The Senate

Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

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

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

(iv) inappropriately delegate legislative powers; or

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

Nature of the committee's scrutiny

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

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

Publications

It is the committee's usual practice to table a *Scrutiny Digest* (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

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

Biosecurity Amendment (Strengthening Biosecurity) Bill 2022

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to enhance Australia's ability to manage the risk of pests and diseases entering, emerging, establishing or spreading in Australian territory and causing harm to animal, plant and human health, the environment and the economy
Portfolio	Agriculture, Fisheries and Forestry
Introduced	Senate on 28 September 2022

Exemption from disallowance

No-invalidity clause[1]

1.1 Schedule 1 to the bill seeks to insert three new legislative instrument-making powers into the *Biosecurity Act 2015* (Biosecurity Act). Each new instrument-making power will be exercisable by the Agriculture Minister and mirrors existing powers that are already exercisable by the Health Minister in relation to human biosecurity risks.[2]

Proposed section 196A

1.2 Proposed section 196A provides that the Agriculture Minister may determine one or more requirements for persons entering Australia on incoming aircraft or vessels. These requirements must relate to preventing or reducing the risk of diseases or pests that are considered to pose an unacceptable level of biosecurity risk from entering Australia, or becoming established or spreading in Australian territory.

1 Schedule 1, item 5, proposed sections 196A and 196B; item 11, proposed section 393B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii), (iv) and (v).

2 See Chapter 2 of the Biosecurity Act.

1.3 Before making a determination under proposed section 196A, the Agriculture Minister must consult with the Directory of Biosecurity,[3] the Director of Human Biosecurity,[4] and the head of the state or territory body that is responsible for the administration of matters relating to biosecurity in that state or territory.[5] However, a failure to do so does not result in the invalidity of the instrument.[6]

1.4 Existing section 635 of the Biosecurity Act provides that the privilege against self-incrimination would not apply in relation to determinations made under proposed section 196A.

Proposed section 196B

1.5 Proposed section 196B provides that the Agriculture Minister may make a determination varying or revoking a clause 196A determination. In order to make a section 196B determination the Agriculture Minister is not required to consult, but must be satisfied that the relevant disease or pest no longer poses an unacceptable biosecurity risk, and that a requirement determined in relation to that disease or pest is no longer appropriate and adapted to preventing the risk.[7]

Proposed section 393B

1.6 Proposed section 393B provides that the Agriculture Minister may make a determination that specifies a preventative biosecurity measure to be taken by specified classes of persons. This determination must be for the purposes of preventing a behaviour or practice that may cause, or contribute to, a disease or pest that is considered to pose an unacceptable risk entering, emerging, or establishing itself or spreading in Australian territory.

1.7 As in relation to determinations made under proposed section 196A, the Agriculture Minister must consult with the Directory of Biosecurity, the Director of Human Biosecurity, and the head of the state or territory body that is responsible for the administration of matters relating to biosecurity before making a section 393B determination.[8] However, a failure to do so does not result in the invalidity of the instrument.[9] This contrasts with the equivalent human biosecurity determinations

3 See definition of 'Director of Biosecurity' at sections 9 and 540 of the Biosecurity Act.

4 See definition of 'Director of Human Biosecurity' at section 9 and subsection 544(1) of the Biosecurity Act.

5 Proposed subsection 196A(9).

6 Proposed subsection 196A(10).

7 Proposed subsection 196B(1).

8 Proposed subsection 393B(7).

9 Proposed subsection 393B(8).

which provide that the Health Minister must consult, but does not include a no-invalidity provision.[10]

1.8 Before making a determination under proposed section 393B, the Agriculture Minister must be satisfied that the relevant disease or pest poses an unacceptable biosecurity risk and that a requirement determined in relation to that disease or pest is appropriate and adapted to preventing the risk.[11] Determinations cannot be in force for longer than 1 year.[12]

Exemptions from disallowance

1.9 Legislative instruments made under each of the powers listed above are exempt from parliamentary disallowance.[13]

1.10 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.[14]

1.11 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its 2021 review of the Biosecurity Act,[15] 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, which included specific commentary on provisions within the Biosecurity Act.[16]

1.12 In light of these comments and the resolution of the Senate, the committee expects the explanatory materials for a bill exempting delegated legislation from

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10 See subsection 51(7) of the *Biosecurity Act 2015*.

11 Proposed subsection 393B(5).

12 Proposed subsection 393B(6).

13 See proposed subsections 196A(4), 196B(2), and 393B(4).

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

15 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.

16 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.

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.

1.13 The committee's already significant scrutiny concerns will be heightened when an exempt instrument may deal with significant matters, such as impacting upon an individual's personal rights or liberties. The committee expects that in such cases, in addition to setting out the exceptional circumstance that are said to justify the exemption, the explanatory memorandum for the bill will address what safeguards are in place to protect individual rights and liberties.

1.14 It appears that, in this case, all three new instrument-making powers may impact on personal rights and liberties. For example, existing section 635 abrogates the privilege against self-incrimination in relation to requirements imposed by determinations made under proposed section 196A. In addition, proposed section 393B would allow the Agriculture Minister to restrict a 'behaviour or practice', require a 'behaviour or practice', require a specified person to provide a report or keep specified records, or require a person to conduct specified tests on specified goods. Similarly, proposed section 196A would allow the Agriculture Minister to determine requirements for individuals entering Australian territory at a prescribed point of entry.

1.15 In this instance, the explanatory memorandum states in relation to proposed section 196A:

> This exemption from disallowance is similar in nature to a number of other determinations that can already be made under the Biosecurity Act, such as those made under section 44 relating to entry requirements for the purpose of preventing a listed human disease from entering, or establishing itself or spreading in, Australian territory or part of Australian territory, and those made under section 51 of the Biosecurity Act relating to biosecurity measures for the purpose of preventing a behaviour or practice that may cause or contribute to, a listed human disease entering, emerging, establishing itself or spreading in Australia.
>
> Similar to these provisions, potential disallowance of a determination made under new subsection 196A(2) would have a significant impact on technical and scientifically based decision-making, risk management processes and the broader management of biosecurity risks, particularly where those risks arise quickly and could have devastating impacts on Australia, like Footh-and-Mouth Deseas or *Xylella fastidiosa*. A determination made under new subsection 196A(2) would be critical to preventing or reducing the risk of dangerous diseases or pests entering, or establishing themselves or spreading in, Australian territory and, as such, should not be subject to disallowance.
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> It is also noted that other reasonable parameters encompass the Agriculture Minister's power in new section 196A. As noted above, the Agriculture Minister may only make a determination for the specified purposes in new subsection 196A(1). Further, and as described in more detail below, before

> making a determination, the Agriculture Minister must consult with the Director of Biosecurity, the Director of Human Biosecurity and the head (however described) of the State and Territory body that is responsible for the administration of matters relating to biosecurity in each State and Territory.
>
> New subsection 196A(5) would provide that a requirement must not be specified in a determination unless the Agriculture Minister is satisfied that the disease or pest poses an unacceptable level of biosecurity risk, and the requirement is appropriate and adapted to prevent, or reduce the risk of, the disease or pest entering, or establishing itself or spreading in, Australian territory or a part of Australian territory.
>
> The effect of this is that no requirement can be included in a determination unless the disease or pest does in fact pose an unacceptable biosecurity risk and the requirement is appropriate and adapted of the purposes specified in new subsection 196A(1). This means that each requirement must serve a legitimate purpose and must be necessary to meet that purpose. Requirements that seek to prevent or reduce the risk of a disease or pest entering, or establishing itself or spreading in, Australian territory or a part of Australian territory would serve a legitimate purpose and would be tailored so as to prevent or reduce such risk. This is particularly so in circumstances where a disease or pest could have a potentially devastating impact on Australia's animal and plant health, the environment and the economy.[17]

1.16 The explanatory memorandum provides similar explanations in relation to proposed sections 196B,[18] and 393B.[19]

1.17 The committee acknowledges the explanation in relation to the limits the bill sets on the Agriculture Minister's discretion under proposed section 196A. The committee welcomes these limits which include a requirement that the Agriculture Minister must consult before making a determination, and that a determination must relate to a purpose set out at proposed subsection 196A(1).

1.18 In addition, the committee recognises the importance of adequate biosecurity risk management processes and the potentially significant impacts of failing to implement such processes, or of repealing processes once they are implemented. The committee also recognises that it is often appropriate to allow technical experts within the executive to have law-making power in relation to instruments which are concerned with highly technical matters. In this regard, the committee notes the explanation as to the appropriateness of including the significant matters covered by

17 Explanatory memorandum, pp. 10–11.

18 Explanatory memorandum, p. 15.

19 Explanatory memorandum, p. 20–21.

section 196A determinations in delegated legislation at pages 13 and 14 of the explanatory memorandum.

1.19 However, the committee notes that whether a matter is scientific or technical is not, of itself, directly relevant to considering whether that matter should be exempt from parliamentary disallowance. Neither is it directly relevant that the impacts of disallowing an instrument may be significant. Simply stating that a matter is technically complex, or has significant policy implications, is not an adequate justification for removing democratic oversight over a law of the Commonwealth. As discussed above, this is particularly so if that law may impact on personal rights or liberties. The committee also notes that there is nothing in the bill limiting decisions made under proposed sections 196A, 196B or 393B to exclusively technical or scientific matters.

1.20 The committee has made extensive comments on scientific and technical matters and on the risk that disallowance of an instrument may lead to significant consequences in the context of the Biosecurity Act, most recently in *Scrutiny Digest 1 of 2022.*[20] The committee reiterates those comments here.

1.21 In particular, the committee reiterates that it is not clear why parliamentarians would be incapable of taking into account scientific and technical evidence when considering the appropriateness of an instrument. The committee notes that parliamentarians are accountable to their electors in relation to how they exercise their law-making functions, including the power to disallow a legislative instrument and any resulting outcomes that flow from that disallowance.

1.22 The exceptional circumstances that may justify an exemption from parliamentary disallowance are necessarily difficult to outline, given their exceptional nature. However, justifications which rely solely on the effect of potential disallowance are not persuasive. As previously stated by the committee, the risk that a law will be repealed is simply the risk associated with the system of democratic lawmaking established by the constitution. Moreover, such justifications are framed by a pejorative view of the parliamentary process which assumes that parliamentary law-making is necessarily less rational than executive law-making.

1.23 Finally, the committee notes that it does not consider the policy content of bills. While the policy content of a bill provides context for the committee's technical scrutiny of that bill it is not a primary consideration. In this instance, the committee's technical scrutiny concerns relate specifically to the appropriateness of removing an appropriate level of parliamentary oversight over instruments that may be made under proposed sections 196A, 196B and 393B. As noted above, the committee has raised similar concerns in relation to the Biosecurity Act as a whole. These concerns are longstanding.

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20 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2022*, 4 February 2022, pp. 76–86. See also, *Scrutiny Digest 7 of 2021*, 12 May 2021, pp. 33–44.

No-invalidity clauses

1.24 In addition, the committee is concerned in relation to the inclusion of no-invalidity clauses applying to determinations made under proposed section 196A and proposed section 393B. The inclusion of these clause heightens the committee's already significant concerns in relation to the exemption from disallowance provisions included within proposed sections 196A and 393B.

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

1.26 The committee notes that the explanatory memorandum does not contain a justification for the inclusion of no-invalidity clauses at proposed sections 196A and 393B of the bill.

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

- **why it is both necessary and appropriate to include no-invalidity clauses in proposed sections 196A and 393B; and**
- **whether the bill could be amended to provide that determinations made under proposed sections 196A, 196B or 393B are subject to disallowance to ensure that they receive appropriate parliamentary oversight.**

Broad discretionary power

Section 96 Commonwealth grants to the states[21]

1.28 Item 6 of Schedule 6 to the bill seeks to insert proposed section 614B into the Biosecurity Act to provide that the Agriculture Minister or the Health Minister may make, vary or administer an arrangement to grant financial assistance for dealing with risks posed by diseases or pests, including to a state or territory. Proposed section 614C provides that the terms and conditions on which financial assistance is

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

to be granted is to be set out in a written agreement between the Commonwealth and the grant recipient.

1.29 The Biosecurity Amendment (Enhanced Risk Management) Bill 2021 (the 2021 Bill) was introduced in the House of Representatives on 1 September 2021 and lapsed at the dissolution of the previous Parliament. The provisions identified above in relation to Schedule 6 are almost identical to proposed sections 614B and 614C of Schedule 4 to the 2021 Bill. The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 15 of 2021, Scrutiny Digest 16 of 2021* and *Scrutiny Digest 17 of 2021*.[22]

1.30 The committee's view is that, where it is proposed to allow the expenditure of a potentially significant amount of public money, the expenditure should be subject to appropriate parliamentary scrutiny and oversight. In addition, the committee notes that section 96 of the Constitution confers on the Parliament the power to make grants to the states and to determine the terms and conditions attaching to them. Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory.

1.31 In this regard, the committee is concerned that the bill contains no guidance on its face as to how the broad power to make arrangements and grants under proposed section 614B is to be exercised, nor any information as to the terms and condition of the grants, other than that they must be set out in a written agreement.

1.32 The committee is also concerned that there is no requirement to table the written agreements between the Commonwealth and the states and territories in the Senate to ensure that senators are at least made aware of, and have an opportunity to debate, any agreements made under proposed section 614C of the bill. In this context, the committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online.

1.33 Where a bill provides for a broad discretionary power to make an arrangement for granting financial assistance, including to the states and territories, the committee expects the explanatory memorandum to justify why a broad discretionary power is necessary, to address what limits or terms and conditions will apply to the making of the grants, and to explain how an appropriate level of parliamentary scrutiny will be maintained. In this instance, the explanatory memorandum states:

> Funding for these arrangements and grants of financial assistance would come from annual appropriations made through the Federal Budget

22 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2021*, 16 September 2021, pp. 14–16; *Scrutiny Digest 16 of 2021*, 21 October 2021, pp. 66–69; *Scrutiny Digest 17 of 2021*, 24 November 2021, pp. 70–73.

> process. Government decisions in relation to these activities would therefore still be subject to those requirements, including the Budget Process Operational Rules, and would be published in the Portfolio Budget Statements including Additional and Supplementary Statements. The Parliament would continue to have the ability to scrutinise expenditure on, and the operation of, arrangements and grants of financial assistance made under new section 614B, through regular parliamentary processes such as Senate Estimates.
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> …
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> Annual reports for Commonwealth entities are required to be presented in the Parliament by the responsible Minister under section 46 of the PGPA Act and are subject to parliamentary scrutiny by the Joint Committee of Public Accounts and Audit. The inclusion of information in the Annual Report relating to arrangements and grants of financial assistance made under section 614B would provide an additional mechanism for parliamentary scrutiny and ensure transparency on the arrangements and grants being made.[23]

1.34 The committee notes that government decisions in relation to arrangements and grants will still be subject to parliamentary oversight through the Budget process. The committee also acknowledges that proposed section 614G provides that the total amount paid under arrangements or grants, and the total number of arrangements and grants, must be detailed in the relevant department's annual report. However, from a scrutiny perspective, the committee remains concerned that there is insufficient guidance on the face of the primary legislation as to how the broad discretionary power to make agreements or grants will be exercised.

1.35 The committee notes that the former Minister for Agriculture provided detailed advice in relation to the administration of the grants process in response to the committee's previously stated concerns.[24] However, the committee reiterates that the former minister's response did not address the appropriateness of limiting parliamentary oversight of the grant framework. To this end, the committee notes that its scrutiny concerns relate specifically to the appropriateness of delegating the executive Parliament's constitutional power to provide grants to the states, in circumstances in which there is little information as to the terms and conditions of those grants within the primary legislation. The committee welcomes the limitations set out in proposed subsections 614B(1) and (2) that set out what a grant may relate to. However, the committee remains concerned that there is no information on the face of the bill, or in the explanatory memorandum, as to the terms and conditions which may be attached to such a grant. The committee does not consider that it is

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23 Explanatory memorandum, pp. 114–117.

24 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 16 of 2021*, 21 October 2021, pp. 66–69; *Scrutiny Digest 17 of 2021*, 24 November 2021, pp. 70–73.

sufficient merely to state that this grants process will be subject to the general administrative and legislative framework that applies to all Commonwealth grant schemes. The committee's expectation is that information as to the terms and conditions for such grants should be included on the face of the bill.

1.36 The former minister also advised that written agreements with the states would be subject to the existing publication guidance provided by the general administrative and legislative framework relating to the federal grants process. In this respect, the committee reiterates that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where there is no requirement for tabling, or where documents are only available for public inspection.

