



Senate Standing

Committee for the Scrutiny of Bills

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# Membership of the committee

## Current members

Senator Dean Smith (Chair)	LP, Western Australia
Senator Raff Ciccone (Deputy Chair)	ALP, Victoria
Senator Nick McKim	AG, Tasmania
Senator Paul Scarr	LP, Queensland
Senator Tony Sheldon	ALP, New South Wales
Senator Jess Walsh	ALP, Victoria

## Secretariat

Fattimah Imtoul, Secretary (A/g)  
Hannah Wilkins, Principal Research Officer  
Stephanie Lum, Senior Research Officer  
Nidhi Venkatesan, Senior Research Officer  
Mia Pafumi, Legislative Research Officer (A/g)

## Committee legal adviser

Professor Leighton McDonald



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# Committee information

## 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 nonpartisan 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, standing order 24 enables senators to ask in the Senate Chamber, the responsible minister, for an explanation as to 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.

## Report snapshot<sup>1</sup>

<b>Chapter 1: Initial scrutiny</b>	
Bills introduced 5 November to 10 November 2023	8
Bills commented on in report	0
Private members or senators' bills that may raise scrutiny concerns	0
Commentary on amendments or explanatory materials	0
<b>Chapter 2: Commentary on ministerial responses</b>	
Bills which the committee has sought further information on or concluded its examination of following receipt of ministerial response	3
<b>Chapter 3: Scrutiny of standing appropriations</b>	
Bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts	0

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<sup>1</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report snapshot; *Scrutiny Digest 14 of 2023*; [2023] AUSStaCSBSD 218.

## Chapter 1

### Initial scrutiny

1.1 This chapter considers the committee's comments on the bills before Parliament and, in some instances, seeks a response or further information from the relevant minister regarding these bills.

1.2 In this Digest, the committee is not commenting on any bills before the Parliament.

### Private senators' and members' bills that may raise scrutiny concerns<sup>2</sup>

1.3 The committee notes that 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 bills' proponents.

1.4 In this Digest, the committee is not commenting on any private senators' or members' bills.

### Bills with no committee comment<sup>3</sup>

1.5 The committee has no comment in relation to the following bills:

- Fair Work Legislation Amendment (Asbestos Safety and Eradication Agency) Bill 2023
- Fair Work Legislation Amendment (First Responders) Bill 2023
- Fair Work Legislation Amendment (Small Business Redundancy Exemption) Bill 2023
- Fair Work Legislation Amendment (Strengthening Protections Against Discrimination) Bill 2023
- Federal Courts Legislation Amendment (Judicial Immunity) Bill 2023

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<sup>2</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 14 of 2023*; [2023] AUSStaCSBSD 219.

<sup>3</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 14 of 2023*; [2023] AUSStaCSBSD 220.

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## Commentary on amendments and explanatory materials<sup>4</sup>

1.6 In this Digest, the committee is not commenting on any amendments or explanatory materials tabled during the last sitting period.

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<sup>4</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 14 of 2023*; [2023] AUSStaCSBSD 221.

## Chapter 2

### Commentary on ministerial responses

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

#### Disability Services and Inclusion Bill 2023<sup>5</sup>

<b>Purpose</b>	The bill is seeking to repeal and replace the <i>Disability Services Act 1986</i> and establish a modern legislative framework for the funding and regulation of programs targeted for the benefit of people with disability, their families and carers.
<b>Portfolio</b>	Social Services
<b>Introduced</b>	House of Representatives on 14 September 2023
<b>Bill status</b>	Before the House of Representatives

#### Significant matters in delegated legislation

##### Privacy

##### Reversal of the evidential burden of proof<sup>6</sup>

2.2 Clause 29 of the bill seeks to provide for authorised uses and disclosures of relevant information. Clause 8 of the bill defines 'relevant information' to mean information obtained or generated by an entrusted person in performing, or assisting another person to perform, functions or duties, or exercising powers, under this Act. Clause 8 defines an 'entrusted person' to mean either the secretary, an APS employee, or any other person employed or engaged by the Commonwealth to provide services to the Commonwealth.

