

The Senate

Standing
Committee for the
Scrutiny of Bills

Scrutiny Digest 5 of 2022

28 September 2022

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ISSN 2207-2004 (print)

ISSN 2207-2012 (online)

This document was prepared by the Senate Standing Committee for the Scrutiny of Bills and printed by the Senate Printing Unit, Department of the Senate, Parliament House, Canberra.

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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* (the 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.

Atomic Energy Amendment (Mine Rehabilitation and Closure) Bill 2022

Purpose	This bill seeks to amend the <i>Atomic Energy Act 1953</i> to allow the Minister to preserve the regulatory framework that applies to the Ranger Uranium Mine in the Northern Territory.
Portfolio	Industry, Science and Resources
Introduced	House of Representatives on 8 September 2022

Availability of merits review¹

1.2 The bill seeks to amend the *Atomic Energy Act 1953* (the Atomic Energy Act) to allow the minister to extend the operation of that Act as it applies to the Ranger Uranium Mine until rehabilitation of that mine is complete. Item 18 of Schedule 1 to the bill inserts Division 4 into Part III of the Atomic Energy Act to establish a new class of authority, known as a Rehabilitation Authority. Schedule 1 also provides for the variation and revocation of Part III authorities, including a section 41 authority.² The mine operator currently holds an authority under section 41 of the Atomic Energy Act which is due to expire in 2026.

1.3 Proposed section 41CK allows the minister, by writing, to vary a Part III authority in response to a failure to comply with an authority,³ to extend the time period in which an authority is in force,⁴ to ensure continued effective operation of an

1 Schedule 1, item 18, proposed subsections 41CK(1)–(5) and 41CR(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

2 Proposed subsection 41CV provides that a Part III authority is not a legislative instrument. A Part III authority may authorise operations, impose requirements and set conditions in relation to specified activities for an area of land in the Ranger Project Area.

3 Proposed subsection 41CK(1).

4 Proposed subsection 41CK(2).

authority,⁵ or to specify close-out conditions.⁶ In addition, proposed subsection 41CR(1) provides that the minister may, by writing, revoke an authority conferred under section 41 if satisfied of certain matters. The bill does not provide for a decision made by the minister under proposed subsections 41CK(1) to (5) and proposed subsection 41CR(1) to be independently merits reviewed.

1.4 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*. In this instance, the committee notes that interests of relevant people, such as the mine operator or Land Council, may be affected by a decision of the minister to vary, or revoke, a Part III authority. However, the explanatory memorandum does not appear to address why merits review is not available for decisions made by the minister under proposed subsections 41CK(1) to (5) or proposed subsection 41CR(1).

1.5 The committee welcomes provisions in the bill which impose constraints on when the minister can vary the authority, and set out consultation and notification requirements the minister must follow before and after varying a Part III authority.⁷ However, the committee considers that such consultation processes and elements of procedural fairness are insufficient to justify the exclusion of independent merits review where the consequences of that decision will, or are likely to, affect the interests of a person. It therefore remains unclear to the committee why individuals whose interests are affected by a decision of the minister to vary, or revoke, a Part III authority should not have access to independent merits review.

1.6 The committee therefore requests the minister's advice as to why merits review will not be available in relation to a decision to vary, or revoke, an authority under proposed subsections 41CK(1) to (5) or proposed subsection 41CR(1) of the bill. The committee's consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*.

5 Proposed subsection 41CK(3).

6 Proposed subsection 41CK(4).

7 Proposed sections 41CL, 41CM, 41CN and 41CO.

Incorporation of external materials as existing from time to time⁸

1.7 Proposed section 41CU provides that a Part III authority may make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in any other instrument or writing as in force or existing from time to time.

1.8 In general, the committee has scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents. This is because such an approach can create uncertainty in the law and means that those obliged to obey the law may have inadequate access to its terms. The committee expects that the explanatory memorandum for a bill which proposes to allow the incorporation of external materials as in force from time to time should contain a sound justification as to why this incorporation power is necessary and appropriate.

1.9 In this instance, the explanatory memorandum states that the incorporation of documents as they exist from time to time will support the efficient operation of the legislation by allowing a Part III Authority to incorporate matters relevant to the Ranger Uranium Mine's rehabilitation which are set out in a separate, specified document. The explanatory memorandum provides one such example:

For example, NT legislation requires the Mine Operator to meet specified closure criteria in respect of the site. Section 41CU will allow a future Part III Authority to make reference to closure criteria which have been approved by stakeholders from time to time, in turn ensuring consistency of obligations imposed on the Mine Operator.⁹

1.10 The committee notes that the incorporation of external materials in this way could operate to change the circumstances in which an authority holder is deemed to have satisfied its rehabilitation requirements. While the committee welcomes the information in the explanatory memorandum that consultation will be undertaken prior to any incorporation, the committee notes that this requirement is not set out on the face of the bill.¹⁰ In addition, the explanatory memorandum does not appear to identify or explain where the incorporated materials may be accessed or whether they will be freely available (for example, on an Australian Government agency website or by request).

1.11 In light of the above, the committee requests the minister's advice as to whether documents incorporated by reference will be freely and readily available to all persons interested in the law.

8 Schedule 1, item 18, proposed section 41CU. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

9 Explanatory memorandum, p. 26.

10 Explanatory memorandum, p. 26.

Counter-Terrorism Legislation Amendment (AFP Powers and Other Matters) Bill 2022

Purpose	This bill seeks to amend the <i>Crimes Act 1914</i> and the <i>Criminal Code Act 1995</i> to extend for 12 months (until 7 December 2023) the sunseting dates for stop, search and seizure powers, control orders and preventative detention orders.
Portfolio	Attorney-General
Introduced	House of Representatives on 8 September 2022

Coercive powers

Deferral of sunseting¹¹

1.12 Items 1, 2 and 3 of Schedule 1 to the bill seek to extend the operation of significant counter-terrorism measures that are currently due to sunset on 7 December 2022.

1.13 Specifically, the bill is seeking to extend the operation of the following measures:

- **the control order regime**,¹² which allows a court to impose obligations, prohibitions and restrictions on a person without charge, for purposes related to preventing terrorist acts or support for terrorist acts;
- **the preventative detention order regime**,¹³ which allows a person to be taken into custody for up to 48 hours for the purpose of either preventing a terrorist attack that is capable of being carried out and could occur within the next 14 days, or to preserve evidence relating to a recent terrorist act; and
- **the stop, search and seizure powers**,¹⁴ which allow a police officer to stop, question and search persons and seize items in a Commonwealth place or prescribed security zone without a warrant (and, in relation to prescribed security zones, without the need for reasonable suspicion).

11 Schedule 1, items 1, 2 and 3. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i) and (v).

12 In Part 3, Division 104 of Schedule 1 to the *Criminal Code Act 1995* (the Criminal Code). Item 2 of Schedule 1 to the bill seeks to extend the operation of this measure.

13 In Division 105 of the Criminal Code. Schedule 1, item 3 seeks to extend the operation of this measure.

14 In Part 1AA, Division 3A of the *Crimes Act 1914*. Item 1 of Schedule 1 to the bill seeks to extend the operation of this measure.

1.14 The bill is proposing to extend the operation of each of these measures for 12 months, until 7 December 2023.

1.15 The committee has previously raised scrutiny concerns regarding these broad coercive powers. In particular, the committee has previously noted that the control order regime constitutes a substantial departure from the traditional approach to restraining and detaining persons on the basis of a criminal conviction.¹⁵ That traditional approach involves a number of steps: investigation, arrest, charge, remand in custody or bail, and then sentence on conviction.

1.16 In contrast, control orders allow restraints to be placed on personal liberty without there being any criminal conviction, or without even a charge being laid.¹⁶ Protections of individual liberty, built into ordinary criminal processes, are necessarily compromised.

1.17 Similarly, the committee considers that preventative detention orders raise significant scrutiny concerns as they permit a person's detention by the executive without charge or arrest, and without even a necessary intention to charge the subject with an offence.

1.18 The committee has also previously raised concerns that the power to stop, search and question a person in a prescribed security zone, without the need for any reasonable suspicion, has the potential to be highly coercive. Once a prescribed security zone is declared, everyone in that zone is subject to stop, question, search and seizure powers, regardless of whether there are reasonable grounds to believe the person may be involved in the commission, or attempted commission, of a terrorist act.

