The Senate

Standing Committee for the Scrutiny of Bills

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Membership of the committee

Current members

Senator Helen Polley (Chair)	ALP, Tasmania
Senator Dean Smith (Deputy Chair)	LP, Western Australia
Senator the Hon Kim Carr	ALP, Victoria
Senator Perin Davey	NATS, New South Wales
Senator Janet Rice	AG, Victoria
Senator Paul Scarr	LP, Queensland

Secretariat

Mr Glenn Ryall, Secretary

Ms Alexandra Logan, Principal Research Officer

Mr Matthew Kowaluk, Senior Research Officer

Ms Eleonora Fionga, Legislative Research Officer

Committee legal adviser

Professor Leighton McDonald

Committee contacts

PO Box 6100
Parliament House
Canberra ACT 2600

Phone: 02 6277 3050

Email: scrutiny.sen@aph.gov.au

Website: http://www.aph.gov.au/senate_scrutiny

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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.

Agriculture Biodiversity Stewardship Market Bill 2022

Purpose	This bill seeks to establish a legislative framework to support a national voluntary agriculture biodiversity stewardship market. This will enable agricultural landholders to undertake projects that enhance or protect biodiversity in native species and receive a tradeable certificate for doing so. This bill will facilitate private investment in projects that will support biodiversity protection and restoration.
Portfolio	Agriculture, Water and the Environment
Introduced	House of Representatives on 9 February 2022

Incorporation of external materials existing from time to time[1]

1.2 This bill seeks to establish a framework for a biodiversity stewardship market that will facilitate projects to enhance or protect biodiversity in native species in Australia. Under the framework, project proponents will receive tradeable biodiversity certificates for projects they undertake. Requirements for biodiversity projects will be set out within protocol determinations made by the Agriculture Minister.

1.3 Subclause 45(5) provides that a protocol determination for the purposes of clause 45 may incorporate an instrument or other writing as in force or existing from time to time.

1.4 Similarly, subclause 197(3) provides that rules made for the purposes of clause 197 may incorporate an instrument or other writing as in force or existing from time to time.

1.5 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:

1 Clauses 45 and 197. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

- 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).

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

1.7 In relation to subclause 45(5) the explanatory memorandum states:

> This approach is necessary to enable protocol determinations to reference up-to-date policy or operational documents that would apply to that type of project, for example, pest and weed management guidelines for particular regions or ecosystems, or fencing construction requirements that would apply across most or all protocol determinations.[2]

1.8 In relation to subclause 197(3) the explanatory memorandum states:

> …the rules made for the purposes of this provision would be able to refer to any matter contained in an instrument or other writing as in force or existing from time to time, if necessary to do so. For example, the rules could refer to a technical fencing standard published by a relevant industry body as in force from time to time.[3]

1.9 While acknowledging these justifications and recognising the importance of being able to regularly update and amend standards, policy and operational documents and guidelines, it is not clear to the committee from these explanations whether the incorporated materials will be freely and readily available.

1.10 Noting the above comments, the committee requests the minister's advice as to whether standards and any other documents incorporated into legislative instruments made under clauses 45 and 197 will be made freely available to all persons interested in the law.

2 Explanatory memorandum, p. 41.

3 Explanatory memorandum, p. 120.

Exemption from disallowance[4]

1.11 Clause 55 of the bill seeks to provide that the Agriculture Minister may, by legislative instrument, direct the Agriculture Biodiversity Stewardship Market Advisory Committee to have regard to one or more specified matters in giving advice about the making, variation or revocation of a protocol determination. A note to clause 55 confirms that a direction given by the Agriculture Minister is not subject to the usual parliamentary disallowance procedure due to the operation of regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003*.[5]

1.12 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. In this instance, the explanatory memorandum provides no explanation, merely restating the effect of the provision.

1.13 At a general level, the committee does not consider the fact that an instrument will fall within one of the classes of exemption in the Legislation (Exemptions and Other Matters) Regulation 2015 to be, of itself, a sufficient justification for excluding parliamentary disallowance.[6] The committee agrees with the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation that 'any exclusion from parliamentary oversight… requires that the grounds for exclusion be justified in individual cases, not merely stated'.[7]

1.14 This issue has been highlighted recently in the committee's review of the *Biosecurity Act 2015*,[8] the inquiry of the Senate Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from

4 Clause 55. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

5 See table item 2, section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.

6 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.

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

8 *See Review of exemption from disallowance provisions in the Biosecurity Act 2015: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Completed_inquiries; First Report,* Scrutiny Digest 7 of 2021, chapter 4, pp. 33-34; and *Second Report,* Scrutiny Digest 1 of 2022, chapter 4, pp. 76-86.

parliamentary oversight,[9] 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.[10] The committee therefore expects that the explanatory memorandum to a bill that authorises the making of a legislative instrument that is exempt from disallowance to specify why the exemption is appropriate in the particular circumstances, including an explanation of the exceptional circumstances that may justify an exemption.

1.15 **In light of the above, the committee requests the minister's advice regarding:**

- **why it is considered necessary and appropriate to provide that directions made under clause 55 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.**

Significant matters in delegated legislation[11]

1.16 Clause 87 of the bill seeks to provide for fit and proper person tests for individuals, body corporates and trusts. A person who does not pass the fit and proper person test set out at clause 87 would not satisfy the criteria for approval of registration of a biodiversity project.[12] In addition, the Regulator may cancel the registration of an existing biodiversity project if a person ceases to be a fit and proper person.[13] The Regulator may also only issue a biodiversity certificate if satisfied that an applicant for a certificate passes the fit and proper person test.[14]

1.17 Subclause 87(1) provides that an individual passes the fit and proper person test if the individual is not an insolvent under administration and the individual is a fit and proper person having regard to whether any events specified in the rules have

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9 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.

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

11 Clause 87. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

12 Paragraphs 16(4)(h) and 20(2)(c).

13 Clause 30.

14 Paragraph 62(2)(a).

happened in relation to the person and any other matter specified in the rules. Subclause 87(2) provides for a similar test for body corporates that are not a Chapter 5 body corporate. Subclause 87(3) provides that a trust passes the fit and proper person test if the trustee(s) pass the relevant test as set out in either subclause 87(1) or subclause 87(2).

1.18 The committee's view is that significant matters, such as key details relating to a fit and proper person test, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> The rules would provide the detail, clarity and flexibility as to the events in relation to the fit and proper person test that the Regulator must have regard to. For example, breaches of certain Acts or regulations or convictions of specific offences. There is the potential for events to change with statutory amendments or Government policy and including this detail in the rules would allow flexibility and efficiency.[15]

1.19 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation. It is unclear to the committee from the explanation provided why further high-level guidance in relation to these matters cannot be provided on the face of the bill. For example, the committee considers that it may be appropriate to specify within the bill which breaches of Acts or regulations or convictions of specific offences will be relevant to the fit and proper person test, alongside a rule-making power so as to ensure an appropriate level of detail is included within the primary legislation while still ensuring the necessary flexibility to adapt the fit and proper person test over time.[16]

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

- **why it is considered necessary and appropriate to leave key details of the fit and proper person test set out at clause 87 to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

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15 Explanatory memorandum, p. 60.

16 See, for example, section 372 of the *Export Control Act 2020.*

Broad delegation of administrative powers[17]

1.21 Part 13 of the bill seeks to provide for the making of biodiversity maintenance declarations. Biodiversity maintenance declarations would be made by the Clean Energy Regulator (the Regulator) where a relinquishment notice is, or is likely, to be given in relation to a biodiversity certificate and the notice has not been complied with or is likely not to be complied with.[18]

1.22 A biodiversity maintenance declaration may be made in relation to a specified area of land that is, or has been, a project area, or a part of it, for a project that is, or has been, a registered biodiversity project.

1.23 A biodiversity maintenance declaration may specify one or more activities that are 'declared prohibited activities',[19] in relation to a relevant biodiversity maintenance area.[20] A person who carries out a prohibited activity specified in a biodiversity maintenance declaration may be liable to a civil penalty.[21]

1.24 Under clause 125 the Regulator may delegate a power to make, vary or revoke a biodiversity maintenance declaration to a member of the Regulator. The delegate would be required to comply with any written directions of the Regulator in exercising a delegated power.

1.25 The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.26 In this regard, the explanatory memorandum states:

> It is the intention that the delegates would be senior officials of the Regulator, who have knowledge and expertise in biodiversity functions or

17 Clause 125. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

18 A 'relinquishment notice' is a notice given by the Regulator under any of the following provisions: subclause 110(2) (false or misleading information), subclause 111(2) (cancellation of registration of biodiversity project), subclause 112(2) (reversal of biodiversity outcome other than due to natural disturbance or conduct etc.), or subclause 113(2) (reversal of biodiversity outcome due to natural disturbance or conduct and no mitigation happens).

19 Subclauses 120(4) and (5).

20 Subclauses 120(1) and (2).

21 Clause 121.

> responsibility and direct oversight of the scheme. This would improve the efficiency of the administration and management of the scheme, noting that the delegates would otherwise be prevented from being delegated any of the Regulator's powers to make, vary or revoke a biodiversity maintenance declaration.[22]

1.27 While noting this explanation, the committee considers that a desire for administrative efficiency is not, of itself, sufficient justification for allowing a broad delegation of administrative powers. Moreover, it is not clear to the committee from the explanation provided why it would not be possible to include within the bill a provision limiting the delegation of powers under clause 125 to senior officials of the Regulator. As noted above, the committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service.

1.28 The committee requests the minister's advice as to why it is considered necessary and appropriate to allow the Clean Energy Regulator's powers to make, vary or revoke a biodiversity maintenance declaration under clause 125 to be delegated to any member of the Regulator.

No-invalidity clause[23]

1.29 As noted above, under clause 120 of the bill the Regulator may, by legislative instrument, make a biodiversity maintenance declaration in relation to a specified area of land known as a biodiversity maintenance area.

1.30 Subclause 120(7) provides that a failure to give a notice of the making of a biodiversity maintenance declaration to the project proponent for the maintained project, the relevant land registration official, and any other person specified in the rules, does not affect the validity of the biodiversity maintenance declaration.

1.31 Similarly, subclauses 123(7) and 124(5) provide that a failure to give a notice of the making of a variation or revocation of a biodiversity maintenance declaration does not affect the validity of the variation or revocation.

1.32 A legislative provision that indicates 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

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22 Explanatory memorandum, p. 86.

23 Subclauses 120(7), 123(7) and 124(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

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. In this instance, the explanatory memorandum provides no explanation, merely restating the effect of the provisions.

1.33 As the explanatory materials do not adequately address this issue, the committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to include a no-invalidity clause in subclauses 120(7), 123(7) and 124(5) of the bill.

Immunity from liability[24]

1.34 Clause 188 provides that certain persons listed at paragraphs 188(a) to (l) are protected from civil liability for damages for, or in relation to, an act or matter done, or omitted to be done, in good faith in the performance of functions or the exercise of powers under the bill.

1.35 The immunities provided for under clause 188 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 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. The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified in the explanatory materials. In this instance, the explanatory memorandum states that:

> This type of provision is used in other Commonwealth legislation and enables persons with statutory functions to perform their functions without fear of legal action being taken against them, as long as they perform those functions in good faith.[25]

1.36 The committee considers that a desire for administrative efficiency is not, of itself, sufficient justification for conferring immunity from liability. Moreover, the committee does not consider consistency with existing provisions to be a sufficient justification for conferring immunity from liability. In this instance, the committee's

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24 Clause 188. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

25 Explanatory memorandum, p. 118.

concerns are heightened given the broad range of persons on whom immunity is conferred under clause 188.

1.37 In light of the above, the committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to confer immunity from liability on the Agriculture Minister, a delegate of the Agriculture Minister, the Secretary, a delegate of the Secretary, the Clean Energy Regulator, a delegate of the Regulator, an inspector, a person assisting an inspector, an audit team leader, a person assisting an audit team leader, an Agriculture Biodiversity Stewardship Market Advisory Committee (ABSMAC) member or a person assisting the ABSMAC.

Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022
Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022

Purpose	Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022 and Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022 seek to propose appropriations from the Consolidated Revenue Fund for the ordinary annual services of the Government. The bills propose additional appropriation to cover the cash flow requirements for Coronavirus response programs that need funding through February and March 2022. These bills are necessary due to the significant impacts of the COVID-19 variants on the Australian community, for which funding is required before the usual time for Parliamentary passage of Appropriation Bills (Nos. 3 and 4) 2021-2022.
Portfolio	Finance
Introduced	House of Representatives on 9 February 2022

Parliamentary scrutiny—appropriations determined by the Finance Minister[26]

1.38 The committee considers that the Advance to the Finance Minister (AFM) provisions in clause 10 of Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022 and clause 12 of Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022 give rise to similar issues to those raised by the committee in *Scrutiny Digest 8 of 2021* in relation to the *Appropriation Act (No. 1) 2021-2022* and the *Appropriation Act (No. 2) 2021-2022*.[27]

1.39 The committee notes that the amount available under the AFM provisions in these bills—$5 billion—is the same as the total amount available under the *Appropriation Act (No. 1) 2021-2022* and the *Appropriation Act (No. 2) 2021-2022*. However, subclause 10(3) of Appropriation (Coronavirus Response) Bill (No. 1) 2021-2022 and subclause 12(3) of Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022 provide that an AFM determination under these bills must relate to expenditure for the purposes of responding to circumstances relating to COVID-19.

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

27 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021*, pp. 8-11.

1.40 **The committee welcomes the inclusion of these provisions which limit the purposes for which additional funds may be allocated to COVID-19 response measures.**

1.41 **The committee otherwise draws its general scrutiny concerns about AFM provisions to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the Finance Minister to determine the specific purposes for which up to $5 billion in additional funds may be allocated in legislative instruments not subject to disallowance.**

1.42 In *Scrutiny Digest 13 of 2021*, the committee welcomed advice from the minister that the additional transparency measures applying in relation to AFM determinations made since the 2020-2021 supply bills would continue in relation to future appropriation bills and that details of these transparency measures would be included within explanatory memoranda to future bills.[28]

1.43 The committee thanks the minister for responding constructively to its proposals regarding the provision of additional information about transparency measures applying to AFM provisions within explanatory memoranda to future appropriation bills.

1.44 In light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on these matters.

28 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2021*, pp. 20-21.

Appropriation Bill (No. 3) 2021-2022
Appropriation Bill (No. 4) 2021-2022

Purpose	The Appropriation Bill (No. 3) 2021-2022 seeks to propose appropriations from the Consolidated Revenue Fund for the ordinary annual services of the Government in addition to amounts appropriated through the *Appropriation Act (No. 1) 2021-2022* and the *Appropriation (Coronavirus Response) (No. 1) 2021-2022*. The Appropriation Bill (No. 4) 2021-2022 seeks to propose appropriations from the Consolidated Revenue Fund for services that are not the ordinary annual services of the Government in addition to amounts appropriated through *Appropriation Act (No. 2) 2021-2022* and the *Appropriation (Coronavirus Response) Bill (No. 2) 2021-2022*. The bills provides for the appropriation of specified amounts for expenditure by Australian Government entities, primarily being non-corporate Commonwealth entities under the *Public Governance, Performance and Accountability Act 2013*.
Portfolio	Finance
Introduced	House of Representatives on 10 February 2022

Parliamentary scrutiny—ordinary annual services of the government[29]

1.45 Under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation.

1.46 Appropriation Bill (No. 3) 2021-2022 seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.47 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or

29 Various provisions of Appropriation Bill (No. 3) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.[30]

1.48 The Senate Standing Committee on Appropriations and Staffing[31] has also actively considered the inappropriate classification of items as ordinary annual services of the government.[32] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[33]

1.49 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 the Senate resolved:

1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]

2) That appropriations for expenditure on:
    a) the construction of public works and buildings;
    b) the acquisition of sites and buildings;
    c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
    d) grants to the states under section 96 of the Constitution;
    e) new policies not previously authorised by special legislation;
    f) items regarded as equity injections and loans; and
    g) existing asset replacement (which is to be regarded as depreciation),

    are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

30 See Senate standing order 24(1)(a)(v).

31 Now the Senate Standing Committee on Appropriations, Staffing and Security.

32 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

33 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

1.50 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

> completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities of government and new programs and projects or to identify the expenditure on each of those areas.[34]

1.51 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.[35]

1.52 Despite these comments, and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.[36]

1.53 Based on the Senate resolution of 22 June 2010, it appears that at least part of the initial expenditure in relation to the following measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 3) 2021-2022:

- Certifying Australian Cosmetics Exports ($8.5 million over four years);[37] and
- Territories Stolen Generations Redress Scheme ($312.7 million over four years from 2021-22, and $65.8 million in 2025-26).[38]

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34 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

35 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

36 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, *Senate Hansard*, 19 March 2018, pp. 1487-1490.

37 Mid-Year Economic and Fiscal Outlook 2021-22, p. 204.

38 Mid-Year Economic and Fiscal Outlook 2021-22, p. 216.

1.54 While it is not the committee's role to consider the policy merit of these measures, the committee considers that they may have been inappropriately classified as 'ordinary annual services', thereby impacting upon the Senate's ability to subject the measures to an appropriate level of parliamentary scrutiny.

1.55 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of occasions;[39] however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

1.56 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.57 The committee notes that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

1.58 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 3) 2021-2022 which should only contain appropriations that are not amendable by the Senate).

Parliamentary scrutiny—appropriations determined by the Finance Minister[40]

1.59 Section 10 of *Appropriation Act (No. 1) 2021-2022* (Appropriation Act No. 1) enables the Finance Minister to allocate additional funds to entities when satisfied that there is an urgent need for expenditure and the existing appropriations are inadequate. The allocated amount is referred to as the Advance to the Finance

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39 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014,* pp. 402-406; *Fourth Report of 2015*, pp. 267-271; *Alert Digest No. 6 of 2015*, pp. 6-9; *Fourth Report of 2016*, pp. 249-255; *Alert Digest No. 7 of 2016*, pp. 1-9; *Scrutiny Digest 2 of 2017*, pp. 1-5; *Scrutiny Digest 6 of 2017*, pp. 1-6; *Scrutiny Digest 12 of 2017*, pp. 89-95; *Scrutiny Digest 2 of 2018*, pp. 1-7.

40 Clause 10 of Appropriation Bill (No. 3) 2021-2022; Clause 12 of Appropriation Bill (No. 4) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

Minister (AFM). The additional amounts are allocated by a determination made by the Finance Minister (an AFM determination). AFM determinations are legislative instruments, but they are not subject to disallowance.

