecessary administration to what is already a highly regulated activity.

Similarly, the Federation Funding Agreement (FFA) framework and FFA Principles implemented by the CFFR require funding agreements between the Commonwealth and state and territory governments to be published on the CFFR website (see in particular, principle 8 on accountability and transparency). I consider this requirement provides sufficient transparency and accountability and it would be duplicative to include additional publication requirements in the Bill.

I therefore do not propose to introduce amendments to the Bill.

Committee comment

2.67 The committee thanks the minister for this response. The committee notes the minister's advice that the bill already provides appropriate guidance as to how the power to make arrangements and grants may be exercised under proposed section 614C. To this end, the minister advised that arrangements and grants may only be made in relation to the activities listed at proposed subsection 614B(1) of the bill. The minister noted that these activities relate specifically to identifying, preventing, preparing for, and managing biosecurity risks and that arrangements and grants are further limited by the matters set out at proposed subsection 614B(2). In addition, the minister noted that guidance as to the terms and conditions of an agreement is already provided by the administrative and legislative framework applying generally to all Commonwealth grant schemes. The minister advised that any additional high-level guidance on top of this general framework would add unnecessary administration to what is already a highly regulated activity.

2.68 The minister also advised that tabling written agreements made under proposed section 614C would be duplicative due to the existing publication guidance provided by the general administrative and legislative framework relating to the federal grants process.

2.69 While acknowledging this advice, the committee notes that the minister's response focuses on the administration of the grants process without comprehensively addressing the appropriateness of limiting parliamentary oversight of the grant framework. In this regard, the committee notes that its scrutiny concerns relate specifically to the appropriateness of delegating to the executive Parliament's constitutional power to provide grants to the states, in circumstances in which there is little information as to the terms and conditions of those grants within the primary legislation. While welcoming the limitations that apply to what a grant may relate to, the committee remains concerned that there is no information as to the terms and conditions which may be attached to such a grant.

2.70 In relation to the minister's advice that tabling the written agreements with the states and territories in relation to grants of financial assistance is not necessary, the committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are otherwise not available if the documents are merely available online. The committee notes that tabling documents within a House of Parliament is not a mere 'publication requirement' but rather an important element of parliamentary scrutiny and oversight. This is particularly significant in this context in which parliamentary scrutiny over grants agreements contributes to the maintenance of the Parliament's role under section 96 of the Constitution. From a scrutiny perspective, the committee does not consider that public reporting obligations are sufficient to address the committee's scrutiny concerns relating to not providing for agreements to be tabled in the Parliament.

2.71 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring on the Agriculture Minister

and the Health Minister a broad power to make arrangements and grants in circumstances where there is limited guidance on the face of the bill as to how the power is to be exercised and there no guidance as to the terms and conditions on which grants may be made and no requirement to table written agreements with the states and territories in the Parliament.

Offshore Electricity Infrastructure Bill 2021

Purpose	This bill seeks to establish a regulatory framework to enable the construction, installation, commissioning, operation, maintenance, and decommissioning of offshore electricity infrastructure in the Commonwealth offshore area.
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 2 September 2021
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[34]

2.72 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice as to:

- why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in subclauses 15(2), 95(4), 96(4), and 116(3), clause 149, and subclauses 203(4) and 211(4); and
- why it is appropriate to use a defence of reasonable excuse in subclauses 203(4) and 211(4), including why it is not possible to rely upon more specific defences.[35]

Minister's response[36]

2.73 The minister advised:

> The *Guide to Framing Commonwealth Offences* (the Guide) indicates that a change in the burden of proof can be appropriate in circumstances where the issues are 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. Having regard to the Guide, it is nevertheless my view that the reversal of the burden of proof is necessary in these circumstances for the following reasons.
>
> *Clause 15(2)*

34 Subclauses 15(2), 95(4), 96(4), and 116(3), clause 149, and subclauses 203(4) and 211(4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

35 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 15-17.

36 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Clause 15 relates to the prohibition of unauthorised offshore electricity infrastructure activities. The exceptions, at subclause 15(2), to this offence are that conduct is authorised by a licence or otherwise authorised or required by or under the Offshore Electricity Infrastructure Bill 2021 (the Bill).

The defendant should know whether the activity in question is authorised by a licence or otherwise authorised or required by or under the Bill and should have quick and easy access to such evidence. While I acknowledge that the prosecution would also be in a position to know if the defendant had been issued with a licence, and what the licence authorised, it is unlikely that it will be able to be determined as quickly and efficiently, whether the activities in question were authorised given the remote nature of offshore electricity infrastructure activities. This information would be readily available from the defendant as they will have intimate knowledge of the specific activities they undertook and the licence or authorisation they hold.

Clause 95(4)

Clause 95 provides that a change in control must be approved by Registrar. Subclause (4) provides that the offence does not apply if the person did not know, and could not reasonably be expected to have known, that the person has begun to control, or ceased to control, the licence holder.

The corporate workings of a licence holder are peculiarly within the knowledge of the defendant. The Offshore Infrastructure Registrar will likely not be aware of all commercial transactions that occur in relation to a licence holder particularly as in some cases, depending on the company ownership structure, transactions may not be publicly reported. It would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish that they were not aware that they had begun to control, or ceased to control, the licence holder.

Clause 96(4)

Clause 96 provides for notification of change in control that takes effect without approval. Subclause (4) provides that the offence does not apply if the person did not know, and could not reasonably be expected to have known, that the person has begun to control, or ceased to control, the licence holder.

In my view, the same reasons for reversing the evidential burden of proof for subclause 95(4) apply to this subclause.

Clause 116(3)

Clause 116 relates to maintenance and removal of property etc. by a licence holder. The licence holder is the entity who has day to day operational control over the activities that occur within their licence area. Therefore the licence holder is the only entity under the regime who will be in a position to authorise, or not authorise, the bringing of property onto their licence

area for the purposes of offshore infrastructure activities or for the removal of offshore infrastructure from their licence area.

It would be disproportionately time consuming, expensive and difficult for the prosecution to have to establish that items of property or equipment were brought into the licence area with the licence holder's authority or otherwise, whereas this information would be readily available to the licence holder as the entity who is in day-to-day control of activities on their licence area. It is therefore considered appropriate in this circumstance that the evidential burden of proof be placed on the licence holder.