1.19 The extraordinary nature of the regimes outlined above is recognised in the current legislation by the inclusion of a sunset period. The committee expects the explanatory memorandum for any bill deferring a sunset date to address why that deferral is necessary and appropriate. Where the relevant measures may trespass unduly on personal rights and liberties, as in this case, the committee's expectations in this regard are even higher. The committee's expectations will also be higher where the sunset date has been repeatedly extended. The explanatory materials accompanying such a bill should provide a comprehensive justification for the continued need for coercive powers, including outlining what *exceptional* circumstances justify the extension, whether those exceptional circumstances are

15 Senate Standing Committee for the Scrutiny of Bills, [Alert Digest No. 7 of 2016](#), 12 October 2016, p. 20; Senate Standing Committee for the Scrutiny of Bills, [Report No. 8 of 2016](#), 9 November 2016.

16 Control orders may be imposed on the basis of a court being satisfied on the balance of probabilities that the threshold requirements for the issue of the orders have been satisfied.

expected to continue into the future and what alternative scrutiny mechanisms are available to Parliament.

1.20 In this instance, the statement of compatibility contains a detailed explanation of the operation of each measure. However, the explanatory materials for the bill contain no direct justification for the extension of the sunseting date for any of the measures.

1.21 The statement of compatibility for the Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021 explained that the previous extension of the sunseting date was justified to allow time for the Parliamentary Joint Committee on Intelligence and Security to table its report of its most recent review into Australian Federal Police powers and to provide time for government to consider any recommendations from the review.¹⁷ A similar explanation was also provided to justify extending the sunseting date until September 2021.¹⁸ However, the committee notes that this report was tabled in October 2021 and the government is yet provided a response.¹⁹

1.22 While the committee acknowledges the importance of the stated purpose of the measures described above it reiterates that these broad coercive powers substantially depart from traditional approaches to the criminal law and the presumption of innocence. The committee is particularly concerned that several of the measures give the power to detain and restrain persons who may not have been convicted of, or even charged with, a criminal offence.

1.23 The committee reiterates its previous concerns that there is a risk that measures that were originally introduced on the basis of being a temporary response to an emergency situation may become permanent by their continual renewal.²⁰ The committee considers the measures being extended by this bill raise significant scrutiny concerns and may, in some instances, unduly trespass on personal rights and liberties.

1.24 The committee therefore requests the minister's advice as to why it is considered necessary and appropriate to extend, by a further twelve months, the operation of broad coercive powers within the *Crimes Act 1914* and the *Criminal Code Act 1995*.

17 Counter-Terrorism Legislation Amendment (Sunsetting Review and Other Measures) Bill 2021, statement of compatibility, p. 16.

18 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 6 of 2018](#), 20 June 2018, pp. 13–16.

19 Parliamentary Joint Committee on Intelligence and Security, [Review of police powers in relation to terrorism, the control order regime, the preventative detention order regime and the continuing detention order regime](#), October 2021.

20 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 6 of 2018](#), 20 June 2018, pp. 13–16; [Scrutiny Digest 12 of 2021](#), 11 August 2021, pp. 1–4.

Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022

Purpose	This bill seeks to amend the <i>Emergency Response Fund Act 2019</i> to: <ul style="list-style-type: none"> • establish the Disaster Ready Fund; • allow up to \$200 million per annum to be debited from the Disaster Ready Fund for natural disaster resilience and risk reduction; • allow the responsible Ministers to adjust the maximum disbursement amount via a disallowable legislative instrument; and • facilitate the transfer of responsibility for fund expenditure to the National Emergency Management Agency and streamline administrative arrangements in relation to transfers from the fund.
Portfolio	Finance
Introduced	House of Representatives on 7 September 2022

Significant matters in delegated legislation²¹

1.1 The bill seeks to rename and repurpose the Emergency Response Fund into the Disaster Ready Fund. Item 105 of Schedule 1 to the bill seeks to repeal and replace Division 5 of Part 3 of the *Emergency Response Fund Act 2019* (Emergency Response Fund Act). That Division currently specifies annual limits on amounts that may be debited from the Emergency Response Fund.²²

1.2 Proposed subsection 34(1) provides that the total amount debited from the Disaster Ready Fund Special Account must not exceed \$200 million or, if another amount is specified by proposed subsection 34(2) or (3), that other amount. Proposed subsections 34(2) and (3) therefore allow the Treasurer and Finance Minister (the

21 Schedule 1, item 105, proposed subsections 34(1)–(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

22 Section 34 of the Emergency Response Fund Act currently provides a total annual limit of \$200 million.

responsible Ministers) to determine, by way of disallowable legislative instrument, a maximum amount that can be debited during a financial year (or years).²³

1.3 The committee's consistent scrutiny view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Given the importance of parliamentary oversight and control of the expenditure of public money, the committee considers that the authorisation of expenditure should, generally, be enacted via primary legislation, rather than delegated to the executive. Where a bill seeks to empower the executive to determine the amount of relevant expenditure by delegated legislation, the committee expects there to be appropriate safeguards within the primary legislation that guide and constrain the exercise of this power. In this regard, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.4 In this instance, the committee has scrutiny concerns that proposed subsections 34(1) to (3) would confer broad powers on the responsible Ministers to determine the maximum debit amount that may be drawn from the Disaster Ready Fund Special Account, with little guidance on the face of the bill as to how these powers are to be exercised. In making the instrument, proposed subsection 34(5) requires the responsible Ministers to have regard to advice given by the Future Fund Board about the impact of a determination on that Board's ability to comply with the Emergency Response Fund Act and associated investment mandate and 'such other matters (if any) as the responsible ministers consider relevant'. However, there is no further guidance as to the amount that may be debited. For example, the committee notes that there is no guidance on the face of the bill regarding the circumstances in which it may be appropriate for the ministers to adjust the maximum debit limit. In this regard, the absence of an express cap on the face of the bill on the amount that may be debited by delegated legislation heightens the committee's concerns.

1.5 The committee expects any inclusion of significant matters in delegated legislation to be thoroughly justified in the explanatory memorandum. In this instance, the explanatory memorandum states that the ability to adjust the maximum annual limit by legislative instrument 'will allow the Government to adjust the maximum disbursement amount in the future, in response to investment market or policy considerations'.²⁴

1.6 The committee has generally not accepted a desire for administrative flexibility to be a sufficient justification for leaving significant matters to delegated

23 The annual limit in proposed subsection 34(1) would apply from the financial year beginning on 1 July 2023 to allow existing funding commitments for the 2022–23 financial year to be met before this limit applies. For further information, see explanatory memorandum, p. 21.

24 Explanatory memorandum, p. 3.

legislation. It is unclear from this explanation why it is necessary to permit the responsible Ministers to adjust the maximum debit amount by legislative instrument in circumstances where the bill contains no cap on the amount that may be determined.

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

- **why it is considered necessary and appropriate to permit the Treasurer and Finance Minister to adjust the maximum amount that may be debited from the Disaster Ready Fund Special Account by legislative instrument; and**
- **whether the bill could be amended to provide a cap on the amount that may be determined by the ministers under proposed subsections 34(2) and (3) or, at a minimum, whether further criteria or considerations constraining the exercise of these powers could be included on the face of the bill.**

Documents not required to be tabled in the Parliament²⁵

1.8 Item 105 of Schedule 1 to the bill seeks to insert proposed section 34A into the Emergency Response Fund Act. Proposed section 34A requires that the responsible Ministers must seek advice from the Future Fund Board on the impact of a proposed adjustment to the amount that may be debited from the Disaster Ready Fund. This advice must outline what the impact of making the adjustment would be on the ability of the Future Fund Board to comply with the Emergency Response Fund Act and associated investment mandate. Proposed subsection 34(5) provides that the responsible Ministers must have regard to advice given by the Future Board Fund in determining an annual limit on debits under proposed subsections 34(2) and (3).

1.9 The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. As such, the committee expects there to be appropriate justification for not including a requirement that documents or information be tabled in Parliament. In this instance, the explanatory memorandum does not appear to explain why the advice is not required to be tabled in Parliament, nor does it explain whether the advice will be publicly available.