1.60 Subsection 10(2) of Appropriation Act No. 1 provides that when the Finance Minister makes such a determination the Appropriation Act has effect as if it were amended to make provision for the additional expenditure. Subsection 10(3) caps the amounts that may be determined under the AFM provision in Appropriation Act No. 1 at $2 billion. Identical provisions appear in *Appropriation Act (No. 2) 2021-2022* (Appropriation Act No. 2), with a separate—$3 billion—cap in that Act. The amount available under the AFM provisions in these Acts—$5 billion—is significantly higher than that available in previous annual appropriation bills prior to the onset of the COVID-19 pandemic.[41]

1.61 The committee notes that the explanatory memorandum to Appropriation Bill (No. 3) 2021-2022 states that the AFM provisions '…take into consideration the unique and evolving nature of the COVID-19 pandemic. The extraordinary AFM provisions ensure the Government is able to respond to urgent and unforeseen expenditure requirements across the remainder of 2021-22, where it is not possible or not practical to pass further Appropriation Acts.'[42] The committee notes, however, that the use of the AFM provisions to allocate additional amounts is not limited on the face of the Acts to COVID-19 response measures.

1.62 The committee considers that, in allowing the Finance Minister to allocate additional funds to entities up to a total of $5 billion via non-disallowable delegated legislation, the AFM provisions in Appropriation Acts Nos. 1 and 2 delegate significant legislative power to the executive. While this does not amount to a delegation of the power to create a new appropriation, the committee notes that one of the core functions of the Parliament is to authorise *and scrutinise* proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.[43] The AFM provisions leave the allocation of the purpose of certain appropriations in the hands of the Finance Minister, rather than the Parliament.

1.63 Subclause 10(1) of Appropriation Bill (No. 3) 2021-2022 seeks to provide that any determinations made under the AFM provisions in Appropriation Act No. 1 are to be disregarded for the purposes of the $2 billion cap in subsection 10(3) of that Act.

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41 For example, subsection 10(3) of *Appropriation Act (No. 1) 2019-2020* set a cap of $295 million and subsection 12(3) *Appropriation Act (No. 2) 2019-2020* set a cap of $380 million.

42 Explanatory memorandum, p. 10.

43 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017), [91].

The note to subclause 10(1) clarifies that this means that the Finance Minister would have access to the full $2 billion for the purposes of making AFM determinations under section 10 of Appropriation Act No. 1, regardless of any amounts that have already been determined under that section. Clause 12 of Appropriation Bill (No. 4) 2020-2021 contains identical provisions, which apply to the $3 billion cap in Appropriation Act No. 2.

1.64 In 2021-22 to date, the AFM provisions have been used to allocate funding:

- to support the construction of Centres for National Resilience in Victoria, Queensland and Western Australia to provide additional quarantine capacity for international travellers to Australia in light of the COVID-19 pandemic ($218 million);[44]
- to extend the availability of the Pandemic Leave Disaster Payment until 30 June 2022 ($66 million);[45]
- to further support the construction of Centres for National Resilience in Victoria, Queensland and Western Australia to provide additional quarantine capacity for international travellers to Australia in light of the COVID-19 pandemic ($403 million);[46]
- in relation to the extension of the availability of the Pandemic Leave Disaster Payment until 30 June 2022 ($920 million);[47] and
- to further support the construction of Centres for National Resilience in Victoria, Queensland and Western Australia to provide additional quarantine capacity for international travellers to Australia in light of the COVID-19 pandemic ($200 million).[48]

1.65 As noted above, under clause 10 of Appropriation Bill (No. 3) 2021-2022 and clause 12 of the Appropriation Bill (No. 4) 2021-2022, this amount ($1.8 billion) would be disregarded for the purposes of the $2 billion cap imposed by subsection 10(3) of Appropriation Act No. 1 and the $3 billion cap imposed by subsection 12(3) of Appropriation Act No. 2.

1.66 The explanatory memorandum to Appropriation Bill (No. 3) 2021-2022 suggests that exempting AFM determinations from disallowance '…reflects the need

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44 Advance to the Finance Minister Determination (No. 1 of 2021-2022) [F2021L01581].

45 Advance to the Finance Minister Determination (No. 2 of 2021-2022) [F2021L01771].

46 Advance to the Finance Minister Determination (No. 3 of 2021-2022) [F2021L01795].

47 Advance to the Finance Minister Determination (No. 4 of 2021-2022) [F2022L00028].

48 Advance to the Finance Minister Determination (No. 5 of 2021-2022) [F2022L00129].

for entities to have certainty of appropriation when making expenditures'.[49] The explanatory memorandum further states that:

> Disallowance of an AFM determination would reduce an entity's appropriation to its original level. Yet the urgent expenditure it has already undertaken validly prior to a disallowance, in reliance upon the determination, would count towards the newly reduced appropriation…
>
> Accordingly, disallowance would leave the entity with a shortfall in the appropriation available to fund the ongoing expenditure for which the Government originally budgeted and which the Parliament approved when it passed the Appropriation Act.[50]

1.67 In *Scrutiny Digest 13 of 2021*, the committee welcomed advice from the minister that the additional transparency measures applying in relation to AFM determinations made under the 2020-2021 supply bills would continue in relation to future appropriation bills and that details of these transparency measures would be included within explanatory memoranda to future bills.[51]

1.68 The committee welcomes the inclusion of this additional information regarding the AFM provisions, including associated transparency measures, in the explanatory memorandums to the bills. The committee considers that the provision of this additional information provides the Parliament with important details to assist in scrutiny of the AFM provisions.

1.69 However, the committee concurs with the view expressed by the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the disallowance status of AFM determinations. In particular, the committee agrees that if the AFM is used for a genuine emergency situation, the likelihood of it subsequently being disallowed would be virtually non-existent, and not sufficient to justify an exemption from disallowance. Instead, the potential for disallowance would simply operate to ensure that the AFM is only utilised in genuinely urgently circumstances, as intended by the Parliament.[52]

1.70 The committee thanks the minister for responding constructively to its proposals regarding the provision of additional information about transparency measures applying to AFM provisions within explanatory memoranda to future appropriation bills.

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49 Explanatory memorandum, p. 10.

50 Explanatory memorandum, pp. 10-11.

51 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2021*, pp. 20-21

52 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 1 of 2022*, 25 January 2022, pp. 4-6.

1.71 In light of the matters raised by the committee in relation to the Advance to the Finance Minister provisions in Appropriation Acts No. 1 and No. 2,[53] the committee draws to the attention of senators the proposal to disregard previous expenditure of $1.8 billion for the purposes of the $5 billion cap on amounts that may be determined under the Advance to the Finance Minister in 2021-22. The committee notes that the effect of this proposal is that $1.8 billion in additional funds will be available for expenditure via non-disallowable legislative instrument.

Parliamentary scrutiny—measures earmarked as 'not for publication'[54]

1.72 Clause 4 of both Appropriation Bill (No. 3) 2021-2022 and Appropriation Bill (No. 4) 2021-2022 provide that portfolio statements (in this case known as Portfolio Additional Estimates Statements – or PAES) are relevant documents for the purposes of section 15AB of the *Acts Interpretation Act 1901*. That is, clause 4 provides that the PAES may be considered in interpreting the provisions of each bill. Moreover, the explanatory memorandums to the bills state that they should be read in conjunction with the PAES.[55]

1.73 Noting the important role of the PAES in interpreting Appropriation Bills No. 3 and No. 4, the committee has scrutiny concerns in relation to the inclusion of measures within the PAES that are earmarked as 'not for publication' (nfp), meaning that the proposed allocation of resources to those budget measures is not published within the PAES. Various reasons are provided for marking a measure as nfp, including that aspects of the relevant program are legally or commercially sensitive.

1.74 Parliament has a fundamental constitutional role to scrutinise and authorise the appropriation of public money. As outlined by the High Court, the appropriation process is intended to 'give expression to the foundational principle of representative and responsible government that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself.'[56]

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53 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2021*, pp. 8-11 and *Scrutiny Digest 13 of 2021*, pp. 20-21.

54 Clause 14 of Appropriation Bill (No. 3) 2021-2022; Clause 14 of Appropriation Bill (No. 4) 2021-2022 . The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

55 Explanatory memorandum to Appropriation Bill (No. 1) 2021-2022, p. 2; Explanatory memorandum to Appropriation Bill (No. 2) 2021-2022, p. 2.

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

1.75 Given the importance of parliamentary scrutiny over the appropriation process, the committee considers that the default position should be to publish the full amount of funding allocated to each Budget measure. However, where it is necessary and appropriate not to publish the total funding amount for a measure, the committee considers that an explanation should be included within the PAES. The committee therefore has significant scrutiny concerns in relation to the inclusion of measures within the PAES that are earmarked as NFP where there is either no, or very limited, explanation as to why it is appropriate to mark the measure as NFP.

1.76 The committee notes that all measures earmarked as NFP within the Mid-Year Economic and Fiscal Outlook for 2021-22 contain at least a high-level explanation as to why it is necessary not to publish the funding level for that measure. It is not clear to the committee why the PAES does not at least contain similar guidance. For example, MYEFO contains an explanation as to why it is considered necessary not to publish total funding amounts for the COVID-19 Response Package for vaccines and treatments purchases measure,[57] the maintenance of the Former British Nuclear Testing Site at Maralinga measure,[58] and the Northern Endeavour Decommission – additional funding measure.[59] However, there is no equivalent explanation for any of these measures within the PAES. The committee notes that this issue appears to have been at least partly addressed with respect to future portfolio statements, given that the Department of Finance *Guide to Preparing the 2022-23 Portfolio Budget Statements* has been updated to include a new requirement that a high-level explanation must be included within a portfolio budget statement to describe why a measure has been reported as 'not for publication'.[60]

1.77 The committee welcomes the new requirement to include a high-level explanation within future portfolio statements and considers that the provision of this additional information will provide the Parliament with important details to assist in scrutiny of measures earmarked as 'not for publication'. However, the committee also has scrutiny concerns in relation to the quality of the explanations provided in regard to a number of measures within the PAES and MYEFO. More detailed explanations as to why it is appropriate to mark a Budget measure as NFP would allow for a greater level of parliamentary scrutiny over these explanations. From the explanations provided, it would appear that several of the measures categorised as NFP within the PAES may be inappropriately categorised. For example, it is currently unclear to the committee from the explanations provided why it is appropriate not to publish total amounts in relation to the National Collecting Institutions—preserving Australia's

57 Mid-Year Economic and Fiscal Outlook 2021-22, p. 245.

58 Mid-Year Economic and Fiscal Outlook 2021-22, p. 265.

59 Mid-Year Economic and Fiscal Outlook 2021-22, p. 266.

60 Department of Finance, *Guide to Preparing the 2022-23 Portfolio Budget Statements*, pp. 7 and 36.

cultural heritage measure,[61] or the Commonwealth Parliamentary Workplaces—Independent Review and ongoing support measures measure.[62] Both of these measures are earmarked as NFP due to commercial sensitivities. The committee notes that the mere existence of a commercial element in relation to a Budget measure is likely not sufficient, of itself, as a justification for not publishing any of the funding amount for that measure. In this regard, the lack of detailed explanation makes it difficult for the Parliament and others to interrogate the rationale behind this classification.

1.78 The committee reiterates its scrutiny concerns that the Parliament is being asked to authorise appropriations without clear information about the amounts that are to be appropriated under each individual measure.

1.79 In light of these ongoing scrutiny concerns, the committee thanks the minister for updating the Department of Finance *Guide to Preparing the 2022-23 Portfolio Budget Statements* to reflect the committee's scrutiny concerns as outlined at paragraph 2.50 of *Scrutiny Digest 16 of 2021*.[63]

1.80 The committee will continue to consider this important matter in its scrutiny of future Appropriation bills.

Parliamentary scrutiny—section 96 grants to the states[64]

1.81 Clause 16 of Appropriation Bill (No. 4) 2021-2022 deals with Parliament's power under section 96 of the Constitution to provide financial assistance to the states. Section 96 states that 'the Parliament may grant financial assistance to any State *on such terms and conditions as the Parliament thinks fit*'.

1.82 Clause 16 seeks to delegate this power to the relevant minister and, in particular, provides the minister with the power to determine:

- terms and conditions under which payments to the states, the Australian Capital Territory and the Northern Territory or a local government authority may be made;[65] and

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61 Mid-Year Economic and Fiscal Outlook 2021-22, pp. 277-278.

62 Mid-Year Economic and Fiscal Outlook 2021-22, p. 217.

63 Department of Finance, *Guide to Preparing the 2022-23 Portfolio Budget Statements*, pp. 7 and 36.

64 Clause 16 and Schedules 1 and 2 to Appropriation Bill (No. 4) 2021-2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

65 Paragraph 16(2)(a) of Appropriation Bill (No. 4) Bill 2021-2022.

- the amounts and timing of those payments.[66]

1.83 Subclause 16(4) provides that determinations made under subclause 16(2) are not legislative instruments. The explanatory memorandum states that this is:

> because these determinations are not altering the appropriations approved by Parliament. Determinations under subclause 16(2) are administrative in nature and will simply determine how appropriations for State, ACT, NT and local government items will be paid.[67]

1.84 The committee has commented in relation to the delegation of power in these standard provisions in previous even-numbered appropriation bills.[68]

1.85 The committee takes this opportunity to reiterate that the power to make grants to the states and to determine terms and conditions attaching to them is conferred on the Parliament by section 96 of the Constitution. While the Parliament has largely delegated this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to effective parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.86 The committee leaves to the Senate as a whole the appropriateness of clause 16 of Appropriation Bill (No. 4) 2021-2022, which allows ministers to determine terms and conditions under which payments to the states, territories and local government may be made and the amounts and timing of those payments.

Parliamentary scrutiny—debit limits[69]

1.87 Section 13 of Appropriation Act No. 2 specifies debit limits for certain grant programs. A debit limit must be set each financial year otherwise grants under these programs cannot be made. The total amount of grants cannot exceed the relevant debit limit set each year.

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66 Paragraph 16(2)(b) of Appropriation Bill (No. 4) Bill 2021-2022.

67 Explanatory memorandum to Appropriation Bill (No. 4) 2021-2022, p. 15.

68 See Senate Standing Committee for the Scrutiny of Bills, *Seventh Report of 2015*, pp. 511-516; *Ninth Report of 2015*, pp. 611-614; *Fifth Report of 2016*, pp. 352-357; *Eighth Report of 2016*, pp. 457-460; *Scrutiny Digest 3 of 2017*, pp. 51-54; *Scrutiny Digest 6 of 2017*, pp. 7-10; *Scrutiny Digest 12 of 2017*, pp. 99-104; *Scrutiny Digest 2 of 2018*, pp. 8-11; *Scrutiny Digest 6 of 2018*, pp. 9-12; *Scrutiny Digest 4 of 2019*, pp. 9-12; *Scrutiny Digest 15 of 2020*, pp. 16-17; *Scrutiny Digest 8 of 2021*, pp. 13-14.

69 Clause 13 of Appropriation Bill (No. 4) 2021-2022. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

1.88 For 2021-22, Appropriation Act No. 2 specifies the following debit limits:

- General purpose financial assistance to the states—$5 billion;[70] and
- National partnership payments to the states—$25 billion.[71]

1.89 In relation to level of these limits, the explanatory memorandum to Appropriation Bill (No. 4) 2021-2022 states that:

> These debit limits were set to ensure the Government had appropriate provisions in place to fund existing undertakings to the States, new programs that may be required between Appropriation Bills, and to respond to major unexpected events such as large-scale natural disasters.
>
> Due to the ongoing nature of the COVID-19 pandemic, the latest forecast for [national partnership] payments under section 16 of the FFR Act indicate that by 30 June 2022 the total is likely to be just under the debit limit established in the *Appropriation Act (No. 2) 2021-2022*, leaving limited capacity to make other unforeseen payments. Accordingly, the Bill proposes that the national partnership payments debit limit for the purposes of section 16 of the FFR Act is increased on a one-off basis to $35,000,000,000 in total, from its current level of $25,000,000,000. This revised debit limit will be available when the Bill commences as an Act, through to the end of this financial year (30 June 2022).[72]

1.90 In explaining the rationale for the proposed increase in the debit limit for national partnership payments from $25 billion to $35 billion, the explanatory memorandum states:

> At the time the Appropriation Bill (No. 2) 2021-2022 was considered, the Australian Government estimated that national partnership payments under section 16 of the FFR Act would be $15.8 billion in 2021-22. However, at the 2021-22 Mid-Year Economic and Fiscal Outlook (MYEFO), the revised estimates were that national partnership payments would be $24.1 billion by 30 June 2022. This is close to the existing debit limit and would leave insufficient capacity to make other exceptional or unforeseen payments.
>
> The main driver of the increase in payments since the last Budget is that, in response to COVID-19 outbreaks and lockdowns in 2021-22, the Australian Government jointly funded business support payments, administered by each of the States and Territories, with costs being shared on a 50:50 basis. At the 2021-22 MYEFO update, the Australian Government estimated that its share of business support programs across all jurisdictions would

70 Subsection 13(1) of *Appropriation Act (No. 2) 2021-2022*.

71 Subsection 13(2) of *Appropriation Act (No. 2) 2021-2022*.

72 Explanatory memorandum to Appropriation Bill (No. 4) 2021-2022, p. 12.

> constitute $7.3 billion. This was all additional to expected payments at the time the relevant debit limit was initially set.[73]

1.91 Finally, the explanatory memorandum confirms that the 'one-off increase for the remainder of this year reflects unique circumstances and is therefore not intended to set a new benchmark for future years'.[74]

1.92 The committee notes that in light of the expected expenditure of $24.1 billion, the debit limit proposed in this bill would allow an additional $10.9 billion in national partnership payments to be made in 2021-22 without the need to seek further parliamentary approval.

1.93 In relation to setting the debit limit at a high level, the explanatory memorandum states that:

> Increasing the debit limit to $35 billion on a temporary basis, through to the end of the financial year, would restore the gap between spending under section 16 and the debit limit, to a level consistent with the Australian Government's practice since 2014-15. It would ensure that the Australian Government has appropriate provisions in place to respond to any further unexpected events, such as natural disasters. This headroom does not remove any of the usual requirements in relation to Commonwealth expenditure, including in relation to legal authority to make expenditure.[75]

1.94 The committee welcomes the inclusion of additional information regarding the setting of debit limits in the explanatory memorandum to Appropriation Bill (No. 4) 2021-2022. The committee considers that the provision of this additional information provides the Parliament with important details to assist in scrutiny of the debit limit provisions.

1.95 The committee thanks the minister for responding constructively to its proposals regarding the provision of additional information about the setting of debit limits within appropriation bills and looks forward to these measures continuing for future appropriation bills.