2.3 The authorised purposes for which relevant information may be used and disclosed include: the administration of the bill;<sup>7</sup> Commonwealth purposes;<sup>8</sup> disclosure to a court or tribunal;<sup>9</sup> preventing threat to life, health or safety of a person with disability;<sup>10</sup> statistical purposes;<sup>11</sup> with the consent of the person to whom the

<sup>5</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, *Disability Services and Inclusion Bill 2023*, *Scrutiny Digest 14 of 2023*; [2023] AUSStaCSBSD 222.

<sup>6</sup> Clause 28 and subclauses 29(3) and 29(7). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

<sup>7</sup> Subclause 29(1).

<sup>8</sup> Subclause 29(5).

<sup>9</sup> Subclauses 29(9) and (10).

<sup>10</sup> Subclause 29(11).

<sup>11</sup> Subclause 29(12).

information relates;<sup>12</sup> disclosure to a person to whom the information relates;<sup>13</sup> and information that is already public.<sup>14</sup>

2.4 Additionally, subclause 29(2) seeks to provide that an entrusted person may use or disclose relevant information if the use or disclosure is for a purpose specified in a determination made by the secretary under subsection 29(3). Subclause 29(6) also provides that an entrusted person may disclose relevant information to the head of a department of state or territory, or of an authority of a state or territory, if the disclosure is for a purpose specified in a determination made under subsection 29(7) by the secretary.

2.5 Further, it is an offence under subclause 28(1) if a person is, or has been, an entrusted person, the person has obtained or generated relevant information in the person's capacity as an entrusted person, and the person uses or discloses protected information. This offence has a penalty of two years imprisonment or 120 penalty units, or both. Subclause 28(2) provides that subsection 28(1) does not apply if the use or disclosure is required or authorised by this Act or another law of the Commonwealth, or a law of a state or territory prescribed by the rules for the purposes of this paragraph. A note to subclause 28(2) states that the defendant bears the evidential burden in relation to the matter.

2.6 In *Scrutiny Digest 12 of 2023*, the committee requested the Minister for Social Services' advice as to:

- why it is necessary for the secretary to have the power to specify further purposes in determinations under subclauses 29(3) and 29(7), given the purposes that relevant information can already be used or disclosed for under clause 29 of the bill; and
- why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in subclause 28(2).<sup>15</sup>

### ***Minister for Social Services' response***<sup>16</sup>

2.7 The Minister for Social Services (the minister) advised that the bill provides a number of specific grounds upon which relevant information can be used and disclosed but does not cover all circumstances in which information may need to be disclosed. The bill therefore provides for information to be disclosed in clear and transparent circumstances by requiring the secretary to make a legislative instrument that will prescribe, ahead of time, specific purposes for which information may be

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<sup>12</sup> Subclause 29(13).

<sup>13</sup> Subclause 29(14).

<sup>14</sup> Subclause 29(15).

<sup>15</sup> Senate Scrutiny of Bills Committee, [Scrutiny Digest 12 of 2023](#) (18 October 2023) pp. 15-18.

<sup>16</sup> The minister responded to the committee's comments in a letter dated 2 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 14 of 2023*).

disclosed. An example of such a circumstance under proposed subclause 29(3) would be to brief the minister to respond to an incident or complaint where consent from the person to disclose the information may not be practicable due to the impact on an investigation.

2.8 The minister also advised that under subclause 29(7) the secretary may prescribe 'State and Territory' purposes such as the enforcement of state and territory laws, which is important where there is no other basis under the bill to allow for such use or disclosure.

2.9 The minister confirmed that any determinations made under proposed subclause 29(3) and subclause 29(7) would be legislative instruments and subject to parliamentary scrutiny.

2.10 In relation to the reversed evidential burden of proof for the defence in subclause 28(2), the minister advised that an entrusted person 'should easily be able to point to records indicating why it was appropriate for them to use and/or disclose that information'. The minister also suggested that the large scope of the exclusion, being justified by any Commonwealth or prescribed state or territory law, would undermine the prosecution's ability to prosecute if they had to prove a disclosure was authorised beyond reasonable doubt. This is because the prosecution would have to go to 'significant lengths' to identify the reasons for the disclosure and identify whether any law authorised the disclosure. The minister also advised this would involve the 'review of personal and sensitive information about people with disabilities by additional parties'.