Clause 149

Clause 149 provides for defences to the offence of engaging in prohibited or restricted activities in clause 148. Protection zones will be put in place in remote maritime locations in the Commonwealth offshore area. In the event that a person engages in prohibited or restricted conduct in a protection zone, that person's motivations for engaging in that conduct are likely to be peculiarly within their own knowledge. The prosecution will not have knowledge of the motivations of the defendant who is alleged to have engaged in the prohibited or restricted conduct and therefore it is considered appropriate for the burden of proof in relation to the motivations of the defendant to rest with the defendant.

Clause 203(4)

Clause 203 relates to obstructing or hindering Offshore Electricity Infrastructure (OEI) inspectors. Subclause (4) provides that a person does not commit an offence if the person has a reasonable excuse. The excuse for obstructing or hindering an inspector is peculiarly within the knowledge of the person who engaged in this conduct. It is therefore reasonable for the defendant to bear the evidential burden of proof in relation to establishing a reasonable excuse for their conduct.

Clause 211(4)

Clause 211 relates to tampering with and removing notices. This offence does not apply if the person has a reasonable excuse. In my view, the same reasons for reversing the evidential burden of proof for subclause 203(4) apply to this subclause.

Further to the above, and as noted by the committee, clauses 203(4) and 211(4) provide that the defendant bears an evidential burden to establish a defence of reasonable excuse, rather than relying on the general defences in the Criminal Code or more offence-specific defences adapted to the particular circumstances. In both instances the defence of reasonable excuse has been applied because it is considered appropriate to allow for a more 'open-ended' defence. This is because the matters relating to the offences will be peculiarly within the defendant's knowledge. For example, there may be any number of reasons why a defendant engaged in conduct that hinders an OEI Inspector (clause 203). The reasons for this would be peculiarly within the defendant's knowledge. A more 'open-ended' defence

> is necessary to capture all of the circumstances which may reasonable explain the defendant's contravention. A contravention of clause 211 could similarly be explained by reasons peculiarly within the defendant's knowledge.
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> Additionally, these provisions have been considered and aligned with those in the Offshore Petroleum and Greenhouse Gas Storage Act 2006 (OPGGS Act). The National Offshore Petroleum Safety and Environmental Management Authority (NOPSEMA) has regulatory functions under that act, and is also being provided the role of Offshore Infrastructure Regulator under the Offshore Electricity Infrastructure Bill 2021. As NOPSEMA is the regulator for both frameworks, and it is possible that there will be others who are participants in the industries regulated by both legislative schemes, it is important that there is a consistency in approach to the extent reasonably possible.
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> In addition, I note that there is a body of case law around the meaning of the expression 'reasonable excuse' and what is needed for a trier of facts to conclude that such an excuse exists. Accordingly, while I acknowledge that, in accordance with the Guide, this defence would usually be avoided in Commonwealth legislation, in view of the policy rationale outlined above, the need for consistency with similar legislative schemes, and the case law surrounding this legal test, I consider its use in this context to be appropriate.

Committee comment

2.74 The committee thanks the minister for this response. The minister's advice in relation to each relevant clause is summarised below.

Subclause 15(2)

2.75 Subclause 15(2) provides that it is a defence if the conduct of certain activities in relation to infrastructure that is within a Commonwealth offshore area is authorised by a licence or the Act.

2.76 The minister advised that, while the prosecution would be in a position to know if the defendant had been issued with a licence, and what the licence authorised, the evidential burden of proof in relation to subclause 15(2) is appropriate as it is unlikely that the prosecution will be able to determine in a quick and efficient manner whether the activities carried out in relation to infrastructure were authorised given the remote nature of offshore electricity infrastructure activities. The minister further advised that the defendant will have intimate knowledge of the specific activities they undertook and the licence or authorisation they hold.

Subclause 95(4) and 96(4)

2.77 Subclauses 95(4) and 96(4) provide that it is a defence if the person did not know, and could not have reasonably been expected to know, that a change in control of a licence holder had occurred.

2.78 The minister advised that it would be significantly more difficult and costly for the prosecution to disprove a change in control of licence holder as the Registrar will likely not be aware of all commercial transactions that occur in relation to a licence holder and, in some cases, transactions may not be publicly reported.

Subclause 116(3)

2.79 Subclause 116(3) provides that it is a defence if structure, equipment or property was not brought into the licence area by authority of the licence holder.

2.80 The minister advised that it would be disproportionately time consuming, expensive and difficult for the prosecution to establish that items of property or equipment were brought into the licence area with the licence holder's authority or otherwise, whereas this information would be readily available to the licence holder as the entity who is in day-to-day control of activities inside their licence area.

Clause 149

2.81 Clause 149 provides a defence if prohibited activities within a protected zone were carried out because it was necessary to save a life or vessel, prevent pollution, or if all reasonable steps had been taken to avoid engaging in the conduct.

2.82 The minister advised that the prosecution will not have knowledge of the motivations of the defendant who is alleged to have engaged in the prohibited or restricted conduct and therefore it is appropriate for the burden of proof to rest with the defendant.

Subclause 203(4)

2.83 It is a defence under subclause 203(4) if the person has a reasonable excuse for a person obstructing or hindering an Offshore Electricity Infrastructure inspector who is exercising powers under Part 2 or 3 of the *Regulatory Powers (Standard Provisions) Act 2014*.

2.84 The minister advised that the excuse for obstructing or hindering an inspector is peculiarly within the knowledge of the person who engaged in this conduct. For this reason, the minister advised that it is reasonable for the defendant to bear the evidential burden of proof in relation to establishing a reasonable excuse for their conduct.

Subclause 211(4)

2.85 It is a defence under subclause 211(4) if the person has a reasonable excuse for tampering with a notice that is displayed in accordance with subclauses 206(2), 208(3) or 209(8).

2.86 The minister advised that the same reasons for reversing the evidential burden of proof for subclause 203(4) apply to this subclause.

2.87 The minister further advised that the defence of reasonable excuse applied for subclause 203(4) and subclause 211(4) is considered appropriate to allow for a more

'open-ended' defence. The minister advised that a more 'open-ended' defence is necessary to capture all of the circumstances which may reasonably explain why a defendant engaged in conduct that hinders an Offshore Electricity Inspector.

2.88 Finally, the minister advised that the above provisions have been considered and aligned with those in the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act). The minister also advised that as NOPSEMA is the regulator for both the OPGGS Act and the Offshore Electricity Infrastructure Bill 2021, it is important that there is a consistency in approach.