1.96 The committee otherwise leaves to the Senate as a whole the appropriateness of clause 13 of Appropriation Bill (No. 4) 2021-2022, which appears to set the debit limit for national partnership payments well above the expected level of expenditure.

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73 Explanatory memorandum to Appropriation Bill (No. 4) 2021-2022, p. 13.

74 Explanatory memorandum to Appropriation Bill (No. 4) 2021-2022, p. 13.

75 Explanatory memorandum to Appropriation Bill (No. 4) 2021-2022, p. 13.

Australian Radioactive Waste Agency Bill 2022

Purpose	This bill seeks to establish the Australian Radioactive Waste Agency as a non-corporate Commonwealth entity. The Bill includes administrative and foundational provisions and sets out the Agency's functions. The Agency will be authorised to conduct activities under section 23 of the *National Radioactive Waste Management Act 2012* to safely manage all radioactive material that may have waste implications for Australia and, more broadly, to ensure the safe management of all radioactive material that may have waste implications for Australia.
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 16 February 2022

Exemption from disallowance[76]

1.97 The bill proposes to establish the Australian Radioactive Waste Agency (the Agency) as a non-corporate Commonwealth entity and to set out the Agency's functions.

1.98 Clause 11 of the bill provides that the minister may give written directions of a general nature to the Agency about the performance of its functions. The Agency must comply with such directions.

1.99 Clause 15 of the bill provides that the minister may give written directions to the Chief Executive Officer of the Agency about the performance of the Chief Executive Officer's functions. The Chief Executive Officer must comply with such directions.

1.100 Directions given under clauses 11 and 15 are legislative instruments, however they are not subject to parliamentary disallowance. The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within executive control or continues or is consistent with current arrangements does not, of itself, provide an adequate justification.

1.101 In this instance, the explanatory memorandum states that directions given under clauses 11 and 15 are legislative instruments but are not subject to disallowance by virtue of section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.[77]

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76 Part 2, clause 11 and Part 3, Division 2, clause 15. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

77 Explanatory memorandum, pp. 9 and 10.

1.102 At a general level, the committee does not consider the fact that an instrument will fall within one of the classes of exemption in the Legislation (Exemptions and Other Matters) Regulation 2015 to be, of itself, a sufficient justification for excluding parliamentary disallowance.[78] The committee agrees with the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation that 'any exclusion from parliamentary oversight… requires that the grounds for exclusion be justified in individual cases, not merely stated'.[79]

1.103 This issue has been highlighted recently in the committee's review of the *Biosecurity Act 2015*,[80] the inquiry of the Senate Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,[81] 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.[82] The committee therefore expects that the explanatory memorandum to a bill that authorises the making of a legislative instrument that is exempt from disallowance to specify why the exemption is appropriate in the particular circumstances, including an explanation of the exceptional circumstances that may justify an exemption.

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

- **why it is considered necessary and appropriate to provide that directions given under clauses 11 and 15 are not subject to disallowance; and**

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78 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.

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

80 *See Review of exemption from disallowance provisions in the Biosecurity Act 2015: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Completed_inquiries; First Report,* Scrutiny Digest 7 of 2021, chapter 4, pp. 33-34; and *Second Report,* Scrutiny Digest 1 of 2022, chapter 4, pp. 76-86.

81 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.

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

- **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.**

Crimes Legislation Amendment (Ransomware Action Plan) Bill 2022

Purpose	This bill seeks to amend the *Criminal Code Act 1995*, the *Crimes Act 1914* and the *Proceeds of Crime Act 2002* to modernise criminal offences and procedures to respond to the threat of ransomware.
Portfolio	Home Affairs
Introduced	House of Representatives on 17 February 2022

Reversal of the evidential burden of proof[83]

1.105 Item 1 of Schedule 1 to the bill seeks to repeal section 476.3 of the *Criminal Code* and substitute it with an amended specialised geographical jurisdiction provision for computer offences under Part 10.7 of the Criminal Code. Proposed subsection 467.3(4) provides an exemption (offence-specific defence) for primary offences in Part 10.7 stating that a person will not commit a primary offence against Part 10.7 if:

- the offence occurs in a foreign country;
- the person is not an Australian citizen;
- proposed paragraph 476.3(1)(d) does not apply; and
- there is no law of that foreign country that creates a corresponding offence.

1.106 Proposed subsection 467.3(6) creates a similar offence-specific defence in relation to ancillary offences in Part 10.7.

1.107 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[84] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

83 Schedule 1, item 1, proposed section 476.3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

84 Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.108 The committee notes that the *Guide to Framing Commonwealth Offences*[85] 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.[86]

1.109 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 476.3(4) and 476.3(6) have not been addressed in the explanatory materials.

1.110 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*.[87]

Significant matters in delegated legislation[88]

1.111 Schedule 3 to the bill seeks to make a number of amendments to the *Crimes Act 1914* (Crimes Act) in relation to the seizing of digital assets. Item 1 of Schedule 3 seeks to insert a new definition of digital asset, which includes that a digital asset means 'a right or thing prescribed by the regulations' and also provides that a digital asset 'does not include any right or thing that, under the regulations, is taken not to be a digital asset for the purposes of this Part'.

1.112 Item 7 of Schedule 3 seeks to insert proposed section 3FA into the Crimes Act. Proposed subsection 3FA(3) provides a definition of what constitutes seizing a digital asset which includes, at paragraph (c), transferring the digital asset in circumstances

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

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

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

88 Schedule 3, items 1, 7, 11 and 12, proposed sections 3C, 3FA, 228A and 338. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

prescribed by the regulations. These definitions are also replicated in items 11 and 12 of Schedule 3 to the bill in relation to the *Proceeds of Crime Act 2002*.

1.113 The committee's consistent scrutiny view is that significant matters, such as key elements of definitions central to the operation of a legislative scheme, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In relation to the definition of 'digital asset', the explanatory memorandum states:

> However, recognising the evolving nature of digital assets, the second limb of the definition is designed to provide flexibility to tailor the definition as technology changes and in the use of digital assets in criminal offending changes.[89]

1.114 In relation to the definition of 'seizing' a digital asset, the explanatory memorandum provides a similar justification, noting that the provision is 'designed to provide flexibility to expressly prescribe other ways in which digital assets can be seized'.[90]

1.115 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for the inclusion of significant matters in delegated legislation. The committee's scrutiny concerns in this instance are heightened noting the definitions relate to the exercise of coercive powers.

1.116 The committee requests the minister's more detailed advice regarding:

- **why it is considered necessary and appropriate to leave key elements of the definitions of 'digital asset' and 'seizing' a digital asset to delegated legislation; and**
- **whether the bill could be amended to include further high-level guidance regarding these matters on the face of the primary legislation.**

89 Explanatory memorandum, p. 19.

90 Explanatory memorandum, p. 22.

Criminal Code Amendment (Firearms Trafficking) Bill 2022

Purpose	The bill seeks to amend the *Criminal Code Act 1995* to double the maximum penalty for existing firearms trafficking offences and introduce new aggravated offences for trafficking 50 or more firearms or firearm parts, or a combination of firearms and firearm parts, within a six-month period within Australia.
Portfolio	Home Affairs
Introduced	House of Representatives on 16 February 2022

Significant penalties[91]

1.117 The bill seeks to amend the *Criminal Code Act 1995* (Criminal Code) in relation to firearms trafficking offences within Divisions 360 and 361 of the Criminal Code, including by amending the penalty amounts for existing offences and by introducing new offences. Specifically, the bill raises the maximum penalties for the offences of:

- trafficking firearms and firearm parts within Australia (in Division 360 of the Criminal Code); and
- trafficking firearms and firearm parts into and out of Australia (in Division 361 of the Criminal Code).

1.118 The maximum penalties for these offences will be doubled from 10 years imprisonment or a fine of 2,500 penalty units or both to 20 years imprisonment or a fine of 5,000 penalty units or both.

1.119 In addition, the bill establishes new aggravated offences relating to the trafficking of firearms and firearm parts within Australia or into or out of Australia. The maximum penalty for these new aggravated offences is imprisonment for life or a fine of 7,500 penalty units or both.

1.120 The committee's expectation is that the rationale for the imposition of significant penalties will be fully outlined in the explanatory memorandum. In this instance, the explanatory memorandum provides the following explanation for increasing the penalties applying to existing firearm trafficking offences in Divisions 360 and 361 of the Criminal Code:

91 Schedule 1, item 1, proposed subsections 360.2(1) and 360.2(2); item 4, proposed subsection 360.3(1); item 5, proposed subsection 360.3(1A); item 9, proposed subsections 361.2(1), 361.2(2), 361.3(1) and 361.3(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

> The increased maximum penalty is necessary to ensure the serious offences of trafficking firearms within and into and out of Australia are matched by commensurate punishments. Consistent with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the increased maximum penalty will be adequate to deter and punish the offence. This ensures sentences imposed by courts can continue to take into account the particular circumstances of the offence and the offender.
>
> The new maximum penalty reflects the seriousness of the conduct covered by the offences, and addresses the clear and serious social and systemic harms associated with the illegal firearms trade.[92]

1.121 In relation to imposing a maximum sentence of life imprisonment for the new aggravated offences, the explanatory memorandum states:

> … life sentences for aggravated offences is appropriate as the offence is of a similar seriousness to existing offences punishable by life imprisonment, as the consequences of committing these offences can lead to similar harms. Similar offences that impose a maximum penalty of life imprisonment include, large-scale drug trafficking and terrorism.
>
> Increased maximum penalties for firearms trafficking offences and life sentences for the aggravated offences are proportionate as they support the courts' discretion when sentencing offenders. [93]

1.122 The committee acknowledges the importance of ensuring adequate deterrence for crimes that result in serious social and systemic harms. However, from a scrutiny perspective, the committee considers that significant penalties should also be justified by reference to similar offences under Commonwealth law. This not only promotes consistency, but guards against the risk that the liberty of a person is unduly limited through the application of disproportionate penalties. In this respect, the committee notes that the *Guide to Framing Commonwealth Offences* states that a penalty 'should be consistent with penalties for existing offences of a similar kind or…seriousness. This should include a consideration of…other comparable offences in Commonwealth legislation'.[94] In this instance, the statement of compatibility and explanatory memorandum merely assert that other Commonwealth offences of a similar level of seriousness also impose life sentences. However, it is not clear to the committee from the explanation provided which specific offences are being referred to, nor how these offences are similar in nature to those in the bill, such as to make the use of significant penalties appropriate. Moreover, the explanatory memorandum

92 Explanatory memorandum, pp. 9-10.

93 Statement of compatibility, pp. 4-5.

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

provides no reference to offences which carry a similar penalty to those proposed in relation to the basic offences within Divisions 360 and 361.

1.123 The committee's scrutiny concerns in relation to this bill are heightened given the significant custodial penalties the bill is seeking to impose. The committee's scrutiny concerns are further heightened in this instance due to the application of strict liability and absolute liability to elements of these offences.[95]

1.124 As the explanatory memorandum does not appear to provide a sufficiently detailed justification as to why it is considered necessary and appropriate to impose significant penalties for the offences in proposed sections 360.2, 360.3, 361.2 and 361.3, the committee requests the minister's detailed advice as to the justification for the significant penalties that may be imposed under those provisions, by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.

Mandatory minimum sentencing[96]

1.125 Schedule 1 to the bill proposes to introduce mandatory minimum sentences for all offences under Divisions 360 and 361 of the Criminal Code, including the new aggravated offences which the bill is seeking to insert into Divisions 360 and 361. A mandatory minimum sentence of five years' imprisonment will apply to these offences. Courts will have the discretion to reduce this minimum sentence by up to 25% where a person pleads guilty to an offence and by up to a further 25% where a person has cooperated with law enforcement agencies in the investigation of the offence.[97] The bill does not seek to impose a minimum non-parole period. In addition, the mandatory minimum sentencing requirements do not apply in relation to persons who were under the age of 18 at the time the relevant offence was committed.[98]

1.126 In relation to the use of mandatory minimum sentences, the statement of compatibility for the bill states that:

> The mandatory minimum penalty of five years' imprisonment and the proposed increased maximum penalties, including life imprisonment for aggravated offences, are necessary to ensure the serious offences of firearms trafficking are matched by commensurate punishments. There are

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95 See, in relation to strict liability, Schedule 1, item 1, proposed subsection 360.1(2D); item 5, proposed subsection 360.3(1C); item 9, proposed subsection 361.2(4) and 361.3(4). See, in relation to absolute liability, Schedule 1, item 1, proposed subsection 360.1(2C); item 5, proposed subsection 360.3(1B); item 9, proposed subsection 361.2(3) and 361.3(3).

96 Schedule 1, item 8, proposed section 360.3A; item 10, proposed section 361.5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

97 Schedule 1, item 8, proposed subsection 360.3A(3); item 10, proposed section 361.5(3).

98 Schedule 1, item 8, proposed subsection 360.3A(2); item 10, proposed subsection 361.5(2).

> clear and serious social and systemic harms associated with firearms trafficking, and the introduction of a mandatory minimum penalty and increased maximum penalties for the offences reflect the gravity of supplying firearms and firearm parts to the illicit market. The entry of even a small number of firearms into Australia's illicit firearms market can have a significant impact on the community. Due to their imperishable nature, firearms can remain within that market for many years and be accessed by individuals and groups who would use them to commit serious and violent crimes, such as murder. For example, in 2019 firearms were identified as being the type of weapon used in 22.2% of homicides in Australia.[99]

1.127 While the committee acknowledges the policy rationale for the use of mandatory minimum sentences, from a scrutiny perspective, the committee has consistently noted that mandatory minimum penalties necessarily undermine the discretion of judges to ensure that penalties imposed are proportionate in light of the individual circumstances of particular cases. While a court retains a discretion as to the non-parole period, a mandatory minimum sentence still requires that a person be subject to a penalty for that period (either imprisonment or subject to parole conditions), and sentencing principles generally provide that a non-parole period is to be in proportion to the head sentence.

1.128 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of setting mandatory minimum sentences, which limits judicial discretion, for firearms trafficking offences under Divisions 360 and 361 of the *Criminal Code Act 1995.*

99 Statement of compatibility, p. 4.

Education Legislation Amendment (2022 Measures No. 1) Bill 2022

Purpose	The bill seeks to amend the *Higher Education Support Act 2003* and also makes minor amendments to the *Tertiary Education Quality and Standards Agency 2011* in order to: • amend the student identifier requirements for a person's eligibility to receive Commonwealth assistance; • provide for new Higher Education Loan Program debt arrangements for rural, remote or very remote health practitioners; • clarify the operation of the student entitlement provisions in respect of enabling courses; • clarify the operation of certain provisions and improve and update the operation of HESA and the TEQSA Act; • reduce the amount of FEE-HELP debt incurred by students undertaking a unit of study in 2022 (FEE-HELP loan fee exemption); • provide that domestic students undertaking a microcredential course are eligible for FEE-HELP; and • provide that New Zealand citizens are eligible for HECS-HELP and FEE-HELP only if they are a resident in Australia for the duration of the unit.
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 17 February 2022

Significant matters in delegated legislation[100]

1.129 Item 39 of Schedule 1 to the bill seeks to insert new Division 144 of Part 4-1 of the *Higher Education Support Act 2003* (Higher Education Act) to deal with special measures for certain HELP debtors who are health practitioners. Proposed section 144-1 provides that a person is a location-preferred HELP debtor (health practitioner) in relation to a course of study if they meet certain criteria. A number of these criteria are left to the HELP Debtor Guidelines (Health Practitioners) (Health Practitioner Guidelines) including the type of registration or accreditation, the type of

100 Schedule 1, item 39, proposed sections 144-1, 144-5 and 144-10 and Schedule 3, item 3. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

work and the location and hours worked. The Health Practitioner Guidelines may also specify what constitutes an eligible course of study.

1.130 Proposed section 144-5 provides that the Secretary must, on the application of a person, determine that the indexation of the person's accumulated HELP debt for a course of study is to be reduced in relation to a financial year if the Secretary is satisfied that the person is a location-preferred HELP debtor and has met any requirements set out in the Health Practitioner Guidelines. This is replicated in proposed section 144-10 in relation to the reduction of a person's accumulated HELP debt.

1.131 Additionally, Schedule 3 to the bill seeks to amend the Higher Education Act to extend FEE-HELP eligibility to microcredential courses. Item 3 of Schedule 3 seeks to amend subclause 1(1) of Schedule 1 to the Higher Education Act to provide that a microcredential course means a course of instruction that consists of one or more units of study and meets the requirements specified in the FEE-HELP Guidelines.

1.132 The committee's view is that significant matters, such as the key details of who will be a location-preferred HELP debtor or what constitutes a microcredential course, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In relation to location-preferred HELP debtors, the explanatory memorandum contains no justification for why these matters have been left to delegated legislation. In relation to microcredential courses, the explanatory memorandum states:

> The ability to specify the detail about what courses are 'microcredential courses' in these Guidelines is intended to ensure that the Commonwealth can effectively pilot the measure and run an application process to identify appropriate 'microcredential courses' for FEE-HELP assistance.
>
> The FEE-HELP Guidelines will be a disallowable legislative instrument. The flexibility to include detail about what courses are 'microcredential courses' in the Guidelines is required because the Commonwealth intends to run an application process to identify appropriate microcredentials to form part of the pilot.[101]

1.133 It is unclear to the committee why at least high-level guidance could not be provided on the face of the primary legislation. The committee notes that delegated legislation, 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.

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

- **why it is considered necessary and appropriate for key details of who will be a location-preferred HELP debtor or what constitutes a microcredential course to be included in delegated legislation; and**

101 Explanatory memorandum, p. 30.

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

Higher Education Support Amendment (Australia's Economic Accelerator) Bill 2022

Purpose	This bill seeks to amend the *Higher Education Support Act 2003* to allow the minister to make grants: • to support arrangements to increase industry-led postgraduate research; and • to assist higher education providers to undertake programs of research which: o progress the development of technologies and services to a state of commercial investor readiness; and o are in sectors aligned with areas of national priority.
Portfolio	Education, Skills and Employment
Introduced	House of Representative on 17 February 2022

Significant matters in non-legislative instruments

Tabling of documents in Parliament[102]

1.135 Proposed section 42-1 provides that the Australia's Economic Accelerator (AEA) Advisory Board must make a research commercialisation strategy outlining the vision and objectives for translation and commercialisation of university research in areas of national priority and identify certain key issues. Proposed subsection 42-1(3) provides that the strategy will be in force for 5 years. Proposed subsection 42-1(5) provides that the minister must table the strategy in both Houses of the Parliament, although no timeframe is specified setting out how quickly the minister must table the report after it is given to him or her. Proposed subsection 42-1(6) provides that the research strategy is not a legislative instrument.