#### **Committee comment**

2.11 The committee thanks the minister for this response.

2.12 The committee notes the minister's advice in relation to secretary determinations which may specify additional purposes in which relevant information may be disclosed. The committee notes these will be legislative instruments subject to further parliamentary scrutiny at the time they are tabled.

2.13 The committee notes the minister's advice in relation to the reversal of the evidential burden of proof with reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. Nevertheless, it is not apparent that the matters in proposed subclause 28(2) 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. For example, whether or not conduct is authorised by the Act, or a Commonwealth, state or territory law is not, in the committee's view, a matter that is peculiarly within the defendant's knowledge.

2.14 While it may be more difficult and costly for the prosecution to establish these matters, the relevant test is whether it would be *significantly* more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

2.15 It is not clear to the committee that the prosecution needing to determine relevant laws applicable in the sharing of information is significantly more difficult in this case. It is also not clear to the committee that the prosecution would need to establish the reasons *why* information was used or disclosed, rather the prosecution would need to establish whether the information was used or disclosed in accordance with a relevant law.

**2.16 The committee draws to the attention of senators and leaves to the Senate as a whole the appropriateness of the reversal of the evidential burden of proof in proposed subclause 28(2).**

**2.17 In light of the information provided in relation to the secretary's power to specify further purposes in which information can be shared, the committee makes no further comment.**

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### **Availability of independent merits review<sup>17</sup>**

2.18 There are a range of clauses in the bill which provide for discretionary decisions that may affect individual rights and liberties and to which neither internal nor external merits review apply.

2.19 In *Scrutiny Digest 12 of 2023*, the committee requested the Minister for Social Services' advice as to:

- whether the exclusion of merits review from decisions made under clause 9 of the bill is in line with Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and
- in relation to clause 13:
  - whether consideration could be given to methods of ensuring compliance with the Commonwealth Rules and Procurement Guidelines; and
  - whether consideration has been given to providing redress for individuals who are denied grants due to an allocation process that has not been based on merit (similar to the process in relation to government procurement under the *Government Procurement (Judicial Review) Act 2018*); and
- in relation to paragraph 14(6)(g):
  - whether the grants and funding agreements made under this Act would enable a person to sue on the basis of the agreement, and

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<sup>17</sup> Subclause 9(2) and (4); subclause 13(1); subclause 21(1),(5) and (8); subclause 26(1) and (4). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

- whether a person who is affected but not party to an agreement would have grounds to sue; and
- why the exclusion of merits review is appropriate in relation to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and
  - in relation to clause 21:
    - whether the exclusion of merits review from decisions made under clause 21 of the bill is in line with Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and
    - whether an aggrieved party would be provided with reasons for a refusal or internal merits review by the relevant certification body; and
  - in relation to clause 26:
    - whether an aggrieved party would be provided with reasons for a refusal or internal merits review by the relevant accrediting authority; and
    - whether and on what basis the decisions made under clause 26 would be subject to judicial review.<sup>18</sup>

### ***Minister for Social Services' response***<sup>19</sup>

2.20 The minister provided a detailed response to each question about the availability of review. The minister acknowledged that in some of the cases, exclusion of merits review did not neatly fit into categories of exclusion in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?* but nevertheless provided a thorough justification as to why these particular decisions should not be subject to merits review.

2.21 In relation to clause 26, the minister advised that certification bodies who are refused accreditation by the accrediting authority will be provided with reasons for the refusal by the accrediting authority and would have recourse through the accrediting authority's internal complaints process. The minister further advised that paragraph 25(1)(b) requires the secretary to be satisfied that an accredited authority will perform its functions in an independent and impartial way, and that part of this

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<sup>18</sup> Senate Scrutiny of Bills Committee, [Scrutiny Digest 12 of 2023](#) (18 October 2023) pp. 18-22.

<sup>19</sup> The minister responded to the committee's comments in a letter dated 2 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 14 of 2023*).

decision making process will be ensuring that an accrediting authority has appropriate internal controls and complaints processes.

2.22 The minister further advised that decisions made by an accrediting authority under clause 26 of the bill are administrative in nature and subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

### **Committee comment**

2.23 The committee thanks the minister for this response.

2.24 The committee considers that, given the capacity for these decisions to affect rights, liberties or obligations, the justifications for the exclusion of merits review in the various provisions should be included in the explanatory materials to the bill.