1.10 Noting the impact on parliamentary scrutiny of not requiring documents to be tabled in Parliament, the committee requests the minister's advice as to whether proposed section 34A of the bill can be amended to provide that the advice given by the Future Fund Board be tabled in the Parliament.

25 Schedule 1, item 105, proposed section 34A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

Financial Accountability Regime Bill 2022

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 8 September 2022

Broad discretionary powers

Significant matters in delegated legislation²⁶

1.25 The Financial Accountability Regime Bill 2021 (the 2021 bill) was introduced in the House of Representatives on 28 October 2021 and lapsed at the dissolution of the previous Parliament. The Financial Accountability Regime Bill 2022 (the 2022 bill) has now been introduced in identical form in the House of Representatives. The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 17 of 2021* and *Scrutiny Digest 2 of 2022*.²⁷

1.26 Chapter 2 of the bill sets out the obligations that will apply to accountable persons²⁸ and accountable entities²⁹ under the new Financial Accountability Regime. Broadly speaking, the obligations imposed by Chapter 2 relate to the following areas:

- **accountability obligations**,³⁰ requiring entities in the banking, insurance and superannuation industries to conduct their business in a certain way;
- **key personnel obligations**,³¹ requiring entities in the banking, insurance and superannuation industries to nominate senior executives to be responsible for all areas of business operations;

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

27 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 17 of 2021](#), 24 November 2021, pp. 14–21; [Scrutiny Digest 2 of 2022](#), 18 March 2022, pp. 65–78.

28 Defined at clause 9.

29 Defined at clause 10.

30 Part 3 of Chapter 2.

31 Part 4 of Chapter 2.

- **deferred remuneration obligations**,³² requiring entities to defer a minimum amount of remuneration for senior executives for at least four years and to reduce variable remuneration; and
- **notification obligations**,³³ requiring entities to notify the Regulator in relation to some aspects of their business and setting up an enhanced notification scheme.

1.27 Clause 16 of the bill allows exemptions to be granted in relation to any of the obligations set out in Chapter 2. Subclause 16(1) provides that the minister may, by written notice, exempt an individual accountable entity from their Chapter 2 obligations, while subclause 16(2) provides that the minister may exempt a class of accountable entities by legislative instrument.

1.28 There is very little guidance, either within the bill or the explanatory memorandum, setting out how this broad exemption power will be used. For example, the bill does not set out any relevant criteria or considerations that may, or must, be considered prior to granting an exemption. Further, the bill does not contain any limits on the exercise of the power. Clause 16 would therefore provide the minister with a broad power to provide an exemption to an accountable entity.

1.29 The committee notes that insufficiently defined administrative powers, such as those granted under clause 16, may be exercised arbitrarily or inconsistently and may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles. In addition, the committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Broad powers allowing exemptions to be granted to significant regulatory requirements are one such matter.

1.30 The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum and that guidance in relation to the exercise of the power should be included within the primary legislation. In this instance, the explanatory memorandum does not appear to justify the broad discretionary power or the use of delegated legislation and, as noted above, no guidance is included on the face of the bill as to the exercise of the power.

1.31 In response to the committee's concerns in relation to the 2021 bill, the then Treasurer advised that providing the minister with a broad power to provide exemptions to the Financial Accountability Regime was required to ensure the regime applies appropriately to regulated industries and to avoid any potential unintended consequences from the application of the regime. The former Treasurer advised that there may be instances where the regime could pose a barrier to entry for some small new entrants into the market and that a broad exemptions power may therefore be

32 Part 5 of Chapter 2.

33 Part 6 of Chapter 2.

needed to facilitate competition in the market. Finally, the then Treasurer advised that it was preferable to provide 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.³⁴

1.32 It is unclear to the committee why this advice has not been included in the explanatory memorandum for the 2022 bill and whether it still applies to the broad exemption power set out in clause 16. In any case, the committee considers that while the former Treasurer's advice explains why exemptions are needed, it does not provide an adequate justification for including exemptions within delegated legislation and non-legislative instruments with very little guidance on the face of the bill as to the exercise of the exemption power.

1.33 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 could undermine the Financial Accountability Regime as enshrined in primary legislation passed by the Parliament.

1.34 At a minimum, the committee considers that it would be beneficial if the bill included an inclusive list of criteria specifying circumstances in which an exemption may be granted and general guidance in relation to the conditions which may apply to an exemption.³⁵ For example, the bill could provide that an exemption is no longer in force if the circumstances under which it was originally granted no longer exist.

1.35 In addition, the committee considers that instruments made under subclause 16(2) should be time-limited to ensure an appropriate level of parliamentary oversight. In this regard, the committee notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has routinely expressed concerns when instruments granting exemptions to requirements in primary legislation are not time-limited in this way. It considers that in such cases either the instrument, or the exemptions themselves, should sunset after a period of three years to facilitate

34 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2022](#), 18 March 2022, p. 66.

35 See, for example, Part 2 of Chapter 2 of the *Export Control Act 2020* which provides high-level guidance as to the circumstances in which an exemption may be granted alongside a general rulemaking power, including setting out high-level circumstances in which an exemption may be granted and a requirement that an application for a new exemption must be made where changes to the exemption are required.

appropriate parliamentary oversight.³⁶ This committee shares these concerns and further notes that recent government amendments made to the Aged Care Amendment (Implementing Care Reform) Bill 2022 amended a previously broad exemption power to instead provide that exemptions lapse after a period of 12 months.³⁷

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

- **why it is considered necessary and appropriate to provide a broad power to grant exemptions under clause 16, including within delegated legislation;**
- **whether the bill can be amended to provide that instruments made under subclause 16(2) are time-limited; and**
- **whether the bill can be amended to include at least high-level guidance on the face of the primary legislation as to the circumstances in which an exemption may be granted and general guidance in relation to the conditions which may apply to an exemption.**

Tabling of documents in Parliament

Significant matters in delegated legislation³⁸

1.37 Division 1 of Part 2 of Chapter 3 of the bill deals with administrative arrangements. Clause 37 of the bill provides that the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) must enter into an arrangement relating to the administration of the bill within six months of commencement. Subclause 37(2) provides that the arrangement must include provisions relating to the matters specified in the Minister rules, a disallowable legislative instrument. Once entered into, the arrangement must be published online. If no arrangement is entered into within 6 months of commencement, the minister may determine an arrangement by notifiable instrument. A failure to comply with

36 For example, in [Delegated Legislation Monitor 5 of 2022](#) the Senate Standing Committee for the Scrutiny of Delegated Legislation requested that the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 be amended to provide that the exemptions specified in that instrument cease to operate three years after they commence. For further information, see Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#), 7 September 2022, pp. 50–53.

37 Aged Care Amendment (Implementing Care Reform) Bill 2022, Schedule 1, item 2, proposed subsection 54-1A(4).

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

clause 37 does not invalidate the performance or exercise of a function or power by either APRA or ASIC.³⁹

1.38 The bill does not require arrangements entered into under clause 37 to be tabled in the Parliament. The committee's consistent scrutiny view is that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As such, the committee expects there to be appropriate justification within the explanatory memorandum to the bill for failing to mandate tabling requirements.

1.39 In addition, the committee considers that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Arrangements for the administration of an Act of Parliament are one such matter. The committee therefore expects the explanatory memorandum to the bill to justify leaving details relating to provisions that must be included within a clause 37 arrangement to delegated legislation.

1.40 In this instance, the explanatory memorandum states:

To ensure a cohesive approach, APRA and ASIC must enter into an arrangement outlining their general approach to administering and enforcing the Financial Accountability Regime within 6 months of the commencement of the Financial Accountability Regime Bill 2021. If this does not occur, the Minister may determine an arrangement for this purpose.⁴⁰

1.41 It is not clear to the committee from this explanation why a clause 37 arrangement is not required to be tabled in Parliament and why it is necessary and appropriate to leave details relating to provisions that must be included within such an arrangement to Minister rules.

1.42 In response to the committee's concerns in relation to the 2021 bill, the then Treasurer advised that requiring the Minister rules to set out matters relating to the administration of the bill provided certainty and visibility of regulatory approach. The former Treasurer also advised that the use of delegated legislation provided the necessary flexibility needed to ensure administration of the Financial Accountability Regime was efficient and fit for purpose, and to ensure that the regulators could adapt their enforcement approach to different industries over time. Finally, the former Treasurer disagreed that a clause 37 arrangement should be tabled in Parliament given

39 Subclause 37(5).

40 Explanatory memorandum, p. 20.

that the arrangement was required to be published on both APRA's and ASIC's websites.⁴¹

1.43 In response, the committee noted that administrative flexibility was not a sufficient justification for leaving significant matters to delegated legislation and reiterated that tabling documents in Parliament provides opportunities for debate that are not available where documents are only published online.