2.89 While noting this explanation, the committee does not consider that the explanation provided adequately justifies why it is proposed to use offence-specific defences in relation to the provisions listed above. The committee reiterates that the *Guide to Framing Commonwealth Offence* 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.[37]

2.90 While the committee acknowledges that it may be difficult for the prosecution to establish that a person did not have lawful authority to engage in the conduct set out in the offences, the committee emphasises that the mere fact that it is more difficult for the prosecution to prove a particular matter is not, of itself, a sufficient justification for placing the evidential burden of proof on a defendant. The committee considers that it does not appear to the appropriate to reverse the evidential burden of proof in relation to the matters in subclauses 15(2), 95(4), 96(4), clause 149, and subclause 211(4).

2.91 In addition, the committee has also generally not accepted consistency with existing legislation to be a sufficient justification for reversing the evidential burden of proof.

2.92 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to subclauses 15(2), 95(4), 96(4), and 116(3), clause 149, and subclauses 203(4) and 211(4) of the bill and whether it is appropriate to use a defence of reasonable excuse in subclauses 203(4) and 211(4) rather than relying upon more specific defences.

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

Reverse legal burden of proof[38]

2.93 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice as to why it is proposed to reverse the legal burden of proof in subclauses 133(1) and 139(8) and why it is not sufficient to reverse the evidential, rather than legal, burden of proof.[39]

Minister's response[40]

2.94 The minister advised:

> The Guide states that placing a legal burden of proof on a defendant should be kept to a minimum and where imposed, the burden of proof must be discharged on the balance of probabilities. Having had regard to the Guide, it is nevertheless my view that the reversal of the legal burden of proof is necessary in these circumstances for the following reasons.
>
> Clause 133 provides for a defence in the case of a prosecution for failing to comply with a direction that may be given to a person by the minister or the Offshore Infrastructure Regulator under a number of provisions. It operates where that person has taken reasonable steps to comply with a direction.
>
> Subclause (1) specifies that it is a defence in a prosecution for an offence, or in proceedings for a civil penalty order, for a breach of a direction in the case where the defendant is able to establish that they took all reasonable steps to comply with the direction. The explanatory note makes clear that the onus is on the defendant to establish this. The defendant bears a legal burden in a prosecution or proceedings for a civil penalty.
>
> This is because the capacity of a person to comply with a direction, and information as to whether a person has taken a reasonable steps to comply with a direction, are all matters that are peculiarly within the person's knowledge and would not generally be available to the prosecution. The prosecution might have no knowledge of what the defendant actually did, and might know only that the direction was not complied with. In contrast, in bringing a defence, the defendant would know what steps were taken and would be better placed to establish the reasonableness of the steps.
>
> Affected persons (offshore electricity infrastructure licence holders) are expected to maintain thorough records of their activities. Raising evidence of their capacity to comply with a direction or proving on the balance of probabilities that they have undertaken reasonable steps to comply with

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38 Subclauses 133(1) and 139(8). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 17-19.

40 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

the direction, should place no significant additional burden on them. The licence holder is in a unique position to understand the technical and financial resources available to them, which may allow them to take reasonable steps to comply with a direction.

If the burden of proof were not reversed, the prosecutor would be required to undertake costly and difficult investigations into the internal workings of the person in question. In many cases the prosecutor may have some difficulty accessing information about the person's capacity to comply with the direction or whether they have undertaken reasonable steps to comply.

Subclause 139(8) sets out a defence provision in a prosecution in relation to entering or being present in a safety zone. The offence provision provides for intentional breach, reckless breach, negligent breach and strict liability. In presenting a defence, again the defendant bears the legal burden. This is because the matters set out are ones that the prosecution would be unable to establish the absence of. For example, in relation to (a), the defendant would be peculiarly able to establish that there was an emergency, that it was unforeseen, and that it had the result outlined in that paragraph. Likewise for paragraphs (b) and (c), the defendant would be peculiarly able to establish the circumstances in which these subclauses apply.

In each case, the remoteness of the Commonwealth offshore area is likely to make it difficult for the prosecution to obtain evidence about what was transpired in any of the circumstances to which the above clauses apply.

In my view, it is appropriate to impose a legal burden of proof instead of an evidential burden because failing to comply with a direction is a serious offence which could result in loss of life, injury or significant damage to infrastructure. Similarly, the offence of entering a safety zone without authorisation is an equally serious offence that could also lead to loss of life, injury, or damage to infrastructure. In both instances it is appropriate that the onus is placed on the defendant to establish on the balance of probabilities.

For the reasons above, it is my view that the reversal of the legal burden of proof in subclauses 133(1) and 139(8) is appropriate.

Committee comment

2.95 The committee thanks the minister for this response. The committee notes the minister's advice that the capacity of a person to comply with a direction, or to provide information as to whether a person has taken reasonable steps to comply with a direction are matters that would be peculiarly within the defendant's knowledge and would not generally be available to the prosecution.

2.96 The minister further advised that offshore electricity infrastructure licence holders are expected to maintain records of their activities to prove that they have undertaken reasonable steps to comply with a direction under clause 133. The

minister advised that if the burden of proof were not reversed in regard to subclause 133(1), the prosecutor would be required to undertake costly investigations and may have some difficulty accessing information about the person's capacity to comply with the direction or whether they have undertaken reasonable steps to comply.

2.97 Similarly, the minister advised that the prosecution would be unable to establish the absence of any of the matters set out in subclause 139(8). For example, in relation to paragraph 139(8)(a), the defendant would be peculiarly able to establish that there was an emergency, that it was unforeseen, and that it had the result outlined in that paragraph.[41]

2.98 Finally, the minister advised that it is appropriate to impose a reverse legal burden of proof instead of an evidential burden in this case because both offences are serious and could result in loss of life, injury or significant damage to infrastructure.

2.99 While acknowledging this advice, it is not clear to the committee from this explanation why it is necessary to reverse the legal burden of proof, as opposed to the evidential burden of proof, in relation to either clause 133 or subclause 139(8). The committee reiterates its view that the legal burden of proof should only be reversed in exceptional circumstances. The committee notes the minister's advice that the seriousness of the offence means that it is appropriate for a reverse legal burden to apply. However, the committee does not consider the seriousness of an offence to be a sufficient justification for reversing a legal burden of proof. Rather, the exceptional circumstance said to justify the reversal of the legal burden of proof would more appropriately relate to the nature of the evidence needed to be adduced in order to prove a relevant defence.

2.100 In this instance, the committee's concerns are heightened given that the legal burden of proof is reversed in relation to a number of strict liability offences and the fact that significant penalties may apply including significant custodial penalties.