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

- **whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and**
- **whether the bill can be amended to include a requirement that written agreements with the states and territories about grants of financial assistance made under proposed section 614C are:**
  - **tabled in the Parliament within 15 sitting days after being made; and**
  - **published on the internet within 30 days after being made.**

Availability of merits review[25]

1.38 Part 5 of Schedule 7 to the bill seeks to amend sections 632 and 633 of the Biosecurity Act. Under those sections the Director of Biosecurity has the discretion to approve the payment of compensation for damaged or destroyed goods, conveyances or other premises. This discretion is only available in certain circumstances. This bill would amend both provisions to provide that the Director of Biosecurity's discretion to provide compensation is exercisable in a more limited set of circumstances than previously available. The explanatory memorandum states that the bill seeks to:

> …assist individuals and businesses to better understand the circumstances in which compensation may be payable under sections 632 and 633. For example, it is not intended that sections 632 and 633 would provide compensation for damage or destruction that is caused by a biosecurity industry participant who acts in a manner that is not specifically required by a direction under the Biosecurity Act or by a condition of the approved arrangement. In such cases, it would be more appropriate for the

25 Schedule 7, part 5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

biosecurity industry participant to bear responsibility for their own actions.[26]

1.39 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 the Director of Biosecurity under section 632 or section 633 of the Biosecurity Act will, or are likely to, affect individual interests. However, there is nothing on the face of the Act, the bill, or within the explanatory memorandum, stating that either decision is subject to independent merits review.

1.40 The committee expects any justification for excluding merits review to be set out clearly within the explanatory materials to the bill. The committee's consideration of such explanations is assisted if the explanation refers to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*. In this case, the explanatory memorandum does not explain why decisions made under sections 632 and 633 of the Biosecurity Act are not subject to merits review.

1.41 In light of the above, the committee requests the minister's advice as to why it is necessary and appropriate not to provide that independent merits review will be available in relation to a decision made under either section 632 or section 633 of the *Biosecurity Act 2015*.

26 Explanatory memorandum, p. 131.

Maritime Legislation Amendment Bill 2022

Purpose	This bill seeks to amend the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* and the *Protection of the Sea (Harmful Anti-fouling Systems) Act 2006* to: • introduce controls for discharges of residues of noxious liquid substances in northern European waters; • ban the use of heavy fuel oil by ships in Arctic waters (a similar ban is already in place in the Antarctic); and • extend controls on ship harmful anti-fouling systems to include the chemical biocide, cybutryne.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	Senate on 28 September 2022

Reversal of the evidential burden of proof

Strict liability offence[27]

1.42 The bill seeks to establish several defences which reverse the evidential burden of proof. These defences are set out under item 10 of Schedule 1 and item 2 of Schedule 2 to the bill.

1.43 Subsection 21(1B) of the *Protection of the Sea (Prevention of Pollution from Ships) Act 1983* currently provides that a person commits an offence of strict liability if a liquid substance, or a mixture containing a liquid substance, being a substance or mixture carried as cargo or part cargo in bulk is discharged from a ship into the sea and the discharge occurred in a location referred to in paragraph 21(1B)(b). This offence is subject to a fine not exceeding 500 penalty units. Proposed subsection 10(5A) of the bill seeks to insert a new offence-specific defence to the effect that the offence under subsection (1B) does not apply if the discharge is in accordance with procedures in the Procedures and Arrangements Manual and the tank is washed in accordance with a specified procedure.[28] In addition, any resulting residues in the tank must have been

27 Schedule 1, item 10, proposed subsection 21(5); Schedule 2, item 2, proposed subsection 10AA(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

28 Being the prewash procedure specified in Appendix VI to Annex II to the *International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto* (MARPOL), see Schedule 1, item 10, proposed subparagraph 21(5A)(a)(iv).

discharged to a reception facility at the port of unloading until the tank is empty and remaining residue must be diluted with water.

1.44 Similarly, proposed subsection 10AA(1) of item 2 of Schedule 2 to the bill provides that it is an offence for the master or owner of an Australian ship to use or carry heavy grade oil (HGO) for use as fuel on the ship in Arctic waters. This offence is subject to 2000 penalty units. Proposed subsection 10AA(2) provides a similar strict liability offence subject to 500 penalty units.

1.45 Proposed subsection 10AA(4) provides an offence-specific defence to these offences to the effect that the offences do not apply if the HGO is being carried or used as fuel on an Australian ship engaged in securing the safety of a ship, engaged in a search and rescue operation or dedicated to oil spill preparedness and response.

1.46 Proposed subsection 10AA(5) provides a further offence specific defence for any HGO residue which is not cleaned or flushed from the tank or pipeline of an Australian ship carrying or using HGO as fuel before it enters Arctic waters.

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

1.48 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[29] 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.

1.49 There is no explanation within the explanatory memorandum for reversing the evidential burden of proof in relation to the exception set out in proposed subsection 10(5A), with the explanatory memorandum merely re-stating the operation of the provision.[30]

1.50 In relation to the defences set out under proposed subsections 10AA(4) and (5) of the bill, the explanatory memorandum states:

> It is reasonable that the defendant should have to adduce or point to evidence that suggests a reasonable possibility that the matters set out in that subsection applied. If a defendant were to rely on the defences in subsection 10AA(4), it is reasonable to expect that the defendant should be able to demonstrate that HGO was used or carried for use as fuel on a ship for the purpose of securing the safety of a ship, conducting search and rescue, or involved in oil spill preparedness and response.

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

30 Explanatory memorandum, p. 6.

1.51 The committee notes that the *Guide to Framing Commonwealth Offences*[31] 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.[32]

1.52 In this case, it is not apparent that the matters are matters *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish the matters than for the defendant to establish them. These matters appear to be matters more appropriate to be included as an element of the offence.

1.53 In addition, the committee notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual or 300 penalty units for a body corporate.[33] When a penalty is higher than that recommended in the *Guide to Framing Commonwealth Offences*, the committee expects this to be thoroughly justified in the explanatory memorandum, including by outlining the exceptional circumstances that justify the penalty.

1.54 In this instance, the explanatory memorandum states:

> An offence against subsection 10AA(2) is an offence of strict liability carrying a maximum penalty of 500 penalty units. It is appropriate that strict liability applies to an offence against subsection 10AA(2) as the master and owner of a ship would be fully aware if the ship is using or carrying HGO for use as fuel, and strict liability will discourage intentional or careless non-compliance with the ban on use or carriage for use of HGO in Arctic waters.
>
> Strict liability makes a person legally responsible for the damage caused by his or her acts and omissions regardless of culpability. Applying strict liability is consistent with similar offences of this nature that apply for the Antarctic Area. A defence of honest and reasonable mistake of fact will be available in relation to this offence.

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

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

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

> The maximum penalty of 500 penalty units for the strict liability offence is the same as the existing strict liability penalty in subsection 10A(2) on the carriage or use of HGO on Australian ships in the Antarctic Area.[34]

1.55 While acknowledging that the offence is intended to encourage compliance, it is not clear to the committee from the explanation provided why it is necessary to impose penalties that significantly exceed the recommended threshold of 60 penalty units for an individual or 300 penalty units for a body corporate.

1.56 The committee requests the minister's detailed justification as to the appropriateness of including the specified matters set out in proposed subsections 10(5A), 10AA(4) and 10AA(5) as an offence-specific defence.

1.57 In relation to the strict liability offence at proposed subsection 10AA(2), the committee draws this offence to the attention of senators and leaves to the Senate as a whole the appropriateness of including it in the bill, noting that a penalty above what is recommended in the *Guide to Framing Commonwealth Offences* applies to the proposed offence.

34 Explanatory memorandum, p. 9.

National Anti-Corruption Commission Bill 2022
National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022

Purpose	The National Anti-Corruption Commission Bill 2022 (NACC Bill) seeks to create a new Commonwealth anti-corruption agency, the National Anti-Corruption, that would investigate and report on serious or systemic corruption in the Commonwealth public sector, refer evidence of criminal corrupt conduct for prosecution, and undertake education and prevention activities regarding corruption. This National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 seeks to support the National Anti-Corruption Commission Bill 2022, which would amend various Acts to give effect to the NACC.
Portfolio	Attorney-General
Introduced	House of Representatives on 28 September 2022

Retrospective application[1]

1.1 The National Anti-Corruption Commission Bill 2022 (the bill) would provide the Commissioner with broad discretion to deal with corruption issues,[2] including a range of powers in order to investigate and report on corruption issues that the Commissioner is of the opinion could involve corrupt conduct[3] that is serious or systemic. Clause 41 sets out how the Commissioner may deal with a corruption issue.[4] Subclause 9(1) defines a corruption issue as an issue of whether a person has engaged, is engaging, or will engage in corrupt conduct. Further to this, clause 8 defines corrupt conduct to include:

1 Clause 8 and subclause 9(1). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

2 Defined in clause 9.

3 Defined in clause 8.

4 See Parts 7 (investigating corruption issues) and 8 (reporting on corruption investigations). The bill would also establish an Inspector of the National Anti-Corruption Commission who would have similar powers in relation to NACC corruption issues—being whether a person has engaged, is engaged, or will engage in corrupt conduct that occurs within the Commission, adversely affects the NACC or that may be otherwise inappropriate for the Commissioner to deal with (clause 201).

- conduct that took place before the National Anti-Corruption Commission (the NACC) was established;[5]
- conduct of a former public official while they were a public official;[6] and
- misuse of information by a former public official that was acquired by the former public official in the course of their functions or duties as a public official.[7]

1.2 The committee notes that the effect of this is that the Commissioner may investigate corrupt conduct that occurred prior to the commencement of the bill.

1.3 Retrospective application challenges a basic principle of the rule of law that laws should only operate prospectively. The committee therefore has long-standing scrutiny concerns in relation to provisions which have the effect of applying retrospectively. These concerns will be particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

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

> It is appropriate that the Commissioner is able to investigate allegations of serious or systemic corrupt conduct that occurred before the NACC was established. This reflects the fact that the definition would not impose new standards of conduct in public administration, but would reflect long-standing community expectations of public officials, including the expectation to act in the public interest. It is possible that certain conduct involving public officials could have fallen short of these existing expectations before the NACC was established … the Commissioner would only be able to make a finding of corrupt conduct if the conduct fell within one of the limbs of the definition, at the time it occurred.[8]

1.5 According to the statement of compatibility, investigating past conduct that is serious or systemic is 'critical to ensuring the Australian community has confidence in the integrity and effective administration of public institutions'.[9]

1.6 In addition, the explanatory memorandum notes that the definition of corrupt conduct would not create a criminal offence, and so would not impose retrospective

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5 Subclause 8(4).

6 Subclause 8(5).

7 Proposed paragraph 8(1)(d).

8 Explanatory memorandum, p. 76.

9 Statement of compatibility, p. 30.

criminal liability for any conduct.[10] It also states that while corrupt conduct may constitute criminal conduct, only a court would be able to make a finding of criminal guilt or impose punishments upon finding that a person had committed an offence. To this end, the bill would enable the Commissioner to refer evidence of criminal conduct to the Commonwealth Department of Public Prosecutions for prosecution.[11]

1.7 The committee acknowledges that the intention of the bill is to expose corruption in public administration. The committee notes that the definition of corrupt conduct, which would include conduct that took place before the NACC was established, would be central to the operation of the bill and the Commissioner's jurisdiction.

1.8 While acknowledging that the bill does not seek to retrospectively impose criminal liability for past corrupt conduct, the committee notes that the bill may subject affected persons to processes in relation to past conduct that could have adverse impacts, such as damage to a person's reputation. In this regard, the committee notes the justification in the explanatory memorandum that this is appropriate because the definition of corrupt conduct reflects long-standing standards of conduct by public officials, rather than imposing any new standards, and is needed to ensure the community has confidence in the integrity of Australia's institutions.[12] However, the committee also notes that paragraph 8(1)(e) extends the definition of corrupt conduct to include conduct of a public official that constitutes 'corruption of any other kind'. According to the explanatory memorandum, this is intended to capture 'emerging areas of corruption that may not currently be foreseen'.[13] The committee notes that this explanation appears to contemplate unknown conduct which is not subject to long-standing standards.

1.9 In relation to paragraph 8(1)(e), the committee recommends that the explanatory memorandum be updated to:

- **explain why it is appropriate to allow the bill to have retrospective application, given that it appears that the bill is intended to cover investigations of 'emerging areas of corruption that may not currently be foreseen' in relation to the conduct of a public official; and**
- **to provide a more detailed list of examples of the kinds of conduct of a public official that is likely to constitute 'corruption of any other kind', noting the importance of this definition for the overall operation of the bill.**

10 Explanatory memorandum, p. 76.

11 Explanatory memorandum, p. 56.

12 Explanatory memorandum, pp. 69 and 76.

13 Explanatory memorandum, p. 56.

1.10 The committee otherwise draws its long-standing scrutiny concerns regarding legislation that seeks to have a retrospective effect to the attention of senators and leaves to the Senate as a whole the appropriateness of the retrospective application of the bill.

Reversal of the evidential burden of proof[14]

1.11 The bills seek to establish several defences which reverse the evidential burden of proof. The committee has scrutiny concerns in relation to a number of these reverse burden provisions, which are set out below.

1.12 Clause 60 makes it an offence to not to comply with a notice to produce within the required period. Clause 69 makes it an offence to fail to give information or produce a document or thing when required to do so, either by a summons or by the Commissioner under clause 65. Subclauses 60(2) and 69(2) provide that it is a defence to these offences if it is not reasonably practicable for the person to comply.

1.13 Clauses 61 and 71 set out offences in relation to providing false or misleading information. Clause 61 makes it an offence to provide false or misleading information, or omit a matter or thing without which the information given is false or misleading, in response to a notice to produce. Clause 71 provides that it is an offence to provide false or misleading information, or omit a matter or thing without which the information given is false or misleading, at a hearing when required by the Commissioner or Inspector. Subclauses 61(2) and 71(2) provide that it is a defence if the information or document was not false or misleading in a material particular.

1.14 Clause 98 makes it an offence to disclose information in contravention of a non-disclosure notation attached to a notice or summons. Strict liability would apply to whether the non-disclosure notation has not been cancelled.[15] Subclause 98(3) provides a number of specific defences. For example, under paragraph 98(3)(f) it is a defence if the disclosure is made after the information has already been lawfully published.

1.15 Clause 228 creates an offence for an entrusted person (or former entrusted person) to disclose information they obtained as an entrusted person.[16] Subclause 228(2) provides that it is a defence if an entrusted person lawfully uses or

14 Subclauses 60(2), 61(2) 69(2), 71(2), 98(3), 229(1), 229(4) and 234(2); and Schedule 1, item 203, proposed subsections 355-192(1) and (2) in the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

15 Paragraph 98(1)(c).

16 Subclause 227(2) defines entrusted person as a staff member of the Commission (including the Commissioner), the Inspector or a person assisting the Inspector.

discloses information under clauses 229 or 230. This includes for the purposes of performing a function or duty under the bill,[17] or if the disclosure is required under another law of the Commonwealth.[18]

1.16 Clause 234 makes it an offence to disclose the whole or part of a protected information report. Subclause 234(2) provides that it is a defence if the disclosure was authorised under subclause 229(4) (if the disclosure is required under another law of the Commonwealth) or clause 230 (if the disclosure is in the public interest).

1.17 In addition, item 203 in Schedule 1 to the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022 (the Consequential Bill) would insert an exception to the existing offence in Section 355-155 in Schedule 1 of the *Taxation Administration Act 1953* (on-disclosure of protected information by other people) for disclosures in relation to the NACC. Specifically, proposed subsection 355-192(1) provides that section 355-155 does not apply if the entity is the Inspector-General of Taxation, the disclosure is for the purposes of the bill and is in relation to a corruption issue that relates to the Australian Tax Office or the Inspector-General of Taxation. Proposed subsection 355-192(2) provides that it is a defence if the disclosure is for the purpose of performing a function or duty of the NACC or its staff under the bill.

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

1.19 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[19] 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.

1.20 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.