1.44 In light of the above, the committee requests the minister'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.**

Reversal of the evidential burden of proof⁴²

1.45 The bill seeks to establish several defences which reverse the evidential burden of proof. These defences are set out in subclauses 68(3) and 72(2) of the bill. The committee previously commented on subclauses 68(3) and 72(2) in its *Scrutiny Digest 17 of 2021* and *Scrutiny Digest 2 of 2022*.⁴³

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

1.47 Similarly, subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* currently provides that it is an offence if a person discloses protected information or produces a protected document within the meaning of that Act.

41 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2022](#), 18 March 2022, pp. 68–69.

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

43 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 17 of 2021](#), 24 November 2021, pp. 18–19; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2022](#), 18 March 2022, pp. 72–74.

Subclause 72(2) seeks to provide that it is a defence to this offence if the disclosure was authorised by clause 69, 70, 71, 73, 74 or 75 of the bill.

1.48 The defendant bears an evidential burden of proof in relation to the defences listed above.

1.49 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.⁴⁴ This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.50 There is no explanation within the explanatory materials for reversing the evidential burden of proof in relation to the exception set out in subclause 68(3), with the explanatory memorandum merely re-stating the operation of the provision.⁴⁵

1.51 In *Scrutiny Digest 2 of 2022*, the committee noted the then 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 then 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. The former Treasurer also 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.

1.52 As mentioned in the former Treasurer's advice, the relevant test 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 defendant.⁴⁶ In this instance, 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.

1.53 In particular, it appears that whether information had already been made lawfully available to the public,⁴⁷ whether the Regulator had allowed the disclosure,⁴⁸ or whether the disclosure was in accordance with a provision of the *Australian*

44 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp. 50–52.

45 Explanatory memorandum, p. 44.

46 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p. 50.

47 See clause 69.

48 See clause 70.

*Prudential Regulation Authority Act 1998*⁴⁹ or the *Australian Securities and Investments Commission Act 2001*⁵⁰ would be matters that are readily ascertainable by the prosecution.

1.54 In relation to the defence set out at subclause 72(2), the explanatory memorandum states:

Exemptions to the secrecy provisions will allow for the appropriate sharing of information by APRA and ASIC. A defendant bears an evidential burden in relation to sharing of information on the reliance of these exemptions. Shifting the evidential burden to the person who disclosed the information is justified and not unduly onerous as the information subject to the new provisions would be peculiarly within the knowledge and control of the defendant.⁵¹

1.55 It is not clear to the committee from this explanation why the information would be *peculiarly* within the knowledge and control of the defendant, noting that elements of the defence seem to relate to matters of public fact or to questions of law. For example, it is 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.⁵² 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.

1.56 The committee considers that the content of any exception, exemption, excuse, qualification or justification to a criminal offence should be included within primary legislation unless a sound justification for the use of delegated legislation is provided.

1.57 In this instance, the explanatory memorandum to the bill does not provide a justification for the use of delegated legislation or for reversing the evidential burden of proof in relation to the matters set out in clause 74. Indeed, the explanatory memorandum does not appear to discuss clause 74, even to re-state the operation of the provision.

1.58 The committee considers it is not appropriate to reverse the evidential burden of proof in relation to matters that are not peculiarly within the knowledge of the defendant. The committee therefore requests the Treasurer's advice as to

49 See clause 72.

50 See clause 73.

51 Explanatory memorandum, p. 33.

52 Paragraph 68(3)(b).

whether proposed clauses 68 and 72 can be amended to include the matters set out in subsections 68(3) and 72(2) as elements of the offence.

1.59 Further, the committee requests the minister's advice as to:

- **why it is necessary and appropriate to set out a defence to the offences in clause 68 of the bill and subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* within delegated legislation; and**
- **whether clause 74 can be amended to include at least high-level guidance in relation to the matters that may be set out within the Minister rules.**

Incorporation of documents as in force from time to time⁵³

1.60 Subclause 31(5) of the bill provides that the Minister rules may provide for a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time. The committee raised scrutiny concerns in relation to this matter in *Scrutiny Digest 17 of 2021* and *Scrutiny Digest 2 of 2022*.⁵⁴

1.61 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach raises the prospect of changes being made to the law in the absence of parliamentary scrutiny. 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. In addition to the implications for parliamentary scrutiny, such provisions can create uncertainty in the law and may mean that those obliged to obey the law 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.

1.62 As a matter of general principle, the committee considers that 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 stated within the explanatory memorandum or within the bill that the material will be freely available and how it may be accessed. The committee also expects the explanatory memorandum to the bill to explain why it is necessary and appropriate to incorporate documents as in force from time to time.

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

54 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 17 of 2021](#), 24 November 2021, pp. 20–21; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2022](#), 18 March 2022, pp. 76–78.

1.63 In this instance, the explanatory memorandum states:

The Minister can make rules to prescribe the threshold for determining which accountable entities will need to comply with the enhanced notification requirements.

...

These rules may incorporate a matter contained in an instrument or writing as in force from time to time if it is published on a website maintained by the Regulator. This is necessary to ensure that the rules align with current standards or guidance. The rules can only incorporate material as it exists from time to time from non-legislative instrument if that material is published by APRA and ASIC on their websites. This limitation will ensure only credible, relevant material may be incorporated.⁵⁵

1.64 It is not clear from this explanation whether the incorporated materials will be freely and readily available. Nor is it clear why it is necessary to allow the rules to incorporate documents as in force or existing from time to time. The committee notes that this incorporation power may allow changes to be made to the circumstances in which an accountable entity can be said to have met the enhanced notification threshold without any involvement from Parliament.

1.65 In *Scrutiny Digest 2 of 2022*, the committee noted the advice of the then Treasurer that:

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.⁵⁶

1.66 It is unclear to the committee why this advice has not been included in the explanatory memorandum for the 2022 bill and whether it still applies to the incorporation power set out in subclause 31(5). In addition, it is not clear from this advice whether *all* material incorporated into the law under subclause 31(5) will be free and available online.

1.67 Noting the above comments, the committee requests the minister's advice as to:

- **whether the documents incorporated under subclause 31(5) will be freely and readily available to all persons interested in the law; and**
- **whether the explanatory memorandum can be amended to provide guidance in relation to this matter.**

55 Explanatory memorandum, pp. 28–29.

56 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2022](#), 18 March 2022, p. 77.

Financial Sector Reform Bill 2022

Purpose	<p>Schedules 1 and 2 to this bill make consequential amendments to relevant Acts to support the new Financial Accountability Regime.</p> <p>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.</p> <p>Schedule 4 to this bill amends the <i>National Consumer Credit Protection Act 2009</i> to enhance the consumer protection framework for consumers of small amount credit contracts and consumer leases, while ensuring these products can continue to fulfil an important role in the economy.</p>
Portfolio	Treasury
Introduced	House of Representatives on 8 September 2022

Reversal of the evidential burden of proof⁵⁷

1.68 The bill seeks to establish several defences which reverse the evidential burden of proof. These defences are set out under items 10 and 17 of Schedule 1 to the bill.

1.69 Schedule 1 to the bill is identical to Schedule 1 to the Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021 (the 2021 bill) which was introduced in the House of Representatives on 28 October 2021 and lapsed at the dissolution of the House of Representatives on 11 April 2022. The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 17 of 2021* and *Scrutiny Digest 2 of 2022*.⁵⁸

1.70 Subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* (APRA Act) currently provides that it is an offence if a person who is or has been an

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

58 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 17 of 2021](#), 24 November 2021, pp. 22–24; [Scrutiny Digest 2 of 2022](#), 18 March 2022, pp. 79–82.

officer discloses protected information or produces a protected document within the meaning of that Act. Item 10 of Schedule 1 to the bill seeks to insert a number of new defences to this offence.⁵⁹

1.71 Proposed subsection 56(7G) provides that it is a defence to the offence set out under existing subsection 56(2) if the person discloses information to an accountable entity and the information was contained in the register of accountable persons kept under clause 40 of the Financial Accountability Regime Bill 2022.