2.101 In light of the above, the committee requests the minister's more detailed advice as to why it is not sufficient to reverse the evidential, rather than legal, burden of proof in relation to the defences set out at clause 133 and subclause 139(8) of the bill.

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41 Under paragraph 139(8)(a), it is a defence if the defendant proves that an unforeseen emergency rendered it necessary for the vessel to enter or be present in the safety zone in order to attempt to secure the safety of the vessel, or another vessel, or offshore renewable energy infrastructure or offshore electricity transmission infrastructure, or any other structure or equipment, or human life.

Strict liability offences[42]

2.102 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice as to why it is proposed to apply strict liability to the offence set out at subclause 139(7), with reference to the principles set out in the *Guide to Framing Commonwealth Offences*.[43]

Minister's response[44]

2.103 The minister advised:

> Safety zones are needed in order to protect offshore electricity infrastructure, vessels in the vicinity of such infrastructure, and the safety and lives of crew on infrastructure and vessels. They are in turn protective of the environment surrounding such infrastructure, as well as of the associated economic investment.
>
> Two of the principal reasons that this Bill applies strict liability to the offence under subclause 139(7) are as follows.
>
> First, an important consideration is alignment with similar offence provisions under sections 616 and 617 of the OPGGS Act, which apply to offshore petroleum infrastructure and offshore greenhouse gas infrastructure respectively. The matters that these existing provisions protect and the matter that clause 139 of this Bill is intended to protect are similar in many regards. Given this degree of similarity, I am concerned that, if corresponding penalties were not applied to clause 139 of this Bill, the effect would be that this Bill would have significantly weaker penalties than existing laws for breaching safety zones, which could conceivably adversely affect investment in offshore renewable energy infrastructure as compared to investment in other offshore resources infrastructure.
>
> Second, I consider that the use of strict liability offences for these safety zone provisions is justified as a result of the serious consequences of a breach of those provisions. In this regard, it is important to note:
>
> - the vulnerability and physical defencelessness of offshore facilities of this nature, particularly unmanned ones; and
> - the potentially serious consequences of damage to, or interference with, facilities or operations at such facilities.

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42 Subclauses 77(2), 78(2), 116(4), 123(3), 128(3), 139(3), and 267(2). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 20-22.

44 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

When considering offences that are alleged to have occurred in an offshore area, this kind of legislation has traditionally taken account of the viability of conducting a successful prosecution, if that can be achieved only with proof of intention, recklessness or negligence.

Taken together, these factors have in the past led to the use of strict liability offences.

In relation to the points outlined in the Guide to Framing Commonwealth Offences, I note the following:

- Contrary to the Guide, subclause 139(7) imposes strict liability in circumstances where there is a term of imprisonment. However, the penalty for the strict liability offence is markedly lower than the penalties for the corresponding fault-based offences under that clause. In view of the above comments, and the cascading nature of the penalties, which reduce as culpability reduces, I consider a departure from this element of the Guide to be justified in this case.
- In light of the above comments, strict liability here is necessary in order to ensure the integrity of the regulatory regime under this Bill as it relates to safety zones. This also gives rise to associated environmental protections.
- There are no broad or uncertain criteria involved in subclause 139(7) of this Bill.
- Strict liability is not being imposed on the sole ground of minimising resource requirements.

Committee comment

2.104 The committee thanks the minister for this response. The committee notes the minister's advice that the offence set out at subclause 139(7) aligns with similar offence provisions under sections 616 and 617 of the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (OPGGS Act). The minister advised that if corresponding penalties were not applied to clause 139 of the bill, the penalties would be significantly weaker than existing laws for breaching safety zones and would adversely affect investment in offshore renewable energy infrastructure.

2.105 The minister advised that the imposition of strict liability offences is justified as a result of the serious consequences of a breach of the provisions under clause 139 such as the vulnerability and physical defencelessness of the offshore facilities, and the potentially serious consequences of damage to, or interference with, facilities or operations at such facilities. The minister advised that imposing strict liability offences is necessary in order to ensure the integrity of the regulatory regime under the bill as it relates to safety zones and associated environmental protections.

2.106 The minister further advised that the imposition of strict liability offences in this case takes into account the viability of conducting a successful prosecution and that, while the penalty imposed under subclause 139(7) includes a term of imprisonment, the penalty for the offence is lower that the penalties for the corresponding fault-based offences under clause 139.

2.107 The committee notes the minister's advice that the offence of strict liability is appropriate in this instance to protect the safety and lives of crew on infrastructure and vessels, and to protect the environment surrounding such infrastructure. While noting this justification, the committee continues to have scrutiny concerns about the application of strict liability to an offence carrying a maximum penalty of imprisonment for five years, noting that this penalty is significantly higher than is recommended in the *Guide to Framing Commonwealth Offences*.[45] 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*.

2.108 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that the offence set out at subclause 139(7) is an offence of strict liability subject to a significant custodial penalty.

Exemption from disallowance[46]

2.109 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice regarding:

- why it is considered necessary and appropriate to provide that directions made under clause 182 are not subject to disallowance; and
- whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.[47]

Minister's response[48]

2.110 The minister advised:

> Clause 182 provides that the minister may make a direction. Directions under this clause provide the minister with a degree of control over the

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

46 Clause 182. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

47 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 22-24.

48 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> exercise of the functions of the Offshore Infrastructure Regulator under the offshore electricity infrastructure framework. The provisions make it clear that the minister may only issue directions to the Offshore Infrastructure Regulator that are general in nature.
>
> For example, I may wish the Offshore Infrastructure Regulator to increase monitoring and compliance activities in relation to the industry, in the event of a significant incident or series of significant incidents that warrant increased regulatory intervention and where I am not satisfied that he Offshore Infrastructure Regulator is appropriately focusing regulatory effort on matters of this nature.
>
> While the directions are given by legislative instrument, they are intrinsically of an administrative rather than a legislative character. This is primarily to ensure public notice of directions. Given the overall administrative character, disallowance would be inappropriate in this context.
>
> In my view, it would be inappropriate to amend this Bill as suggested, as a power to direct a regulator such as this is not the kind of matter that is traditionally made subject to Parliamentary oversight and disallowance.

Committee comment

2.111 The committee thanks the minister for this response. The committee notes the minister's advice that, while directions given under clause 182 are legislative instruments, they are intrinsically of an administrative rather than a legislative character. The minister further advised that given this administrative character and the fact that similar directions powers have previously not been subject to disallowance, disallowance would be inappropriate in this context.