1.21 The explanatory memorandum seeks to justify the reverse burden provisions on the grounds that if a person bears the burden of proving the relevant defence, then they are more likely to comply with a notice to produce or summons,[20] ensure that

17 Clause 229(1).

18 Clause 229(4).

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

20 Per the offences in clauses 60 and 69.

information provided is complete and truthful,[21] or that the disclosure of information is in fact permitted and authorised.[22] For example, in relation to clauses 60 and 69 the explanatory memorandum states that:

> Clauses 60 and 69 serve the legitimate objective of ensuring NACC and Inspector investigations are timely. If a person bears the burden of proving that it was not reasonably practicable for them to comply with a notice to produce (per the offence in clause 60) or a summons to attend a hearing (per the offence in clause 69), then they are more likely to comply with the notice or summons within the specified timeframe.[23]

1.22 It is not clear to the committee how reversing the evidential burden of proof is intended to improve compliance. In any case, the committee does not consider that this is a sufficient justification for reversing the evidential burden of proof. To this end, the committee notes that the relevant test, as set out in the *Guide to Framing Commonwealth Offences,*[24] 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; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[25]

1.23 In relation to the defences set out in subclauses 69(2), 228(2) and 234(2), the statement of compatibility states:

> It is reasonable and necessary for the burden of proof to be placed on the defendant where the facts in relation to the defence are peculiarly within the knowledge of the defendant. For example, a defendant is best-placed to give evidence that it was not reasonably practicable for them to comply with a requirement to produce information, documents or things within the required timeframe (see the defences in clauses 58 and 69). Similarly, a defendant is best placed to produce regarding the circumstances in which they made a particular record or disclosure (clauses 84, 228 and 234), or circumstances in which an identity card was lost or stolen (clause 268).[26]

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21 Per the offences in clauses 61 and 71.

22 Per the offences in 228 and 234.

23 Explanatory memorandum, p. 21.

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

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

26 Explanatory memorandum, p. 22.

1.24 The committee notes that the relevant test is not whether the defendant is 'best-placed' to give evidence, but rather whether a matter is *peculiarly* within the knowledge of the defendant.

1.25 The explanatory memorandum similarly claims that the defences in subclauses 60(2), 61(2), 71(2) and 98(3) are peculiarly within the knowledge of the defendant, but provides little to no explanation as to why this is the case.[27] In relation to proposed subsections 355-192(1) and (2) of the Consequential Bill, the explanatory memorandum contains no justification for the reversal of the evidential burden of proof.

1.26 In this case, it does not appear that the matters relevant to the defences set out in proposed subsections 355-192(1) and (2) of the Consequential Bill and subclauses 60(2), 61(2) 69(2), 71(2), 98(3), 229(1), 229(4) and 234(2) would be peculiarly within the knowledge of the defendant, or that it would be significantly more difficult or costly for the prosecution to establish the matters than for the defendant to establish them. As a result, from a scrutiny perspective, the committee considers that these matters would be more appropriately included as elements of the offences, rather than as offence-specific defences.

1.27 For example, it would appear that whether the disclosure was required under another law of the Commonwealth in accordance with subclause 229(4) would be a matter that the prosecution could readily ascertain. Further, in relation to paragraph 98(3)(f), it appears that whether or not information had been published is not a matter that would be *peculiarly* within the knowledge of the defendant. In relation to subclause 98(3), it appears that several of these matters are not peculiarly within the knowledge of the defendant. In this instance, the explanatory memorandum states that '[t]he reason the defendant believed a disclosure to be permitted will in some cases be peculiarly within the mind of the defendant'.[28] The committee notes that this explanation suggests that matters will not always be peculiarly within the knowledge of the defendant.

1.28 In relation to subclauses 60(2) and 69(2), the committee also considers that an offence-specific defence of 'reasonably practicable' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences. The committee notes that the explanatory memorandum contains no justification regarding why it is not possible to design more specific offences in this instance. In addition, the explanatory memorandum provides examples of where it may not be reasonably practicable for the person to comply, including where the person does not have the information, document or thing that is required, or where it is not possible to compile all of the relevant information or

27 Explanatory memorandum, pp. 133, 134 and 142.

28 Explanatory memorandum, p. 159.

documents in the time allowed.[29] It is unclear to the committee why these examples could not have been included as defences, or as elements of the offences.

1.29 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 defence. The committee therefore recommends that:

- **where there is sufficient justification for providing that a matter is *peculiarly* within the knowledge of the defendant, the explanatory memorandum be updated to reflect this justification; and**
- **where there is not a sufficient justification, consideration be given to amending the bill so that the matters specified by the committee are included as elements of the relevant offence, rather than as offence-specific defences.**

1.30 In addition, in relation to subclauses 60(2) and 69(2), the committee recommends that:

- **where there is sufficient justification for providing a general defence, the explanatory memorandum be updated to reflect this justification; and**
- **where there is not a sufficient justification, consideration be given to amending the bill so that more specific defences apply.**

Abrogation of privilege against self-incrimination
Abrogation of legal professional privilege[30]

1.31 The Commissioner would be empowered to require that a person give information to the NACC where it is reasonably believed they have information, or a document or thing, relevant to a corruption investigation. This could apply to persons who have separately been charged with a relevant offence, or been subject to relevant confiscation proceedings.[31] Clause 105 provides that a person or body that may lawfully disclose investigation material, or material derived from the investigation material, may disclose it to a prosecutor of the witness. In the case of investigation material (but not derivative material) this is subject to any direction to the contrary by the Commissioner.[32] In the case of material obtained post-charge, it may only be disclosed with a court order. The court may order that investigation material or derivative material may be disclosed to prosecutors of the witness if satisfied that the

29 Explanatory memorandum, pp. 132 and 139–140.

30 Clauses 113 and 114. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

31 See clauses 58, 63 and 105. 'Investigation material' is defined at clause 99.

32 See clause 100 and subclause 105(2).

disclosure is required in the interests of justice, but this does not restrict a court's power to make any orders necessary to ensure that the witness' fair trial is not prejudiced.[33]

1.32 Clause 113 would provide that a person is not excused from answering a question or producing a document or thing as required by a notice to produce, or at a hearing, on the ground that doing so would tend to incriminate the person or expose the person to a penalty. That is, the bill would abrogate a person's common law privilege against self-incrimination.

1.33 The committee recognises that there may be circumstances in which the privilege against self-incrimination can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs this loss to personal liberty. The committee considers that any justification for abrogating the privilege against self-incrimination will be more likely to be considered appropriate if accompanied by both a 'use immunity' and a 'derivative use immunity'. A use immunity provides that information or documents produced are not admissible in evidence in most proceedings. By contrast, a derivative use immunity provides that anything obtained as a direct, or indirect, consequence of the information or documents is not admissible in most proceedings.

1.34 In this case, subclause 113(2) states that an answer given, or a document or thing produced, is not admissible in evidence against the person in a criminal proceeding, or a proceeding for the imposition or recovery of a penalty, or a confiscation proceeding. However, there is no such protection in relation to information derived from an answer or information given, or a document or thing produced. This means that clause 113 will provide a use immunity but not a derivative use immunity. Further, as set out above, the bill makes clear that material derived from anything a witness is compelled to produce may be able to be used in prosecuting them, subject to a court order.[34]

1.35 In addition, clause 114 of the bill provides that a person is not excused from giving an answer, or producing a document or thing, under a notice to produce or at a hearing on the grounds that the information is protected against disclosure by legal professional privilege. Subclauses 114(2), (3) and (4) set out exceptions to this abrogation of legal professional privilege. However, clause 115 requires a legal practitioner who refuses to provide information, documents or things on the grounds that doing so would disclose advice or a communication to which section 114 does not apply to provide the name and address of the person who is able to waive the legal

33 Clause 106.

34 Clauses 105–108.

professional privilege concerned. Paragraph 82(b) provides that a practitioner who refuses to comply with this requirement would be in contempt of the NACC.

1.36 Abrogating legal professional privilege represents a serious loss of personal liberty as an abrogation necessarily interferes with the legitimate, confidential communications between individuals and their legal representatives. The committee considers that legal professional privilege is not merely a rule of substantive law but an important common law right which is fundamental to the administration of justice. This has been recognised by the High Court on numerous occasions.[35] Where legal professional privilege is abrogated, use and derivative use immunities should ordinarily apply to documents or communications revealing the content of legal advice, in order to minimise harm to the administration of justice and to individual rights.

1.37 Where a bill seeks to abrogate the privilege against self-incrimination or legal professional privilege, the committee would expect a sound justification for the abrogation to be included in the explanatory memorandum.

1.38 In relation to the abrogation of the privilege against self-incrimination, the explanatory memorandum states that the existence of use immunity is an important safeguard and that the lack of derivative use immunity is appropriate:

> … to ensure the Commissioner can fulfil their statutory functions of detecting, preventing and investigating corrupt conduct that could be serious or systemic. Such conduct causes significant harm, including:
>
> - direct harm to individual victims of serious or systemic corrupt conduct;
> - broader, direct harms across the Australian community and economy—for example, through the corrupt diversion of public resources; and
> - harm to public confidence in government and public administration.
>
> It is important that material derived from investigation material can be used to investigate, disrupt and—where appropriate—prosecute persons involved in serious or systemic corrupt conduct, including by prosecuting persons who have been witnesses before the Commissioner. For example, material provided by a witness in a hearing may lead the Commissioner to pursue new lines of investigation, which ultimately culminate in a brief of evidence against the witness. It is critical that such evidence can be used to disrupt corrupt conduct, including by prosecuting persons who have been witnesses.

35 See, for example, *Baker v Campbell* (1983) 153 CLR 52.

> Further, it would open court proceedings up to inappropriate delay, and be contrary to the interests of justice, if evidence referred by the NACC could not be admitted until the prosecution had established its provenance.[36]

1.39 The explanatory memorandum also states that a lack of derivative use immunity is consistent with the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act), and that the bill would preserve the inherent power of the courts to make orders that are necessary to ensure a fair trial of the witness, including orders to limit or remove any prejudice from the prosecution's lawful possession or use of derivative material.[37]

1.40 While acknowledging this explanation, and welcoming the safeguards included within the bill, the committee remains concerned about abrogating the privilege against self-incrimination in circumstances in which derivative use immunity is not available. The committee notes that consistency with existing legislation does not justify abrogating a significant common law right. Rather, any abrogation should be justified with respect to the specific circumstances of the case at hand. Moreover, in light of the fact that information can be given to a prosecutor,[38] the committee is concerned that the approach taken in the bill may impact on a person's right to a fair trial. While the committee notes that it remains open to the court to make an order that the prosecutor disregard prejudicial derivative material,[39] the committee notes that knowledge of prejudicial material may unconsciously inform a prosecutor's decisions in an unfair manner.

1.41 The committee considers that it would be more appropriate if the privilege against self-incrimination in clause 113 should be conditional upon requiring the NACC to demonstrate that all other less coercive avenues to obtain information have been exhausted prior to compelling a person to give evidence in circumstances where the privilege is abrogated.

1.42 In relation to the abrogation of legal professional privilege the explanatory memorandum states:

> … it is appropriate to abrogate legal professional privilege in this way due to the significant impact that corrupt conduct can have in eroding the community's trust in public administration. Privileged information can provide valuable insight into conduct, and be important evidence in a corruption investigation. This clause would prevent corrupt actors from

36 Explanatory memorandum, p. 173.

37 Explanatory memorandum, p. 173.

38 See, for example, clauses 107 and 108.

39 See clause 106.

relying on legal professional privilege as a shield from investigation by the Commissioner.[40]

1.43 The explanatory memorandum also argues that abrogating legal professional privilege is appropriate because it would prevent corrupt actors from using the privilege as a shield to protect against investigation, and because allowing the privilege without limitation could affect the public's confidence in the NACC.[41]

1.44 While acknowledging the concerns expressed in the explanatory memorandum, the committee remains concerned about abrogating legal professional privilege in circumstances in which a use and derivate use immunity is not available.

1.45 Moreover, the committee considers that the justifications contained within the explanatory memorandum do not adequately address the rationale for the existence of legal professional privilege. The committee considers that clauses 114 and 115 may have the effect of discouraging persons from obtaining legal advice. Clauses 114 and 115 may also impact on a person's right to a fair trial because certain disclosures allowed by those clauses raise the possibility of adverse inferences being drawn about persons who have sought legal advice. For example, clauses 114 and 115 open the possibility of adverse inferences being drawn in relation to a person having sought legal advice from a practitioner with a particular speciality. To this end, the committee considers that it would be appropriate if the bill was amended to provide additional safeguards in relation to the publication of such information. For instance, by providing that the Commissioner must give a notice to an affected party where the Commissioner proposes to publish privileged information, stating that they intend to publish the information and why they are satisfied that it is appropriate to do so.

1.46 The committee welcomes the existence of numerous safeguards in the bill, including that the abrogation of legal professional privilege does not apply to journalists,[42] and that evidence must be given in private if it would involve the disclosure of information covered by legal professional privilege.[43] However, these safeguards do not fully assuage the committee's concerns in this instance.

1.47 As above, the committee considers that it would be more appropriate if the NACC was required to consider whether other less coercive avenues to obtain information were available prior to compelling a person to give evidence in circumstances where legal professional privilege is abrogated.

1.48 In light of the above, the committee recommends that consideration be given to amending the bill:

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40 Explanatory memorandum, p. 175.

41 Explanatory memorandum, p. 175.

42 Subclauses 114(3) and (4).

43 Clause 74.

- **so that the privilege against self-incrimination and legal professional privilege are only abrogated to the extent that both use and derivative use immunity are available;**
- **or, at a minimum, to provide that the NACC must consider whether less coercive avenues are available to obtain the information prior to compelling a person to give information in circumstances which would abrogate the privilege against self-incrimination or legal professional privilege.**

Broad scope of offence provisions[44]

1.49 Subclause 72(1) provides that a person would commit an offence if they obstruct or hinder a staff member of the NACC in the performance or exercise of the staff member's functions, powers or duties in connection with a hearing. Similarly, subclause 72(2) provides that a person commits an offence if they disrupt a hearing.

1.50 Both offences carry a maximum penalty of 2 years imprisonment.

1.51 The committee considers that it is unclear what conduct could constitute disrupting a hearing such that it would constitute this offence. Similarly, it is unclear what conduct could constitute obstructing or hindering a staff member of the NACC. The committee notes that there is nothing on the face of the bill clarifying the meaning of these terms. The explanatory memorandum helpfully clarifies the relevant fault elements for both offences, but otherwise provides no further guidance.[45]

1.52 The committee considers that the terms 'disrupt', 'obstruct', and 'hinder' could conceivably cover a broad range of conduct from relatively minor actions to serious misconduct. If the intention is to cover this entire spectrum by relying on the ordinary meaning of 'disrupt', 'obstruct', and 'hinder' the bill and accompanying explanatory materials should make that clear. However, the committee considers that, given the significant penalties that may be imposed under clause 72, it would be more appropriate to clarify with a higher level of precision what conduct subclauses 72(1) and (2) are intended to cover.

1.53 The committee considers that any offence provision should be clearly drafted and sufficiently precise to ensure that any person may understand what may constitute an offence. The committee notes that insufficiently defined terms contained within offence provisions may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles. This is particularly so when the offence provision contains a custodial penalty, as in this instance.

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44 Subclauses 72(1) and 72(2), paragraphs 82(g) and 82(f). The committee draws senators' attention to these provision pursuant to Senate Standing Order 24(1)(a)(i).

45 Explanatory memorandum, p. 142.

1.54 It appears that clause 72, as with many offences within the bill, has been drawn from the LEIC Act.[46] The explanatory memorandum to the bill notes that the penalty of two years imprisonment is consistent with the equivalent provision in the LEIC Act. The committee takes this opportunity to note that consistency with existing provisions is not a sufficient justification for the use of imprecise terms within an offence provision.

1.55 The committee also notes that paragraph 82(g) of the bill provides that a person is in contempt of the NACC if they disrupt a hearing. Similarly, paragraph 82(f) provides that a person is in contempt of the NACC if they obstruct or hinder a staff member. If such a finding is made the court could find that the person was in contempt of the Commission, and deal with them as if their conduct had constituted contempt of that court.[47]

1.56 It is unclear to the committee why it is necessary to include both a contempt provision at clause 82 and an offence provision at clause 72 in relation to the same conduct. This is particularly so given the custodial penalties set out under clause 72 and the fact that the court could find that contempt of the NACC could constitute contempt of the court, noting that the court can impose significant penalties for contempt including, in certain cases, imprisonment. The committee's already significant concerns in relation to the use of imprecise terms is heightened given this duplication. The committee notes that the explanatory memorandum does not explain why both provisions are needed.

1.57 In light of the above, the committee recommends that:

- **unless sufficient justification can be provided as to why it is necessary and appropriate to make it both an offence, and a contempt of court, to disrupt a hearing or obstruct or hinder a staff member of the Commission, consideration be given to amending the bill to remove clause 72; and**
- **if clause 72 is not removed, that consideration be given to amending the bill to better clarify what conduct is intended to be covered by this clause or, at a minimum, that the explanatory memorandum to the bill be updated to included specific examples of the kinds of conduct that the provisions are intended to cover.**

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46 For clause 72, see section 94 of the *Law Enforcement Integrity Commissioner Act 2006*.