1.136 Proposed section 42-5 provides that the AEA Advisory Board must also formulate an investment plan for each year which contains written policies for the Australia's Economic Accelerator program, dealing with the following matters in relation to the year:

- areas of national priority;
- the total amount of funding available;

102 Schedule 1, item 3, proposed sections 42-1 and 42-5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

- any other matters the AEA Advisory Board considers appropriate to deal with to ensure the program meets the program's objectives.

1.137 It appears that these investment plans are not intended to be legislative instruments. It is unclear to the committee whether investment plans are intended to be formulated as a standalone document in relation to each year or whether the plan for a year will consist of numerous written policies. The explanatory memorandum does, however, indicate that the investment plans will likely set out significant matters relating to the Australia's Economic Accelerator program:

> The investment plan will set out specific and detailed advice on the investment opportunities within the national priority areas for a given year. The annual plan allows for the Australia's Economic Accelerator program to respond to developments in the research and industry sectors. The investment plan also provides for transparency over funding decisions and can set out directions for the Australia's Economic Accelerator program.[103]

1.138 Furthermore, there is no equivalent requirement to table investment plans in both Houses of the Parliament, as is required for the research commercialisation strategy under proposed subsection 42-1(5). In this regard, the committee notes that the process of tabling documents alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online.

1.139 The committee notes that, as a research commercialisation strategy and investment plan will not be legislative instruments, they will not be subject to the disallowance by the Parliament. Given the impact on parliamentary scrutiny, the committee expects the explanatory materials to include a justification for why a research commercialisation strategy and investment plan is not considered to be legislative in character. In this instance, in relation to the strategy, the explanatory memorandum states:

> As a statement of strategy, the research commercialisation strategy will not determine or alter the content of the law and is intended to be administrative in nature. As such, subsection 42-1(6) is declaratory of the law and is not intended to prescribe a substantive exemption from the requirements of the *Legislation Act 2003*.[104]

1.140 While noting this explanation, it is not clear to the committee that either the research commercialisation strategy or investment plan will be purely administrative in nature.

1.141 The committee therefore requests the minister's more detailed advice regarding:

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103 Explanatory memorandum, p. 10.

104 Explanatory memorandum, p. 9.

- **why a research commercialisation strategy made under proposed section 42-1 and an investment plan formulated under proposed section 42-5 are not legislative instruments; and**
- **whether the bill could be amended to:**
  - **provide that the strategy and investment plan are legislative instruments to ensure that they are subject to appropriate parliamentary oversight; or**
  - **at a minimum, to specify that the strategy and investment plan must be tabled in both Houses of the Parliament within 15 sitting days of the minister receiving a strategy or the Australia's Economic Accelerator Advisory Board finalising an investment plan.**

Reversal of the evidential burden of proof[105]

1.142 Proposed section 181-15 seeks to provide that it will be an offence for an officer to disclose or make a copy of Australia's Economic Accelerator program information that was obtained in the course of the officer's employment and the information is personal information, will cause competitive detriment to a person or founds an action by a person for a breach of a duty of confidence. Proposed subsections 181-15(2), (3) and (4) provide exceptions (offence-specific defences) to this offence, stating that the offence will not apply if:

- the person to whom the information relates has consented to the disclosure, or the making of the copy or record; or
- the disclosure, or the making of the copy or record, is authorised by proposed Division 181; or
- the disclosure, or the making of the copy or record, is required by a law of the Commonwealth.

1.143 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[106] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

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105 Schedule 1, item 7, proposed section 181-15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

106 Subsection 13.3(3) of the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

1.144 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 section 181-15 have not been addressed in the explanatory materials.

1.145 The committee notes that the *Guide to Framing Commonwealth Offences*[107] 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.[108]

1.146 In this case, it is not apparent that matters such as whether the person to whom the information relates has consented to the disclosure, are matters *peculiarly* within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence.

1.147 The committee requests the minister's detailed justification as to the appropriateness of including the specified matters as an offence-specific defence.

1.148 The committee suggests that it may be appropriate for the bill to be amended to provide that these matters are elements of the offence. The committee also requests the minister's advice in relation to this matter.

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

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

Security Legislation Amendment (Critical Infrastructure Protection) Bill 2022

Purpose	This bill seeks to protect the essential services all Australians rely on by uplifting the security and resilience of our critical infrastructure.
Portfolio	Home Affairs
Introduced	House of Representatives on 10 February 2022

Significant matters in delegated legislation[109]

1.149 The bill seeks to insert a range of powers to prescribe matters in delegated legislation into the *Security of Critical Infrastructure Act 2018*.

1.150 Schedule 1 to the bill seeks to:

- amend section 5 to repeal and replace the definition of 'data storage or processing service' and provide that this can include a service specified in the rules and that the rules may also prescribe that a service is not a data storage or processing service;
- amend section 8 to provide an exemption to when an entity will be a direct interest holder in circumstances specified in the rules;
- amend section 12KA to provide that the rules may prescribe specified assets that are critical to the administration of an Australian domain name system or requirements for an asset to be critical to the administration of an Australian domain name system;
- insert proposed section 30AB to provide that Part 2A of the bill applies to assets specified in the rules and that the rules may exempt assets from Part 2A for a certain period of time;
- insert proposed section 30AH, which leaves a number of elements in relation to critical infrastructure risk management programs to the rules;
- insert proposed section 30AKA which provides that entities must have regard to matters set out in the rules when determining to adopt, review or vary a critical infrastructure risk management program; and

109 Schedule 1, items 13, 29, 43 and 49, proposed sections 5, 8, 12AKA, 30AB, 30AH, 30AKA, 30CJ, 30CN, 30CS, 30CY. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

- require that incident response plans, cyber security exercises, evaluation reports and vulnerability assessments all comply with requirements set out in the rules.

1.151 The committee's view is that matters which may be significant to the operation of a legislative scheme should be included in primary legislation unless sound justification for the use of delegated legislation is provided.

1.152 The committee considers that these matters have not been sufficiently addressed in the explanatory memorandum and that the prescription of so many delegated legislation making powers in the bill has not been adequately justified.

1.153 The committee therefore requests the minister's detailed advice as to why it is considered necessary and appropriate to leave each of the above matters to delegated legislation.

Privilege against self-incrimination[110]

1.154 Proposed section 30DG provides that if an individual would ordinarily be able to claim the privilege against self-exposure to a penalty in relation to giving a report under proposed sections 30DB or 30DC, the individual is not excused from giving a report under that section on that ground. Proposed section 30DH provides that if a report is given under proposed sections 30DB or 30DC, the report or the giving of the report is not admissible in evidence against an entity in criminal proceedings other than proceedings for an offence against section 137.2 of the *Criminal Code* that relates to this bill or in civil proceedings other than proceedings for recovery of a penalty in relation to a contravention of proposed section 30DF.

1.155 Proposed section 30DN provides that if an individual would ordinarily be able to claim the privilege against self-exposure to a penalty in relation to complying with a system information software notice, the individual is not excused from complying with the notice on that ground. Proposed section 30DP provides that if the information in relation to a system information software notice is not admissible in evidence against an entity in criminal proceedings other than proceedings for an offence against section 137.2 of the *Criminal Code* that relates to this bill or in civil proceedings other than proceedings for recovery of a penalty in relation to a contravention of proposed section 30DM.

1.156 Proposed sections 30DH and 30DP only provide a use immunity in relation to an individual who gives a report or information. A derivative use immunity (which prevents information or evidence indirectly obtained from being used in criminal proceedings against the person) has not been included.

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110 Schedule 1, item 58, proposed sections 30DG, 30DH, 30DN and 30DP. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.157 The committee considers that the privilege against self-incrimination is an important right under the common law and any abrogation of that right represents a significant loss to personal liberty. As such, the committee considers it would be more appropriate if a derivative use immunity were included to ensure information or evidence indirectly obtained from a person compelled to produce a report or provide information under a system information software notice could not be used in evidence against them. The lack of a derivative use immunity has not been addressed in the explanatory memorandum.

1.158 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination in circumstances where no derivative use immunity is provided.

Social Media (Anti-Trolling) Bill 2022

Purpose	The bill seeks to create a novel framework to allow Australians to respond to defamatory content posted on social media. The bill will also provide new mechanisms for Australians to ascertain whether potentially defamatory material on a page of a social media service was posted in Australia and, if so, to obtain the relevant contact details of the poster.
Portfolio	Attorney-General
Introduced	House of Representatives on 10 February 2022

Significant matters in delegated legislation[111]

1.159 The bill seeks to establish a new framework for responding to, and establishing liability for, defamatory content on social media services. In particular, the bill alters the current position in the general law of the tort of defamation in relation to third-party publishers of defamatory material on social media services. Key elements of several significant terms in the bill are left to delegated legislation.

1.160 The definition of 'social media service' set out at clause 6 of the bill provides that a social media service is either:

- an electronic service that is a social media service under the *Online Safety Act 2021* which satisfies any other conditions set out in the legislative rules; or
- an electronic service specified in the legislative rules.

1.161 Clause 6 of the bill also provides that 'exempt service' means an electronic service specified in the legislative rules. A 'social media service' does not include an exempt service.

1.162 Under clause 22 of the bill, the provider of a social media service that is a body corporate incorporated in a foreign country must ensure that it has an Australian 'nominated entity' capable of meeting the various obligations that may arise under, or in connection with, the bill. This obligation applies where either there are at least 250,000 Australian persons who hold accounts with the service, or the service is specified in the legislative rules.

111 Clause 6, definition of 'social media service' and definition of 'exempt service'; clause 22. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

1.163 The committee's view is that significant matters, such as the scope of terms central to a legislative scheme, should be set out in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.164 In this instance, the explanatory memorandum states in relation to the definition of 'social media service' that:

> This ensures the definition has sufficient flexibility to clearly cover or exclude specified services or types of service that may be developed from time to time.[112]

1.165 In relation to clause 22, the explanatory memorandum states:

> The ability to specify services in the legislative rules will serve two purposes: it will allow providers of social media services with less than 250,000 Australian account holders to be prescribed in appropriate circumstances, and providers with at least 250,000 Australian account holders to be expressly prescribed and thereby avoid the need to prove this element in civil penalty or defamation proceedings.[113]

1.166 There is no explanation provided for leaving the definition of 'exempt service' to the legislative rules.

1.167 While noting the explanation provided in relation to the definition of 'social media service', 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 relation to clause 22, it is not clear to the committee from the explanation provided in which circumstances it would be appropriate to prescribe social media services with less than 250,000 Australian account holders, nor why it is necessary and appropriate to prescribe this matter within delegated legislation.

1.168 Given the significance of these terms to the proposed new defamation framework, the committee considers that it may be appropriate to include at least high-level guidance in relation to these matters on the face of the primary legislation. For example, the committee considers that it may be appropriate to, at a minimum, include examples of appropriate circumstances for prescribing social media services with less than 250,000 Australian account holders, or to include guidance in relation to the types of social media services that may be prescribed within the legislative rules.

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

- **why it is considered necessary and appropriate to leave key elements of the definitions of 'social media service' and 'exempt service' to delegated legislation;**

112 Explanatory memorandum, p. 12.

113 Explanatory memorandum, p. 23.

- **why it is considered necessary and appropriate to leave the scope of the application of the requirement to have a 'nominated entity' to delegated legislation; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

Telecommunications (Interception and Access) Amendment (Corrective Services Authorities) Bill 2022

Purpose	This bill seeks to amend the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to provide State and Territory corrective services authorities with the ability to access telecommunications data under the TIA Act.
Portfolio	Home Affairs
Introduced	House of Representatives on 17 February 2022

Broad discretionary power

Significant matters in delegated legislation[114]

1.170 Item 4 of Schedule 1 to the bill seeks to amend the *Telecommunications (Interception and Access) Act 1979* (TIA Act) to provide that the minister may declare, by legislative instrument, a corrective services authority to be an enforcement agency for the purpose of the TIA Act. This would provide declared corrective services authorities with the ability to access telecommunications data under the TIA Act. The minister must not make a declaration unless requested by the relevant State or Territory minister. The minister may also consult any persons as they think fit, including the Commonwealth Ombudsman or the Privacy Commissioner. The declaration may also be subject to conditions determined by the minister.

1.171 The committee's scrutiny view is that this provides the minister with a broad discretionary power to declare that a corrective services authority is an enforcement agency in circumstances where there is limited guidance on the face of the primary legislation as to when it may be appropriate to exercise this power. In this instance, the explanatory memorandum states:

> Noting the intrusive nature of the powers, the Commonwealth Minister would have regard to an authority's readiness to access these powers before issuing a declaration.
>
> This might include considering the authority's privacy arrangements and the way in which they handle personal information and the policies and procedures they have put in place to govern access to data. The Minister would also be able to ensure the necessary arrangements are in place with the Commonwealth Ombudsman regarding oversight of the use of these

114 Schedule 1, item 4, proposed section 176B. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii)and (iv).

powers, including that any financial implications have been considered and addressed.[115]

1.172 It is unclear to the committee why at least high-level guidance, such as the matters set out in the explanatory memorandum, could not be provided on the face of the primary legislation. The committee notes that its scrutiny concerns are heightened noting the significant powers that are granted to enforcement agencies and notes that these powers may trespass on an individual's rights and liberties, particularly their right to privacy. The committee also notes that existing section 176A provides similar powers for the minister to declare an authority or body to be an enforcement agency but provides that such a declaration will expire 40 sitting days after it was made.

1.173 The committee notes that the explanatory memorandum states that the power in 176A was designed to be more temporary and prescriptive and that the new power in proposed section 176B is administrative in nature.[116] However, the committee notes that providing that a declaration under 176A is temporary is a significant legislative safeguard and in its absence the committee considers that it would be appropriate to provide additional guidance on the face of the primary legislation regarding when it will be appropriate to declare a corrective services agency is an enforcement agency.

1.174 The committee requests the minister's more detailed advice regarding:

- **why it is considered necessary and appropriate for the minister to be provided with a broad discretionary power to declare that a corrective services agency is an enforcement agency for the purposes of the *Telecommunications (Interception and Access) Act 1979*; and**
- **whether the bill can be amended to either:**
  - **provide at least high-level guidance regarding the exercise of this power on the face of the primary legislation; or**
  - **provide that any declaration will expire at the end of 40 sitting days of both Houses of the Parliament.**

115 Explanatory memorandum, p. 9.

116 Explanatory memorandum, p. 9.

Transport Security Amendment (Critical Infrastructure) Bill 2022

Purpose	This bill seeks to amend the definition of unlawful interference in both the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*. The bill will also establish an additional purpose, under both the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003*, of safeguarding against operational interference.
Portfolio	Home Affairs
Introduced	House of Representatives on 17 February 2022

Strict liability[117]

1.175 Item 53 of Schedule 1 to the bill seeks to introduce two new provisions into the *Aviation Transport Security Act 2004* (the Aviation Act) which make it an offence for a person to engage in conduct which breaches an improvement notice. An improvement notice may be issued under proposed section 117A where a security inspector reasonably believes there has been a contravention of the Aviation Act, or that a contravention is likely to occur.

1.176 Item 96 of Schedule 2 to the bill introduces two new similar offences into the *Maritime Transport and Offshore Facilities Security Act 2003* (the Maritime Act).

1.177 All four of these offences are drafted as offences of strict liability. The offences set out in proposed subsection 117C(1) of the Aviation Act and proposed subsection 187C(1) of the Maritime Act are subject to a maximum penalty of 200 penalty units. The offences set out in proposed subsection 117C(4) of Aviation Act and proposed subsection 187C(4) of the Maritime Act are subject to a maximum penalty of 100 penalty units.

1.178 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

117 Schedule1, item 53, subsections 117C(2) and 117C(4); Schedule 2, item 96, 187C(2) and 187C(4) . 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. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[118]

1.179 In this instance, the explanatory memorandum states in relation to the offences introduced by item 53 of Schedule 1 to the bill that:

> … imposing strict liability offences for non-compliance with subsections 117C(1) and (3) is appropriate in the circumstances because:
>
> - the offences and their penalties each operate as a general deterrent to noncompliance and as an incentive to comply with an improvement notice;
> - the penalties for these offence are similar to others imposed within the Aviation Act, and are commensurate with the risk to aviation security that non-compliance poses;
> - these penalties are reasonable penalties to impose, as they each have a necessary element of deterrence whilst they are each not a manifestly excessive penalty for a strict liability offence.[119]

1.180 The explanatory memorandum further states:

> … penalising these persons in the absence of proof of fault is appropriate to apply because giving an improvement notice is necessary to safeguard against an unlawful interference with aviation, and engaging in noncompliant conduct poses a serious risk to aviation security.[120]

1.181 In relation to the strict liability offences introduced under Schedule 2 to the bill, the explanatory memorandum states:

> Making the offence strict liability penalty operates to deter behaviour that would obstruct the activities of an aviation security inspector and prevent them from obtaining relevant information. It is appropriate for the offences not to include a fault element to act as a strong deterrent against engaging in behaviour that hinders or obstructs the exercise of an inspectors powers. The ability to exercise their powers is necessary to safeguard against unlawful interference in the aviation and maritime industries and to ensure the integrity of the inspection regime.[121]

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118 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

119 Explanatory memorandum, p. 70.

120 Explanatory memorandum, p. 71.

121 Explanatory memorandum, p. 203.

1.182 While acknowledging the importance of ensuring deterrence of behaviour which may impact on the effectiveness of the aviation and maritime transport security regimes, the committee notes that the penalties that would be imposed under the offences are higher than is recommended within the *Guide to Framing Commonwealth Offences*.[122] It is not clear to the committee from the explanation provided why it is appropriate or necessary to impose a higher penalty than is recommended within the Guide.

1.183 In light of the above, the committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of inserting four new strict liability offences into the *Aviation Transport Security Act 2004* and the *Maritime Transport and Offshore Facilities Security Act 2003* which would impose penalties that are higher than those recommended in the *Guide to Framing Commonwealth Offences*.

Protection from civil liability[123]

1.184 Item 34 of Schedule 1 to the bill seeks to insert proposed subsections 80B(3) and (4) into the Aviation Act to provide that an aviation industry participant, an employee of an aviation industry participant, or an officer, employee or agent of a person is not liable to an action or other proceeding in damages for acts done, or omitted to be done, in good faith in compliance with a notice provided under proposed subsection 80B(1). A notice provided under proposed subsection 80B(1) may require a person to provide an aviation security inspector with specified assistance that is reasonably necessary to allow the inspector to exercise powers conferred on the inspector by the bill.