2.25 In relation to clause 26, the committee notes the minister's advice that the accrediting authority should have appropriate internal controls and complaints processes and that this informs the secretary's approval of a body to be an accrediting authority under paragraph 25(1)(b). The committee considers that it would be preferable for there to be an explicit requirement on the face of the bill that the accrediting authority have appropriate internal controls and complaints processes.

**2.26 The committee requests that the bill be amended to explicitly include a requirement that an accrediting authority have appropriate internal controls and complaints processes under subclause 25(1).**

**2.27 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to the availability of independent merits review be tabled in the Parliament as soon as practicable. The committee notes 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*).**

## Public Health (Tobacco and Other Products) Bill 2023<sup>20</sup>

<b>Purpose</b>	This bill seeks to consolidate Commonwealth tobacco regulation into one legislation package to streamline the operation of the legal framework. The bill will be supported by the Public Health (Tobacco and Other Products) (Consequential Amendments and Transitional Provisions) Bill 2023.
<b>Portfolio</b>	Health and Aged Care
<b>Introduced</b>	House of Representatives on 13 September 2023
<b>Bill status</b>	Before the Senate.

### Immunity from civil liability<sup>21</sup>

2.28 Clause 183 of the bill seeks to provide that a protected person, which includes the minister, the secretary, an authorised officer or a person acting under an authorised officer's direction or authority<sup>22</sup>, is not liable to civil proceedings for loss, damage or injury of any kind suffered by another person as a result of anything done by the protected person in good faith in performance of the bill.

2.29 An authorised officer would be granted monitoring and investigation powers<sup>23</sup>, as well as the power to require information or documents<sup>24</sup>. These powers could include using force against things in executing a warrant<sup>25</sup>.

2.30 In *Scrutiny Digest 12 of 2023*, the committee requested the Minister for Health and Aged Care's (the minister) detailed advice as to why it is considered necessary and appropriate to confer immunity from civil liability on the minister, secretary, authorised officers and persons acting under authorised officers.<sup>26</sup>

<sup>20</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Public Health (Tobacco and Other Products) Bill 2023, *Scrutiny Digest 14 of 2023*; [2023] AUSStaCSBSD 223.

<sup>21</sup> Clause 183. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

<sup>22</sup> Subclause 183(1).

<sup>23</sup> Clauses 154 and 156.

<sup>24</sup> Clause 151.

<sup>25</sup> Subclauses 154(10) and 156(9).

<sup>26</sup> Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2023* (9 August 2023) pp. 36–37.

**Minister for Health and Aged Care's response<sup>27</sup>**

2.31 The minister advised that the overarching purpose of clause 183 is to protect the minister, secretary, authorised officers and persons acting under the direction or authority of authorised officers against personal civil liability for acts or omissions done in good faith, as this supports efficiency in decision making. The minister also advised that this immunity relates to individuals and an affected person may still seek a remedy from the Commonwealth when applicable. The minister advised that remedies are also available under the Scheme for Compensation for Detriment caused by Defective Administration.

2.32 Finally, the minister advised that there is '[a] well-established body of evidence that demonstrates that the tobacco industry has operated [...] with the intention of subverting the role of governments in developing and implementing public health policies to combat the tobacco epidemic, [which includes a history of litigious activity].'<sup>28</sup> The minister advised that conferral of immunity from civil liability when performing functions and powers in good faith prevents the ability for civil proceedings to be utilised to undermine or put at risk actions taken by protected persons.

**Committee comment**

2.33 The committee thanks the minister for this advice.

2.34 The committee welcomes the additional context provided by the minister particularly in relation to the history of the tobacco industry operating with the intention of subverting public health regulatory schemes including through litigious activity. The committee also welcomes the minister's confirmation that the bill does not confer immunity on the Commonwealth.

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

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**Reversal of the evidential burden of proof<sup>29</sup>**

2.36 A number of provisions in the bill seek to create offences which have offence-specific defences which reverse the evidential burden of proof. These defences are provided by the following subclauses: 19(3), 42(3), 93(2), 94(2), 95(4), 96(4), 99(4),

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<sup>27</sup> The minister responded to the committee's comments in a letter dated 9 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 14 of 2023*).

<sup>28</sup> See the minister's response.