47 See clause 82, and page 150 of the explanatory memorandum.

Evidentiary certificates[48]

1.58 As noted above, the bill would provide that a person is in contempt of the NACC where they engage in certain conduct.[49] Clause 83 provides that the Commissioner may subsequently make an application for the court to deal with contempt. Subclause 83(3) states that an application to the court must be accompanied by a certificate that states the grounds for making the application and the evidence in support of the application. Subclause 84(2) provides that a clause 83(3) certificate is prima facie evidence of the matters specified in the certificate.

1.59 Certificates that constitute prima facie evidence of the matters contained within them are known as evidentiary certificates. The committee notes that where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceeding. While a person still retains the right to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. The use of evidentiary certificates therefore effectively reverses the evidential burden of proof, and may, if used in criminal proceedings, interfere with the common law right to be presumed innocent until proven guilty. Consequently, the committee expects a detailed justification for any proposed powers to use evidentiary certificates to be included in the explanatory materials. In this instance the explanatory memorandum contains no justification, merely re-stating the effect of the provision.

1.60 The committee notes that the *Guide to Framing Commonwealth Offences states*, in relation to criminal proceedings, that evidentiary certificates:

> … are generally only suitable where they relate to formal or technical matters that are not likely to be in dispute or would be difficult to prove under the normal evidential rules.[50]

1.61 The *Guide to Framing Commonwealth Offences* further provides that evidentiary certificates 'may be appropriate in limited circumstances where they cover technical matters sufficiently removed from the main facts at issue'.[51]

1.62 In this instance, it appears that the matters that may be included in a certificate given in accordance with subclause 83(3) may encompass a wide range of technical and non-technical issues. Consequently, it is not clear to the committee

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48 Subclause 84(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

49 See clause 82.

50 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 54.

51 Attorney-General's Department, *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 55.

whether a certificate would cover only formal or technical matters sufficiently removed from the relevant proceedings such as might make its use appropriate.

1.63 **In light of the above, the committee recommends that unless sufficient justification can be provided as to why it is necessary and appropriate to provide that a certificate given under subclause 83(3) is an evidentiary certificate, noting that such certificates are generally only considered appropriate when they cover formal or technical matters, consideration be given to amending the bill to remove subclause 84(4).**

Immunity from civil liability[52]

1.64 The bill seeks to introduce several provisions which provide immunity from civil liability.

1.65 Subdivision D of Part 10 to the bill would provide certain immunities for the Inspector and persons assisting the Inspector. Subclause 196(1) provides that the Inspector is protected from civil liability in relation to an act or omission done in good faith, during the actual or purported performance or exercise of their functions, powers or duties under the bill. Subclause 169(2) further extends immunity from civil liability to any person whom the Inspector requests, in writing, to assist a staff member. Clause 269 of Part 12 to the bill provides an identical immunity in relation to a staff member of the NACC or a person whom the Commissioner requests assists a staff member of the NACC.

1.66 The immunities provided for under clauses 196 and 269 would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that a lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances. The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified.

1.67 In relation to the immunity provided under clause 196, the explanatory memorandum states that providing immunity from liability:

> … would ensure that the Inspector and persons assisting the Inspector are able to perform their functions and duties under the NACC Bill without fear of personal liability for any actions they perform in good faith. Without

52 Clauses 196 and 269. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

> immunity from civil proceedings, the Inspector or a person assisting may be exposed to civil liability in the performance of their duties. For example, the Inspector may be exposed in circumstances where a person wishes to bring legal action to seek compensation for damage to their personal property arising from a search on Commonwealth premises. This clause would protect the Inspector and persons assisting the Inspector from such action.[53]

1.68 The explanatory memorandum provides an identical explanation in relation to clause 269.[54]

1.69 The committee considers that a desire for administrative efficiency is not, of itself, a sufficient justification for conferring a broad immunity from liability. The committee therefore remains concerned that the immunity conferred by clauses 196 and 269 is overly broad, particularly given that the effect of these clauses is that affected persons will have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

1.70 In light of the above, the committee recommends that

- **the explanatory memorandum be updated to explain why it is necessary and appropriate to confer immunity from civil proceedings on a potentially broad range of persons, so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown; and**
- **where there is not a sufficient justification, consideration be given to amending the bill so that a more limited immunity is conferred.**

Privacy[55]

1.71 The bill seeks to confer a broad range of powers on the Commissioner, Inspector and authorised officers to obtain information—including personal information—relevant to an investigation or public inquiry.[56] The bill also includes a number of provisions which would allow for the disclosure of this information, including through the tabling or publication of reports, public hearings and the

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53 Explanatory memorandum, p. 227.

54 Explanatory memorandum, p. 295.

55 Paragraphs 54(6)(b), 74(b)(iii) and 151(1)(b), subparagraphs 154(5)(b)(i), 158(3)(b)(i), 159(4)(b)(i) and 160(6)(6)(b), paragraph 164(3)(c), subparagraph 167(3)(b)(i), paragraphs 171(6)(b) and 227(3)(n) and subclause 272(b). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

56 This includes conducting searches and compelling people to give evidence, information and produce documents at a hearing or for the purpose of an investigation. See Part 7.

disclosure of other information relevant to the NACC.[57] As a result the committee considers that the bill trespasses on an individual's right to privacy.

1.72 Subclause 227(3) would define a class of information to be known as sensitive information. Under paragraph 227(3)(n), this includes information the disclosure of which would unreasonably disclose a person's personal affairs.[58]

1.73 The bill proposes several measures which would provide protections around the use and disclosure of sensitive information. Among other things, this includes that:

- evidence at a hearing would need to be given in private if it would disclose sensitive information;[59]
- sensitive information would be required to be excluded from an inquiry report;[60]
- sensitive information would be required to be excluded from the Commissioner's and Inspector's annual reports;[61] and
- sensitive information would be required to be excluded from the Commissioner's investigation reports and the Inspector's NACC investigation reports.[62]

1.74 In addition, where sensitive information is excluded from reports, such information would generally be required to be included in a protected information report.[63] Clause 234 would make it a criminal offence for a person to disclose a

57 For example, reports are required to be tabled in Parliament where a public hearing has been held in the course of an investigation, NACC investigation, or public inquiry, or where public submissions were invited on matters that were the subject of a public inquiry (clauses 155, 168 and 221). The Commissioner and Inspector would be able to publish reports and disclose other information if satisfied it is in the public interest to do so (clauses 156, 169, 222 and 230).

58 Paragraph 227(3)(n).

59 Clause 74.

60 Clause 164.

61 Clauses 199 and 272.

62 Clause 151 and 217.

63 See clause 152 in relation to the Commissioner's investigation reports, clause 218 in relation to the Inspector's NACC investigation reports, and clause 165 in relation to inquiry reports.

protected information report, or information contained in a protected information report, to the public.[64]

1.75 In relation to personal information, these requirements would apply where the relevant authorised discloser (defined in clause 227 to include the Commissioner and the Inspector) is satisfied that disclosure of the information would unreasonably disclose a person's personal affairs.[65] The committee notes that in this instance there is no guidance, either on the face of the bill or in the explanatory memorandum, regarding the circumstances in which an authorised discloser may be satisfied that the disclosure of sensitive information would unreasonably disclose a person's personal affairs. The explanatory memorandum merely states:

> The relevant authorised discloser would need to be satisfied that information fell within the definition of sensitive information for associated restrictions on the disclose of that information to arise. Once the authorised discloser is satisfied, there would be restrictions on the disclosure of the information.[66]

1.76 The explanatory memorandum also notes that in assessing whether information is sensitive or not, the relevant authorised discloser may be required to consult with relevant officials.[67] For example, under subclause 151(2) the Commissioner must consult with the head of each Commonwealth agency or state or territory government entity to which the information relates about whether the information is sensitive information before including it in an investigation report.

1.77 While the committee welcomes these proposed restrictions on the disclosure of sensitive information, the committee is concerned that there is a significant amount of flexibility in the meaning of the terms 'unreasonably' and 'personal affairs' in this context. Further, the committee is concerned about the lack of guidance as to what an authorised discloser would need to consider in order to be *satisfied* about the matters in paragraph 227(3)(n). The committee notes that these terms are key to the operation of the sensitive information framework and its effectiveness in protecting against undue trespass on an individual's right to privacy. The committee's scrutiny concerns are heightened in this instance due to the potential harm that could result from the

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64 Where there is a requirement to give copies of protected information reports, the Commissioner and Inspector are required to exclude sensitive information if it is desirable in the circumstances to exclude the information from the report. In deciding whether to exclude information from a protected information report, the relevant authorised discloser must seek to achieve an appropriate balance between the person's interest in having the information included in the report, and the prejudicial consequences that might result from including the information in the report. See, for example, subclause 167(4) in relation to a protected information report prepared for an inquiry.

65 Subclause 227(3).

66 Explanatory memorandum, p. 259.

67 Explanatory memorandum, p. 259.

disclosure of personal information, which could, for example, adversely and permanently affect a person's reputation. The committee also notes that while this framework seeks to minimise the disclosure of personal information, there are no requirements on the face of the bill for disclosing only de-identified data.

1.78 While the committee acknowledges that some flexibility may be required in this instance, it is unclear why at least high-level guidance in relation to the circumstances in which an authorised discloser may be satisfied that disclosure of information would unreasonably disclose a person's personal affairs cannot be included on the face of the bill. The committee considers that, at a minimum, it would also be useful for the explanatory memorandum to provide specific examples of when the threshold for the definition of sensitive information in paragraph 227(3)(n) is likely to be met. Without this information, the ability of the Parliament to consider whether appropriate safeguards are in place to protect personal information is limited.

1.79 Finally, the committee notes that section 47F of the *Freedom of Information Act 1982* provides relevant matters which the minister must have regard to in determining whether the disclosure of a document would involve the unreasonable disclosure of personal information (as defined by the *Privacy Act 1988*). The committee considers that a similar approach would be helpful in this instance.

1.80 Given the potential impact on an individual's right to privacy resulting from the disclosure of personal information, the committee recommends that:

- **consideration be given to amending the bill to include a list of considerations that an authorised discloser must have regard to in order to be satisfied that disclosure of information would unreasonably disclose a person's personal affairs; or**
- **at a minimum, that the explanatory memorandum be updated to include such a list of considerations and to provide specific examples of circumstances in which this threshold is likely to be met.**

Broad delegation of administrative powers and functions[68]

1.81 Division 2 of Part 13 to the bill sets out the circumstances in which the Commissioner may delegate their functions, powers and duties under the bill.

1.82 Subparagraph 276(1)(b)(ii) provides that the Commissioner may delegate all or any of the Commissioner's functions, powers or duties to a staff member of the NACC who holds, or is acting in, an Executive Level 2, or equivalent, position.

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68 Subparagraph 276(1)(b)(ii), and paragraphs 276(2)(b) and 277(1)(b). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

1.83 Paragraph 276(2)(b) provides that the Commissioner may delegate the Commissioner's power to take no action in relation to a corruption issue under subclause 41(6) to any staff member of the NACC.

1.84 Paragraph 277(1)(b) provides that the head of a Commonwealth agency may delegate all or any of their functions, powers or duties to an individual who is concerned in, or takes part in, the management of the agency.

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

1.86 In relation to the broad delegation of powers set out under subparagraph 276(1)(b)(ii), the explanatory memorandum states:

> The jurisdiction of the NACC will be significantly broader than that of the Integrity Commissioner. Accordingly, the number of decisions of this kind that would need to be taken could reasonably be expected to significantly increase. In these circumstances, it would be appropriate for the Commissioner to be able to delegate these functions to Executive Level 2 staff in appropriate circumstances and subject to appropriate directions.

1.87 While noting this explanation, and acknowledging the operational complexities involved, it remains unclear to the committee why it is considered necessary to delegate *all* of the powers and functions of the Commissioner to persons who hold an Executive Level 2 position. The committee's concerns in this instance are heightened by the significant nature of the powers involved.

1.88 In relation to the broad delegation of powers set out under paragraph 276(2)(b), the explanatory memorandum states:

> It is anticipated that the NACC will receive a larger number of referrals than the Integrity Commissioner, necessitating the need to dispense with unmeritorious referrals in the most expeditious manner available. In turn, this would ensure the Commissioner can devote their resources appropriately to dealing with corrupt conduct that could be serious or systemic.[69]

1.89 While acknowledging this explanation, it is not clear to the committee why it is appropriate to delegate the power under paragraph 276(2)(b) to *any* staff member

69 Explanatory memorandum, p. 299.

of the NACC. The committee notes that it is sometimes appropriate to delegate powers to a wide range of staff in order to allow for administrative efficiency. However, the committee considers that it would be possible to achieve this without allowing delegation to any staff member. The committee considers that it would be appropriate to, at a minimum, amend the bill to provide that delegates possess the appropriate training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions.

1.90 In relation to the broad of powers set out under subparagraph 277(1)(b), the explanatory memorandum states:

> The second class of delegates is outlined for Commonwealth agencies that do not have SES employees, for example parliamentary offices and Commonwealth companies, as well as to enable delegations to statutory office holders in circumstances where an office or entity headed by that statutory office holder forms part of a separate Commonwealth agency within the meaning of the NACC Bill.[70]

1.91 While noting this explanation, the committee continues to have concerns given the breadth of the power conferred by paragraph 277(1)(b). The committee reiterates that it is possible to deal with issues of administrative efficiency while still providing appropriate limits on delegation powers. For example, as noted above, the bill could be amended to provide that delegates possess the appropriate training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions.

1.92 The committee notes that subparagraph 267(3)(a)(i) provides that an authorised officer must be a staff member of the NACC who the Commissioner considers has suitable qualifications or experience. It is unclear to the committee why a similar requirement cannot be included in the provisions discussed above.

1.93 **In light of the above, the committee recommends that:**

- **the explanatory memorandum be updated to explain why it is necessary and appropriate to delegate:**
  - ***all* of the Commissioner's functions, powers or duties to Executive Level 2 staff members of the NACC; and**
  - **the Commissioner's powers under subclause 41(6) to *any* staff member*;* and**
  - **the Commissioner's functions, powers or duties to an individual who is concerned in, or takes part in, the management of the agency*;* and**
- **that consideration be given to amending the bill to limit these broad delegations by, at a minimum, providing that only delegates in possession of**

70 Explanatory memorandum, p. 300.

the appropriate training, qualifications, skills or experience are able to exercise decision-making powers or carry out administrative functions.

Coercive powers

Privacy[71]

1.94 Schedule 1 to the Consequential Bill would repeal the LEIC Act, and transfer many of the functions, duties and powers conferred on the Australian Commission for Law Enforcement Integrity to the NACC. Powers which Schedule 1 proposes to transfer to the NACC include significant covert investigative powers. Briefly, these are:

- **powers under the *Surveillance Devices Act 2004*:** including powers to search a computer and to access content on that computer;[72]
- **powers under the *Telecommunications (Interception and Access) Act 1979*:** including powers to access telecommunications interceptions, stored communications, telecommunications data and international production orders;[73]
- **powers under the *Telecommunications Act 1997*:** including powers to obtain assistance from communications providers to access encrypted information;[74]
- **powers under Division 4, Part IAB of the *Crimes Act 1914*:** allowing the NACC to authorise and conduct controlled operations;[75]
- **powers under Part IABA of the *Crimes Act 1914*:** allowing the NACC to conduct operations designed to test the integrity of staff members of certain Commonwealth agencies, using controlled or simulated situations;[76]
- **powers under the *Proceeds of Crime Act 2002*:** including powers to seek information about accounts, to search for and seize property and evidential material, and to apply for freezing orders;[77]

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71 Schedule 1. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

72 Schedule 1, items 188–204.

73 Schedule 1, items 263–270.

74 Schedule 1, items 263–270.

75 Schedule 1, items 35–39, 42–46, 48–54 and 56–62.

76 Schedule 1, items 63–88.

77 Schedule 1, items 158–162.

- **information sharing powers:** allowing information to be shared with specified Commonwealth agencies.[78]

1.95 Many of these powers have the potential to impact unduly upon personal rights and liberties, including by impacting upon a person's right to privacy or by authorising the use of coercion. Several of these powers have previously attracted committee comment on this basis. For example, the committee considered the computer access scheme set out within the *Surveillance Devices Act 2004* and the industry assistance framework set out within Part 15 of the *Telecommunications Act 1997* in *Scrutiny Digest 12 of 2018* and *Scrutiny Digest 14 of 2018*.[79] The committee's comments in relation to both frameworks were extensive, and included concerns in relation to the potentially significant impact of the measures on an individual's privacy, without appropriate limits being set on the use of coercive powers. In particular, the committee expressed its concerns in relation to warrant regimes that do not adequately guard against the seizure of material unrelated to an investigation; do not adequately protect third parties; or that authorise covert access to material and thereby deny individuals the opportunity to protect privileged information. The committee was also concerned that the warrant regime was not subject to adequate judicial oversight.