1.185 Proposed subsections 80B(3) and (4) 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 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.

122 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 22–25.

123 Schedule 1, item 34, proposed subsections 80B(3) and (4); Schedule 2, item 64, proposed subsections 145BB(3) and (4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

1.186 Item 64 of Schedule 2 to the bill seeks to insert similar provisions into the Maritime Act.

1.187 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision and providing a general discussion of the meaning of 'good faith'.[124]

1.188 The committee requests the minister's advice as to why it is considered necessary and appropriate to confer civil immunity on persons under proposed subsections 80B(3) and (4) of the *Aviation Transport Security Act 2004* and proposed subsections 145BB(3) and (4) of the *Maritime Transport and Offshore Facilities Security Act 2003* so that affected persons have their right to bring an action to enforce their legal rights limited to situations where lack of good faith is shown.

Protection from criminal and civil liability

Reversal of the evidential burden of proof[125]

1.189 Item 54 of Schedule 2 to the bill seeks to insert proposed subsection 139(4) into the Maritime Act. Proposed subsection 139(4) seeks to provide that a maritime security inspector is not subject to any civil or criminal liability under a law of the Commonwealth, a state or a territory in relation to the exercise of a power under proposed paragraph 139(2)(i) to the extent that the exercise of the power is in good faith, and does not endanger the health or safety of any person or result in significant loss of, or serious damage to, property. Proposed paragraph 139(2)(i) provides that a maritime security inspector may test a security system (including by using an item, test weapon or vehicle to test its detection) in a restricted access area of a security regulated ship, in accordance with any requirements prescribed in the regulations.

1.190 Item 58 of Schedule 2 to the bill seeks to insert proposed subsection 140A(5) into the Maritime Act to provide for a similar immunity in relation to tests of security systems on regulated offshore facilities, while proposed subsection 141(4), as set out

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124 Explanatory memorandum, pp. 33-34 and 123.

125 Schedule 2, item 54, proposed subsection 139(4); item 58, proposed subsection 140A(5); item 63, proposed subsection 141(4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

at item 63 of Schedule 2 to the bill, would introduce a similar immunity in relation to maritime industry participants.[126]

1.191 Notes to each of these proposed subsections state that a defendant bears an evidential burden in relation to the matters set out under each immunity in respect of a criminal proceeding.

1.192 The committee acknowledges that the immunity provided for under these proposed subsections does not apply in relation to actions that are not done in good faith. However, the committee reiterates 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 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.

1.193 The committee expects that if a bill seeks to provide immunity from civil and criminal liability this should be soundly justified. In relation to proposed subsection 139(4), the explanatory memorandum states:

> … this will allow for maritime security inspectors to conduct systems tests in the knowledge that they are not at risk of breaking other laws, such as those relating the bomb hoaxes. This is as long as the maritime security inspector is conducting the test in good faith, and the test does not seriously endanger the health or safety of any person or result in significant loss of, or damage to, property.[127]

1.194 While acknowledging this explanation, the committee considers that it does not adequately justify why a broad immunity from both civil and criminal liability has been provided in this instance. Similar explanations are provided in relation to proposed subsections 140A(5) and 141(4).

1.195 In addition, the committee has concerns in relation to the reversal of the evidential burden of proof in proposed subsections 139(4), 140A(5), and 141(4). At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[128] 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

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126 Under section 10 of the *Maritime Transport and Offshore Facilities Security Act 2003* a 'maritime industry participant' means a port operator, port facility operator, a ship operator of an Australian or a foreign ship, an offshore industry participant, a contractor who provides services to a person mentioned above, or a person who conducts a maritime related enterprise and is prescribed in the regulations.

127 Explanatory memorandum, p. 117.

128 Subsection 13.3(3) of the *Criminal Code Act 1995* 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.

disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.196 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 this instance, the explanatory memorandum provides no explanation for the reversals of the evidential burden of proof in proposed subsections 139(4), 140A(5), and 141(4).

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

- **why it is considered necessary and appropriate to provide protected persons with both civil and criminal immunity so that civil and criminal proceedings may only be brought against a protected person in circumstances where lack of good faith is shown; and**
- **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.*** [129]

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

Treasury Laws Amendment (Streamlining and Improving Economic Outcomes for Australians) Bill 2022

Purpose	Schedule 1 seeks to amend the *Corporations Act 2001* to provide relief for foreign financial services providers to promote diversified investment opportunities for Australian investors and attract investment and liquidity to Australian markets. Schedule 2 seeks to amend the *Corporations Act 2001*, the *Australian Securities and Investments Commission Act 2001* and the *Superannuation Industry (Supervision) Act 1993* to extend and adapt the financial reporting and auditing requirements in Chapter 2M of the *Corporations Act 2001* to apply to registrable superannuation entities. Schedule 3 seeks to amend the *Taxation Administration Act 1953* to enable small business entities to apply to the Small Business Taxation Division of the AAT for an order staying, or otherwise affecting, the operation or implementation of decisions of the Commissioner that are being reviewed by the AAT.
Portfolio	Treasury
Introduced	House of Representatives on 17 February 2022

Significant matters in delegated legislation[130]

1.198 Schedule 1 to the bill seeks to amend the *Corporations Act 2001* (the Corporations Act) to create a new professional investor exemption which provides that a person is exempt from the requirement to hold an Australian financial services licence under existing subsection 911A(1) of the Corporations Act. Proposed section 911F provides that the regulations may provide that the professional investor exemption does not apply to particular kinds of financial services, financial products or investors.

1.199 The committee's view is that significant matters, such as the services and products to which the professional investor exemption will not apply, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

130 Schedule 1, item 4, proposed section 911F. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

> Regulations prescribing exceptions to the professional investor exemption are only intended to be made in exceptional circumstances where the application of the professional investor exemption to a particular kind of financial product, financial service or professional investor is considered to pose a risk to investors, the regulatory regime, or the market.
>
> …
>
> The regulation-making power to exclude particular kinds of financial products, financial services or professional investors from the professional investor exemption is intended to provide the Government with the necessary flexibility to ensure the effective operation of the professional investor exemption and to respond to emerging risks and changes in global financial markets. In accordance with the *Legislation Act 2003*, regulations made under this power would be subject to disallowance and would therefore be subject to appropriate parliamentary scrutiny.[131]

1.200 It is unclear to the committee why at least high-level guidance in relation to the scope of the exceptions power could not be provided on the face of the primary legislation. For example, the committee notes that there is no guidance on the face of the bill regarding the circumstances where it may be appropriate to determine that the professional investor exemption should not apply to certain kind of services. The committee has generally not accepted a desire for administrative flexibility to be a sufficient justification of itself for leaving significant matters to delegated legislation. The committee also notes that while the explanatory memorandum notes that the minister's power is only intended to be used in exceptional circumstances, this is not a requirement that is included on the face of the primary legislation.

1.201 The committee therefore requests the minister's more detailed advice regarding:

- **why it is considered necessary and appropriate to leave the prescription of exceptions to the professional investor exemption to delegated legislation; and**
- **whether the bill could be amended to include at least high-level guidance in relation to the scope of the exceptions power on the face of the primary legislation.**

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131 Explanatory memorandum, pp. 23-24.

Significant matters in delegated legislation[132]

1.202 Item 33 of Schedule 2 to the bill seeks to insert proposed subsections 292(4) and (5) into the Corporations Act to provide for regulations to be made prescribing the requirements for a financial report and directors' report prepared for a registrable superannuation entity.

1.203 Item 44 of Schedule 2 to the bill seeks to insert proposed section 300C into the Corporations Act to provide for regulations to be made setting out matters relating to remuneration that must be included in the directors' report of registrable superannuation entities. Specifically, proposed subsection 300C(1) provides that the directors' report for a financial year for a registrable superannuation entity must also include (in a separate and clearly identified section of the report):

- the prescribed details in relation to the remuneration of each member of the key management personnel for the registrable superannuation entity; and
- such other matters (if any) relating to such remuneration as are prescribed by the regulations.

1.204 Proposed subsection 300C(3), without limiting the matters that the regulations may provide for, specifies that the regulations may prescribe:

- the way in which the value of an element of remuneration is to be determined; and
- the details of remuneration that must relate to the financial year to which the directors' report relates and earlier financial years specified in regulations.[133]

1.205 The committee's consistent view is that significant matters, such as key requirements regarding the content of annual financial and directors' reports of registrable superannuation entities, should be included in primary legislation unless a sound justification is provided for in the explanatory memorandum. In this instance, in relation to item 33, the explanatory memorandum states:

> These regulation-making powers are necessary to enable regulations to be made prescribing alternative requirements for the form and lodgement of financial reports to ensure the long-term flexibility of the financial reporting requirements by keeping up with future technological changes. In accordance with the *Legislation Act 2003*, regulations are subject to disallowance and therefore subject to appropriate parliamentary scrutiny.[134]

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132 Schedule 2, items 33 and 44, proposed subsections 292(4) and (5) and proposed section 300C. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

133 Explanatory memorandum, p. 72.

134 Explanatory memorandum, p. 72.

1.206 In relation to item 44, the explanatory memorandum states:

> This regulation-making power is necessary and appropriate to ensure that the types of information required to be included in the directors' report are able to be updated as required to support the policy objectives of ensuring that financial reports for registrable superannuation entities are transparent and accountable. In accordance with the *Legislation Act 2003*, regulations are subject to disallowance and therefore subject to appropriate parliamentary scrutiny.[135]

1.207 In light of the explanation set out in the explanatory memorandum, the committee leaves to the Senate as a whole the appropriateness of leaving key requirements regarding the content of annual financial and directors' reports of registrable superannuation entities to delegated legislation.

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

135 Explanatory memorandum, p. 72

Bills with no committee comment

1.209 The committee has no comment in relation to the following bills which were introduced into the Parliament between 8-17 February 2022:

- Health Insurance Amendment (Administrative Actions) Bill 2022
- Income Tax Amendment (Labour Mobility Program) Bill 2022
- Public Sector Superannuation Legislation Amendment Bill 2022
- Regulator Performance Omnibus Bill 2022
- Social Security Amendment (Improved Child to Adult Transfer for Carer Payment and Carer Allowance) Bill 2022
- Social Services Legislation Amendment (Workforce Incentive) Bill 2022
- Treasury Laws Amendment (Cyclone and Flood Damage Reinsurance Pool) Bill 2022
- Treasury Laws Amendment (Enhancing Tax Integrity and Supporting Business Investment) Bill 2022
- Treasury Laws Amendment (Modernising Business Communications) Bill 2022
- Treasury Laws Amendment (Tax Concession for Australian Medical Innovations) Bill 2022
- Veterans' Affairs Legislation Amendment (Enhanced Family Support) Bill 2022

Commentary on amendments and explanatory materials

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

- Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021[136]
- Electoral Legislation Amendment (Authorisations) Bill 2022[137]
- Human Rights Legislation Amendment Bill 2022[138]
- Parliamentary Workplace Reform (Set the Standard Measures No. 1) Bill 2022[139]
- Religious Discrimination Bill 2022[140]

136 On 14 February 2022, the Assistant Minister for Waste Reduction and Environmental Management (Mr Evans) presented a revised explanatory memorandum to the bill.

137 On 10 February 2022 the Senate agreed to 5 opposition amendments to the bill. Additionally, on 15 February 2022, the Assistant Minister to the Minister for Industry, Energy and Emissions Reduction (Mr T. R. Wilson) presented a revised explanatory memorandum to the bill.

138 On 9 February 2022, Ms Sharkie moved 3 amendments to the bill. Additionally, on 10 February 2022, the Minister for Families and Social Services and Minister for Women's Safety (Senator Ruston) tabled a revised explanatory memorandum to the bill.

139 On 15 February 2022, the Assistant Minister for Youth and Employment Services (Mr Howarth) presented a replacement explanatory memorandum to the bill.

140 On 9 February 2022, the House of Representatives agreed to 22 government amendments. Additionally, The Minister representing the Attorney-General (Mr Fletcher) presented a supplementary explanatory memorandum to the bill.
On 10 February 2022, the Minister for Families and Social Services and Minister for Women's Safety (Senator Ruston) tabled a replacement explanatory memorandum and a revised explanatory memorandum 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.

Animal Health Australia and Plant Health Australia Funding Legislation Amendment Bill 2021

Purpose	This bill seeks to amend the *Australian Animal Health Council (Livestock Industries) Funding Act 1996* and the *Plant Health Australia (Plant Industries) Funding Act 2002* to streamline administrative processes by removing redundant provisions, to add provisions that create efficiencies and facilitate future levy arrangements, and to increase consistency between the Acts regarding the spending of emergency response levies.
Portfolio	Agriculture and Northern Australia
Introduced	House of Representatives on 25 November 2021
Bill status	Before the Senate

Instruments not subject to parliamentary disallowance[1]

2.2 In *Scrutiny Digest 1 of 2022* the committee requested the minister's advice as to why it is considered necessary and appropriate to amend the *Plant Health Australia (Plant Industries) Funding Act 2002* to provide that relevant Plant Industry Members will no longer be declared by legislative instrument, noting that such declarations would therefore no longer be subject to parliamentary scrutiny.[2]

Minister's response[3]

2.3 The minister advised:

1 Schedule 1, items 9 and 10. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 1-3.

3 The minister responded to the committee's comments in a letter dated 22 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

> At present the Primary Industries legislation is unnecessarily linked to the PHA Act through the combined use of the designated bodies declarations made under the Primary Industries legislation. The primary purpose of the designated bodies declarations is to ensure the Minister must consider a designated body's representations prior to making recommendations to the Governor-General regarding regulations that effect levy changes that will apply to specified plant products.
>
> In its current form, the PHA Act uses the designated bodies declarations as a means of identifying which Plant Industry Member represents a plant product on which a levy or charge is imposed. This can create a situation where a designated body declaration under the Primary Industry legislation is amended solely for purposes under the PHA Act. The purpose of these amendments is to simply delink this process and provide for a process within the PHA Act itself.
>
> To become a Plant Health Australia member, an applicant body would be required to demonstrate that it represents the plant products ("crops") identified in its application. If the applicant body was successful, its representation of the plant product would be noted in the formal record and the Secretary of the department would make an instrument under the PHA Act determining it to be a relevant Plant Industry Member.
>
> I note the changes would not impact in any way the ability of an industry body to seek designated body status for other levy-related purpose under the Primary Industries legislation. For additional clarity, I note these amendments do not impact on the nature or rate of levies or charges being applied.

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the purpose of items 9 and 10 of Schedule 1 to the bill is to provide for a process for identifying which plant industry members appropriately represent a particular plant product within the *Plant Health Australia (Plant Industries) Funding Act 2002,* rather than being required to amend a designated body declaration.

2.5 The committee also notes the minister's advice that the bill would not impact upon the ability of an industry body to seek designated body status for other levy-related purposes under the *Primary Industries (Excise) Levies Act 1999* or the *Primary Industries (Customs) Charges Act 1999*, nor would the bill impact on the nature or rate of levies or charges being applied.

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

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
Bill status	Before the House of Representatives

Broad discretionary power

Significant matters in delegated legislation[4]

2.8 In *Scrutiny Digest 17 of 2021* the committee requested the Treasurer's advice as to:

- 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.[5]

Treasurer's response[6]

2.9 The minister advised:

> The power to exempt an accountable entity or a class of accountable entities from the Financial Accountability Regime under clause 16 of the bill is required to ensure the regime applies appropriately to the regulated

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

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 14-15.

6 The minister responded to the committee's comments in a letter dated 15 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

> industries and to avoid any potential unintended consequences from the application of the regime.
>
> The Financial Accountability Regime is based on the existing Banking Executive Accountability Regime (BEAR) and will apply to the banking, general insurance, life insurance, private health insurance and superannuation industries. The regime is designed to improve the transparency and accountability of the decision making by directors and senior executives in these industries due to the important role these financial services industries play in the Australian economy.
>
> Similar to the BEAR, the power to exempt entities from the Financial Accountability Regime ensures that the regime can operate flexibly and be appropriately targeted. There may be instances where the Financial Accountability Regime may act as a barrier to entry for some small new entrants and the ability to exempt entities or classes of entities from the regime under clause 16 of the Bill may facilitate competition in the market. An exemption for classes of accountable entities is a legislative instrument and is therefore subject to Parliamentary disallowance.
>
> The exemption power is broadly framed to avoid constraining relevant considerations. It is preferable that the Minister be granted a broad exemption power due to the diversity of industries regulated by the Financial Accountability Regime, and the complexity and unforeseen nature of the issues the exemption power is seeking to address.

Committee comment

2.10 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that providing the minister with a broad power to provide exemptions to the Financial Accountability Regime under clause 16 is required to ensure the regime applies appropriately to the regulated industries and to avoid any potential unintended consequences from the application of the regime. The Treasurer advised that there may be instances where the regime could pose a barrier to entry for some small new entrants into the market. The Treasurer further advised that a broad exemptions power may therefore be needed to facilitate competition in the market. Finally, the Treasurer advised that it is preferable that the minister be granted a broad exemption power due to the diversity of industries regulated by the Financial Accountability Regime, and the complexity and unforeseen nature of the issues the exemption power is seeking to address.

2.11 While acknowledging the importance of allowing flexibility in the context of the complex Financial Accountability Regime, it is unclear to the committee from the Treasurer's explanation why at least high-level guidance cannot be included within the bill in relation to the exercise of the exemption power under clause 16. For example, the committee considers that it may be appropriate to include a requirement that exemptions to Chapter 2 of the bill are time limited.

2.12 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.

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

2.14 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the minister with a broad power to provide exemptions to the Financial Accountability Regime under clause 16 of the bill.**

Tabling of documents in Parliament

Significant matters in delegated legislation[7]

2.15 In *Scrutiny Digest 17 of 2021* the committee requested 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.[8]

Treasurer's response[9]

2.16 The Treasurer advised:

> The Financial Accountability Regime is to be jointly administered by ASIC and APRA. This will ensure the Regime is enforced from both a prudential

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

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

9 The minister responded to the committee's comments in a letter dated 15 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

perspective and a conduct and consumer outcomes-based perspective. This means it is important that both ASIC and APRA co-ordinate their administration of the Financial Accountability Regime to ensure the regime is administered effectively. To this end, the bill requires ASIC and APRA to enter into an arrangement outlining their approach to the administration of the regime (see clause 37 of the bill). The Minister may make rules which require certain matters to be included in the arrangement (see clause 37(2)).

Arrangement for administration – prescription by Minister's rules

It is necessary to prescribe details of the Regulators' administrative arrangement in delegated legislation as such instruments provide accountability and legal certainty while being more adaptable than legislation.