1.72 Proposed subsection 56(7H) provides that it is not an offence if the person discloses information to another individual, where the information is personal to that individual and was contained in the register of accountable persons kept under clause 40 of the Financial Accountability Regime Bill 2022.

1.73 Proposed subsection 56(7J) provides that it is not an offence if APRA discloses information about whether the Regulator has disqualified an accountable person under clause 42 of the Financial Accountability Regime Bill 2022 or any other decision made under Division 2 of Part 3 of Chapter 3 of that bill.

1.74 Proposed subsection 56(7K) provides that it is not an offence if a person discloses information in accordance with clause 39 of the Financial Accountability Regime Bill 2022. That clause currently provides for information-sharing arrangements between APRA and ASIC.

1.75 Proposed subsection 56(7L) provides that it is not an offence if ASIC discloses information for the purposes of the performance or exercise of ASIC's functions or powers and the information had previously been disclosed to ASIC under clause 39 of the Financial Accountability Regime Bill 2022.

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

1.77 Proposed subsection 127(7A) provides that it is a defence to this offence if the disclosure was an authorised disclosure for the purposes of subsection 127(1) of the ASIC Act.

1.78 The defendant bears an evidential burden of proof in relation to each of the defences outlined above.

59 See Schedule 1, item 10, proposed subsections 56(7G), (7H), (7J), (7K) and (7L).

1.79 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.⁶⁰ This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.80 In relation to the defences set out under both items 10 and 17, the explanatory memorandum states:

Exemptions to the secrecy provisions will allow for the appropriate sharing of information by APRA and ASIC. A defendant bears an evidential burden in relation to sharing of information on the reliance of these exemptions. Shifting the evidential burden to the person who disclosed the information is justified and not unduly onerous as the information subject to the new provisions would be peculiarly within the knowledge and control of the defendant.⁶¹

1.81 In *Scrutiny Digest 2 of 2022*, the committee noted the then Treasurer's advice that reversing the evidential burden of proof in relation to items 10 and 17 of the 2021 bill was justified as the relevant information would be peculiarly within the knowledge and control of the defendant. The former 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 former Treasurer also advised that provisions within the bill which reverse the evidential burden of proof in relation to offences within the APRA Act and the ASIC Act are justified because they align with the approach taken in other similar frameworks.⁶²

1.82 The relevant test, as set out in the *Guide to Framing Commonwealth Offences*,⁶³ 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 defendant.⁶⁴ In this instance, it does not appear that several of the matters relevant to the defences set out at proposed subsections 56(7G), (7H), (7J), (7K), (7L) and 127(7A) would be peculiarly within the knowledge of the defendant, noting that elements of these defences seem to relate to matters of public fact or to

60 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp. 50–52.

61 Explanatory memorandum, p. 33.

62 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 2 of 2022](#), 18 March 2022, pp. 79–81.

63 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp. 50–52.

64 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p. 50.

questions of law. For example, it would appear that whether information had been shared between APRA and ASIC in accordance with clause 39 of the Financial Accountability Regime Bill 2022 would be a matter that the prosecution could readily ascertain.

1.83 The committee does not consider that consistency with existing provisions is a sufficient justification for reversing the evidential burden of proof in relation to matters which do not appear to be peculiarly within the knowledge of the defendant.

1.84 The committee considers it is not appropriate to reverse the evidential burden of proof in relation to matters that are not peculiarly within the knowledge of the defendant. The committee therefore requests the Treasurer's advice as to whether items 10 and 17 can be amended so that the matters set out in subsections 56(7G), (7H), (7J), (7K), (7L) and 127(7A) are instead included as elements of the offence.

Significant matters in delegated legislation

Broad discretionary power⁶⁵

1.85 Item 62 of Schedule 4 to the bill seeks to insert proposed section 323A into the *National Consumer Credit Protection Act 2009* (the Credit Act). Schedule 4 to the bill is intended to enhance the consumer protection framework currently set out within the Credit Act, particularly in relation to consumers of small amount credit contracts and consumer leases. These consumers are considered to be financially vulnerable. To this end, proposed section 323A sets out a general prohibition intended to prevent persons entering into, or carrying out, a scheme which will result in a small amount credit contract⁶⁶ or a consumer lease⁶⁷ being made.

1.86 Proposed section 323D of the bill provides that ASIC may, by disallowable legislative instrument, exempt a scheme, or a class of schemes, from this general prohibition. The exemption is subject to any conditions imposed by ASIC.

1.87 There is no further guidance within the bill setting out how this broad exemption power will be used. For example, the bill does not set out any relevant criteria or considerations that may, or must, be considered prior to granting an exemption. Further, the bill does not contain any limits on the exercise of the power.

1.88 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Broad powers allowing exemptions to be granted to significant regulatory

65 Schedule 4, item 62, proposed section 323D. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

66 As defined by section 5 of the Credit Act.

67 As defined by section 5 of the Credit Act.

requirements are one such matter. In this instance, the explanatory memorandum provides the following justification for the use of delegated legislation:

This ensures that ASIC is able to provide appropriately deal with a scheme and provide certainty, where the scheme:

- does not cause harm to consumers or regulated industry participants; and
- has a legitimate (non-avoidance) purpose.⁶⁸

1.89 It is not clear to the committee from this explanation why it is necessary and appropriate to provide a broad power to include exemptions within delegated legislation, noting that there is nothing on the face of the bill limiting the exercise of the power to schemes which have a legitimate purpose and do not cause harm to consumers or regulated industry participants. From the explanation provided it is not clear how the inclusion of a broad exemption power provides certainty.

1.90 The committee is concerned about the use of delegated legislation to provide for exemptions, particularly noting the lack of justification in the explanatory memorandum for the exemption power and the limited guidance in the bill about how the exemptions framework will operate. As drafted, it appears that ASIC will have a broad discretionary power to determine, via delegated legislation, when the general prohibition in proposed section 323A will no longer apply. In this regard, the committee notes that delegated legislation is not subject to the same level of parliamentary scrutiny as amendments to primary legislation.

1.91 At a minimum, the committee considers that it would be beneficial if the bill included an inclusive list of criteria specifying circumstances in which an exemption may be granted and general guidance in relation to the conditions which may apply to an exemption.⁶⁹ For example, the bill could provide that an exemption is no longer in force if the circumstances under which it was originally granted no longer exist.

1.92 In addition, the committee considers that instruments made under proposed section 323D should be time-limited. In this regard, the committee notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has routinely expressed concerns when instruments granting exemptions to requirements in primary legislation are not time-limited in this way. It considers that in such cases either the instrument, or the exemptions themselves, should sunset after a period of

68 Explanatory memorandum, p. 165.

69 See, for example, Part 2 of Chapter 2 of the *Export Control Act 2020* which provides high-level guidance as to the circumstances in which an exemption may be granted alongside a general rulemaking power, including setting out high-level circumstances in which an exemption may be granted and a requirement that an application for a new exemption must be made where changes to the exemption are required.

three years to facilitate appropriate parliamentary oversight.⁷⁰ This committee shares these concerns and further notes that recent government amendments made to the Aged Care Amendment (Implementing Care Reform) Bill 2022 amended a previously broad exemption power to instead provide that exemptions lapse after a period of 12 months.⁷¹

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

- **why it is considered necessary and appropriate to provide a broad power to exempt schemes or classes of schemes from proposed section 323A in delegated legislation;**
- **whether the bill can be amended to provide that instruments made under proposed section 323D are time-limited; and**
- **whether the bill can be amended to include at least high-level guidance on the face of the primary legislation as to the circumstances in which an exemption may be granted and general guidance in relation to the conditions which may apply to an exemption.**

Reversal of the evidential burden of proof⁷²

1.94 Item 76 of Schedule 4 to the bill seeks to insert proposed subsection 160CB(2) into the Credit Act to provide that it is an offence for a licensee to use or disclose a constrained document or information prescribed by the regulations. The offence carries a maximum penalty of 100 penalty units.

1.95 Proposed subsection 160CB(5) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the use or disclosure is:

- to the person about whom the information relates;

70 For example, in [Delegated Legislation Monitor 5 of 2022](#) the Senate Standing Committee for the Scrutiny of Delegated Legislation requested that the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 be amended to provide that the exemptions specified in that instrument cease to operate three years after they commence. For further information, see Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#), 7 September 2022, pp. 50–53.