<sup>29</sup> Subclauses 19(3), 42(3), 93(2), 94(2), 95(4), 96(4), 99(4), 100(2), 103(3), 104(3), 107(2), 108(2), 109(4), 110(4), 113(4), 114(2), 117(3), 118(3), 120(2), 127(3) and 128(3). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

100(2), 103(3), 104(3), 107(2), 108(2), 109(4), 110(4), 113(4), 114(2), 117(3), 118(3), 120(2), 127(3) and 128(3).

2.37 Broadly, these offences are contained in Chapter 3 of the bill and relate to the sale, supplying, possession, purchasing, packaging or manufacturing of tobacco products that are not compliant with retail packaging requirements, or that are prohibited or are otherwise non-compliant. The proposed defences provided by the subclauses above broadly relate to personal use or conduct that is in the course of compliance and enforcement activities.

2.38 In *Scrutiny Digest 12 of 2023*, the committee requested the minister's detailed justification as to why it is proposed to use offence-specific defences for the defences listed in subclauses 19(3) and 42(3). The committee also requested the minister's justification as to the requirement to reverse the evidential burden of proof in relation to the other categories of defences under Chapter 3 of the bill.<sup>30</sup>

### ***Minister for Health and Aged Care's response***<sup>31</sup>

2.39 The minister advised that the approach adopted for proposed subclauses 19(3) and 42(3) as offence-specific defences is consistent with the approach for permitted publications established by the *Tobacco Advertising Prohibition Act 1992*. However, the approach adopted in the bill is intended to result in more areas being treated as permitted publications through the use of offence-specific defences rather than falling outside of the definition of advertising or publishing. The minister also advised that the provisions have been drafted with consideration given to balancing the needs of effective law enforcement and the presumption of innocence as it would be overly onerous for the prosecution to need to discount the possibility of a permitted publication exception.

2.40 The minister further advised that the exception for permitted publications reflect that the matter, or relevant facts and evidence, may be peculiarly the defendant's knowledge. This may include evidence of mailing receipts, sent items, address lists or other types of trade communications that were sent only to tobacco distribution entities and not to members of the public.

2.41 In relation to the proposed common exceptions provided for offences under Chapter 3 of the bill, the minister advised that these provisions adopted a similar approach of reversing the evidential burden of proof for certain categories of defences as applied under the *Tobacco Plain Packaging Act 2011*. The minister also provided advice in relation to the nature of the evidence or material that a defendant would

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<sup>30</sup> Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2023* (9 August 2023) pp. 37–39.

<sup>31</sup> The minister responded to the committee's comments in a letter dated 9 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 14 of 2023*).

need to adduce in order to rely on the common exceptions to offences under Chapter 3. These categories included exceptions for:

- the sale, supply, possession or purchase of cigars in non-compliant retail packaging for individual resale;
- the purchase or possession of a tobacco product for personal use;
- a manufacturer taking all reasonable steps to ensure that retail packaging complies with tobacco product requirements;
- possession in the course of repackaging or intention to repackage the products into compliant packaging;
- possession in the course of compliance and enforcement activities; and
- the export exception.

### ***Committee comment***

2.42 The committee thanks the minister for this advice.

2.43 The committee reiterates that offence-specific defences that reverse the evidential burden of proof, which ordinarily rests with the prosecution, should only be utilised where the evidence needed to be adduced is peculiarly within the defendant's knowledge. However, the committee welcomes the clarity provided by the minister in relation to the offence-specific defences under Chapters 2 and 3 of the bill.

**2.44 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to the offence-specific defences under Chapters 2 and 3 of the bill be tabled in the Parliament as soon as practicable. The committee notes 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*).**

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## **Reversal of the legal burden of proof**

### **Broad scope of offence provision(s)<sup>32</sup>**

2.45 The bill seeks to impose three rebuttable presumptions. These are provided by clause 17, relating to a rebuttable presumption of offer for retail sale; subclause 20(4), relating to a rebuttable presumption for when material is presumed to be a tobacco advertisement; and subclause 43(4), relating to when material is presumed to be an e-cigarette advertisement.