1.96 Other powers listed above have raised similar concerns. For example, the committee commented on the international production order framework, set out under the *Telecommunications (Interception and Access) Act 1979* in *Scrutiny Digest 5 of 2020* and *Scrutiny Digest 8 of 2020*.[80] The committee was concerned that the framework, which permits Australian agencies to access overseas communications and permits foreign governments to access private communications, did not contain adequate safeguards or oversight mechanisms. In particular, the committee was concerned that International Production Orders could be issued by members of the Administrative Appeals Tribunal, rather than issuing powers being restricted to members of judicial officers.

1.97 The committee reiterates its previous concerns here. In particular, the committee repeats its longstanding scrutiny view that legislation enabling coercive search powers be tightly controlled, with sufficient safeguards to protect individual rights and liberties. The committee considers that one such safeguard is that the power to issue warrants or orders relating to the use of intrusive powers should only be conferred on judicial officers. Where a warrant or order contains a significant coercive element or has the potential to significantly impact upon a person's right to

78 Schedule 1, items 4-10, 117–121, 108–111 and 201–204.

79 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, 17 October 2018, pp. 20-49; *Scrutiny Digest 14 of 2018*, 28 November 2018, pp. 23–82.

80 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2020*, 17 April 2020, pp. 24–35; *Scrutiny Digest 8 of 2020*, 17 June 2020, pp. 27–52.

privacy, the committee considers that it is appropriate if issuing powers are restricted to superior court judges. The committee also considers that issuing thresholds for warrants or orders that would allow for the use of significant surveillance powers should incorporate thresholds of necessity and proportionality into the authorisation criteria, to ensure that the use of such powers remains proportional and appropriate. Generally speaking, the committee considers that established and robust oversight mechanisms should be put in place over any covert investigative power frameworks, such as those outlined above.

1.98 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of granting significant existing covert investigative powers on the NACC.

Availability of judicial review[81]

1.99 Item 2 of Schedule 1 to the Consequential Bill seeks to insert paragraph (zi) into Schedule 1 to the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act). Proposed paragraph (zi) would have the effect of excluding certain decisions made under the NACC Bill from judicial review by the Federal Court. These are:

- decision-making powers in Part 6 (corruption issues);
- decision-making powers in Part 7 (investigation powers); and
- decisions made under clauses 161 and 162 (conducting public inquiries into corruption risks etc), clauses 162, 209 and 210 (NACC corruption issues) and clause 213 (investigations by Inspector).

1.100 Judicial review of these decisions remains available under section 39B of the *Judiciary Act 1903* and paragraph 75(v) of the Constitution.[82]

1.101 Where a provision excludes the operation of the ADJR Act, the committee expects that the explanatory memorandum should provide a justification for the exclusion. In this instance, the explanatory memorandum states:

> The provisions of the NACC Bill that would be excluded from the operation of the ADJR Act concern intermediate process steps necessary for the NACC to effectively undertake an investigation into a corruption issue. If a person were able to seek review of decisions made under these provisions, this could significantly impede the NACC's ability to fulfil its statutory functions.

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81 Schedule 1, item 2 of the Consequential and Transitional Bill. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

82 Explanatory memorandum, p. 305.

> Enabling a person to seek review of these intermediate decisions could also cause lengthy delays that could prejudice the NACC Act process.[83]

1.102 The committee acknowledges that it may be appropriate to exclude judicial review over certain kinds of intermediate or procedural decisions in order to ensure the administrative efficiency of the NACC. However, the committee remains concerned that the exclusion set out in proposed paragraph (zi) is overbroad. It is not clear to the committee that all of the decisions excluded from ADJR Act review could be appropriately classified as 'intermediate' decisions or 'process steps'. For example, the Commissioner's power under clause 40 to deal with corruption issues does not appear to be procedural or intermediate. Other decisions which proposed paragraph (zi) seeks to exclude could be described as 'intermediate' but are nevertheless significant decisions which the committee considers should be subject to ADJR Act review. The Commissioner's discretion to hold a public hearing in exceptional circumstances appears to be one such decision.[84]

1.103 The committee also notes that, in interpreting the ADJR Act's review jurisdiction, the courts have held that, in general, decisions must be final and determinative before they will be reviewable decisions.[85] It is therefore unclear to the committee why the court's ruling is not sufficient to ensure that intermediate decisions are excluded from review.

1.104 The committee notes that the ADJR Act overcomes a number of technical and remedial complications that arise in an application for judicial review under alternative jurisdictional bases (principally, section 39B of the *Judiciary Act 1903*) and also provides for the right to reasons in some circumstances. From a scrutiny perspective, the committee considers that the proliferation of exclusions from the ADJR Act should be avoided.

1.105 In light of the above, the committee recommends:

- **that the explanatory memorandum be updated to explain why the court's ruling in relation to the ADJR Act's review jurisdiction is not sufficient to ensure administrative efficiency, and to justify the breadth of the exclusion at item 2, Schedule 1 to the Consequential Bill; and**
- **that consideration be given to amending the Consequential Bill to provide that ADJR Act review is available for decisions made under jurisdiction-conferring provisions, such as clause 40, and for significant intermediate decisions, such as a decision under clause 71.**

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83 Explanatory memorandum, p. 305.

84 Clause 71.

85 *Bond v Australian Broadcasting Tribunal* (1990) 170 CLR 321.

Offshore Electricity Infrastructure Legislation Amendment Bill 2022

Purpose	This bill seeks to amend the *Customs Act 1901* to ensure that goods and vessels that enter or exit areas off the coast of Australia in relation to offshore electricity infrastructure are appropriately regulated.
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representative on 28 September 2022

Strict liability offence[120]

1.163 The bill seeks to amend the *Customs Act 1901* (Customs Act) by introducing a new offence in relation to offshore electricity installations. Under proposed section 33BA of item 11 of Schedule 1 to the bill, a person commits an offence of strict liability if the person uses an Australian offshore electricity installation that is subject to customs control, without first obtaining permission of the Comptroller-General of Customs. This offence is subject to a maximum of 500 penalty units.

1.164 Under general principles of the common law, fault is required to be proven before a person can be found guilty of a criminal offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant had the intention to engage in the relevant conduct or was reckless or negligent while doing so. As the imposition of strict liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences.*[121] The committee notes in particular that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered

120 Schedule 1, item 11, proposed section 33BA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[122]

1.165 In this instance, the explanatory memorandum provides the following explanation:

> This is the same as the equivalent provisions of the Customs Act requiring permission for the use of resources installations or sea installations in the same circumstances. It is appropriate to ensure the integrity of the regime that strict liability applies to this offence. This is particularly the case because these provisions are a principal means of addressing the border security risks posed at offshore electricity installations, which may be installed far from the Australian coast and in remote locations without an Australian Border Force presence. These provisions only have operation for a limited class of persons, being operators of offshore electricity installations.[123]

1.166 While acknowledging that the offence is intended to ensure the integrity of the offshore infrastructure regime, it is not clear to the committee from the explanation provided why it is necessary to provide for an offence of strict liability to achieve this outcome. The committee's scrutiny concerns in this instance are heightened, noting that the amount payable in relation to this offence significantly exceeds the recommended threshold of 60 penalty units.

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

- **why it is considered necessary and appropriate to apply strict liability to the offence set out at proposed section 33BA; and**
- **why it is considered necessary and appropriate to impose a significant penalty of 500 penalty units for failing to comply with proposed subsection 33BA.**

1.168 The committee's consideration of the minister's response will be assisted if the response includes reference to the principles set out in the *Guide to Framing Commonwealth Offences*.

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

123 Explanatory memorandum, p. 18.

Ozone Protection and Synthetic Greenhouse Gas Management Reform (Closing the Hole in the Ozone Layer) Bill 2022

Purpose	This bill seeks to amend the *e Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* to improve the effectiveness and efficiency of the Ozone Protection and Synthetic Greenhouse Gas Program in order to reduce the burden on business, streamline and reduce the complexity of the Act, and ensure the Program can continue to achieve important environmental outcomes.
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representative on 28 September 2022

1.169 The Ozone Protection and Synthetic Greenhouse Gas Management Amendment (Miscellaneous Measures) Bill 2021 (the 2021 Bill) was introduced in the House of Representatives on 2 December 2021 and lapsed at the dissolution of the previous Parliament. The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 1 of 2022* and *Scrutiny Digest 2 of 2022*.[124] The provisions identified below in relation to the Ozone Protection and Synthetic Greenhouse Gas Management Reform (Closing the Hole in the Ozone Layer) Bill 2022 (the 2022 Bill) are almost identical to the provisions which the committee was concerned with in relation to the earlier bill.

Reversal of the evidential burden of proof

Significant matters in delegated legislation[125]

1.170 The 2022 Bill seeks to establish several defences which reverse the evidential burden of proof. Proposed subsection 13(1) provides that it is an offence if a person manufactures a scheduled substance and the person does not hold a licence that allows the manufacture. Proposed subsections 13(2), (4), and (6) of the 2022 Bill provide offence-specific defences to this offence to the effect that the offence does not apply to a person in a circumstance prescribed by the regulations.

124 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2022*, 4 February 2022, pp. 17–22; *Scrutiny Digest 2 of 2022*, 18 March 2022, pp. 96–101.

125 Schedule 1, item 52, proposed subsections 13(2), 13(4), 13(6), 13AA(2), 13AA(6), 13AA(7), 13AA(8), 13AA(9), 13AB(2), 13AB(4), 13AB(6). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

1.171 Similarly, proposed subsection 13AA(1) provides that it is an offence if a person imports a scheduled substance and the person does not hold a licence that allows the importation. Proposed subsection 13AB(1) provides that it is an offence if a person exports a scheduled substance and the person does not hold a licence that allows the exportation. Proposed subsections 13AA(2), (6) (7), (8) and (9) and proposed subsections 13AB(2), (4) and (6) provide offence-specific defences to these offences to the effect that the offences do not apply to a person in a circumstance prescribed by the regulations.

1.172 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[126] 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.

1.173 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:

> The reversal of the burden of proof is appropriate as the matter to be proved is a matter than would be peculiarly in the knowledge of the defendant. For instance, the defendant would be best placed to know the circumstance in which, or purpose for which, they manufactured a scheduled substance. Further, there may be a number of circumstances or purposes prescribed in the regulations for which a licence would not be required to manufacture a scheduled substance. In the event of a prosecution, it would be significantly more difficult and costly for the prosecution to disprove all possible circumstances than it would be for a defendant to establish the existence of one potential circumstance or purpose.[127]

1.174 Similar explanations are provided in relation to the other offence-specific defences listed above.

1.175 It is not clear to the committee how the relevant matters can be said to be peculiarly within the knowledge of the defendant or why it would be significantly more difficult and costly for the prosecution to disprove the matters than it would be for a defendant to establish them when the content of the offence-specific defences have not yet been prescribed.

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126 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

127 Explanatory memorandum, p. 25.

1.176 In addition, the committee's view is that significant matters, such as the key details of an offence-specific defence, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states in relation to the use of delegated legislation that:

> The ability to prescribe such matters in regulations made under the Act is consistent with good regulatory practice and ensures continued compliance with Australia's international obligations under the Montreal Protocol and other relevant international treaties. In the past, the Montreal Protocol has adopted decisions to exempt certain circumstances or purposes from the scope of the treaty. Over time, exemptions may be adopted or amended, and domestic requirements will need to be able to be quickly updated to reflect these changes, in order to support decision-makers and ensure both compliance with international obligations and minimal disruptions to licence applicants and holders. Continuing to allow the regulations to prescribe such matters provides the necessary flexibility to quickly respond to changes in the international regulatory regime.[128]

1.177 The committee has not generally considered a desire for flexibility to be a sufficient justification, of itself, for prescribing significant matters in delegated legislation. In this case, the committee's scrutiny concerns are heightened given the significance of prescribing key details of an offence-specific defence, which reverses the evidential burden of proof and limits fundamental common law rights, within delegated legislation. 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.

1.178 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in proposed subsections 13(2), 13(4), 13(6), 13AA(2), 13AA(6), 13AA(7), 13AA(8), 13AA(9), 13AB(2), 13AB(4) and 13AB(6) in relation to matters that do not appear to be peculiarly within the knowledge of the defendant and of leaving the prescription of key details of these defences to delegated legislation.

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128 Explanatory memorandum, pp. 24–25.

Significant matters in delegated legislation[129]

1.179 Proposed subsection 45C(1) of the 2022 Bill provides that a person contravenes the subsection if the person uses an HCFC[130] that was manufactured or imported on or after 1 January 2020 and the use is not for a purpose prescribed by the regulations. Contravention of the subsection is an offence (subject to a maximum penalty of 300 penalty units for the fault-based offence and 60 penalty units for the strict liability offence). Additionally, a person is liable to a civil penalty of 400 penalty units for contravening proposed subsection 45C(1). The committee's view is that significant matters, such as key elements of an offence, particularly an offence of strict liability which undermines fundamental criminal law principles, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.180 In this instance, the explanatory memorandum states:

> Production and import of HCFC is in the last stage of a global phase out in developed countries under the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol). … As the global phase out progresses and changes in technology result in fewer essential uses for HCFC, the uses allowed under the Montreal Protocol are expected to be further refined in the future and it is important that Australia's laws are aligned to such changes in a timely way.
>
> Allowing the regulations to prescribe allowed uses for HCFC that was manufactured or imported on or after 1 January 2020 provides the necessary flexibility in the Act to respond in a timely way to changes in Australia's international obligations and to ensure that the regulatory burden to industry is minimised so far as possible. Importantly, this would ensure Australia's continued and ongoing compliance with its international obligations and would also minimise the adverse impacts of HCFC on human health and the environment.
>
> As the regulations would be required to adapt to changing circumstances domestically and internationally, providing high level guidance in the Act would not be appropriate as it could hamper the ability to align with international requirements. For example, it could hamper the ability to address unforeseen advances in technology. Further, any regulations made to prescribe permitted uses of HCFC would be subject to the usual parliamentary scrutiny processes.[131]

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

130 Defined in section 7 of the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989*.

131 Explanatory memorandum, pp.24–25.

1.181 While acknowledging the need for administrative flexibility due to potential changes in technology, the committee considers that it would be possible to include at least high-level guidance regarding permitted uses of HCFCs within the bill. The committee notes that the bill is proposing to prescribe key elements of offences, including an offence of strict liability which undermines fundamental common law rights, within delegated legislation.

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

Reversal of the evidential burden of proof[132]

1.183 Proposed section 65U of the 2022 Bill makes it an offence to disclose protected information by a person who is, or has been, an entrusted person and who obtained the protected information in their capacity as an entrusted person. The fault-based offence carries a maximum penalty of 180 penalty units, or 2 years' imprisonment, or both. The strict liability offence carries a maximum penalty of 60 penalty units. Proposed subsection 65U(2) provides that it is a defence if the use of disclosure is authorised or required by the Act, another law of the Commonwealth or a prescribed law of a State or a Territory.

1.184 The defendant bears an evidential burden in relation to the defence set out at proposed subsection 65U(2). As noted above, at common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[133] 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.

1.185 The committee expects any such reversal of the evidential burden of proof to be justified. In this instance, the explanatory memorandum states:

> The reversal of the burden of proof is justified in this instance as the matter to be proved (that is, that the use or disclosure of protected information was authorised by a Commonwealth law or a prescribed State or Territory law) is a matter that would be peculiarly in the knowledge of the defendant. Further, there would be a number of authorised uses and disclosures set out in Division 3 of Part VIIIB of the Act (as inserted by this Bill) and across

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132 Schedule 1, item 145, proposed section 65U. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

133 Subsection 13.3(3) of the *Criminal Code Act 1995* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification bears an evidential burden in relation to that matter.

> Commonwealth law generally. In the event of a prosecution, it would be significantly more difficult and costly for the prosecution to disprove all possible circumstances than it would be for a defendant to establish the existence of one potential circumstance.[134]

1.186 While the committee acknowledges that it may be significantly more difficult and costly for the prosecution to establish that a person did not have lawful authority to engage in the conduct set out in proposed section 65U(2) than the defendant, it is not clear to the committee why the relevant matters would be *peculiarly* within the knowledge of the defendant. For example, whether disclosure of information is authorised by another Commonwealth law would appear to be a matter that the prosecution could readily ascertain.