Many obligations of the Financial Accountability Regime are principles-based to cater for the diverse industries and entities being regulated. As such, it will be crucial for regulated entities to understand how the Regulators intend to monitor and enforce regime requirements. It is therefore appropriate for the Minister to be able to require the Regulators' arrangement to contain information on particular matters to provide certainty and visibility of their regulatory approach.

Prescribing these matters in delegated legislation rather than the primary law ensures the Regulators have more flexibility to refine their approach to ensure their administration is efficient and fit for purpose, and may adapt their enforcement approach to different industries over time. Further, while the Regulators' arrangement must be published online, allowing Minister rules tabled before Parliament to prescribe particular matters for the arrangement brings an additional layer of public accountability to the approach taken to enforcing the Financial Accountability Regime.

Tabling in Parliament

It is appropriate for the Regulators' arrangement to be available to the public and to Parliament in the interests of transparency and accountability. To this end, the arrangement must be published on both ASIC and APRA's website (see clause 37) – and any Minister rules made in relation to matters to be included in the arrangement, or determining the arrangement, must be tabled in Parliament to bring the additional layer of scrutiny associated with executive involvement. As the current publication requirement serves the dual purpose of accountability and making the arrangement readily available to all, the bill does not require the basic arrangement be tabled before Parliament.

Committee comment

2.17 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that it will be important for regulated entities to understand how the government intends to monitor and enforce regime requirements under the

Financial Accountability Regime and that it is therefore appropriate to include a power within delegated legislation to require the regulators' arrangement to contain information on particular matters. The Treasurer advised that this will provide certainty and visibility of regulatory approach.

2.18 The Treasurer advised that prescribing these matters in delegated legislation ensures that the regulators have flexibility to ensure administration of the Financial Accountability Regime is efficient and fit for purpose, and to ensure that the regulators can adapt their enforcement approach to different industries over time.

2.19 The Treasurer further advised that it is not necessary to provide that an arrangement entered into under clause 37 of the bill is required to be tabled in each House of the Parliament because the bill already requires that such an arrangement must be published on both ASIC and APRA's website.

2.20 While acknowledging this advice, the committee notes that administrative flexibility is not a sufficient justification for leaving significant matters to delegated legislation. In addition, the committee reiterates its consistent scrutiny view that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability.

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

- **not providing that an arrangement entered into under clause 37 of the bill is required to be tabled in each House of the Parliament; and**
- **leaving details relating to provisions that must be included within a clause 37 arrangement to delegated legislation.**

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

No-invalidity clause[10]

2.23 In *Scrutiny Digest 17 of 2021* the committee requested 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.[11]

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10 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).

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

Treasurer's response[12]

2.24 The Treasurer advised:

The Bill contains no invalidity clauses that state:

- a power exercised by ASIC under the regime is not invalid because ASIC exercises the power in relation to an entity regulated by APRA (see clause 36(2));
- a power exercised by ASIC or APRA under the regime is not invalid because APRA and ASIC fail to enter into an agreement for administration of the Regime (see clause 37(5)); and
- a power exercised by ASIC or APRA under the regime is not invalid because ASIC and APRA fail to agree on the exercise of the power (see clause 38(4)).

These no-invalidity clauses are necessary to provide certainty to regulated entities regarding the performance or exercise of a function or power under the Financial Accountability Regime.

The enforcement powers of the Financial Accountability Regime are designed to combat serious regulatory issues such as prudential risk to the Australian financial system or significant and systemic consumer harms. As such, the exercise of these powers can cause significant disruption to the business activities of regulated entities. In particular, exercise of the powers under the regime could require businesses to take significant and difficult to reverse actions such as restructuring their business, terminating the employment of a senior executive or director, or reallocating the responsibilities of their senior executives and directors (see clause 42 and 65 of the bill). This means it is essential industry has certainty around the process and exercise of the powers under the Financial Accountability Regime.

This need for certainty means a Regulator's failure to comply with certain procedural matters should not result in the invalidity of the regulatory action. An exercise of a power by ASIC in relation to an entity regulated by APRA (clause 36), a failure to have an agreement for administration in place (clause 37), or a failure to reach formal agreement on the exercise of a power (clause 38) should not compromise the enforcement of the Regime. For example, if ASIC disqualified a person from being an accountable person under clause 42 due to a significant breach of accountability obligations that resulted in consumer harm, and that disqualification was inadvertently invalid due to ASIC and APRA failing to enter an agreement, the person

12 The minister responded to the committee's comments in a letter dated 15 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

would be able to continue to act and could continue to cause significant harm to consumers.

The no-invalidity clauses are appropriate as they are designed to meet this valid purpose (regulatory certainty) and form part of a balanced regulatory framework which includes redress mechanisms available if there is an objection to the regulatory action. The bill expressly provides for merits review of decisions made under the regime by the Administrative Appeals Tribunal (see clause 96). Further, judicial review of an exercise of power or performance of function by APRA or ASIC will be available – unless on the grounds of jurisdictional error solely in relation to one Regulator not having the other's agreement to act (clause 38), or their arrangement for administration not being in place or available on their website (clause 37).

Committee comment

2.25 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the no-invalidity clauses are necessary to provide certainty to regulated entities regarding the performance or exercise of a function or power under the Financial Accountability Regime.

2.26 The Treasurer advised that the enforcement powers imposed under the Financial Accountability Regime are designed to combat serious regulatory issues such as prudential risk to the Australian financial system or significant and systemic consumer harms, including significant disruption to the business activities of regulated entities. The Treasurer advised that the potential significance of these consequences means that it is essential industry has certainty around the process and exercise of the powers under the Financial Accountability Regime.

2.27 The Treasurer also advised that this need for certainty means a Regulator's failure to comply with certain procedural matters should not result in the invalidity of the regulatory action. The Treasurer further advised that the no-invalidity clauses will ensure that the enforcement of the regime will not be compromised. For example, the Treasurer advised that if ASIC disqualified a person from being an accountable person under clause 42 due to a significant breach of accountability obligations that resulted in consumer harm, and that disqualification was inadvertently invalid due to ASIC and APRA failing to enter an agreement, the person would be able to continue to act and could continue to cause significant harm to consumers.

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

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

Reversal of evidential burden of proof[13]

2.30 In *Scrutiny Digest 17 of 2021* the committee requested the Treasurer's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in clause 68 of the bill.[14]

Treasurer's response[15]

2.31 The minister advised:

> Clause 68 of the Bill contains an offence for disclosure of information that reveals a direction covered by a secrecy determination was given by the Regulator, except where the disclosure was authorised by specified clauses of the bill or is required by a court or tribunal. As noted in the explanatory memorandum at paragraph 1.208, the offence does not apply where the information was already lawfully in the public domain, or was disclosed to a legal representative in order to seek advice or to another person who is also subject to relevant secrecy arrangements for the purpose of another exception (clauses 69, 71, and 75). It is also not an offence where the disclosure was in accordance with the *Australian Prudential Regulation Authority Act 1998*, the *Australian Securities and Investments Commission Act 2001*, a determination of the Regulator, or the Minister rules of the Financial Accountability Regime (clauses 70 and 72-74).
>
> Subsection 13.3(3) of the *Criminal Code Act 1995* 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. Consistent with this, the defendant bears an evidential burden of proof to exercise the offence-specific defence in subclause 68(3) of the bill.
>
> This approach is justified as relevant information for matters in subsection 68(3) would be within the knowledge and control of the defendant. The prosecution and defendant could both be expected to have ready access to information and records to establish the exceptions for publicly available information or disclosure authorised by law or instrument of the regime. However, the defendant would be best positioned to provide information establishing disclosure was to a legal representative for the purpose of seeking legal advice, or to another person for the purpose of one of the

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

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

15 The minister responded to the committee's comments in a letter dated 15 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

exceptions. Such evidence is peculiarly within the defendant's knowledge and control, and could be difficult or costly in terms of time and resources for the prosecution to establish. As such, consistent with the *Guide to framing Commonwealth offences*, an evidential burden to establish matters within subsection 68(3) has been placed on the defendant.

Placing the evidential burden of proof on the defendant is also justified as it aligns with the approach taken in other similar frameworks. For example, it is consistent with the treatment of other protected information collected under prudential frameworks which is held by APRA including information collected under the predecessor regime to the Financial Accountability Regime, the Banking Executive Accountability Regime under Part IIAA of the *Banking Act 1959* (see section 56 of the *Australian Prudential Regulation Authority Act 1998*). Similarly, an evidential burden of proof exists in relation to the other prudential frameworks which interact with the regime including a matter raised under section 11CI of the *Banking Act 1959*, section 109A of the *Insurance Act 1973*, section 231A of the *Life Insurance Act 1995*. Consistency of approach across this complex legal framework is important to support understanding and application of the law.

Committee comment

2.32 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that reversing the evidential burden of proof in relation to subclause 68(3) is justified as the relevant information would be within the knowledge and control of the defendant. The Treasurer advised that both the prosecution and the defendant could be expected to have ready access to information and records to establish the exceptions for publicly available information or disclosure authorised by a law or instrument of the Financial Accountability Regime. By contrast, the Treasurer advised that it would be peculiarly within the defendant's knowledge and control, and could be difficult or costly for the prosecution to establish, whether the disclosure was for the purpose of seeking legal advice, or whether the disclosure was to another person for the purpose of one of the exceptions.

2.33 The Treasurer further advised that reversing the evidential burden of proof in this instance is justified as it aligns with the approach taken in other similar frameworks.

2.34 While acknowledging the Treasurer's advice, from a scrutiny perspective, the committee notes that it is not relevant whether the relevant knowledge would be within the knowledge and control of the defendant. Rather, the relevant test, as set out in the *Guide to Framing Commonwealth Offences,*[16] is 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

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

defendant.[17] As advised by the Treasurer, it does not appear that several of the matters relevant to a subclause 68(3) defence would be peculiarly within the knowledge of the defendant.

2.35 In particular, it appears that whether information had already been made lawfully available to the public,[18] whether the Regulator had allowed the disclosure,[19] or whether the disclosure was in accordance with a provision of the *Australian Prudential Regulation Authority Act 1998,*[20] or the *Australian Securities and Investments Commission Act 2001*,[21] would 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 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.[22]

2.36 The committee further notes that the Treasurer's response does not include discussion of the committee's concerns in relation to the defence set out at subclause 72(2) of the bill.

2.37 Finally, the committee notes that it does not consider consistency with existing legislation to be a sufficient justification for inappropriately reversing the evidential burden of proof.

2.38 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to several defences to secrecy offences in circumstances where the relevant matters do not appear to be peculiarly within the knowledge of the defendant.**

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

18 See clause 69.

19 See clause 70.

20 See clause 72.

21 See clause 73.

22 See paragraph 68(3)(b).

Immunity from liability[23]

2.39 In *Scrutiny Digest 17 of 2021* the committee requested 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.[24]

Treasurer's response[25]

2.40 The Treasurer advised:

> The bill provides protection from liability where:
>
> - a person exercises or performs their powers, functions, or duties under the Financial Accountability Regime in good faith (clause 101); or
> - certain persons regulated by the Financial Accountability Regime act in good faith for the purpose of (or in relation to) complying with a direction given by the Regulator under the Bill or a condition on a notice of a reviewable decision issued by the Regulator given to the accountable entity Those provisions do not limit the operation of each other, or of like provisions in the *Australian Prudential Regulation Authority Act 1998* and *Australian Securities and Investments Commission Act 2001*, which protect officers of APRA and ASIC carrying out their duties in good faith.
>
> Limitation of civil and criminal liability in these circumstances is necessary and appropriate to support compliance with the regime and minimise prudential risk as directed by the Regulator.
>
> The protection in clause 102 is necessary, for example, to allow an accountable entity and its senior management (or other relevant persons) to promptly and fully comply with a direction given by the Regulator to address prudential risks or non-compliance with obligations. The need to mitigate such risks, which could impact the broader economy, takes precedence over lesser risks such as the possibility of the person breaching another applicable framework in complying with the direction. This protection complements protections already available for officers and staff of the Regulators, for instance those involved in issuing the direction and monitoring its implementation.
>
> The protection in clause 101 supports this approach to protecting persons acting to reduce prudential risk, as it extends the protection from liability to

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

24 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 19-20.

25 The minister responded to the committee's comments in a letter dated 15 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

persons not formally employed by a regulator but who may be involved in carrying out the direction.

Clauses 101 and 102 also support compliance with the regime more broadly by concentrating enforcement on intentional and malicious contraventions of the bill, rather than inadvertent breaches which may arise during a genuine attempt to comply with the regime.

Committee comment

2.41 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the protection from civil and criminal liability conferred on persons under clauses 101 and 102 of the bill is necessary and appropriate to support compliance with the Financial Accountability Regime and to minimise prudential risk. The Treasurer advised that this approach concentrates enforcement on intentional and malicious contraventions of the bill, rather than inadvertent breaches which may arise during a genuine attempt to comply with the regime.

2.42 In relation to clause 102, the Treasurer advised that the need to mitigate prudential risks, which could impact the broader economy, takes precedence over lesser risks such as the possibility of a person breaching another applicable framework in complying with the direction. The Treasurer advised that clause 101 extends this approach to persons not formally employed by a regulator but who may be involved in carrying out the direction.

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

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

Incorporation of external materials existing from time to time[26]

2.45 In *Scrutiny Digest 17 of 2021* the committee requested the Treasurer's advice as to why it is considered necessary and appropriate to incorporate documents as in force or existing from time to time, noting that such an approach may mean that future changes to an incorporated document could operate to change the circumstances

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

when an accountable entity meets the enhanced notification threshold without any involvement from Parliament.[27]

Treasurer's response[28]

2.46 The minister advised:

> Clause 31 sets out core and enhanced notification obligations under the Regime, where the threshold for an entity having enhanced obligations is set in Minister rules. Clause 31(5) provides an incorporation by reference power, so Minister rules which prescribe how to determine when an entity meets the enhanced notification threshold can apply, incorporate, or adapt contents of non-legislative material. Importantly, the power is limited to incorporation of material published on a website maintained by the Regulator to ensure only credible, relevant material may be incorporated.
>
> The incorporation power allows the Minister rules to pick up and align with existing standards or guidance such as those issued by APRA. This material is freely available on its website, as it sets out the regulator's expectations for best practice compliance and accountability.
>
> The power does not extend to modifying incorporated material. This means a change to the incorporated material at source will carry through to the requirements set by the rules.
>
> This approach is important to ensure there is consistent content and requirements across Regime materials, to minimise confusion and support compliance with requirements.

Committee comment

2.47 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the incorporation power allows the Minister rules to align with existing standards or guidance, such as those issued by APRA. The Treasurer advised that this material is freely available on APRA's website. The Treasurer also advised that the power does not extend to modifying incorporated material. The Treasurer further advised that the approach taken by clause 31 is important to ensure there is consistent content and requirements across Financial Accountability Regime materials, so as to minimise confusion and support compliance with requirements.

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

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27 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 20-21.

28 The minister responded to the committee's comments in a letter dated 15 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

available to all those who may be interested in the law. It is not clear to the committee from the explanation provided whether all external materials incorporated under clause 31 would be freely and readily available.

2.49 **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*).**

2.50 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including a power to incorporate external materials as in force from time to time in circumstances where incorporated materials may not be freely available. The committee also notes that the incorporation of external materials in this way could operate to change the circumstances when an accountable entity meets the enhanced notification threshold without any opportunity for parliamentary oversight.**

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
Bill status	Before the House of Representatives

Reversal of evidential burden of proof[29]

2.51 In *Scrutiny Digest 17 of 2021* the committee requested 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*.[30]

Treasurer's response[31]

2.52 The Treasurer advised:

> The bill amends the secrecy regime contained in the *Australian Prudential Regulation Authority Act 1998* and the *Australian Securities and Investments Commission Act 2001* to include information collected under the Financial

29 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).

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 22-24.

31 The Treasurer responded to the committee's comments in a letter dated 15 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Accountability Regime. Both Acts contain pre-existing secrecy regimes which make it a breach of the statute or a criminal offence for an individual who has been employed by ASIC or APRA to disclose information they received in the course of their duties, unless certain exemptions apply. Generally, the defendant, who is the individual who discloses the information, is under an evidential burden to raise a relevant exemption (see section 56 of the *Australian Prudential Regulation Authority Act 1998*).

The relevant exemptions inserted for the Financial Accountability Regime are exemptions where:

- the disclosure is of information on the register to an accountable entity under 56(7G);
- the disclosure is of personal information on the register to the person to whom the information relates under 56(7H);
- the disclosure relates to whether a regulator has disqualified an individual under the regime under 56(7J); and
- the disclosure is the sharing of information between APRA and ASIC under 56(7K) or 56(7L).

The exemptions are for the most part replications of pre-existing exemptions under the Banking Executive Accountability Regime under Part IIAA of the *Banking Act 1959*, with the addition of the information sharing exemption. This approach ensures continuity of the regimes.

Subsection 13.3(3) of the *Criminal Code Act 1995* 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. Consistent with this, the defendant bears an evidential burden of proof to exercise the offence-specific defence in the proposed subsections 56(7G) to (7L) of the *Australian Prudential Regulation Authority Act 1998*. This approach is justified as the information subject to the provisions would be peculiarly within the knowledge and control of the defendant, and to preserve the integrity of the Financial Accountability Regime.

The Financial Accountability Regime requires accountable entities in the banking, insurance and superannuation industries to disclose highly sensitive and confidential information in relation to their businesses to APRA and ASIC (see clause 31 of the bill). This information could include information about the internal affairs and structures of the business, lines of accountability between the businesses most senior executives and directors, or information about the wrongdoing of the businesses senior executives and directors that has given rise to prudential risks which could affect the broader Australian economy. This means it is essential for the efficacy of the Financial Accountability Regime that individuals employed by APRA and ASIC who receive information under the regime are subject to strict controls in relation to their treatment of this information.