71 Schedule 1, item 2, proposed subsection 54-1A(4) of the Aged Care Amendment (Implementing Care Reform) Bill 2022.

72 Schedule 4, item 76, proposed subsection 160CB(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

- necessary for the person to comply with the person's obligations under the Credit Act;
- required or authorised by or under a law of the Commonwealth, or of a state or territory, or a court or tribunal order;
- for the purposes of considering a hardship notice;
- for the purposes of assisting ASIC to perform its functions or exercise its powers; or
- for the purposes for allowing the Australian Financial Complaints Authority to perform its functions or exercise its powers.

1.96 A defendant bears an evidential burden in relation to each of the defences outlined above.

1.97 As noted above, it is ordinarily the duty of the prosecution to prove all elements of an offence.⁷³ 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.

1.98 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 states that the reversal is appropriate as:

The circumstances which give rise to the defences (that is, the purpose of the defendant's use or disclosure of the account information) are peculiarly within the knowledge of the defendant. This is consistent with the principles in the *Guide to Framing Commonwealth Offences*.⁷⁴

1.99 The *Guide to Framing Commonwealth Offences*⁷⁵ 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.

73 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.

74 Explanatory memorandum, p. 151.

75 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp. 50–52.

1.100 In this case, it is not apparent that the disclosure of information is a matter *peculiarly* within the defendant's knowledge, or that it would be difficult or costly for the prosecution to establish the matters. For example, it would appear that whether the information was required to be disclosed by order of a court or a tribunal would be a matter that the prosecution could readily ascertain.

1.101 The committee therefore requests the minister's detailed justification as to the appropriateness of including the specified matters as an offence-specific defence. The committee suggests that it may be appropriate if proposed subsection 160CB(2) were amended to provide that the relevant matters are instead included as elements of the offence. The committee also requests the minister's advice in relation to this matter.

High Speed Rail Authority Bill 2022

Purpose	This bill seeks to establish the High Speed Rail Authority as an independent body to advise on, plan and develop the high speed rail system.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 6 September 2022

Exemption from disallowance

Broad discretionary powers⁷⁶

1.102 Clause 11 of the bill provides that the minister may, by legislative instrument, give written directions to the High Speed Rail Authority (the Authority) about the performance of its functions under the bill. Although such directions must relate to the Authority's functions, paragraph 8(1)(e) of the bill allows the rules to prescribe additional functions without the need for an amending bill. While subclause 11(2) provides that directions must be 'of a general nature only', the bill provides no further limitations or guidance on the content of such directions.

1.103 A note to clause 11 clarifies that a direction is not subject to disallowance due to the operation of regulations made under the *Legislation Act 2003*. Item 2 of the table at regulation 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 declares that an instrument that is a direction by a minister to any person or body is not subject to disallowance.

1.104 Disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless there are exceptional circumstances, and any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.⁷⁷

1.105 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in

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

77 Senate resolution 53B. See *Journals of the Senate*, No. 101, 16 June 2021, pp. 3581–3582.

its 2021 review of the *Biosecurity Act 2015*,⁷⁸ and by the Senate Standing Committee for the Scrutiny of Delegated Legislation (Delegated Legislation Committee) in its inquiry into the exemption of delegated legislation from parliamentary oversight.⁷⁹ The Delegated Legislation Committee expressed particular concern about broad classes of exemptions from disallowance based exclusively on the form of the relevant instrument,⁸⁰ emphasising that 'any exclusion from parliamentary oversight...requires that the grounds for exclusion be justified in individual cases, not merely stated'.⁸¹

1.106 In light of these comments and the resolution of the Senate, the committee expects the explanatory materials for a bill exempting delegated legislation from disallowance to set out the exceptional circumstances that are said to justify the exemption and how they apply to the circumstances of the provision in question.

1.107 The committee's already significant concerns in relation to exemptions from disallowance will be heightened where a provision confers a broad discretionary power on a person, as in this instance.⁸² The committee expects that, in addition to setting out the exceptional circumstances that are said to justify the exemption, the explanatory memorandum for the bill will address why it is necessary to confer a broad discretionary power, whether there are appropriate criteria or considerations that limit the exercise of the power, and whether those criteria or considerations are contained in law or policy.

1.108 Finally, where circumstances are so exceptional as to justify the exemption of delegated legislation from disallowance, the committee shares the view of the Delegated Legislation Committee that the exemption should be provided by primary legislation, rather than delegated legislation.⁸³ This is consistent with Parliament's

78 See Chapter 4 of Senate Standing Committee for the Scrutiny of Bills, [Review of exemption from disallowance provisions in the Biosecurity Act 2015: Scrutiny Digest 7 of 2021](#), 12 May 2021, pp. 33–44; and [Scrutiny Digest 1 of 2022](#), 4 February 2022, pp. 76–86.

79 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.

80 See, for example, Senate Standing Committee for the Scrutiny of Delegated Legislation, [Delegated Legislation Monitor 5 of 2022](#), 7 September 2022, p. 103.

81 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.

82 See Chapter 4 of Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 1 of 2022](#), 4 February 2022, p. 77.

83 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. 100–101.

constitutionally-conferred legislative role and the fact that delegated legislation is not subject to the same level of parliamentary scrutiny as primary legislation.

1.109 In this instance, the explanatory memorandum merely states the effect of clause 11 and the operation of section 42 of the *Legislation Act 2003*. It does not appear to provide any further justification for exempting instruments made under clause 11 from disallowance. Accordingly, it remains unclear to the committee what exceptional circumstances necessitate the exclusion of parliamentary oversight from written directions given to the Authority.

1.110 It is also unclear to the committee what criteria or considerations may limit or guide the minister's broad discretionary power to give directions to the Authority. To this end, the committee notes that the explanatory memorandum does not appear to address the broad discretionary nature of the power set out under clause 11, or the contemplated scope of the rule-making power at paragraph 8(1)(e). This paragraph, which permits rules to prescribe additional functions of the Authority, has the potential to further broaden this directions power. For example, the explanatory memorandum refers to the role of the Authority as encompassing the operation of a high speed rail network.⁸⁴ However, the current functions of the Authority, as set out at clause 8, relate to planning, policy, coordination, and construction activities. It is therefore not clear from the explanatory memorandum whether it is contemplated that the rule-making power at paragraph 8(1)(e) will be used to expand the functions of the Authority to encompass operation activities. This lack of clarity limits the Parliament's ability to properly scrutinise the bill and, in particular, the directions power set out at clause 11. This is particularly concerning given the limited opportunities for scrutiny of exempt instruments.

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

- **the exceptional circumstances which make it necessary to exempt the ministerial directions from the usual parliamentary disallowance process;**
- **what criteria or considerations may limit the minister's broad discretionary power to give directions;**
- **whether these criteria or considerations are contained in law or policy; and**
- **whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they receive appropriate parliamentary oversight.**

84 Explanatory memorandum, p. 1.

Treasury Laws Amendment (2022 Measures No. 3) Bill 2022

<p>Purpose</p>	<p>Schedule 1 to the bill amends the <i>Foreign Acquisitions and Takeovers Act 1975</i> to double the maximum financial penalties for contraventions of provisions that relate only to residential land.</p> <p>Schedule 2 to the bill amends the <i>Taxation Administration Act 1953</i> to allow protected information to be disclosed to Australian government agencies for the purpose of administering major disaster support programs approved by the minister.</p> <p>Schedule 3 to the bill amends Schedule 5 of the <i>Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020</i> to extend a temporary mechanism for responsible ministers to make alternative arrangements for meeting information and documentary requirements under Commonwealth legislation, including requirements to give information and produce, witness and sign documents, in response to COVID-19.</p> <p>Schedule 4 to the bill make amendments to reduce the tax rate on certain income earned by foreign resident workers participating in the Pacific Australia Labour Mobility scheme from marginal rates starting at 32.5 per cent to a flat 15 per cent.</p> <p>Schedule 5 to the bill amends the <i>Superannuation Industry (Supervision) Act 1993</i> to provide for an alternative annual performance test for faith-based products.</p>
<p>Portfolio</p>	<p>Treasury</p>
<p>Introduced</p>	<p>House of Representative on 8 September 2022</p>

Reversal of the evidential burden of proof⁸⁵

1.112 Section 365-25 of Schedule 1 to the *Taxation Administration Act 1953* currently provides that it is an offence if a person records or discloses protected information, with a maximum penalty of imprisonment for two years. Item 2 of Schedule 2 to the bill seeks to insert a new defence this offence.⁸⁶

85 Schedule 2, item 2, proposed subsection 355-65(8). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

86 See Schedule 2, item 2, proposed subsection 355-65(8).

1.113 Proposed subsection 365-25(8) provides that it is a defence to the offence set out under existing section 365-25 if the record is made for, or the disclosure is to, an Australian government agency and the record or disclosure is for the purpose of administering a program declared under section 355-66 to be a major disaster support program. A defendant bears an evidential burden in relation to this defence.