1.187 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in proposed subsection 65U(2) in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

Incorporation of external material as in force from time to time[135]

1.188 Proposed subsection 45A(4) of the 2022 Bill provides that regulations made for the purposes of proposed section 45A may incorporate an instrument or other writing as in force or existing from time to time.

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

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

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134 Explanatory memorandum, p. 119.

135 Schedule 1, item 110, proposed subsection 45A(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

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

1.191 In this instance, the explanatory memorandum explains:

> The purpose of this amendment is to allow the regulations concerning the end use of scheduled substances to incorporate documents (such as standards or qualifications) as existing from time to time. This is appropriate as such documents are regularly updated and amended, and it is important that end use permit holders and applicants are at all times required to comply with the most up to date and appropriate qualifications and standards for the substance they are using. It is anticipated that this power would be used where the relevant standards or qualifications remain in regulations and are updated on a regular basis (rather than in a legislative instrument under new subsection 45A(3), which is expected to be used to add new standards or qualifications quickly as needed).
>
> It is envisaged that the standards that would be incorporated by the regulations would generally be official Australia and New Zealand industry standards which would be readily available via Standards Australia. While Standards Australia is not freely accessible, it is expected that standards that are incorporated would be industry best practice and would already be widely used by industry. Therefore, it can be reasonably expected that those who would be regulated by any such regulations would already have access to any incorporated standards to carry out their business or meet their professional obligations.[136]

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

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

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136 Explanatory memorandum, p. 71.

No-invalidity clause[137]

1.194 Item 145 of Schedule 1 to the 2022 Bill seeks to insert proposed subsections 65Y(3) and 65ZB(3) into the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* to provide that a failure to provide a written notice of a decision, including the reasons for the decision and the details of person's right to have the decision reviewed, would not affect the validity of the original reviewable decision or reconsideration decision.

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

> The purpose of proposed subsection 65Y(3) is to provide the necessary certainty for both industry and the Commonwealth as to whether a licence is in force and covers a particular import, manufacture or export. This is particularly the case where, for example, a decision has been made to refuse to grant a licence or refuse to renew a licence. In these instances, it is important that current practices are maintained and that industry has sufficient certainty over the decision to reduce any further regulatory burden and to minimise any possibility of non-compliance.
>
> It is also important that decisions relating to non-compliance with the licensing conditions by licence holders, for example, are made in a timely way and with sufficient certainty. This enables an effective response to manage and mitigate any harm that may result from the non-compliance to Australia's environmental and human health, as well as Australia's continued compliance with its international obligations and its international relations. Proposed 65Y(3) would provide the necessary regulatory certainty that is required to deal with these situations.[138]

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

138 Explanatory memorandum, p. 124.

1.196 An identical explanation is provided in relation to proposed subsection 65ZB(3).[139]

1.197 While acknowledging these explanations, the committee reiterates that there are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. The committee has generally not accepted a desire for certainty to be, of itself, a sufficient justification for the inclusion of no-invalidity clauses.

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

139 Explanatory memorandum, p. 126.

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

1.199 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
Crimes Legislation Amendment (Ransomware Action Plan) Bill 2022	Schedule 1, item 1, proposed section 476.3	The provision may raise scrutiny concerns under principle (i) in relation to the reversal of the evidential burden of proof.
	Schedule 3, items 1, 7, 11 and 12, proposed sections 3C, 3FA, 228A and 338	The provisions may raise scrutiny concerns under principle (iv) in relation to the inclusion of significant matters in delegated legislation.
National Energy Transition Authority Bill 2022	Clause 55	The provision may raise scrutiny concerns under: • principle (ii) in relation to broad discretionary powers; and • principle (v) in relation to instruments not subject to an appropriate level of parliamentary oversight.
	Clause 62	The provision may raise scrutiny concerns under principle (v) in relation to tabling of documents in Parliament.

Bills with no committee comment

1.200 The committee has no comment in relation to the following bills which were introduced into the Parliament between 26-28 September 2022:

- Animal Health Australia and Plant Health Australia Funding Legislation Amendment Bill 2022
- Environment and Other Legislation Amendment (Removing Nuclear Energy Prohibitions) Bill 2022
- Family Assistance Legislation Amendment (Cheaper Child Care) Bill 2022
- Ozone Protection and Synthetic Greenhouse Gas (Import Levy) Amendment Bill 202
- Ozone Protection and Synthetic Greenhouse Gas (Manufacture Levy) Amendment Bill 2022
- Social Services and Other Legislation Amendment (Workforce Incentive) Bill 2022
- Treasury Laws Amendment (Australia-India Economic Cooperation and Trade Agreement Implementation) Bill 2022
- Treasury Laws Amendment (More Competition, Better Prices) Bill 2022

Commentary on amendments and explanatory materials

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

- Aged Care Amendment (Implementing Care Reform) Bill 2022;[140]
- Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022;[141]
- Jobs and Skills Australia Bill 2022;[142] and
- Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Bill 2022.[143]

140 On 26 September 2022, the Minister for Finance (Senator Gallagher) presented a revised explanatory memorandum to the bill.

141 On 26 September 2022, the Minister for Employment and Workplace Relations (Mr Burke MP) presented a supplementary explanatory memorandum to the bill.

142 On 26 September 2022, the House of Representatives agreed to on Government amendment. Additionally, the Minister for Skills and Training (Mr O'Connor MP) presented a supplementary explanatory memorandum to the bill.

143 On 26 September 2022, the Manager of Opposition Business in the Senate (Senator Ruston) moved an amendment to the bill.
On 27 September 2022, the Senate agreed to 34 Government and 3 Australian Greens amendments to the bill. Additionally, the Minister for Trade and Tourism (Senator Farrell) tabled a supplementary explanatory memoranda relating to the government amendments.

Chapter 2

Commentary on ministerial responses

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

Aged Care Amendment (Implementing Care Reform) Bill 2022

Purpose	This bill seeks to amend the *Aged Care Act 1997* to implement a series of measures intended to enable meaningful, practical improvements to the delivery of aged care services, to improve the means for care recipients and their families to assess the relative quality of service delivery by care providers and at individual care facilities, and to provide greater oversight and understanding of what funds are being used for.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 27 July 2022
Bill status	Before the Senate

Significant matters in delegated legislation
Broad discretionary power[1]

2.2 The bill seeks to insert a new requirement that an approved provider ensures that at least one registered nurse is on site, and on duty, at all times at a residential facility. This new requirement would apply to all approved providers who are providing residential care,[2] or flexible care,[3] at a residential facility.

2.3 Proposed subsection 54-1A(3) of the bill gives a broad power to grant exemptions to this new requirement within delegated legislation.

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

1 Schedule 1, item 2, proposed subsections 54-1A(3) and (4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

2 Defined by 41-3 of the Aged Care Act.

3 As specified in the Quality of Care Principles.

- why it is considered necessary and appropriate to provide a broad power to make provision for, or in relation to, the granting of an exemption from proposed section 54-1A in delegated legislation; 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.[4]

Minister's response[5]

2.5 The minister advised that the inclusion of arrangements that allow for exemptions from the requirement set out in proposed subsection 54-1A(2) is consistent with the recommendations of the Royal Commission into Aged Care Quality and Safety. The minister advised that allowing for these matters to be dealt with in delegated legislation will ensure the flexibility necessary to enable the Government to evaluate the impact of the measure and promptly respond to unforeseen risks, concerns or omissions, aligning with community expectations to ensure quality care for all older Australians in residential aged care.

2.6 The minister further advised that the inclusion of these matters in delegated legislation provides for thorough consultation with experts and the residential aged care sector. The minister advised that this will ensure that any resulting framework appropriately protects the integrity of the measure without leading to perverse behaviour and outcomes.

2.7 Additionally, the minister advised that the Government moved amendments to the bill that were agreed by the House of Representatives on 8 September 2022. As a result, the bill now provides greater clarity as to the arrangements that the Quality of Care Principles may make provision for in relation to exemptions from the responsibility.[6] A relevant extract of the minister's response is set out below:

> Firstly, the Bill now provides that the Secretary of the Department of Health and Aged Care (or a delegate) will be the specified decision-maker for the purposes of granting an exemption. The decision will likely relate to factors such as availability of workforce, the size of the facility and its location. The department will work with the Aged Care Quality and Safety Commission on any aspects of the process relating to quality and safe care.

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4 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2022*, pp. 1–3.

5 The minister responded to the committee's comments in a letter dated 28 September 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

6 See also the Senate Community Affairs Legislation Committee inquiry into the *Aged Care Amendment (Implementing Care Reform) Bill 2022 [Provisions]*, 2 September 2022.

> Further, when granting an exemption, the Bill now provides that the decision-maker must be satisfied the provider has taken reasonable steps to ensure the clinical care needs of the care recipients in the facility will be met when making a decision to grant an exemption. This will ensure the intention of the legislation, that older Australians living in residential aged care have access to the nursing care they deserve, is at the centre of any decision made to grant an exemption.
>
> The Bill also now provides that an exemption must not be in force for more than 12 months. This will ensure exemptions are regularly reviewed and will encourage approved providers to continue to strive to meet the new responsibility. More than one exemption can be granted to an approved provider, meaning that should an exemption be required for longer than 12 months in respect of a residential facility, an approved provider would be able to re-apply.
>
> Finally, a new provision has been inserted to require that, where an exemption is provided, the Secretary must make information about the exemption publicly available. This will further incentivise providers to meet the requirement, rather than seek an exemption. It will also increase transparency, providing older people and their families with information so they can make more informed decisions.

Committee comment

2.8 The committee thanks the minister for this response.

2.9 The committee welcomes the amendments made by the bill which provide guidance in relation to the circumstances in which an exemption may be granted. The committee particularly welcomes amendments which clearly identify the Secretary as the relevant decision-maker and amendments which limit exemptions to a maximum period of 12 months.

2.10 The committee thanks the minister for moving amendments to the bill which appear to address the committee's scrutiny concerns regarding the broad power to grant exemptions within delegated legislation.

2.11 In light of the information provided, the committee leaves to the Senate as a whole the appropriateness of this matter.

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

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

Coercive powers

Deferral of sunsetting[7]

2.12 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.

2.13 In *Scrutiny Digest 5 of 2022* the committee requested the Attorney-General'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,* noting that the explanatory memorandum contained no explanation or justification for the extension.[8]

Attorney-General's response[9]

2.14 The Attorney-General advised that the Parliamentary Joint Committee on Intelligence and Security (PJCIS) conducted a statutory review of the powers commented upon by the committee. This review supported the extension of the powers, subject to certain amendments including the introduction of additional safeguards.

2.15 The Attorney-General advised that extending the operation of the powers is appropriate to ensure that there is sufficient time to consult on, and implement, the government's response to PJCIS' recommendations. The Attorney-General advised

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

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 4–6.

9 The Attorney-General responded to the committee's comments in a letter dated 12 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

that this consultation and implementation work will take place over the coming months.

2.16 Finally, the Attorney-General advised that extending the powers by 12 months strikes an appropriate balance between ensuring that agencies continue to have access to the powers, while responding in a considered and appropriate manner to the recommendations of the PJCIS for more robust safeguards.

Committee comment

2.17 The committee thanks the Attorney-General for this response.

2.18 The committee notes that this advice would have been helpful had it been included in the explanatory memorandum to the bill.

2.19 While acknowledging the need to ensure an appropriate amount of time to respond to the recommendations of the PJCIS, the committee notes that the sunsetting dates of the measures have already been extended on a number of occasions. 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.[10] The committee considers the measures being extended by this bill raise significant scrutiny concerns and may unduly trespass on personal rights and liberties.

2.20 The committee reiterates its expectation that the explanatory materials accompanying a bill which proposes to extend the sunsetting date of significant coercive powers should provide a comprehensive justification for the continued need for the powers, including outlining what exceptional circumstances justify the extension, whether those exceptional circumstances are expected to continue into the future and what alternative scrutiny mechanisms are available to Parliament.

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

2.22 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of extending, by a further twelve months, the operation of a number of broad coercive powers which raise significant scrutiny concerns.

10 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 *Emergency Response Fund Act 2019* to: • 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 Minsters 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
Bill status	Before the House of Representatives

Significant matters in delegated legislation[11]

2.23 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.[12]

2.24 In *Scrutiny Digest 5 of 2022* the committee requested 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

11 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).

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

- 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.[13]

Minister's response[14]

2.25 The minister advised that it is appropriate to permit the responsible Ministers to amend the maximum disbursement amount by way of legislative instrument in order to provide for timely updates following a review under proposed subsection 34(8). Proposed subsection 34(8) would require the responsible Ministers to review the maximum disbursement amount at least once every five years.

2.26 The minister advised that this legislated review mechanism would allow consideration of whether the maximum disbursement amounts should be adjusted in response to investment market or policy considerations and would also likely include consideration of operational matters, including the target rate of return on investment, investment performance, risk tolerance and the predictably and sustainability of disbursements.

2.27 The minister also noted that the responsible Ministers would be required to consult the Future Fund Board and have regard to the Board's advice before adjusting the maximum disbursement amount. The minister advised that this would ensure that any adjustment to the maximum disbursement amount appropriately considers possible impacts on the Future Fund Board's ability to comply with its investment functions and obligations. The minister further advised that the responsible Ministers would consult with the Minister for Emergency Management as part of both the review process and the Future Fund Board consultation process.

2.28 Finally, the minister advised that it is not necessary to amend the bill to provide a cap on the maximum disbursement amount that may be determined by the responsible Ministers, or further criteria or considerations constraining the exercise of these powers, as a legislative instrument adjusting the maximum disbursement amount would be subject to parliamentary oversight via the disallowance process.

Committee comment

2.29 The committee thanks the minister for this response.

2.30 The committee notes the minister's advice that a legislative instrument determined by the responsible Ministers under proposed subsections 34(2) or 34(3) would provide for timely updates following a review under proposed subsection 34(8)

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13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, 28 September 2022, pp. 7–9.

14 The minister responded to the committee's comments in a letter dated 7 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

of the Emergency Response Fund Act. However, the committee notes that there is no requirement on the face of the bill that an adjustment to the maximum disbursement amount must follow such a review. It remains unclear to the committee why it is necessary 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.

2.31 The committee also notes the minister's advice that it is unnecessary to provide a cap on the maximum disbursement amount that may determined by the responsible Ministers, as a legislative instrument made under proposed subsections 34(2) or 34(3) would be subject to parliamentary disallowance. 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. Further, 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. The committee therefore reiterates its expectation that appropriate safeguards be included within the primary legislation to guide and constrain the exercise of this power. In particular, the committee considers that an express cap on the amount that may be determined by the responsible Ministers would provide a significant safeguard and facilitate increased parliamentary scrutiny and oversight of the amount of relevant expenditure proposed to be authorised by delegated legislation.

2.32 The committee draws its scrutiny concerns to the attention of the senators and leaves to the Senate as a whole the appropriateness of allowing the Treasurer and Finance Minister to adjust the maximum amount that may be debited from the Disaster Ready Fund Special Account via legislative instrument in circumstances where there is no cap on the amount that may be determined by the ministers under proposed subsections 34(2) and (3).

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

Documents not required to be tabled in the Parliament[15]

2.34 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

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

adjustment to the amount that may be debited from the Disaster Ready Fund Special Account.

2.35 In *Scrutiny Digest 5 of 2022* the committee requested 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.[16]

Minister's response[17]

2.36 The minister advised that it is not necessary to amend the bill to require the Future Fund Board's advice to be tabled in the Parliament as the reasons for an adjustment would be set out in the explanatory statement accompanying any legislative instrument that adjusts the maximum disbursement amount. The minister advised that this would include an overview of the responsible Ministers' consultation with the Future Fund Board and how the Board's advice was taken into consideration, as well as other relevant factors considered.

2.37 The minister advised that there are other opportunities for the Parliament to scrutinise and retain oversight of the maximum disbursement amount, including through disallowance and the Senate estimates process. The minister also advised that the Finance Minister would have the discretion to publish the Future Fund Board's advice, provided the advice does not contain any commercial or sensitive information.