> An individual employed by APRA and ASIC who discloses information obtained under the Financial Accountability Regime, in a situation which could potentially breach their secrecy obligations, is in the best position to assess what exemptions might apply to their conduct.
>
> It is reasonable to place the evidential burden upon an individual in this circumstance to raise a relevant exemption from the secrecy regime. The situation surrounding the disclosure would be peculiarly within the person's own knowledge and control as they would be aware of the information they disclosed, and the recipient, and the manner and purpose for which it was disclosed. In contrast, requiring the prosecution to eliminate all possible exemptions beyond reasonable doubt could be difficult and costly in terms of time and resources, and could undermine the effectiveness of the secrecy regime which is essential to the functioning of the regime. As such, consistent with the *Guide to framing Commonwealth offences*, an evidential burden has been placed on the defendant in the proposed subsections 56(7G) to (7L) of the *Australian Prudential Regulation Authority Act 1998*.
>
> Placing the evidential burden of proof on the defendant is also justified as it aligns with the approach taken in other similar frameworks. For example, it is consistent with the treatment of other protected information collected by APRA under the predecessor regime to the Financial Accountability Regime, the Banking Executive Accountability Regime under Part IIAA of the *Banking Act 1959* (see section 56 of the *Australian Prudential Regulation Authority Act 1998*). Similarly, an evidential burden of proof exists in relation to the other prudential frameworks which interact with the regime including a matter raised under section 11CI of the *Banking Act 1959*, section 109A of the *Insurance Act 1973*, section 231A of the *Life Insurance Act 1995*. Consistency of approach across this complex legal framework is important to support understanding and application of the law.

Committee comment

2.53 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that provisions within the bill which reverse the evidential burden of proof in relation to offences within the *Australian Prudential Regulation Authority Act 1998* and the *Australian Securities and Investments Commission Act 2001* are justified because they align with the approach taken in other similar frameworks. The Treasurer advised that consistency of approach is important to support understanding and application of the law.

2.54 The Treasurer further advised that reversing the evidential burden of proof is justified in this instance as the relevant information would be peculiarly within the knowledge and control of the defendant. For example, the Treasurer advised that the situation surrounding disclosure of protected information would be peculiarly within the defendant's own knowledge as they would be aware of the information they disclosed, the recipient, and the manner and purpose for the disclosure. The Treasurer

advised that requiring the prosecution to eliminate all possible exemptions beyond reasonable doubt could be difficult and costly and could undermine the effectiveness of the secrecy scheme underpinning the financial accountability regime.

2.55 While acknowledging this advice, it is not clear to the committee from the explanation provided how it can be said that the relevant matters could be *peculiarly* within the defendant's knowledge. For example, as previously noted by the committee, 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. In addition, the committee notes that consistency with existing legislation is not a sufficient justification for reversing the evidential burden of proof.

2.56 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to several defences to secrecy offences in circumstances where the relevant matters do not appear to be peculiarly within the knowledge of the defendant.**

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	Health
Introduced	House of Representatives on 21 October 2021
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[32]

2.57 In *Scrutiny Digest 17 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 proposed subsections 105AA(2) and (5). 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*.[33]

Minister's response[34]

2.58 The minister advised:

> The Committee has requested that I clarify why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in Item 34 of Schedule 1 to the Bill, which inserts proposed section 105AA.
>
> The Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Guide) suggests 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
> - it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

32 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).

33 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 25-26.

34 The minister responded to the committee's comments in a letter dated 8 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

In this case, the proposed offence-specific defence is appropriate as it relates to matters peculiarly within the knowledge of the defendant. Proposed subsection 105AA(1) provides that it is a strict liability offence for an individual under review who is not a practitioner to fail to appear at a hearing of a Professional Services Review (PSR) Committee, or to appear at a hearing but refuse or fail to give evidence or to answer-questions.

Proposed subsection 105AA(2) provides a defence (offence-specific defence) to this offence in circumstances where the defendant has notified the PSR Committee of a medical condition prior to the hearing; complied with reasonable requirements to undergo a medical examination to determine the existence and extent of the medical condition; and the results of the medical examination indicate the defendant has a medical condition preventing them from appearing or from giving evidence or answering questions.

There will be situations where the defendant is the only person who knows whether they have completely met the criteria for the offence-specific defence and who is able to access relevant documents relating to the matters of the offence-specific defence.

Although the prosecution is likely to have knowledge of one aspect of the offence-specific defence, that is, whether the defendant notified the PSR Committee as required, information relating to the medical condition of the defendant and the results of any medical examination(s) would not be available to the prosecution in all cases.

Details as to the existence and extent of a medical condition would therefore be matters peculiarly within the knowledge of the defendant. Conversely, it would be difficult for the prosecution to prove, in all cases, that the defendant did not have a medical condition preventing them from appearing at a hearing or giving evidence as required.

In the instance where a defendant notifies the PSR Committee that they have a medical condition preventing them from appearing at a hearing and then does not provide any evidence that they have undergone a medical examination, the defendant would be the only person with any evidence of a medical examination and the results of the examination. If the defendant is then prosecuted under subsection 105AA(1), it would only be the defendant that holds the evidence necessary to successfully raise the offence-specific defence in subsection 105AA(2).

Similarly, proposed subsection 105AA(4) provides that it is 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 PSR Committee that he or she has a medical condition which prevents him or her from appearing, giving evidence or

> answering questions. In this case, as body corporate is a sole director company, details of the medical condition of the sole executive officer would also be peculiarly within the knowledge of the defendant.
>
> These offence-specific defences address specific stakeholder concerns in providing a medical exemption that mirrors the application of subsection 104(5) as this is a situation not completely covered by existing defences in the *Criminal Code Act 1995* (Criminal Code).
>
> As noted by the Committee, proposed subsections 105AA(2) and 105AA(5) do not impose a legal burden of proof upon a defendant as it is not expressed to do so (see section 13.4 of the Criminal Code). This is in line with the principle in the Guide and the default position in section 13.3 of the Criminal Code.

Committee comment

2.59 The committee thanks the minister for this response. The committee notes the minister's advice that the offence-specific defences in proposed subsections 105AA(2) and (5) are appropriate as they relate to matters peculiarly within the knowledge of the defendant.

2.60 In regard to the use of an offence-specific defence in proposed subsection 105AA(2), the committee notes the minister's advice that although the prosecution is likely to have knowledge of one aspect of the offence-specific defence, that is, whether the defendant notified the Professional Services Review (PSR) Committee as required, information relating to the medical condition of the defendant and the results of any medical examination(s) would not be available to the prosecution in all cases.

2.61 The committee also notes the minister's advice that where a defendant notifies the PSR Committee that they have a medical condition preventing them from appearing at a hearing and then does not provide any evidence that they have undergone a medical examination, the defendant would be the only person with any evidence of a medical examination and the results of the examination.

2.62 In relation to the other offence-specific in proposed subsection 105AA(5), the committee notes the minister's advice that as the body corporate is a sole director company, details of the medical condition of the sole executive officer would be peculiarly within the knowledge of the defendant.

2.63 The committee also notes the minister's advice that the offence-specific defences address specific stakeholder concerns in providing a medical exemption that mirrors the application of subsection 104(5) as this is a situation not completely covered by existing defences in the *Criminal Code Act 1995*.

2.64 **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 if the *Acts Interpretation Act 1901*).

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

National Security Legislation Amendment (Comprehensive Review and Other Measures No. 1) Bill 2021

Purpose	This bill seeks to amend the: • *Intelligence Services Act 2001*; • *Criminal Code Act 1995*; • *Crimes Act 1914*; • *Australian Passports Act 2005*; • *Foreign Passports (Law Enforcement and Security) Act 2005*; • *Office of National Intelligence Act 2018*; • *Inspector-General of Intelligence and Security Act 1986*; • *Australian Security Intelligence Organisation Act 1979*; and • *Telecommunications (Interception and Access) Act 1979*. This bill seeks to implement the government response to a number of recommendations of the *Comprehensive Review of the Legal Framework of the National Intelligence Community (Comprehensive Review)*. The measures in the bill seek to improve the legislative framework governing the National Intelligence Community by addressing key operational challenges facing the Australian Security Intelligence Organisation, the Australian Secret Intelligence Service, the Australian Signals Directorate, the Australian Geospatial-Intelligence Organisation, the Defence Intelligence Organisation and the Office of National Intelligence.
Portfolio	Home Affairs
Introduced	House of Representatives on 25 November 2021
Bill status	Before the House of Representatives

Broad delegation of administrative powers[35]

2.66 In *Scrutiny Digest 1 of 2022* the committee requested the minister's advice as to whether the bill can be amended to either:

- limit the ability to delegate powers, functions or duties under proposed section 9D (relating to emergency authorisations) to staff members of the senior executive service (or equivalent) and above; or
- limit the scope of the powers, functions and duties under proposed section 9D that can be delegated to a staff member.[36]

Minister's response[37]

2.67 The minister advised:

> Schedule 1 amends the Intelligence Services Act 2001 (IS Act) to permit the Australian Secret Intelligence Service (ASIS), Australian Signals Directorate (ASD) and Australian Geospatial-Intelligence Organisation (AGO) (together, the IS Act agencies) to produce intelligence on an Australian person, without first obtaining ministerial authorisation, in circumstances where there is an imminent risk to the person's safety overseas, and only in the very narrow situation where it is reasonable to believe that the person would consent to the IS Act agencies taking action. This allows for swift action to be taken in situations of imminent risk to an Australian person's safety overseas, such as a kidnapping or hostage situation.
>
> In emergency circumstances, time is of the essence. The ministerial authorisation process, even including the existing emergency authorisation provisions, can constitute a significant and unacceptable delay. Operational experience has demonstrated that the current emergency authorisation provisions in sections 9A, 9B and 9C of the IS Act do not support expeditious action by the relevant agencies where an Australian person's life may depend on immediate action. In particular, under the current framework, if an agency head considers it necessary or desirable to undertake an activity or series of activities, they must be satisfied that relevant Ministers are not available before giving an authorisation. In time-critical situations, the extra time involved in satisfying this requirement can put Australians at risk.

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35 Schedule 1, item 2, proposed subsection 9D(14). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 8-10.

37 The minister responded to the committee's comments in a letter dated 22 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

The ability to delegate powers, functions or duties under proposed section 9D

There is a strong operational need for this power to be devolved. The new emergency authorisation is for the limited scenario in which an immediate or near-immediate response is required. Introducing any delay into the authorisation process would defeat the purpose of the new authorisation and potentially put Australians at further risk. Crucially, the new authorisation is only for the very narrow scenario where it is reasonable to believe that the person would consent to the production of intelligence on themselves, if they were able to do so.

The scope of the delegation

It is also appropriate for the scope of the delegation to include all or any powers, functions or duties of the agency head under this section. The other obligations that may be delegated – for example, requirements to notify the responsible Minister and Inspector-General of Intelligence and Security (IGIS) – ensure that the responsible Minister maintains visibility and that the IGIS can properly exercise its oversight function. Requiring these obligations to only be fulfilled by the agency head personally could have the counter-productive effect of delaying provision to the responsible Minister and IGIS of the information and documentation to which they are legally entitled. Similarly, limiting a delegate's ability to cancel an authorisation under subsection 9D(12) could result in an authorisation continuing for longer than necessary, if the relevant agency-head was not immediately available.

The IGIS will have an important oversight role for agencies' use of this emergency authorisation, including whether the agencies act legally and with propriety, comply with ministerial guidelines and directives, and respect human rights. Under proposed subsection 9D(8) of Schedule 1, the IGIS is required to consider whether the agency head has complied with the requirements of section 9D, prepare a compliance report for the responsible Minister each time this power is exercised and provide the Committee with a copy of the conclusions to this report.

Fundamentally, the proposed emergency authorisation provisions are for the protection and benefit of individual Australians and can only be used in very narrow circumstances – to collect intelligence on an Australian who is at imminent risk of harm overseas, and where that Australian is likely to want, and indeed expect, the Government to take every action to assist them. It is therefore appropriate that the ability to delegate this power is reflective of the operational reality.

Committee comment

2.68 The committee thanks the minister for this response. The committee notes the minister's advice that there is a strong operational need for the power under proposed section 9D (relating to emergency authorisations) to be devolved and that

introducing any delay into the authorisation process would defeat the purpose of the new authorisation and potentially put Australians at further risk.

2.69 The committee also notes the minister's advice that the new authorisation is only for the very narrow scenario where it is reasonable to believe that the person would consent to the production of intelligence on themselves, if they were able to do so.

2.70 The committee further notes the minister's advice that requiring these obligations to only be fulfilled by the agency head personally could have the counter-productive effect of delaying provision to the responsible minister and IGIS of the information and documentation to which they are legally entitled.

2.71 While the committee acknowledges the need for immediate action in certain circumstances, it remains unclear to the committee why *all* of the powers and functions of an agency head under proposed section 9D may be delegated to *any* staff member (other than a consultant or contractor).

2.72 For example, it remains unclear to the committee why there could not be some limit on the persons to whom the power to give emergency authorisations under proposed subsections 9D(1)–(3) may be delegated. The committee notes that this could include a requirement that an agency head is satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated power.

2.73 Additionally, it remains unclear to the committee why the power of an agency head to delegate their responsibilities under proposed subsection 9D(4) or (5) could not be limited to relevant members of the Senior Executive Service without compromising the ability of the agency to ensure that the minister and IGIS are efficiently informed.

2.74 The committee reiterates that its scrutiny concerns in this instance are heightened by the significant nature of the powers involved, the fact that emergency authorisations may remain in force for up to six months, and the potential impacts on an individual's privacy that may be a consequence of their use.

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

2.76 **As the minister's response has not adequately addressed the committee's scrutiny concerns, the committee requests the minister's further advice as to:**

- **the level of staff members who, in practice, it is expected will be delegated the power to give emergency authorisations under proposed subsections 9D(1)–(3); and**

- **whether the bill could be amended to:**
  - **require that an agency head, when making a delegation under proposed subsection 9D(14), must be satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated power; and**
  - **limit the delegation of an agency head's responsibilities under proposed subsections 9D(4) or (5) to members of the Senior Executive Service.**

Tabling of documents[38]

2.77 In *Scrutiny Digest 1 of 2022* the committee requested the minister's advice as to whether the bill can be amended to provide that the privacy rules published online under proposed subsections 15(5) and 41C(6) are also tabled in the Parliament.[39]

Minister's response[40]

2.78 The minister advised:

> Schedule 10 implements recommendations 12 and 189 of the Comprehensive Review. It requires the Defence Intelligence Organisation (DIO) to have legally binding privacy rules, requires ASIS, ASD, AGO and DIO to make their privacy rules publicly available (except for operationally sensitive information or information that would or might prejudice Australia's national security, foreign relations, or the performance of agency functions), and updates the Office of National Intelligence's (ONI) privacy rules provisions so that they only apply to intelligence about an Australian person under ONI's analytical functions. The purpose of the amendments is to ensure increased transparency and accountability by requiring the privacy rules to be publicly available and reviewable by the Parliamentary Joint Committee on Intelligence and Security (PJCIS).
>
> Under the reforms, the privacy rules will be subject to robust ministerial oversight. In each case, the privacy rules are made by the responsible Minister – ensuring the principle of ministerial accountability is engaged. In making the privacy rules, the relevant Minister must have regard to the need to ensure that the privacy of Australians is preserved as far as is consistent with the proper performance by the agencies of their functions.

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38 Schedule 10, items 2 and 12, proposed subsections 15(5) and 41C(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 14-15.

40 The minister responded to the committee's comments in a letter dated 22 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

> The main argument in favour of tabling the privacy rules is to provide an opportunity for parliamentary scrutiny. This is a policy outcome that is already achieved by the Bill introducing a new function for the PJCIS to review each agency's privacy rules (see amended subsections 29(1) and 29(3) in Schedule 10). Review by the PJCIS provides openness, transparency and accountability and provides an avenue for members of the public to raise any concerns with respect to the privacy rules. PJCIS members have significant insight into the activities and functions of the intelligence agencies, and are well-placed to review agencies' privacy rules in a comprehensive manner that is cognisant of the unique operating environment of those agencies.
>
> As the Bill already requires the privacy rules to be published (other than sensitive information) and subject to parliamentary committee oversight, a requirement to table the rules is unlikely to result in any additional transparency or scrutiny.

Committee comment

2.79 The committee thanks the minister for this response. The committee notes the minister's advice that the opportunity for parliamentary scrutiny is already achieved by the bill introducing a new function for the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to review each agency's privacy rules.

2.80 The committee also notes the minister's advice that review by the PJCIS provides openness, transparency and accountability and provides an avenue for members of the public to raise any concerns with respect to the privacy rules. The minister also advised that PJCIS members have significant insight into the activities and functions of the intelligence agencies, and are well-placed to review agencies' privacy rules in a comprehensive manner that is cognisant of the unique operating environment of those agencies.

2.81 While the committee welcomes the proposal to introduce a new function for the PJCIS to review each agency's privacy rules, the committee reiterates that the process of tabling documents in Parliament provides opportunities for debate that are not available where documents are only published online, even where such documents are also subject to review by a parliamentary committee.

2.82 **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*).**

2.83 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of not providing that the privacy rules published online under proposed subsections 15(5) and 41C(6) are also tabled in the Parliament.**

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
Bill status	Currently before the House of Representatives

Modified disallowance procedures[41]

2.84 In *Scrutiny Digest 17 of 2021* the committee requested 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.[42]

Treasurer's response[43]

2.85 The Treasurer advised:

> I can advise that it is not necessary to amend the Bill as requested. As section 12 of the Bill does not override, and is not intended to override, the usual operation of subsection 42(2) of the *Legislation Act 2003* (Legislation Act), this already achieves the outcome sought by the Committee. Further, section 44 of the Legislation Act already provides the circumstances in which section 42 of the Legislation Act does not apply and those circumstances are not satisfied by subclause 12 of the Bill.
>
> The Bill states that an instrument made under subsection 7(2) or 8(2) will take effect on the day immediately after the last day upon which such a resolution *could* have been passed. This takes into account both the period

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

42 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021*, pp. 35-36.

43 The minister responded to the committee's comments in a letter dated 2 March 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

> for either House of Parliament to give a notice of a motion to disallow, and the period to resolve that motion.
>
> In other words, an instrument will take affect after there is no longer a possibility that either House may pass a resolution to disallow the instrument or provision specified in the motion. For example, if a notice of a motion to disallow is placed on the instrument on the 15th sitting day, then the instrument will not commence until the day after that motion has been finally resolved unless the instrument or a provision is disallowed.
>
> Finally, I note that as the Bill does not reference or override the operation of section 42 of the Legislation Act, which is a provision of general application across the entire Commonwealth statute book, it would be inappropriate to explain the function of those provisions of the Legislation Act in the explanatory memorandum to this Bill.

Committee comment

2.86 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that clause 12 of the bill does not override, and is not intended to override, the usual operation of subsection 42(2) of the *Legislation Act 2003* (Legislation Act). The Treasurer advised that, as a result, it is not necessary to amend the bill to clarify that clause 12 does not override the Legislation Act.