1.114 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.⁸⁷ 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.

1.115 In relation to the defence set out under item 2, the explanatory memorandum states:

The reversal of the evidential burden of proof is consistent with the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011 edition.

It is appropriate that the evidential burden be reversed in this situation. Matters relating to the disclosure of protected information and for which purposes (such as what information is being disclosed and for what purpose the disclosure is being made) are peculiarly within the knowledge of the person making the disclosure as the defendant is the only person who will be aware of to whom the information has been disclosed or that it was disclosed in reliance of the exception. It would be significantly more difficult and costly for the prosecution to disprove these facts.⁸⁸

1.116 As alluded to in this explanation, the *Guide to Framing Commonwealth Offences*⁸⁹ 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.⁹⁰

87 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.

88 Explanatory memorandum, p. 17.

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

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

1.117 In this instance, it does not appear that several of the matters relevant to a proposed subsection 365-25(8) defence would be *peculiarly* within the knowledge of the defendant. For example, it appears that the fact that a disclosure was made to a government agency in relation to a section 355-66 program is a matter that the prosecution could readily ascertain. These matters therefore appear to be matters more appropriate to be included as elements of the offence.

1.118 The committee further notes that it does not consider that consistency with existing provisions is a sufficient justification for reversing the evidential burden of proof in relation to matters which do not appear to be peculiarly within the knowledge of the defendant.

1.119 The committee considers it is not appropriate to reverse the evidential burden of proof in relation to matters that are not peculiarly within the knowledge of the defendant. The committee therefore 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.

Significant matters in delegated legislation⁹¹

1.120 Schedule 2 to the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (Your Future, Your Super Act) requires the Australian Prudential Regulation Authority (APRA) to conduct an annual superannuation performance test for certain superannuation products. Schedule 5 to the bill seeks to amend this process to provide for an alternative supplementary performance test for faith-based superannuation products. Under this new process, if a faith-based product fails the original assessment it is then required to undergo the supplementary faith-based test. A superannuation trustee is only subject to the consequences of a failed performance if it also fails the supplementary test.

1.121 The committee commented on Schedule 2 of the then Treasury Laws Amendment (Your Future, Your Super) Bill 2021 in *Scrutiny Digest 4 of 2021* and *Scrutiny Digest 6 of 2021* in relation to the inclusion of significant matters within delegated legislation.⁹² The committee was concerned that Schedule 2 of that bill was characterised by 'framework provisions' which contain only the broad principles of a legislative scheme while relying heavily on delegated legislation to determine the scheme's scope and operation. The committee has longstanding concerns with

91 Schedule 5. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

92 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 4 of 2021](#), 24 February 2021, pp. 9–15; Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 6 of 2021](#), 21 April 2021, pp. 88–99.

framework provisions because they considerably limit the ability of Parliament to have appropriate oversight over new legislative schemes.

1.122 The amendments introduced by Schedule 5 of this bill mirror the framework approach already taken by the Your Future, Your Super Act by leaving significant elements of the new supplementary test scheme to the regulations. For example, a 'faith-based product' is defined by the bill as a Part 6A product which APRA has determined under proposed subsection 60L(4) to be a faith-based product.⁹³ A 'Part 6A product' is defined as a MySuper product or a class of beneficial interest in a regulated superannuation fund that is identified by regulations.⁹⁴ Other than MySuper products, a superannuation product must therefore be identified in regulations and then specified in a determination in order to be defined as a faith-based product. Determinations made by APRA under proposed subsection 60L(4) are themselves made on the basis of an application given to APRA which must contain information specified by the regulations.⁹⁵ Regulations made for that purpose may specify information by reference to information already specified in a legislative instrument.⁹⁶

1.123 Many other significant elements of the scope and operation of this new legislative scheme are left to delegated legislation. For example, the requirements relating to the supplementary test may be specified within the regulations.⁹⁷

1.124 The committee's position is that significant matters should be included within primary legislation unless a sound justification for the use of delegated legislation is provided. Where substantial elements of the scope and operation of a legislative scheme are proposed to be left to delegated legislation, the committee's already significant concerns will be further heightened.

1.125 In this instance, the explanatory memorandum does not contain any justification for the framework approach taken by the bill but does justify individual uses of delegated legislation. For example, in relation to the power to specify requirements for the supplementary test, the explanatory memorandum states:

These regulation-making powers reduce the complexity of the [Superannuation Industry (Supervision)] Act by removing the administrative and technical matters from the primary law and unfolding that detail in a lower level of legislation. This accords with hierarchy of laws principles and increases the readability of the SIS Act. As a consequence, this may increase

93 Schedule 5, item 1, proposed subsection 10(1).

94 *Superannuation Industry (Supervision) Act 1993*, section 60B.

95 Schedule 5, item 2, proposed paragraph 60L(2)(d).

96 Schedule 5, item 2, proposed paragraph 60L(3)(a).

97 Schedule 5, item 2, proposed section 60Q.

the level of understanding about responsibilities and obligations and, ultimately, compliance with regulatory expectations.⁹⁸

1.126 The committee acknowledges that it is appropriate to include certain administrative and technical matters within delegated legislation. For example, highly technical scientific information may be appropriate for inclusion within delegated legislation on the basis that the law-making process should include considerable input from experts within the executive. However, in this instance, it appears that substantial elements of the scope and operation of the legislative scheme proposed to be introduced by Schedule 5 of the bill will be left to delegated legislation. The committee considers that it would be more appropriate to include this information within the primary legislation to allow an appropriate level of parliamentary oversight.

1.127 The committee's concerns in this regard are heightened given that other key elements of the supplementary test scheme are set out in what appear to be non-legislative instruments. Specifically, Schedule 5 includes several provisions allowing the minister to set out certain matters within determinations.⁹⁹ There is nothing on the face of the bill, or within the explanatory memorandum, clarifying whether determinations made by the minister under Schedule 5 are legislative instruments. Given that it appears that these determinations are intended to be non-legislative in nature, the committee notes that significant elements of the scheme set up by Schedule 5 will thus be contained within instruments that are not subject to the tabling, disallowance or sunseting requirements that apply to legislative instruments or scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation.

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

- **why it is considered necessary and appropriate to leave almost all of the information relating to the scope and operation of the new supplementary performance test for faith-based superannuation products to delegated legislation and non-legislative instruments; and**
- **whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.**

98 Explanatory memorandum, p. 40.

99 See, for example, Schedule 5, item 2, proposed subsections 60L(4) and 60N(1); *Superannuation Industry (Supervision) Act 1993*, section 60C(2).

Availability of merits review¹⁰⁰

1.129 Item 2 of Schedule 5 to the bill seeks to insert proposed section 60L into the *Superannuation Industry (Supervision) Act 1993*. As noted above, Schedule 5 to the bill introduces a new supplementary performance test for faith-based superannuation products. Proposed subsection 60L(4) provides that APRA may determine that a product is a faith-based product for a financial year if a trustee provides APRA with a valid application between 1 February of the prior financial year and 31 January of the relevant financial year. Under proposed subsection 60N(1), APRA may decide to revoke a subsection 60L(4) determination.

1.130 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. It appears that decisions made by APRA under proposed subsection 60L(4) and proposed subsection 60N(1) will, or are likely to, affect individual interests. However, there is nothing on the face of the bill, or within the explanatory memorandum, stating that either decision is subject to independent merits review. The committee expects any justification for excluding merits review to refer to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*.