Committee comment

2.38 The committee thanks the minister for this response. The committee notes the minister's advice that she does not consider it necessary to amend the bill to require the Future Fund Board's advice to be tabled in the Parliament, as there are other opportunities for parliamentary scrutiny outside the tabling process and because it is open to the Finance Minister to publish the advice. While noting this advice, the committee reiterates its scrutiny concerns with respect to the importance of tabling requirements for parliamentary scrutiny. Tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where there is no requirement for tabling, or where documents are only available for public inspection. While noting the minister's advice that advice given by the Future Fund Board may contain commercial or sensitive information, it remains unclear to the committee why the bill cannot be amended to provide that advice, with any sensitive information removed, be tabled in the Parliament.

2.39 The committee also notes the minister's advice that the explanatory materials accompanying any legislative instruments that adjust the maximum disbursement

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, 28 September 2022, p. 9.

17 The minister responded to the committee's comments in a letter dated 7 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

amount will include an overview of the responsible Ministers' consultation with the Future Fund Board, how the Board's advice was taken into consideration and information on a range of relevant factors considered outside of the Future Fund Board's advice. The committee welcomes this advice and considers that it would have been useful had this information been included in the explanatory memorandum to the bill.

2.40 The committee welcomes the minister's advice that the explanatory materials accompanying a legislative instrument which adjusts the maximum disbursement amount that may be debited from the Disaster Ready Fund Special Account will include the reasons for the adjustment.

2.41 To enhance the Parliament's scrutiny of such instruments, the committee requests that the minister undertakes to include, at a high-level, information about the following matters in the explanatory statement for an instrument made under proposed subsections 34(2) and (3):

- **an overview of the responsible Ministers' consultation with the Minister for Emergency Management;**
- **a summary of the Future Fund Board's advice with any sensitive information removed;**
- **how the Future Fund Board's advice was taken into account;**
- **if the responsible Ministers depart from the Future Fund Board's advice, the reasons for this; and**
- **other relevant factors considered.**

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
Bill status	Before the House of Representatives

Broad discretionary powers
Significant matters in delegated legislation[18]

2.42 Chapter 2 of the bill sets out the obligations that will apply to accountable persons[19] and accountable entities[20] under the new Financial Accountability Regime.

2.43 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.

2.44 In *Scrutiny Digest 5 of 2022* the committee requested the minister's 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

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

19 Defined at clause 9.

20 Defined at clause 10.

may be granted and general guidance in relation to the conditions which may apply to an exemption.[21]

Minister's response[22]

2.45 The minister advised that the power to exempt an accountable entity or a class of accountable entities from the Financial Accountability Regime under clause 16 of the bill ensures the regime applies appropriately to the regulated industries and avoids any potential unintended consequences from the application of the regime.

2.46 The minister advised that the Financial Accountability Regime is based on the existing Banking Executive Accountability Regime (BEAR), and that, like the BEAR, the power to exempt entities from the Financial Accountability Regime ensures that the regime can operate flexibly and be appropriately targeted. For example, the minister advised that there may be instances where the Financial Accountability Regime may act as a barrier to entry for some small new entrants. In these circumstances, clause 16 of the bill may facilitate competition in the market.

2.47 The minister also advised that an exemption for classes of accountable entities under subclause 16(2) is a legislative instrument and is therefore subject to Parliamentary scrutiny and disallowance. The minister considered that this level of scrutiny is warranted given the broader economic and prudential implications that exemption of a class of entities may have from a financial systems perspective. The minister also advised that allowing the standard ten-year sunsetting period to apply to the instruments is appropriate as it provides system stability and certainty for the entities affected, and means that a future sunset review will consider the operation of the exemption based on a substantive amount of time and practice. The minister considered that a shorter period would not provide those benefits, but noted that the responsible Minister may also nominate a shorter period, if merited in the circumstances.

2.48 Finally, the minister advised that the framing of the exemption power is broad to avoid constraining the use of the power. The minister advised that the responsible Minister requires 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 seeks to address.

2.49 The minister advised that, on the basis of the above, he does not intend to amend the bill to provide time limits for instruments of exemption under subclause

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21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 10–13.

22 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

16(2), or to limit the circumstances or conditions attached to exercise of the exemption power.

Committee comment

2.50 The committee thanks the minister for this response.

2.51 The committee acknowledges that it is sometimes appropriate to include broad exemptions powers in order to ensure an appropriate level of flexibility is built into the regulation of complex regulatory schemes, such as the Financial Accountability Regime. However, it is unclear to the committee from the minister's explanation why at least high-level guidance cannot be included within the bill in relation to the exercise of the exemption power under clause 16. The committee considers that it is possible to allow for an appropriate level of flexibility while still setting out high-level conditions that would apply to exemptions. For example, by providing that an exemption is no longer valid when the circumstances upon which the exemption was provided no longer apply.

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

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

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

Tabling of documents in Parliament
Significant matters in delegated legislation[23]

2.55 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

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

may determine an arrangement by notifiable instrument. A failure to comply with clause 37 does not invalidate the performance or exercise of a function or power by either APRA or ASIC.[24]

2.56 The bill does not require arrangements entered into under clause 37 to be tabled in the Parliament.

2.57 In *Scrutiny Digest 5 of 2022* the committee requested 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.[25]

Minister's response[26]

2.58 The minister advised that the arrangement between APRA and ASIC is not required to be the tabled in Parliament, as it is of an administrative and operational nature, and because the existing arrangements in the bill already ensure appropriate levels of public and Parliamentary oversight of significant aspects of the regime.

2.59 The minister also advised that it is necessary and appropriate to provide capacity for the relevant Minister to specify matters that must be in the arrangement in rules. At first instance the content of the arrangement is left to the regulators, as they are best placed to determine the matters and procedures to put in place to administer the regime. However, the minister advised that because it may later become apparent that there is a need to include particular matters in the arrangement to ensure effective administration, the rule-making power set out in subclause 37(2) is appropriate.

Committee comment

2.60 The committee thanks the minister for this response.

2.61 The committee acknowledges and welcomes the existing publication requirements that would apply to a clause 37 arrangement. However, the committee considers that tabling provides opportunities for parliamentary scrutiny and oversight

24 Subclause 37(5).

25 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 13–15.

26 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

that are not available when documents are made publicly available through other means, such as by publishing them online.

2.62 The committee is concerned that a matter as significant as the administration of the Financial Accountability Regime is being left to a non-legislative arrangement rather than being set out within the bill. The committee's concerns are heightened given the no-invalidity clause included at subclause 37(5) and the fact that details relating to provisions that must be included within a clause 37 arrangement can be set out within delegated legislation. The committee considers that, in these circumstances, requiring a clause 37 arrangement to be tabled in Parliament would provide at least a minimum level of parliamentary scrutiny over this important matter.

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

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

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

Reversal of the evidential burden of proof[27]

2.65 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.

2.66 In *Scrutiny Digest 5 of 2022* the committee requested the minister's advice as to 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.

2.67 Further, the committee requested 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.[28]

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

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 15–18.

Minister's response[29]

2.68 The minister advised that the approach taken in the bill is justified as relevant information for the matters set out in subclause 68(3) would be peculiarly within the person's own knowledge and control as the person would be aware of the information they disclosed, the recipient, and the manner and purpose for which it was disclosed. The minister advised that if the prosecution were required to eliminate all possible exemptions beyond reasonable doubt it would likely be difficult, costly and resource intensive. As such, the minister considers that subclause 68(3) is consistent with the *Guide to framing Commonwealth Offences*.

2.69 The minister advised that the approach taken in the bill aligns with the approach taken in other similar frameworks. For example, information collected under Part IIAA of the *Banking Act 1959* (see section 56 of the *Australian Prudential Regulation Authority Act 1998*) as part of the BEAR and the evidential burden of proof in relation to the other prudential frameworks that interact with the regime including a matter raised under section 11 CI of the *Banking Act 1959*, section 109A of the *Insurance Act 1973* and section 231A of the *Life Insurance Act 1995*. Consistency of approach across the broader legal framework is important to support understanding and application of the law.

Committee comment

2.70 The committee thanks the minister for this response.

2.71 The committee acknowledges that it may be costly for the prosecution to ascertain the matters set out in a subclause 68(3) defence in some circumstances. However, the committee reiterates that it is not clear how matters that seem to relate to issues of public fact or to questions of law could be said to be peculiarly within the knowledge of a defendant.

2.72 The committee notes that the minister's response did not address the committee's concerns with respect to the defences set out in subclauses 72(2), or clause 74.

2.73 The committee acknowledges the merits of ensuring a consistent approach across Commonwealth offence provisions. However, the committee notes that consistency with existing legislation is not a valid justification for inappropriately reversing the evidential burden of proof. The fact that Commonwealth law regularly impacts upon individual rights and liberties does not justify that future provisions do the same. Provisions which may impact individual rights and liberties should be

29 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

justified on their own merits and according to the specific circumstances of the case at hand.

2.74 The committee does not consider that the minister's response has adequately addressed the committee's concerns.

2.75 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters which do not appear to be peculiarly within the knowledge of the defendant. The committee is particularly concerned that the defence at clause 74 is set out in delegated legislation and that not even high-level guidance has been provided to clarify which matters the defence may relate to.

Incorporation of documents as in force from time to time[30]

2.76 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.

2.77 In *Scrutiny Digest 5 of 2022* the committee requested 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. [31]

Minister's response[32]

2.78 The minister advised that Clause 31 sets out core and enhanced notification obligations under the regime, where the threshold for an entity having enhanced obligations is set in Minister rules. Subclause 31(5) provides an incorporation by reference power, so Minister rules that prescribe how to determine when an entity meets the enhanced notification threshold can apply, incorporate, or adapt contents of non-legislative material. Importantly, the power is limited to incorporation of material published on a website maintained by the regulator to ensure the incorporation of credible and relevant material only. The incorporation power allows the Minister rules to align with existing standards or guidance.

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

31 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 18–19.

32 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

2.79 The explanatory memorandum at paragraph 1.132 explains the power is to incorporate material that ASIC and APRA publish on their websites.

Committee comment

2.80 The committee thanks the minister for this response.

2.81 The committee notes that its concerns did not relate to whether incorporated material would be derived from material published on ASIC and APRA's websites, particularly given that this information was already noted in the committee's previous comments in *Scrutiny Digest 5 of 2022* and is, as advised by the minister, included in the explanatory materials to the bill.

2.82 The committee's concerns relate specifically to whether incorporated material will be freely and readily available. The fact that the material will be derived from information published online is useful context but does not, of itself, necessitate that the material will be freely and readily available in all circumstances. For example, it is common that a legislative framework incorporates industry standards into the law in circumstances in which those standards are hosted online, but are only accessible upon payment of a fee and receipt of a password. The committee considers that where it is proposed to incorporate external material into the law, the explanatory memorandum for the bill should, at a minimum, contain an undertaking that the material will be freely and readily available in all circumstances. If it is not possible to do this, the committee expects that the explanatory memorandum state this clearly and explain why it is not possible and why it is nevertheless justifiable to allow external incorporation of non-legislative materials.

2.83 In this case, the former minister advised that incorporated material would be freely available. The committee is concerned that this undertaking was not included in the explanatory memorandum to the bill. The committee does not consider that the minister's response has adequately addressed the committee's concerns.

2.84 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing 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, in circumstances where it is not clear that incorporated material will be freely and readily available.

Financial Sector Reform Bill 2022

Purpose	Schedules 1 and 2 to this bill make consequential amendments to relevant Acts to support the new Financial Accountability Regime. Schedule 3 to this bill is part of a package that seeks to introduce the 'compensation scheme of last resort'. The scheme will provide compensation where a determination issued by Australian Financial Complaints Authority remains unpaid and the determination relates to a financial product or service within the scope of the scheme. The scheme is intended to support confidence in the financial system's external dispute resolution framework. Schedule 4 to this bill amends the *National Consumer Credit Protection Act 2009* 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.
Portfolio	Treasury
Introduced	House of Representatives on 8 September 2022
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[33]

2.85 Schedule 1 to the bill seeks to establish several defences which reverse the evidential burden of proof. Item 10 of Schedule 1 provides a number of new defences for the disclosure of protected information or production of protected document within the meaning of the *Australian Prudential Regulation Authority Act 1998*.

2.86 In addition, item 17 of Schedule 1 provides a defence for the disclosure of protected information 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.

2.87 In *Scrutiny Digest 5 of 2022* the committee requested the minister's advice as to whether items 10 and 17 can be amended so that the matters set out in subsections

33 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).

56(7G), (7H), (7J), (7K), (7L) and 127(7A) are instead included as elements of the offence.[34]

Minister's response[35]

2.88 The minister advised that the approach taken in the bill is justified as an individual employed by APRA and ASIC who discloses information obtained under the Financial Accountability Regime, in a situation that may result in a breach of their secrecy obligations, is in the best position to assess the application of exemptions to their conduct.

2.89 The minister advised that the relevant information for matters relevant to those exemptions would be peculiarly within the person's own knowledge and control as the person would be aware of the information they disclosed, the recipient, and the manner and purpose for which it was disclosed.

2.90 The minister advised that it would be difficult, costly and resource-intensive for the prosecution to eliminate all possible exemptions beyond reasonable doubt. The minister further advised that, consistent with the *Guide to framing Commonwealth Offences*, the defendant bears an evidential burden to establish matters within proposed subsections 56(7G) to (7L) of the *Australian Prudential Regulation Authority Act 1998* and subsection 127(7A) of the *Australian Securities and Investments Commission Act 2001*.

2.91 The minister advised that the reversal of the evidential burden also aligns with the approach taken in other similar frameworks, including the Banking Executive Accountability Regime, and that consistency of approach across the broader legal framework is important to support understanding and application of the law.

Committee comment

2.92 The committee thanks the minister for this response.

2.93 The committee acknowledges that it may be costly for the prosecution to ascertain some of the matters set out in under subsections 56(7G), (7H), (7J), (7K), (7L) and 127(7A). However, it remains unclear to the committee why it would not be possible to include these matters as elements of the offence, noting that the information does not appear to be peculiarly withing the knowledge of the defendant.

2.94 Moreover, the committee notes that consistency with existing legislation is not a valid justification for inappropriately reversing the evidential burden of proof.

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34 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 20–23.

35 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

2.95 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters which do not appear to be peculiarly within the knowledge of the defendant.

Significant matters in delegated legislation

Broad discretionary power[36]

2.96 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. 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 contract[37] or a consumer lease[38] being made.

2.97 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. There is no further guidance within the bill setting out how this broad exemption power will be used.

2.98 In *Scrutiny Digest 5 of 2022* the committee requested the minister's 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.[39]

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

37 As defined by section 5 of the Credit Act.

38 As defined by section 5 of the Credit Act.

39 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 23–25.

Minister's response[40]

2.99 The minister advised that the use of delegated legislation is critical to ensure that the legislative framework can respond promptly to changing circumstances.

2.100 The minister advised that it is appropriate that ASIC has this instrument making power because, as the administrator of the consumer credit legislation, ASIC has first-hand knowledge of the operation of the legislation and how it affects the consumer credit industry.

2.101 The minister advised that amending the bill to time-limit instruments made under proposed section 323D for a period of 3 years would provide uncertainty to industry and consumers in circumstances where the primary law does not operate as intended. Additionally, the minister advised that as instruments made under this section would be relatively technical and have narrow application, time-limiting them would require ASIC to routinely remake the instruments without necessarily improving policy outcomes.

2.102 The minister advised that the inclusion of a high-level guidance on the face of the bill may unnecessarily diminish ASIC's ability to promptly provide certainty to industry and consumers.

2.103 The minister further advised that proposed section 323B requires ASIC to have regard to certain matters in determining whether it would be reasonable to conclude that a purpose of a person entering into or carrying out a scheme was avoidance.[41] The minister advised that this would include:

- the complexity and cost of how the scheme or contract provides the consumer with credit or goods, relative to ordinary small amount credit contracts and consumer leases; and
- whether the scheme or contract is held out to be equivalent to an ordinary small amount credit contract or consumer lease.

Committee comment

2.104 The committee thanks the minister for this response.

2.105 While noting the minister's advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification, of itself, for leaving significant matters to delegated legislation.

2.106 The committee acknowledges that it is sometimes appropriate to include broad exemptions powers in order to ensure an appropriate level of flexibility is built

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40 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

41 See ministerial response, p. 4.

into the regulation of complex regulatory schemes. However, the committee reiterates that it is not clear why at least high-level guidance in relation to the conditions which may apply to an exemption cannot be included within the bill.

2.107 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 ASIC which would undermine the Financial Accountability Regime enshrined in primary legislation passed by the Parliament.

2.108 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing ASIC with a broad power to provide exemptions to the Financial Accountability Regime under proposed section 323A.

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

Reversal of the evidential burden of proof[42]

2.110 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.