2.87 The committee reiterates its view that the usual parliamentary disallowance process is one of the primary means by which Parliament exercises control of its delegated legislative power. As previously noted by the committee, *Odgers' Australian Senate Practice* states that subsection 42(2) of the Legislation Act 'greatly strengthens the Senate in its oversight of delegated legislation'.[44]

2.88 Given the importance of the usual disallowance procedure to parliamentary scrutiny, the committee is concerned with any provision which introduces legislative ambiguity into the disallowance process. While welcoming the Treasurer's advice that the bill is not intended to override the operation of subsection 42(2) of the Legislation Act, the committee considers that it is necessary to more explicitly reflect this intention in the bill and its accompanying explanatory memorandum so as to put the intended limited statutory purpose of clause 12 beyond doubt.

2.89 **In light of the above, the committee requests the Treasurer's more detailed 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; or**

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

- **whether, at a minimum, an addendum to the explanatory memorandum could be tabled in the Parliament stating that clause 12 of the bill is not intended to override the usual operation of subsection 42(2) of the *Legislation Act 2003* with respect to automatic disallowance of an instrument where a disallowance motion is not resolved at the end of the disallowance period.**

Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Miscellaneous Measures) Bill 2021

Purpose	This bill seeks to amend the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* to improve the effectiveness and efficiency of the Ozone Protection and Synthetic Greenhouse Gas Program in order to reduce the burden on business, streamline and reduce the complexity of the Act, and ensure the Program can continue to achieve important environmental outcomes.
Portfolio	Environment
Introduced	House of Representatives on 2 December 2021
Bill status	Before the House of Representatives

Significant matters in delegated legislation[45]

2.90 In *Scrutiny Digest 1 of 2022* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave the prescription of permitted uses of HCFCs for the purposes of offence and civil penalty provisions to delegated legislation; and
- whether the bill can be amended to include at least high-level guidance regarding this matter on the face of the primary legislation.[46]

Minister's response[47]

2.91 The minister advised:

> Allowing the regulations to prescribe the permitted uses of hydrochlorofluorocarbon (HCFC) for the purposes of the offence and civil penalty provision in proposed subsection 45C(1) is necessary and

45 Schedule 1, item 111, proposed section 45C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

46 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 18-19.

47 The minister responded to the committee's comments in a letter dated 18 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

appropriate to ensure Australia's compliance with its international obligations whilst minimising regulatory burden as far as possible.

Production and import of HCFC is in the last stage of a global phase out in developed countries under the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol). The last stage from 2020 to 2029 allows a very small quantity of HCFC to be imported for a small number of prescribed circumstances agreed by the Montreal Protocol. Furthermore, the Montreal Protocol may also allow for additional essential uses if there are no practical alternative substances for that use and the use is essential for purposes such as public or industry safety, medical, veterinary or defence uses. As the global phase out progresses and changes in technology result in fewer essential uses for HCFC, the uses allowed under the Montreal Protocol are expected to be further refined in the future and it is important that Australia's laws are aligned to such changes in a timely way.

Allowing the regulations to prescribe allowed uses for HCFC that was manufactured or imported on or after 1 January 2020 provides the necessary flexibility in the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (the Act) to respond in a timely way to changes in Australia's international obligations and to ensure that the regulatory burden to industry is minimised so far as possible. Importantly, this would ensure Australia's continued and ongoing compliance with its international obligations and would also minimise the adverse impacts of HCFC on human health and the environment.

As the regulations would be required to adapt to changing circumstances domestically and internationally, providing high level guidance in the Act could hamper the ability to align with international requirements. For example, it could hamper the ability to address unforeseen advances in technology. Further, any regulations made to prescribe permitted uses of HCFC would be subject to the usual parliamentary scrutiny and disallowance processes. I therefore consider that it is not appropriate to include further high-level guidance in the bill regarding this matter.

Committee comment

2.92 The committee thanks the minister for this response. The committee notes the minister's advice that leaving the prescription of permitted uses of HCFCs to delegated legislation is necessary and appropriate to ensure Australia's compliance with its international obligations whilst also minimising regulatory burden. The minister advised that it is expected that permitted uses of HCFCs under the Montreal Protocol will be reduced in the future and that it is important that Australia's laws are aligned to such changes in a timely way. The minister advised that allowing the prescription of permitted uses of HCFCs within the regulations will provide the necessary flexibility to align to these changes and will therefore ensure Australia's ongoing compliance with its international obligations and also minimise the adverse impacts of HCFCs on human health and the environment.

2.93 While acknowledging this advice, the committee has generally not considered a desire for administrative flexibility to be a sufficient justification for including significant matters within delegated legislation. In this case, the committee's concerns are heightened given that the bill prescribes key elements of offences, including an offence of strict liability which undermines fundamental common law rights, within delegated legislation. In this context, it is not clear to the committee from the explanation provided why at least high-level guidance regarding permitted uses of HCFCs cannot be included within the bill.

2.94 **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*).**

2.95 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the prescription of permitted uses of HCFCs for the purposes of offence and civil penalty provisions to delegated legislation.**

Incorporation of external material as in force from time to time[48]

2.96 In *Scrutiny Digest 1 of 2022* the committee requested the minister's advice as to whether standards and any other documents incorporated into the regulations will be made freely available to all persons interested in the law.[49]

Minister's response[50]

2.97 The minister advised:

> Proposed subsection 45A(4) would allow the regulations to incorporate an instrument or other writing as in force or existing from time to time. As outlined in the Explanatory Memorandum to the bill, the purpose of this amendment is to allow regulations concerning the end use of scheduled substances to incorporate documents, such as standards or qualifications, and to enable those documents to be regularly updated so that they are the

48 Schedule 1, Item 111, proposed subsection 45A(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

49 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 20-21.

50 The minister responded to the committee's comments in a letter dated 18 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

most up-to-date and appropriate qualifications and standards for any particular end use.

It is envisaged that the standards that would be incorporated by the regulations would generally be official Australia and New Zealand industry standards which would be readily available via Standards Australia. While Standards Australia is not freely accessible, it is expected that standards that are incorporated would be industry best practice and would already be widely used by industry. Therefore, it can be reasonably expected that those who would be regulated by any such regulations would already have access to any incorporated standards to carry out their business or meet their professional obligations.

Committee comment

2.98 The committee thanks the minister for this response. The committee notes the minister's advice that the purpose of this amendment is to allow regulations concerning the end use of scheduled substances to incorporate documents, and to enable those documents to be regularly updated so that they are the most up-to-date and appropriate qualifications and standards for any particular end use.

2.99 The minister advised that any standards that would be incorporated by the regulations would be readily available via Standards Australia. The minister advised that while standards published through Standards Australia are not freely accessible, it is expected that any standards that are incorporated would be industry best-practice and would therefore already be widely used by industry.

2.100 While acknowledging this advice, the committee notes that, as a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

2.101 **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*).**

2.102 **The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of including in the bill a power to incorporate external materials as in force from time to time in circumstances where incorporated materials will not be freely available.**

No-invalidity clause[51]

2.103 In *Scrutiny Digest 1 of 2022* the committee requested the minister's advice as to why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsection 65Y(3) and proposed subsection 65ZB(3) of the bill.[52]

Minister's response[53]

2.104 The minister advised:

> Proposed subsections 65Y(3) and 65ZB(3) would provide that a failure to provide a written notice of decision would not affect the validity of the original reviewable decision. The proposed provisions are based on, and would replace, existing subsection 67(2) of the Act which already provides that a failure to comply with the notice requirements does not affect the validity of the relevant decision. The proposed new subsections 65Y(3) and 65ZB(3) does not broaden this provision, but rather seeks to re-draft the existing provision to allow for more clarity and for it to apply it consistently across the Act including to newly introduced provisions.
>
> The purpose of proposed subsections 65Y(3) and 65ZB(3) is to provide the necessary certainty for both industry and the Commonwealth as to whether a licence is in force and covers a particular import, manufacture or export. This is particularly the case where, for example, a decision has been made to refuse to grant a licence or refuse to renew a licence. In these instances, it is important that current practices are maintained and that industry has sufficient certainty over the decision to reduce any further regulatory burden and to minimise any possibility of non-compliance.
>
> It is important that decisions relating to non-compliance with the licensing conditions by licence holders, for example, are made in a timely way and with sufficient certainty. This enables an effective response to manage and mitigate any harm that may result from the non-compliance to Australia's environmental and human health, Australia's continued compliance with its international obligations and its international relations. Proposed 65Y(3) and 65ZB(3) would provide the necessary regulatory certainty that is required to deal with these situations.

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51 Schedule 1, item 145, proposed subsection 65Y(3), and proposed subsection 65ZB(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

52 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 21-22.

53 The minister responded to the committee's comments in a letter dated 18 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Committee comment

2.105 The committee thanks the minister for this response. The committee notes the minister's advice that proposed subsections 65Y(3) and 65ZB(3) seek to provide the necessary certainty for both industry and the Commonwealth as to whether a licence is in force and covers a particular import, manufacture or export. The minister advised that it is important that current practices are maintained and that industry has sufficient certainty over the decision to reduce any further regulatory burden and to minimise any possibility of non-compliance.

2.106 While acknowledging this advice, the committee reiterates that 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. As previously stated, the committee has generally not accepted a desire for certainty to be, of itself, a sufficient justification for the inclusion of no-invalidity clauses.

2.107 **The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of including a no-invalidity clause in proposed subsections 65Y(3) and 65ZB(3).**

Religious Discrimination Bill 2021

Religious Discrimination (Consequential Amendments) Bill 2021

Purpose	The Religious Discrimination Bill 2021 seeks to introduce federal protections to prohibit discrimination on the basis of a person's religious belief or activity in a wide range of areas of public life, including in relation to employment, education, access to premises, goods, services and facilities, and accommodation. The Religious Discrimination (Consequential Amendments) Bill 2021 seeks to amend the *Australian Human Rights Commission Act 1986* and other existing federal legislation to ensure that discrimination on the basis of religious belief or activity under the Religious Discrimination Bill is treated in the same manner as discrimination under the *Age Discrimination Act 2004*, *Disability Discrimination Act 1992*, *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1986*.
Portfolio	Attorney-General
Introduced	House of Representatives on 24 November 2021
Bill status	Before the Senate

Significant matters in delegated legislation—publicly available policies[54]

2.108 In *Scrutiny Digest 18 of 2021*, the committee requested the Attorney-General's advice as to:

- why the requirements for certain policies relevant to the application of discrimination law, including how the policies are to be made publicly available, have been left to delegated legislation; and
- whether the bill could be amended to include at least high-level guidance in relation to this matter on the face of the primary legislation.[55]

54 Subclauses 7(7), 9(7), 40(3) and 40(6) of the Religious Discrimination Bill 2021. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

55 *Scrutiny Digest 18 of 2021*, pp. 25-27.

2.109 The committee considered the Attorney-General's response in *Scrutiny Digest 1 of 2022* and requested that an addendum containing the key information provided by the Attorney-General be tabled in the Parliament as soon as practicable.[56]

Attorney-General's response[57]

2.110 The Attorney-General advised:

> I note the Committee has recommended further explanatory material on the requirements for publicly available polices be included.
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> The Government has now moved amendments to the Religious Discrimination Bill 2021 to provide further clarity regarding what is required to be included in a publicly available policy. The requirements are based upon the suggested approach by the Religious Freedom Review (for example, in paragraph 1.250 of the Report) and the requirements set out in paragraph 11(1)(b). These amendments to subclauses 7(6), 9(3), 9(5), 40(2), and 40(5) provide that a policy must:
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> - outline the religious body's position in relation to particular religious beliefs or activities; and
> - explain how that position is or will be enforced; and
> - be publicly available, including at the time employment opportunities with the religious body become available.
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> This ensures the requirements for publicly available policies are consistent throughout the Bill. However, as clause 40 relates to accommodation, rather than employment, it is not necessary to include the requirement specifying that the policy be available at the time employment opportunities become available.
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> This implements recommendation 8 of the [Parliamentary Joint Committee on Human Rights] inquiry report on the Religious Discrimination Bill 2021 and related bills, with one minor variation. With the inclusion of these requirements, sufficient detail about these policies is now included in the Bill. Accordingly, the Government amendments also removed the provisions permitting the Minister to determine requirements for a publicly available policy (being former subclauses 7(7), 9(7), 40(3) and 40(6)).

Committee comment

2.111 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the government has moved amendments to

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56 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 52-55.

57 The Attorney-General responded to the committee's comments in a letter dated 22 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

clarify what is required to be included in a publicly available policy. Specifically, the government's amendments provide that a policy must outline a religious body's position in relation to particular religious beliefs or activities and explain how that position is or will be enforced. The amendments also require that a policy be publicly available, including (where relevant) at the time employment opportunities with the religious body become available.

2.112 **The committee welcomes the government amendments which set out further detail within the bill as to what is required to be included within a publicly available policy. In light of these amendments, the committee makes no further comment on this matter.**

Significant matters in delegated legislation—overriding state or territory laws in relation to employment by religious educational institutions and statements of belief[58]

2.113 In *Scrutiny Digest 18 of 2021*, the committee requested the Attorney-General's advice as to:

- why the power to prescribe certain state and territory laws under clause 11 is left to delegated legislation; and
- which state or territory laws, if any, are currently intended to be prescribed within regulations made under subclause 11(3).[59]

2.114 The committee considered the Attorney-General's response in *Scrutiny Digest 1 of 2022* and requested the Attorney-General's further advice as to why it is considered necessary and appropriate to leave the power to prescribe additional laws for the purpose of clause 12 (statements of belief) to delegated legislation.[60]

Attorney-General's response[61]

2.115 The Attorney-General advised:

> I note my advice in response to *Scrutiny Digest 18 of 2021* set out the Government's position in relation to this issue.

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58 Clauses 11 and 12 of the Religious Discrimination Bill 2021. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

59 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, p. 27.

60 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 55-58.

61 The Attorney-General responded to the committee's comments in a letter dated 22 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Further, I note that the Government moved minor amendments to the drafting of clauses 11 and 12 to more clearly engage section 109 of the Constitution to override relevant State and Territory laws.

Committee comment

2.116 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the government has moved amendments to more clearly engage section 109 of the Constitution to override relevant State and Territory laws.

2.117 While acknowledging these amendments, which are intended to address uncertainty as to whether the Commonwealth Parliament has the power to alter the application or effect of a state law in the manner previously contemplated by the bill, the committee reiterates its view that overriding or altering the effect of a law duly passed by a state parliament is a particularly significant matter that should not be dealt with by way of executive-made law.

2.118 **The committee therefore draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving to delegated legislation:**

- **the prescription of which state and territory laws relating to employment by religious educational institutions will be overridden by Commonwealth law; and**
- **the prescription of additional Commonwealth, state and territory laws for which the making of a statement of belief will not constitute discrimination.**

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

Broad discretionary power[62]

2.120 The committee initially scrutinised this bill in *Scrutiny Digest 18 of 2021*.[63] The committee considered the Attorney-General's response in *Scrutiny Digest 1 of 2022* and requested the Attorney-General's further advice as to whether the bill could be amended to:

- provide high-level guidance in relation to the circumstances in which the ministerial variation and revocation power at clause 47 may be invoked;

62 Clauses 44 and 47 of the Religious Discrimination Bill 2021. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

63 Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021*, pp. 29-30.

- clarify whether the variation power may be utilised to extend the period of an exemption beyond 5 years; and
- include a requirement that the Commission or minister must, consistent with section 46 of the *Age Discrimination Act 2004,* section 57 of the *Disability Discrimination Act 1992* and section 46 of the *Sex Discrimination Act 1984,* publish within a month of an exemption decision, or a variation or revocation decision, a notice setting out:
  - the Commission or minister's findings on material questions of facts in relation to the decision;
  - the evidence on which those findings were based;
  - the reasons for the decision; and
  - the fact that an application may be made to the Administrative Appeal Tribunal for a review of the decision; or
- alternatively, specify that the above information must be included within the relevant notifiable instrument made under subclause 44(1) or 47(1).[64]

Attorney-General's response[65]

2.121 The Attorney-General advised:

> Further to my advice in response to *Scrutiny Digest 18 of 2021*, the Government has moved amendments to increase transparency around the making of temporary exemptions by the Australian Human Rights Commission, and to remove the Minister's power to vary or revoke a temporary exemption. This will be done through the inclusion of a new clause 44A, and amendments to existing clauses 47 and 48.
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> As noted by the Committee, under clause 44 of the Bill, the Commission is currently able to grant temporary exemptions from the prohibition on discrimination on the grounds of religious belief or activity under the Bill. New clause 44A will require the Commission, after making a decision on an application for a temporary exemption, to publish a notice on its website specifying its reasons, findings, relevant evidence, and noting that the Commission's decision is subject to review through the Administrative Appeals Tribunal. This new subclause is consistent with the Commission's existing notice requirements in making temporary exemptions under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992* and the

64 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022*, pp. 61-64.

65 The Attorney-General responded to the committee's comments in a letter dated 22 February 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

> *Sex Discrimination Act 1984*, and will ensure transparency of the Commission's decisions and allow for appropriate public scrutiny.
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> Additionally, clause 47 had provided that either the Commission or the Minister may vary or revoke a temporary exemption granted by the Commission under clause 44. The Government has now moved an amendment that will remove the Minister's power to revoke or vary a temporary exemption granted by the Commission, consistent with the approach under existing Commonwealth anti-discrimination law.
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> These amendments also implement recommendations 4 and 6 of the report of the Parliamentary Joint Committee on Human Rights inquiry on the Religious Discrimination Bill 2021 and related bills, tabled on 4 February 2022.

Committee comment

2.122 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that the government has moved amendments to increase transparency around the making of temporary exemptions and to remove the minister's power to vary or revoke a temporary exemption.

2.123 The committee reiterates its scrutiny concerns that there appear to be no restrictions on the ability of the Commission to renew an exemption indefinitely, as well as no restriction on the period of the exemption being varied by the Commission.

2.124 **The committee welcomes the government amendments which:**

- **remove the minister's power to vary or revoke exemptions; and**
- **provide that the Commission must, consistent with section 46 of the *Age Discrimination Act 2004*, section 57 of the *Disability Discrimination Act 1992* and section 46 of the *Sex Discrimination Act 1984*, publish within a month of an exemption decision a notice setting out:**
  - **the Commission's findings on material questions of facts in relation to the decision;**
  - **the evidence on which those findings were based;**
  - **the reasons for the decision; and**
  - **the fact that an application may be made to the Administrative Appeal Tribunal for a review of the decision.**

2.125 **The committee otherwise draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the Australian Human Rights Commission with a broad power to grant or vary exemptions from the prohibition on discrimination on the grounds of religious belief or activity under the bill, with no restrictions on the ability of the Commission to renew an exemption indefinitely.**

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
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> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.[2]

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

Senator Helen Polley
Chair

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

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