2.112 While acknowledging this advice, the committee considers that it is not sufficient to merely state that instruments made under clause 182 will be administrative in nature when instruments made under clause 182 could conceivably include provisions that are legislative in character. The committee also reiterates that the mere fact that an instrument making power falls within a class of provisions that are routinely exempt from disallowance is not a sufficient justification for not subjecting those instruments from disallowance without further justification.[49]

2.113 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of not subjecting ministerial directions given to the Regulator under clause 182 of the bill to parliamentary disallowance.

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49 The committee further notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has recommended that the blanket exemption of instruments that are 'a direction by a Minister to any person or body' should be abolished. See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, p. 101.

Instruments not subject to parliamentary disallowance[50]

2.114 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice regarding:

- why it is considered necessary and appropriate that all determinations made under proposed clause 136 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.[51]

Minister's response[52]

2.115 The minister advised:

> Safety zones are needed in order to protect offshore electricity infrastructure, vessels in the vicinity of such infrastructure, and the safety and lives of crew on infrastructure and vessels. They are in turn protective of the environment surrounding such infrastructure, as well as of the associated economic investment.
>
> Determinations of safety zones are likely to occur at different times throughout the life of an offshore electricity infrastructure project and are intended to be short term in nature. They prohibit vessels from entering an area for a period of time in order to minimise risks of collision during times of significant activity, such as during construction and installation of infrastructure where risks to the health and safety of workers and other marine users are heightened, or in response to an emergency.
>
> Due to restrictions on the size of safety zones that stem from the United Nations Convention of the Law of the Sea (500m from the outer edge of infrastructure), it is likely that multiple safety zones will be required for an individual project depending on project layout. For example, a large windfarm with up to 300 wind turbines may require in excess of 300 safety zone determinations to cover all infrastructure, including turbines, cables and substations during periods of construction, installation and commissioning, and these determinations may be subject to amendment over time. These safety zones may also be progressively determined and then revoked over relatively short timeframes as needed.

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50 Clause 136. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

51 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 24-26.

52 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> In my view, safety zone determinations do not of themselves determine the content of the law. Rather, the content of the law is set out in Division 3 of Part 2 of this Bill. As the determinations do not determine the content of the law, they are not intrinsically of a legislative character, and so are appropriately classified as not being legislative instruments.
>
> What the determinations do is determine the facts on which the law, as set out in this Bill, operates. It is accordingly more akin to an administrative determination that is given legal consequence by provisions of this Bill.
>
> In my view it would not be appropriate for safety zone determinations to be subject to disallowance, as the time-critical nature of the implementation is key to its effectiveness. For this reason, and those above, I consider it appropriate that safety zone determinations are notifiable instruments and that amending this Bill is not necessary.

Committee comment

2.116 The committee thanks the minister for this response. The committee notes the minister's advice that safety zones are needed in order to protect offshore electricity infrastructure, vessels in the vicinity of such infrastructure, surrounding areas, and the safety and lives of crew on infrastructure and vessels. The minister further advised that determinations of safety zones are likely to occur at different times throughout the life of an offshore electricity infrastructure project and are intended to be short term in nature.

2.117 The minister further advised that as safety zone determinations do not of themselves determine the content of the law, they are not intrinsically of a legislative character and so are appropriately classified as not being legislative instruments. Finally, the minister advised that it would not be appropriate for safety zone determinations to be subject to disallowance, as the time-critical nature of the implementation is key to its effectiveness.

2.118 While acknowledging this advice, it is not clear to the committee why a determination made under clause 136 is not of a legislative character in circumstances where it appears that the making of such a determination could alter or determine the content of the law. For example, the committee notes that vessels may be prohibited from entering a safety zone under subclause 137(3). In this regard, the committee notes that a protection zone determination made under clause 142 of the bill is a legislative instrument. It remains unclear to the committee why determinations made under clause 142, which may impose similar obligations, are specified as legislative instruments while determinations made under clause 137 are specified as notifiable instruments.

2.119 Furthermore, the committee notes that legislative instruments can commence immediately after they registered on the Federal Register of Legislation. It is therefore unclear to the committee how providing that determinations made under clause 136

are legislative instruments would prevent the Regulator from acting quickly if necessary.

2.120 The committee reiterates its scrutiny concerns in relation to proposed clause 136 of the bill which provides that safety zone determinations are notifiable instruments, which are not subject to the tabling, disallowance and sunsetting requirements that apply to legislative instruments.

2.121 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving determinations made under clause 136 to non-disallowable instruments which are not subject to parliamentary scrutiny.

Significant matters in delegated legislation—licensing scheme[53]

2.122 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the details of the licensing scheme to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding the matters listed at subclause 29(1) on the face of the primary legislation.[54]

Minister's response[55]

2.123 The minister advised:

> The framework of the licensing scheme has been set out in Chapter 3 of this Bill. The ability to set out the operational detail in delegated legislation is considered essential for flexibility to adapt to a changing industry and a cover a range of different technologies and infrastructure. Having the technical details that underpin these licence arrangements in delegated legislation allows for industry and other stakeholders to participate in the development of the regulations.
>
> I understand that the Committee generally does not accept a desire for administrative flexibility in order to justify broad delegation legislation-

53 Clauses 29. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

54 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, p. 26.

55 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

making powers, and I appreciate the basis of the Committee's view in this regard. However, in my view, the need to permit these details to be set out in delegated legislation goes beyond what might be thought of as being mere administrative flexibility. Its need stems from the newness of the offshore energy industry, and the impossibility, at this stage, of predicting precisely what kind of regulatory scheme will be needed over time as the industry develops. If this Bill was to unduly limit the ability of the legislative scheme to develop as the industry develops, there would be a real risk that the legislation could then hamper the development of the industry, which would be an unwelcome outcome.

In relation to providing high-level guidance as to the matters listed at subclause 29(1) of this Bill, I note that this Bill already includes several provisions in addition to clause 29 which specify:

- particular matters that the licensing scheme must include – see subclauses 32(1) and (2), 41(2) and (3), 51(1) and (2), 60(1) and (2), 69(3) and 114(1), and
- particular matters that the licensing scheme may include – see subclauses 29(2), 32(3), 34(2), 36(3), 37(1), 44(2), 46(2), 47(1), 53(2), 55(3), 56(1), 62(2), 64(2), 65(1), 72(2) and (3), 84(3), 107(5), 114(1) and (3), and 115(2).