2.111 Proposed subsection 160CB(5) provides an exception (offence-specific defence) to this offence. A defendant bears an evidential burden in relation to each of the defences outlined in proposed subsection 160CB(5).

2.112 In *Scrutiny Digest 5 of 2022* the committee requested the minister's detailed justification as to the appropriateness of including the specified matters as an offence-specific defence. The committee suggested 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 requested the minister's advice in relation to this matter.[43]

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

43 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 25–27.

Minister's response[44]

2.113 The minister advised that the approach taken in the bill is justified as the relevant information for matters relevant to those exemptions would be peculiarly within the person's own knowledge and control as the person would be aware of the information they disclosed, the recipient, and the manner and purpose for which it was disclosed.

2.114 The minister advised that it would be difficult, costly and resource-intensive for the prosecution to eliminate all possible exemptions beyond reasonable doubt.

2.115 Finally, the minister advised that including the specified matters as an offence-specific defence is consistent with the *Guide to framing Commonwealth Offences*.

Committee comment

2.116 The committee thanks the minister for this response.

2.117 While the committee acknowledges that it may be difficult and more costly for the prosecution to establish that a person did not have lawful authority to engage in the conduct set out in the offences in some circumstances, the committee emphasises that it is not apparent from the minister's explanation that the matters are matters *peculiarly* within the defendant's knowledge.

2.118 In addition, while the committee acknowledges the merits of ensuring a consistent approach across Commonwealth offence provisions, the committee notes that consistency with existing legislation is not a valid justification for inappropriately reversing the evidential burden of proof. Provisions which may impact individual rights and liberties should be justified on their own merits and according to the specific circumstances of the case at hand.

2.119 As the minister's advice does not explain how the matters in each of the offence-specific defences on which the committee sought advice are peculiarly within the knowledge of the defendant, the committee remains of the view that it does not appear to be appropriate to reverse the evidential burden of proof in relation to these matters.

The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters which do not appear to be peculiarly within the knowledge of the defendant.

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44 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2022

Purpose	This bill seeks to amend the *Health Insurance Act 1973*, the *National Health Act 1953*, and the *Dental Benefits Act 2008* to protect the integrity of Medicare.
Portfolio	Health and Aged Care
Introduced	Senate on 3 August 2022
Bill status	Before the Senate

Reversal of the evidential burden of proof[45]

2.120 Item 34 of Schedule 1 to the Health Legislation Amendment (Medicare Compliance and Other Measures) Bill 2022 seeks to insert proposed section 105AA into the *Health Insurance Act 1973* (the Act). Proposed subsection 105AA(1) provides that it is a strict liability offence for an individual under review to fail to appear at a hearing, or to appear at a hearing but refuse or fail to give evidence or to answer questions. The offence carries a maximum penalty of 30 penalty units.

2.121 Proposed subsection 105AA(2) provides an exception to this offence. Including by providing that a person is not liable for an offence under proposed subsection 105AA(1) where the person has notified the Professional Services Review Committee (the Review Committee) that they have a medical condition which prevents them from appearing, giving evidence or answering questions;[46] the person has complied with any reasonable requirements of the Review Committee that they undergo medical examination to establish the existence and extent of the medical condition;[47] and the results of the medical examination indicate that the person has a medical condition preventing them from appearing or giving evidence or answering questions.[48]

2.122 In *Scrutiny Digest 4 of 2022* the committee requested the minister's advice as to whether proposed section 105AA can be amended to include the matters set out in

45 Schedule 1, item 34. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

46 See paragraph 104(5)(a) of the *Health Insurance Act 1973.*

47 See paragraph 104(5)(b) of the *Health Insurance Act 1973.*

48 See paragraph 104(5)(c) of the *Health Insurance Act 1973.*

paragraph 104(5)(a) of the *Health Insurance Act 1973* as an element of the offence, rather than as an element of an offence-specific defence.[49]

Minister's response[50]

2.123 The minister advised that if proposed subsection 105AA(1) were amended in the manner suggested by the committee, paragraph 104(5)(a) would need to be redrafted in the negative, making the person liable if they had not notified the Professional Services Review Committee of a medical condition preventing their attendance prior to a hearing.

2.124 The minister advised that this would allow a defendant to claim illness without the need for any assessment or evidence. The minister advised that, for this reason, if proposed section 105AA is amended to include a variant of paragraph 104(5)(a), it would also be necessary to include paragraphs 104(5)(b) and (c), requiring the prosecution to prove that the defendant did not comply with reasonable requirements to undergo a medical examination, or that the results of the examination did not indicate a medical condition preventing the person's appearance at the hearing. The minister advised that it would be significantly more difficult or costly for the prosecution to establish the matters set out in paragraphs 104(5)(b) and (c) than for the defendant to disprove them.

2.125 Further, the minister advised that knowledge of whether a relevant medical examination was conducted or if relevant medical evidence was provided is knowledge that would be peculiarly within the knowledge of the defendant. For example, the minister advised that it may not be possible for the prosecution to prove that the defendant contacted all medical practices in a region.

2.126 Finally, the minister advised that the effect of the amendment proposed by the committee would likely be to increase the duration of Professional Services Review process, potentially resulting in additional costs and stress for defendants.

Committee comment

2.127 The committee thanks the minister for this response.

2.128 While acknowledging the minister's advice, it is not clear to the committee why it would be necessary to include the matters set out in paragraphs 104(5)(b) and (c) as elements of the offence, simply because the matters set out in paragraph 104(5)(a) were reframed on that basis.

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49 Senate Scrutiny of Bills Committee, *Scrutiny Digest 4 of 2022*, pp. 12–14.

50 The minister responded to the committee's comments in a letter dated 28 September 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

2.129 In addition, the committee considers that it would be possible to redraft the provisions to include the matters set out in paragraph 104(5)(a) as elements of the offence without providing that a person was liable if they had not notified the Professional Services Review Committee of a medical condition preventing their attendance prior to a hearing. The committee notes that, if this is a concern, the current drafting of the provision means that, in any case, a defendant may not rely on the defence set out in proposed subsection 105AA(2) if they had not provided notification prior to a hearing and would therefore be liable for the strict liability offence set out in subsection 105AA(1) on that basis.

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

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
Bill status	Before the House of Representatives

Exemption from disallowance
Broad discretionary powers[51]

2.131 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.

2.132 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.

2.133 In *Scrutiny Digest 5 of 2022* the committee requested the minister's 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

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

- whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they receive appropriate parliamentary oversight.[52]

Minister's response[53]

2.134 The minister advised that an addendum to the explanatory memorandum explaining the criteria and considerations associated with clause 11 of the bill will be provided to address the matters raised by the committee.

2.135 The minister advised that it is necessary for the ministerial directions to be exempt from disallowance because the high-speed rail network will likely be Australia's largest cross-border transport infrastructure project for generations and it will be necessary to minimise barriers to the Authority functioning effectively and efficiently.

2.136 The minister advised that ministerial directions to corporate Commonwealth entities are not usually legislative instruments and do not need to be tabled or published on the Federal Register of Legislation. The minister advised that ministerial directions that are not legislative instruments are also not subject to disallowance or sunsetting under the *Legislation Act 2003*. The minister also advised that having the ministerial directions tabled in Parliament and on the public record, will enable the public and the Parliament to hold the Government appropriately accountable for directions made to the Authority.

2.137 The minister further advised that directions under clause 11 cannot add or expand the functions of the Authority, and rules made under clause 50 would be legislative instruments subject to both disallowance and to the important subject matter limitations set out in subclause 50(2).

2.138 The also minister advised that given the range of functions of the Authority, and the complex legal and stakeholder environment in which the Authority will operate, it is difficult to anticipate the kind of matters in which it may be desirable to provide general directions to the Authority.

2.139 Finally, the minister advised that they do not intend to amend the bill as they consider the ministerial directions power in clause 11 to be appropriate. However, the minister advised that the committee's concerns will be given due regard in relation to the explanatory memoranda for future bills.

Committee comment

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52 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 28–30.

53 The minister responded to the committee's comments in a letter dated 17 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

2.140 The committee thanks the minister for this response.

2.141 Given the significant activities that are proposed to be undertaken by the Authority, the committee welcomes the fact that directions made under clause 11 are legislative instruments and are thus subject to some level of parliamentary oversight. However, the committee remains concerned that these instruments are exempt from parliamentary disallowance. The committee does not consider the fact that an instrument falls within one of the classes of exemption in the *Legislation Act 2003* to be, of itself, a sufficient justification for excluding parliamentary disallowance.

2.142 The committee reiterates that disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive and that exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. The committee's concerns in this regard reflect the longstanding view of the Senate. For example, in June 2021, the Senate 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.[54]

2.143 The committee does not consider that a desire to minimise barriers to the effective functioning of the Authority is a sufficient justification for exempting instruments made under clause 11 from disallowance.

2.144 Finally, the committee notes that its concern was not that clause 11 could be used to add to the Authority's functions, but that the rule-making power at paragraph 8(1)(e) of the bill has the potential to broaden the minister's discretion under clause 11, given that a clause 11 direction must relate to the functions of the Authority.

2.145 The committee does not consider that the justifications provided in relation to provisions exempting delegated legislation from disallowance adequately address the committee's scrutiny concerns.

2.146 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of exempting ministerial directions made under clause 11 from disallowance and of providing the minister with a broad discretion to give such directions.

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

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

Purpose	Schedule 1 to the bill amends the *Foreign Acquisitions and Takeovers Act 1975* to double the maximum financial penalties for contraventions of provisions that relate only to residential land. Schedule 2 to the bill amends the *Taxation Administration Act 1953* to allow protected information to be disclosed to Australian government agencies for the purpose of administering major disaster support programs approved by the minister. Schedule 3 to the bill amends Schedule 5 of the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* 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. 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. Schedule 5 to the bill amends the *Superannuation Industry (Supervision) Act 1993* to provide for an alternative annual performance test for faith-based products.
Portfolio	Treasury
Introduced	House of Representatives on 8 September 2022
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[55]

2.147 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

55 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).

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.[56]

2.148 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.

2.149 In *Scrutiny Digest 5 of 2022* the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.[57]

Minister's response[58]

2.150 The minister advised that the approach taken in the bill is justified, as the relevant information for matters relevant to the exemptions would be peculiarly within the person's own knowledge and control as the person would be aware of the information they disclosed, the recipient, and the manner and purpose for which it was disclosed. The minister advised that if the prosecution were required to eliminate all possible exemptions beyond reasonable doubt it would likely be difficult, costly and resource intensive. The minister considered that proposed subsection 365-25(8) is consistent with the *Guide to framing Commonwealth Offences* on this basis.

2.151 In addition, the minister advised that consistency of approach within the framework of the existing offence and exceptions to the prohibition against disclosing or recording protected information is important to support understanding and application of the law.

Committee comment

2.152 The committee thanks the minister for this response. However, it is not clear to the committee from this explanation why the matters set out in proposed subsection 365-25(8) could be said to 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

2.153 In addition, while the committee acknowledges the merits of ensuring a consistent approach across Commonwealth offence provisions, the committee notes that consistency with existing legislation is not a valid justification for inappropriately

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56 See Schedule 2, item 2, proposed subsection 355–65(8).

57 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 56–57.

58 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

reversing the evidential burden of proof. Provisions which may impact individual rights and liberties should be justified on their own merits and according to the specific circumstances of the case at hand.

2.154 The committee does not consider that the minister's response has adequately addressed the committee's concerns.

2.155 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to matters which do not appear to be peculiarly within the knowledge of the defendant.

Significant matters in delegated legislation[59]

2.156 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.

2.157 Much of the detail of this new faith-based performance test is left to delegated legislation.

2.158 In *Scrutiny Digest 5 of 2022* the committee requested 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.[60]

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59 Schedule 5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

60 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 33–35.

Minister's response[61]

2.159 The minister advised that the framework for the supplementary test mirrors the framework approach already taken by the original test introduced by Schedule 2 to the *Treasury Laws Amendment (Your Future, Your Super) Act 2021*. The specific requirements for the original and supplementary test involve setting out various technical matters including specifying complex mathematical formula and assumptions that apply in performing the calculations. The minister advised that the supplementary test will use the same complex mathematical formulas and assumptions, making modifications to allow the input of tailored faith-based indices into the calculations. The minister advised that regulations are the appropriate mechanism for setting out such technical details because they will enable the government to be more responsive in updating relevant assumptions for use in the calculations where there is a change in the investment environment that makes updates appropriate or necessary.

2.160 The minister also advised that regulations are the appropriate mechanism for dealing with administrative details relating to the operation of the supplementary test, such as the timing of APRA conducting the test and the timing of any notifications APRA must give to trustees.

2.161 The bill provides that a faith-based product application must contain a particular declaration by the trustee. The bill allows regulations to prescribe further information for inclusion in an application before APRA decides on faith-based status. The minister advised that this regulation-making power ensures the information supporting an application remains relevant and fit-for-purpose taking into account, for example, changes in the marketplace.

2.162 The minister advised that any regulations dealing with the matters outlined above would, in line with usual government processes, be open to stakeholder input during consultation and remain subject to parliamentary scrutiny through the usual tabling and disallowance process.

2.163 The minister advised that, given the above, he does not propose to amend the bill to incorporate further guidance regarding these matters.

2.164 Finally, the minister advised that proposed subsections 60L(4) and 60N(1) respectively allow APRA to make a determination that a product is a faith-based product and to revoke that determination. The minister clarified that such determinations are non-legislative in nature, as they do not set out an element of the scheme rather, they set out the application of the scheme to a specific product.

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61 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

Committee comment

2.165 The committee thanks the minister for this response.

2.166 The committee thanks the minister for his advice that determinations under proposed subsections 60L(4) and 60N(1) are not legislative instruments.

2.167 The committee acknowledges that it is often appropriate to set out complex technical matters within delegated legislation. However, in this case, the committee is concerned about the level of detail included within delegated legislation. The committee has longstanding concerns in relation to bills which rely heavily on 'framework provisions' that 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 considers that this approach considerably limits the ability of Parliament to have appropriate oversight over new legislative schemes.

2.168 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*).

2.169 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving much of the intended operation of the faith-based performance testing scheme to delegated legislation.

2.170 The committee also draws these matters to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

Availability of merits review[62]

2.171 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.

2.172 In *Scrutiny Digest 5 of 2022* the committee requested the minister's advice as to whether the bill can be amended to provide that independent merits review will be

62 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).

available in relation to a decision made under proposed subsection 60L(4) and proposed subsection 60N(1) of the bill. [63]

Minister's response[64]

2.173 The minister advised that proposed subsections 60L(4) and 60N(1) were drafted permissively, as APRA may not make a determination or revoke a determination where it reasonably considers that the declarations are false.

2.174 The minister advised that the discretion afforded under proposed subsections 60L(4) and 60N(1) is therefore very limited, allowing APRA to consider the truth of the declaration and supporting evidence. For example, APRA may through its compliance action, become aware that the trustee has provided false or misleading information. As such, the decision is not appropriate for merits review.

Committee comment

2.175 The committee thanks the minister for this response.

2.176 It is not clear to the committee why the minister has advised that it is only open to APRA not to make a determination or revoke a determination where APRA reasonably considers that a declarations is false when there appears to be nothing on the face of the bill requiring this. Moreover, the committee notes that even if the discretion afforded under proposed subsections 60L(4) and 60N(1) were limited, this would not justify removing merits review over a decision made under those subsections. In this regard, the committee notes that there is nothing in the Administrative Review Council's guide, *What decisions should be subject to merits review?* that suggests decisions with 'limited' discretion should not be subject to merits review.

2.177 In light of the above, the committee requests the minister's further advice as to:

- **where it is stated within the bill, or within other legislation, that it is only open to APRA not to make a determination or revoke a determination where APRA reasonably considers that a declarations is false; or**
- **if there is no such legal requirement, whether the bill can be amended to include this requirement and to provide that decisions made under proposed subsections 60N(1) and 60L(4) be subject to independent merits review.**

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63 Senate Scrutiny of Bills Committee, *Scrutiny Digest 5 of 2022*, pp. 36–37.

64 The minister responded to the committee's comments in a letter dated 19 October 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 6 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

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]

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

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

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

- National Anti-Corruption Commission Bill 2022.[3]

Senator Dean Smith
Chair

3 Subclause 280(2) provides that the regulations would be able to prescribe arrangements for the Commonwealth to provide financial assistance in relation to matters arising under, or in relation to, the National Anti-Corruption Commission Bill 2022. Subclause 280(3) provides that the Consolidated Revenue Fund is appropriated for this purpose.