1.131 In relation to a decision made under proposed subsection 60L(4), the explanatory memorandum states:

APRA's decision whether or not to determine a product is a faith-based product will not be a 'reviewable decision' within the meaning of the SIS Act. The omission of merits review is in accordance with the Administrative Review Council's guide, *What decisions should be subject to merits review?*, which states that decisions that automatically follow from the happening of certain circumstances are unsuitable for merits review. APRA's decision is an automatic decision, following from the submission of an application that contains the required information. The requirements for the faith-based status determination are clearly specified in the SIS Act (and will be further specified in the regulations) and the determination is based on whether certain information, already available to trustees, is provided to APRA or not. Upon the occurrence of a valid application, there is nothing on which merits review can operate.¹⁰¹

1.132 It is not clear to the committee why the explanatory memorandum states that a decision to determine that a product is a faith-based product for a financial year is an automatic decision when proposed subsection 60L(4) states that if the trustee gives an application within the relevant period APRA *may* make a determination. The

100 Schedule 5, item 2, proposed subsections 60L(4) and 60N(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

101 Explanatory memorandum, pp. 34-35.

committee further notes that there is nothing on the face of the bill mandating that a subsection 60L(4) determination must be made upon receipt of a valid application. It therefore appears that a decision under proposed subsection 60L(4) should be subject to independent merits review.

1.133 The explanatory memorandum does not explain why proposed subsection 60N(1) is not subject to merits review. As with subsection 60L(4), this decision appears to be discretionary.

1.134 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to provide that independent merits review will be available in relation to a decision made under proposed subsection 60L(4) and proposed subsection 60N(1) of the bill.

Private senators' and members' bills that may raise scrutiny concerns

1.135 The committee notes that the following private senators' and members' bills may raise scrutiny concerns under Senate Standing Order 24. Should these bills proceed to further stages of debate, the committee may request further information from the bill proponent.

Bill	Relevant provisions	Potential scrutiny concerns
Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022 Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2022 [No. 2]	Proposed subsection 24J(4)	The provision may raise scrutiny concerns under principle (i) in relation to the reversal of the evidential burden of proof.
Parliamentary Privileges Amendment (Royal Commission Response) Bill 2022	Proposed subsection 16(6A)	The provision may raise scrutiny concerns under principle (i) in relation to the abrogation of parliamentary privilege.

Bills with no committee comment

1.136 The committee has no comment in relation to the following bills which were introduced into the Parliament between 5–8 September 2022:

- Anti-Money Laundering and Counter-Terrorism Financing Amendment (Making Gambling Businesses Accountable) Bill 2022
- Financial Services Compensation Scheme of Last Resort Levy Bill 2022
- Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2022
- Foreign Acquisitions and Takeovers Fees Imposition Amendment Bill 2022
- Income Tax Amendment (Labour Mobility Program) Bill 2022
- National Health Amendment (General Co-payment) Bill 2022
- Social Services and Other Legislation Amendment (Incentivising Pensioners to Downsize) Bill 2022

Commentary on amendments and explanatory materials

Aged Care Amendment (Implementing Care Reform) Bill 2022

1.137 On 8 September 2022, one government amendment was made to the bill in the House of Representatives.

1.138 The committee welcomes the amendment which provides further limits and guidance on the broad power to make provision for, or in relation to, the granting of an exemption from proposed section 54-1A, including that any exemption must not be granted for a period exceeding 12 months.

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

- Climate Change Bill 2022; and
- Climate Change (Consequential Amendments) Bill 2022.

Chapter 2

Commentary on ministerial responses

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

Defence, Veterans' and Families' Acute Support Package Bill 2022

Purpose	This bill seeks to amend the <i>Veterans' Entitlements Act 1986</i> , <i>Military Rehabilitation and Compensation Act 2004</i> and <i>Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988</i> to extend eligibility to veterans and their family members covered by the three Acts, who are at risk of or in crisis, whether or not the veteran is participating in a rehabilitation program or has rendered warlike service.
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 3 August 2022
Bill status	Before Senate

Broad delegation of administrative functions or powers¹

2.2 Item 14 of Schedule 1 to the bill seeks to insert proposed subsection 152(1A) into the *Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988*. Proposed subsection 152(1A) empowers the Military Rehabilitation and Compensation Commission (the Commission) to, by resolution, delegate any of its functions or powers under an acute support package instrument to a member of the Commission, a person assisting a member, a consultant, a public servant or a Defence Force member whose duties relate to matters to which the provision relates.²

2.3 In *Scrutiny Digest 4 of 2022*, the committee requested the minister's advice as to:

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- 1 Schedule 1, item 14. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).
 - 2 Acute support package instruments are legislative instruments made by the Commission under proposed section 41B of the bill. Persons to whom functions or powers may be delegated are set out in section 384 of the *Military Rehabilitation and Compensation Act 2004*.

- why it is considered necessary and appropriate to empower the Commission to delegate any or all of its functions or powers to such a broad class of people; and
- whether the bill can be amended to provide some legislative guidance as to the scope of powers that might be delegated and to limit the categories of people to whom those powers might be delegated.³

Minister's response⁴

2.4 The minister advised that enabling the Commission to delegate its functions or powers to a broad class of people is appropriate and necessary to meet the intent of the Acute Support Program, which is to support vulnerable veteran families. The minister further advised that delegating powers to non-Senior Executive Service officers is necessary to meet the needs of families at risk of, or in, crisis. To this end, the minister advised that the delegation of powers allows for operational and administrative flexibility, so that decisions to grant support under the Acute Support Program are made in a timely fashion.

2.5 The minister also advised that delegates will have the necessary experience to exercise decision-making powers and that all delegates will be provided with policy and procedural guides to assist in appropriate decision-making. Delegates will also be required to comply with any written directions given by the Department of Veterans' Affairs, for example, under the Accountable Authority Instructions.

2.6 Finally, the minister acknowledged the committee's concerns in relation to consultants exercising delegated powers, but stated that any consultants thus engaged would be chosen based on particular expert knowledge.

Committee comment

2.7 The committee thanks the minister for this response.

2.8 The committee welcomes the minister's advice that delegates will be chosen based on particular expertise. However, it remains unclear to the committee why the bill cannot be amended to include this requirement. The committee considers that future bills should include a requirement that delegates be confined to nominated office holders or to members of the Senior Executive Service or, if this is not possible, that delegates possess the appropriate training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions.

3 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 4 of 2022](#), 7 September 2022, pp. 10–11.

4 The minister responded to the committee's comments in a letter dated 27 September 2022. A copy of the letter is available on the committee's website: see correspondence relating to [Scrutiny Digest 5 of 2022](#).

2.9 The committee also welcomes the minister's advice that delegates will be provided with policy and procedural guidance to assist in appropriate decision-making. The committee considers that it would have been useful had this information been included in the explanatory memorandum for the bill, together with further high-level information as to the content of the relevant policy and procedural documents.

2.10 The committee acknowledges that it may sometimes be both appropriate and necessary to delegate administrative functions and powers to persons below the Senior Executive Service level. However, in this instance, it remains unclear why it is necessary to delegate *any or all* of the Commission's functions or powers with no legislative limits or guidance on what these functions or powers may be or when it is appropriate to delegate them. It also remains unclear why it is necessary to delegate functions or powers to a broad class of people with no accompanying legislative requirement that delegates have the appropriate expertise. The committee considers that it is possible to provide for delegation powers which allow the necessary administrative flexibility to deal with urgent matters of policy while still providing appropriate limits on the exercise of the power.

2.11 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*).

2.12 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of delegating any or all of the Military Rehabilitation and Compensation Commission's powers to a broad class of people with no accompanying legislative requirement that delegates have the appropriate training, qualifications, skills or experience.

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

- Emergency Response Fund Amendment (Disaster Ready Fund) Bill 2022 – Schedule 1, item 46, proposed section 9;³ and
- Financial Sector Reform Bill 2022 – Schedule 3, item 3, proposed section 1069P.⁴

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

2 For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

3 Proposed section 9 would provide that the Emergency Response Fund, which consists of the Disaster Ready Fund Special Account and the investments of the Disaster Ready Fund, would continue under the new name of the Disaster Ready Fund.

4 Proposed section 1069P would provide that the Consolidated Revenue Fund is appropriated for the purposes of payments to the Compensation Scheme of Last Resort.

Senator Raff Ciccone
Deputy Chair