I consider that, in view of these provisions, this Bill already contains a sufficient level of guidance as to what must and may be included in the feasibility scheme, and more guidance than Bills ordinarily provide for delegated legislation. Because of that, while I appreciate the Committee's underlying concern here, I do not consider it necessary in this instance for this Bill to be amended to provide further high-level guidance regarding the matters listed at subclause 29(1).

Committee comment

2.124 The committee thanks the minister for this response. The committee notes the minister's advice that flexibility is needed due to the newness of the offshore energy industry and the impossibility at this stage of predicting what kind of regulatory scheme will be needed as the industry develops. The minister advised that including the key details of the licensing scheme within delegated legislation will allow for industry and other stakeholders to participate in the development of the regulations and that including this detail within the bill could instead serve to hamper the development of the industry.

2.125 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*).

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

Fees in delegated legislation[56]

2.127 In *Scrutiny Digest 16 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 clause 111 and clause 286 will be calculated, including, at a minimum, a provision stating that the fees must not be such as to amount to taxation.[57]

Minister's response[58]

2.128 The minister advised:

> In my view, it would be inappropriate for this Bill to be amended to provide further guidance regarding how the fees under clauses 111 and 286 will be calculated.
>
> As the Committee notes, the explanatory memorandum to this Bill already indicates that fees will be set at cost-recovery levels. The fees will be calculated in line with the guidelines for Cost Recovery Implementation Statements (CRIS), and set out in delegated legislation. It is expected that this will be done within the 6 month proclamation period so that industry can be consulted and the details settled to coincide with commencement of the legislation. I consider that this is important to ensure that this new regulatory regime is able to be fully cost recovered. As the industry evolves, adjustments to the fees may be required to ensure that they continue to reflect industry needs. The regulations are subject to disallowance.
>
> Further, in my view, clauses 111 and 286 are not intended to be read as independent, free-standing powers to prescribe fees by regulation.
>
> Rather, clause 111 should be read as an obligation on the Offshore Infrastructure Registrar to (stated broadly) ensure that instruments are available for inspection upon payment of a fee, where the fee will be calculated in accordance with the licensing scheme. This clause does not deal with the actual power to prescribe the fee, which is dealt with

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56 Clauses 111 and 286. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

57 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 27-28.

58 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> elsewhere. Rather, this clause requires the Offshore Infrastructure Registrar to ensure that instruments are made open for inspection, where this requirement is condition on the payment of the relevant fee. The fee itself would need to be prescribed under the provisions contained in Part 3 of Chapter 5 of this Bill. Of this part, subclause 189(1) permits fees to be charged, and subclause 189(2) provides that the amount of such a fee is the amount prescribed, or worked out in accordance with a method prescribed, by the regulations. Subclause (3) provides that such a fee must not be such as to amount to taxation. Accordingly, my view is that the limitation sought by the Committee already exists in relation to clause 111, when the Bill is read in the intended way.
>
> Similarly, I do not consider that clause 286 should be read as an independent, free-standing power to prescribe fees. This provision should be read as expressly providing that fees may be prescribed in relation to the matters referred to in paragraph 283(3)(a) or 285(4)(a), but it should also be read as operating alongside the provisions of Part 3 of Chapter 5 of this Bill, which relate to prescribing of fees, and as also being limited by subclause 189(3).
>
> Accordingly, while I appreciate the Committee's concerns in this regard, I consider that these observations together obviate the need for further amendment to this Bill to address these concerns in relation to these provisions.

Committee comment

2.129 The committee thanks the minister for this response. The committee notes the minister's advice that the explanatory memorandum already states that the amount of the fees will be set at cost-recovery level. The minister also advised that the fees will be calculated in line with the guidelines for Cost Recovery Implementation Statements. The minister advised that the fee is expected to be set out within delegated legislation within the 6-month proclamation period so that industry can be consulted, and the details settled to coincide with commencement of the legislation. The minister also advised that, as the industry evolves, adjustments to the fees may be required to ensure that they continue to reflect industry needs.

2.130 The minister further advised that, in his view, clauses 111 and 286 are not intended to be read as independent, free-standing powers to prescribe fees by regulation. The minister advised that, rather, this power is instead contained in Part 3 of Chapter 5 of the bill. The minister noted that subclause 189(1) permits fees to be charged, and subclause 189(2) provides that the amount of such a fee is the amount prescribed, or worked out in accordance with a method prescribed, by the regulations. Subclause (3) provides that such a fee must not be such as to amount to taxation.

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

Power for delegated legislation to modify the operation of primary legislation (akin to Henry VIII clause)—regulations for pre-existing infrastructure[59]

2.132 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to allow delegated legislation to modify the operation of the bill as it applies to pre-existing offshore infrastructure; and
- whether the bill can be amended to, at a minimum, provide that the regulations may only have a beneficial effect and to specify a timeframe as to when clause 309 ceases to apply within the primary legislation.[60]

Minister's response[61]

2.133 The minister advised:

> Henry VIII clauses are not uncommon as part of transitional arrangements. In my view, this clause is needed to deal with any unintended or unforeseen circumstances that may arise in the future. As the purpose of the provision is to assist with unintended or unforeseen circumstances, it is difficult to provide specific examples of when the rule-making power may be used or a timeframe for when they may apply.
>
> The use of delegated legislation in this instance will provide the flexibility to work directly with owners of existing infrastructure to ensure that specific adjustments can be made, if needed, to minimise the impact on operations. It was not possible for this Bill to set out a comprehensive scheme for dealing with pre-existing infrastructure, because:
>
> • When this Bill was introduced, it was not possible to state with certainty what pre-existing infrastructure there would be in the Commonwealth offshore area when the Bill commences.
>
> • After this Bill enters into law, the appropriate way to regulate pre-existing infrastructure might develop, along with the general development of the offshore electricity infrastructure industry and the associated regulatory regime. For this reason, the flexibility provided by delegated

59 Clause 309. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

60 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 28-29.

61 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> legislation was needed to deal with regulation of this pre-existing infrastructure.
>
> The Committee noted that there was no requirement under this Bill that regulations made for the purposes of clause 309 operate beneficially to individuals. In my view, it would be inappropriate to include a limitation of this nature. The regulatory scheme under this Bill necessarily balances a range of interests, and regulations made for the purposes of this clause will similarly need to balance the interests of owners or operators of pre-existing infrastructure against the interests of others affected by regulation of offshore electricity infrastructure, or with broader interests in the Commonwealth offshore area. Because of that, I think that it would be inappropriate for the Bill to impose a limitation of the kind proposed.
>
> The Committee noted that there was no requirement under this Bill that such regulations cease to have effect after a specified timeframe. For similar reasons to those outlined above, in a new and evolving industry such as this, it is not possible to propose a particular date up-front by which transitional provisions of this nature will cease to be required.
>
> As such, I consider it appropriate for delegated legislation to modify the operation of this Bill as it applies to pre-existing infrastructure, ensuring a fit for purpose approach can be taken.