2.46 Further, under subclauses 20(4)(c) and 43(4)(c), the prosecution would be able to presume that material containing a trade mark, design, colour, logo, get-up or work

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<sup>32</sup> Clause 17, subclauses 19(9), 20(4), 42(9), 43(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

that is 'evocative of, or closely associated with, a registered trade mark or design that is used, or has been used by any person at any time'<sup>33</sup> in relation to tobacco or e-cigarette products is a tobacco or e-cigarette advertisement. The committee considered that this term could conceivably cover a broad range of material and is not sufficiently specific as to what is evocative of or closely associated with a registered trademark or design.

2.47 Subclauses 19(1) and 42(1) seek to create offences which relate to the prohibition on publishing tobacco and e-cigarette advertisements.

2.48 Subclauses 19(9) and 42(9) seek to create exceptions to these offences where:

- the defendant is an individual;
- the publication was not in the course of or associated with the manufacture, importation, distribution or sale of tobacco or e-cigarette products; and
- the defendant did not receive any direct or indirect benefit (whether financial or not) from any person for publishing the material.

2.49 In *Scrutiny Digest 12 of 2023*, the committee requested the minister's advice as to why it is proposed to reverse the legal, rather than the evidential burden of proof in relation to clause 17 and subclauses 19(9), 20(4), 42(9) and 43(4).

2.50 The committee also requested the minister's detailed advice as to the types of material expected to be captured by subclauses 20(4)(c) and 43(4)(c) as well as how it is anticipated a defendant would be able to rebut a presumption that has arisen due to the operation of subclauses 20(4)(c) and 43(4)(c).<sup>34</sup>

### ***Minister for Health and Aged Care's response***<sup>35</sup>

2.51 The minister advised that the proposed reverse onus provisions are appropriate as they relate to elements which would be extremely difficult for the prosecution to prove and are peculiar to the defendant's knowledge. Further, the nature of the regulatory regime in this area will at times be dependant on the operation of rebuttable presumption.

2.52 In relation to clause 17, the minister advised that the circumstances in which the reversed burden of proof could apply are narrow. The presumption facilitates prosecutions in circumstances where it is reasonable to presume tobacco products are for retail, such as in a shop or a wholesale facility.

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<sup>33</sup> Subclauses 20(4), 43(4).

<sup>34</sup> Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2023* (9 August 2023) pp. 40–43.

<sup>35</sup> The minister responded to the committee's comments in a letter dated 9 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 14 of 2023*).

2.53 The presumption would also be limited to only one element of the offence, and would prevent prosecutions from being erroneously held up by having to prove the intention to sell goods for retail purposes. It would also remove the possibility of the defendant raising doubt by asserting that the product is not for retail sale in circumstances where that is highly improbable.

2.54 In relation to subclauses 19(9) and 42(9), the minister advised it would be difficult to prove an individual has received a direct or indirect benefit for publishing a tobacco advertisement and that as a matter of effective administration, it is more appropriate that the burden be on the individual.

2.55 In relation to subclauses 20(4) and 43(4), the minister advised the presumption facilitates prosecutions in circumstances where it would otherwise be overly technical for the prosecution to prove that an item, such as a trademark, was promoting tobacco or e-cigarettes.

2.56 The presumption would also only be limited to one element of the offence. Further, the minister advised that the inclusion of these subclauses is to 'address attempts to subvert advertising prohibitions by utilising things such as logos which look like, and are therefore recognisable as, tobacco product trademarks but depart from the specific trademark.'<sup>36</sup> The minister provided two examples of a tobacco product company utilising branding similar to its trademark by sponsoring another company in order to flout existing prohibitions on advertising.

2.57 The minister also advised in relation to subclauses 20(4) and 43(4) that the approach to rebut the presumption would likely be equivalent to how evidence is adduced in an intellectual property or copyright cases, such that there may need to be evidence from focus groups or consumers as to the perceived 'promotional' nature of the item. A focus group survey could support the view that the use of the trademark on that product was not having the effect of promoting tobacco or e-cigarettes and rather that it might be being utilised with the opposite effect.<sup>37</sup>

2.58 Finally, the minister advised that the requirement for a defendant to need to rebut the presumption is balanced against the consideration that it would be unproductive for the prosecution to need to establish that such things as trademarks that are clearly evocative of tobacco insignia are promoting tobacco. This kind of material is generally recognised as advertising for the purposes of the bill as these are the kinds of items that are already restricted or prohibited from being included on tobacco packaging.<sup>38</sup>

### ***Committee comment***

2.59 The committee thanks the minister for this advice.

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<sup>36</sup> See the minister's response.