Committee comment

2.134 The committee thanks the minister for this response. The committee notes the minister's advice that the use of delegated legislation in this instance will provide the flexibility to work directly with owners of existing infrastructure to ensure that specific adjustments can be made to minimise the impact on offshore infrastructure operations.

2.135 The minister advised that it would be inappropriate to introduce a requirement that regulations made for the purposes of clause 309 operate beneficially for individuals because the regulations will need to balance the interests of owners or operators of pre-existing infrastructure against the interests of others affected by regulation of offshore electricity infrastructure, or with broader interests in the Commonwealth offshore area.

2.136 The minister also advised that it would be inappropriate to introduce amendments such that the regulations cease to have effect after a specified timeframe because it is not possible to propose a particular date by which transitional provisions of this nature will cease to be required.

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

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

Tabling of documents in Parliament[62]

2.139 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice as to why reports or documents prepared under clause 181 of the bill are not required to be tabled in the Parliament.[63]

Minister's response[64]

2.140 The minister advised:

> Clause 181 of this Bill provides that the minister may require the Offshore Infrastructure Regulator to prepare reports or give information. The Offshore Infrastructure Regulator must comply with that requirement. NOPSEMA is the specified Offshore Infrastructure Regulator and it is important that this process aligns with the specifications in the legislation NOPSEMA is created under, the OPGGS Act.
>
> There are other mechanisms in this Bill whereby the Offshore Infrastructure Regulator is required to table or publish information on the performance of its functions and as such, I do not consider that an amendment is needed.
>
> Importantly, this Bill does not preclude the tabling of these reports or documents, and so there is discretion to table in appropriate circumstances, in accordance with usual Parliamentary procedures.

Committee comment

2.141 The committee thanks the minister for this response. The committee notes the minister's advice that the current tabling requirements align with similar provisions in the OPGGS Act. The minister further advised that an amendment introducing tabling requirements in relation to documents produced under clause 181 is not needed as there are other provisions within the bill that require the Regulator to table or publish information on the performance of its functions.

2.142 While acknowledging this advice, the committee does not consider consistency with existing legislation to be a valid justification for not providing for

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62 Clause 181. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

63 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 29-30.

64 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

significant documents to be tabled in Parliament. The committee reiterates that not providing for reports produced by the Regulator to be tabled in Parliament reduces the scope for parliamentary scrutiny. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are no available where documents are only published online. From a scrutiny perspective, the committee therefore does not consider that the minister's response has provided a sufficient justification as to why it is appropriate not to provide for tabling of reports or documents prepared under clause 181 of the bill in the Parliament.

2.143 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not requiring reports prepared by the Offshore Infrastructure Regulator under clause 181 to be tabled in the Parliament.

Limitation on merits review[65]

2.144 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice as to why merits review will not be available in relation to the grant of a feasibility licence under clause 33 or the varying of a licence under clauses 38, 48, 57 or 66 of the bill. The committee noted that its consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What Decisions Should be Subject to Merit Review?*.[66]

Minister's response[67]

2.145 The minister advised:

> The principles as set out in the Administrative Review Council's guidance document 'What Decisions Should be Subject to Merit Review'? (the ARC guidance document) were considered during development of the Bill.
>
> In response to the specific queries of the Committee I make the following comments.

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65 Clauses 33 and 38. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

66 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 30-31.

67 The minister responded to the committee's comments in a letter dated 8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

> The ARC guidance document provides for the exclusion of merits review, amongst other things, where decisions are allocating a finite resource between competing applicants and an allocation that has already been made to another party would be affected by overturning the original decision.
>
> A feasibility licence authorises the holder to construct, install, commission, operate, maintain and decommission offshore renewable energy infrastructure. The undertaking of these activities are exclusive to the licence holder within the licence area. Therefore, in granting a feasibility licence, I am allocating a finite resource. Where there is multiple parties applying for licences in the same, or overlapping, areas, I am allocating a finite resource between competing parties. It is not possible to grant a feasibility licence to each and every proponent.
>
> Merit criteria have been set out to determine the suitability of applicants. The criteria for allocating feasibility licences will be made clear in the licensing scheme and associated guidance.
>
> A successful feasibility licence applicant could be negatively affected if, for example, upon the successful grant of a feasibility licence, the holder proceeded to finance activities authorised under the feasibility licence. If a merits review application was then made, and the subsequent decision was to overturn the original decision, the original successful feasibility licence applicant could be left in an uncertain position and therefore be negatively affected.
>
> In the case of a licence variation there are limitations to when a licence may be varied. The licence holder can make an application, in accordance with the licensing scheme, to vary the licence. Variation applications are expected to be mainly made in this way or connected to other applications (such as change of control). The licence holder will have visibility over the decision-making processes for variation and the processes will be subject to procedural fairness.
>
> I am satisfied that the approach in this Bill aligns with the ARC guidance document.

Committee comment

2.146 The committee thanks the minister for this response. The committee notes the minister's advice that the Administrative Review Council's guidance document *What Decisions Should be Subject to Merit Review?* provides for the exclusion of merits review where decisions are allocating a finite resource between competing applicants and an allocation that has already been made to another party would be affected by overturning the original decision. The minister advised that, as a feasibility licence authorises the holder to construct, install, commission, operate, maintain and decommission offshore renewable energy infrastructure within a specific area, a finite resource is being allocated upon granting a feasibility licence.

2.147 The minister advised that a successful feasibility licence applicant could be negatively affected if, for example, upon the successful grant of a feasibility licence, the holder proceeded to finance activities authorised under the feasibility licence and the original decision was subsequently overturned as a result of an application for independent merits review. The minister advised that the criteria for granting a feasibility licence will be found within guidance documents and the licensing scheme upon passage of the bill through Parliament.

2.148 In relation to the minister's power to vary a licence, the minister advised that there are limitations placed on when a licence may be varied. The minister advised that the licence holder can make an application, in accordance with the licensing scheme, to vary the licence and that it is expected this will be the main way in which variation applications will be made. As such, the minister advised that the licence holder will have visibility over the decision-making processes for variations and that these processes will be subject to procedural fairness.

2.149 While acknowledging the minister's advice, the committee does not consider that the mere existence of some elements of procedural fairness in relation to a decision justifies the exclusion of independent merits review where the consequences of that decision will, or are likely to, affect the interests of a person. The committee notes that the broad powers to vary a licence under clauses 38, 48, 57 or 66 of the bill may affect the interests of a person and that it would therefore be more appropriate to subject these decisions to independent merits review.

2.150 In relation to the granting of a feasibility licence under clause 33 of the bill, 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*).

2.151 In relation to the varying of a licence under clauses 38, 48, 57 or 66 of the bill, the committee requests the minister's more detailed advice as to why merits review will not be available. The committee's consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What Decisions Should be Subject to Merit Review?*.

Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021

Purpose	The Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021 provides for an offshore electricity infrastructure levy to be imposed on offshore electricity infrastructure licence holders or those engaging in offshore infrastructure activities set out in regulations. The amount of the levy or method to calculate the levy will be set out in regulations.
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 2 September 2021
Bill status	Before the Senate

Levies in delegated legislation[68]

2.152 In *Scrutiny Digest 16 of 2021* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the persons on whom the offshore electricity infrastructure levy will be imposed, the kinds of levy that may be imposed and the amount of any levy to delegated legislation; and
- whether the bill can be amended to prescribe at least high-level guidance in relation to these matters on the face of the primary legislation, including whether the bill can be amended to include, at a minimum, guidance in relation to the method of calculation of the levy and/or a cap on the amount of levy.[69]

Minister's response[70]

2.153 The minister advised:

> The *Offshore Electricity Infrastructure (Regulatory Levies) Bill 2021* (the Regulatory Levies Bill) and *Offshore Electricity Infrastructure Bill 2021* (the main Bill) establish a statutory framework to allow for the complete cost recovery of the costs of the Offshore Infrastructure Registrar and Offshore

68 Clauses 8 and 9. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

69 Senate Scrutiny of Bills Committee, *Scrutiny Digest 16 of 2021*, pp. 32-34.

70 The minister responded to the committee's comments in a letter dated8 November 2021. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 17 of 2021* available at: www.aph.gov.au/senate_scrutiny_digest.

Infrastructure Regulator. These cost recovery arrangements were highlighted repeatedly throughout the explanatory memorandum to the main Bill, and aim to ensure that the Offshore Infrastructure Registrar and Offshore Infrastructure Regulator have adequate funding for the performance of their functions.

In response to the specific queries of the Committee, I make the following comments.

First, as indicated in the explanatory memoranda that accompanied the Bills, the offshore electricity infrastructure industry is a new and emerging one, and it is expected to develop over time. In my view, it is not possible to foresee the ways in which the industry might develop at this early stage, and for that reason, the main Bill contains broad regulation-making powers to prescribe a licensing scheme for the purposes of the Bills. As noted in the explanatory memorandum to the Regulatory Levies Bill, at paragraph 20, there is a close link between the persons on whom levies will be imposed, and persons who would be regulated under this licensing scheme. Accordingly, given the reasonably broad power for regulations to prescribe the licensing scheme, there is a need for an adjoining, and hence reasonably broad, power for regulations to prescribe the kinds of levy that might be imposed, the persons on whom levies are imposed, and the amounts of those levies.

I understand that the Committee generally does not accept a desire for administrative flexibility in order to justify broad delegation legislation-making powers, and I appreciate the basis of the Committee's view in this regard. However, similarly to related questions on the main Bill, in my view, the need for these reasonably broad powers goes beyond what might be thought of as being mere administrative flexibility. Their need stems from the newness of this industry, and the impossibility, at this stage, of predicting precisely what kind of regulatory scheme will be needed over time as the industry develops. As I have stated earlier, if the Bills were to unduly limit the ability of the legislative scheme to develop as the industry develops, there would be a real risk that the legislation could then hamper the development of the industry, which would be an unwelcome outcome.

Second, I acknowledge that it would be possible, in principle, for the Bills to be amended to prescribe the kind of guidance that the Committee refers to in relation to the matters referred to in paragraph 1.130 of Scrutiny Digest 16/21. However, having regard to my comments above, in my view, it is not possible to arrive at reliable numerical caps as to the amount of these levies at this stage. Setting limits might give rise to the risks outlined above. In relation to high-level guidance as to these matters, I note that the explanatory memoranda to the main Bill and the Regulatory Levies Bill both refer on several occasions to recovery of costs under fees and levies, and so my view is that these documents have made the intention underlying the legislation sufficiently clear, even without these matters being addressed expressly in the Bills themselves. I also emphasise that regulations

> prescribing these matters are disallowable legislative instruments, and so the Parliament will have an opportunity to consider levies once they have been set, and disallow the regulations if it chooses to do so. That is to say, the relative breadth of these regulation-making powers in no way undermines the role of the Parliament in the setting of these levies and associated matters.

Committee comment

2.154 The committee thanks the minister for this response. The committee notes the minister's advice that the levy framework imposed by both this bill and the Offshore Electricity Infrastructure Bill 2021 is intended to allow for the complete cost recovery of the costs of the Offshore Infrastructure Registrar and the Offshore Infrastructure Regulator. The minister also advised that, because the offshore electricity infrastructure industry is a new and emerging industry, it is currently impossible to predict what kind of regulatory scheme will be required as the industry develops. The minister advised that broad regulation-making powers are necessary for this reason. The minister advised that if the bills were to unduly limit the ability of the legislative scheme to develop in response to industry developments the legislation could hamper the development of the industry.

2.155 The minister further advised that, at this stage, it is not possible to arrive at reliable caps as to the amount of the levies to be imposed by the bill. However, the minister advised that the explanatory materials to the bill make clear that the intention of the bill is to set the amount of any fee or levy at cost-recovery level.

2.156 While acknowledging this explanation and the need to maintain regulatory flexibility in relation to new and emerging industries, the committee remains of the view that it would still be possible to provide further high-level guidance in relation to the kinds of levy that may be imposed and the amount of any levy within the primary legislation. In particular, while welcoming the guidance contained within the explanatory memorandum which indicates that the levy is intended to be limited to cost recovery, the committee considers that this kind of guidance should also be included on the face of the bill.

2.157 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving virtually all of the details of the imposition of the offshore electricity infrastructure levy to delegated legislation.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

- Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021—Schedule 3, item 3, proposed section 1069P.[3]

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*.

3 This proposed section provides that the Consolidated Revenue Fund is appropriated for the purposes of payments to the CSLR.