<sup>37</sup> See the minister's response.

<sup>38</sup> See the minister's response.

2.60 The committee welcomes the clarity provided by the minister in relation to tobacco product companies attempting to subvert advertising prohibitions through the use of logos, trademarks or other brandings that are similar to or may be evocative of tobacco products.

**2.61 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to the reversed legal burdens of proof be tabled in the Parliament as soon as practicable. The committee notes 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*).**

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### **Broad delegation of administrative powers<sup>39</sup>**

2.62 Subclauses 154(11) and 156(10) of the bill seek to provide that an authorised officer may be assisted by other persons in exercising powers or performing functions or duties under Parts 2 and 3 of the *Regulatory Powers Act 2014*.<sup>40</sup> Persons assisting would be able to exercise these powers and functions in relation to evidential material that relates to an offence against the bill, a civil penalty provision of the bill or an offence against the *Crimes Act 1914* or the *Criminal Code 1995*. In addition, they would be able to exercise all monitoring and investigation powers that authorised officers are empowered to.

2.63 Subclause 150(2) seeks to provide that an authorised officer may only be appointed if the secretary is satisfied that the person has suitable qualifications, training or experience to properly perform the functions or exercise the powers of an authorised officer.<sup>41</sup>

2.64 In *Scrutiny Digest 12 of 2023*, the committee requested the minister's advice as to why it is necessary to confer monitoring and investigation powers on any person to assist an authorised officer and what requirements a person assisting will be subject to prior to their appointment.<sup>42</sup>

### **Minister for Health and Aged Care's response<sup>43</sup>**

2.65 The minister advised that there may be a number of reasons why an authorised person may seek assistance from another person, such as for workplace

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<sup>39</sup> Subclauses 154(11) and 156(10). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

<sup>40</sup> *Regulatory Powers Act 2014*.

<sup>41</sup> Subclause 150(2).

<sup>42</sup> Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2023* (9 August 2023) pp. 43–44.

<sup>43</sup> The minister responded to the committee's comments in a letter dated 9 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 14 of 2023*).

health and safety reasons, for administrative and operational assistance or for other technical specialist skills that are relevant and necessary for conduct monitoring or investigation.

2.66 The minister advised it would not be appropriate to require authorised or specific training or qualifications of a person assisting as there may be times where the function of the assisting person is not directly related to the analysis of products for compliance with tobacco product analysis but are critical nonetheless. For example, the use of a locksmith, data forensics analyst, or police and other law enforcement officers may be needed but would not need training or qualification in relation to the bill's provisions.

***Committee comment***

2.67 The committee thanks the minister for this advice.

**2.68 In light of the above, the committee makes no further comment on this matter.**

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## Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023<sup>44</sup>

<p><b>Purpose</b></p>	<p>The bill seeks to amend:</p> <ul style="list-style-type: none"> <li>• the <i>Income Tax (Transitional Provisions) Act 1997</i> to temporarily increase the instant asset write-off threshold;</li> <li>• the <i>Income Tax (Transitional Provisions) Act 1997</i> to provide small and medium businesses with access to a bonus deduction equal to 20 per cent of the cost of eligible assets or improvements to existing assets that support electrification or more efficient energy use;</li> <li>• the <i>Income Tax Assessment Act 1997</i> to list and extend deductible gift recipients (DGR);</li> <li>• the <i>Income Tax Assessment Act 1997</i> to continue to provide the Global Infrastructure Hub with an exemption from the liability to pay income tax on its ordinary and statutory income.</li> </ul> <p>The bill also seeks to:</p> <ul style="list-style-type: none"> <li>• create a new class of community charity trusts and community charity corporations that may apply for DGR endorsement by the Commissioner;</li> <li>• amend the income tax law with respect to general insurance to provide broad alignment with the new accounting standard, AASB 17;</li> <li>• change the rules for non-arm's length expenses for superannuation entities; and</li> <li>• amend the <i>Corporations Act 2001</i> to restore the Australian Financial Complaints Authority's jurisdiction to validly receive and resolve complaints which relate to superannuation, irrespective of whether the complaint falls within the definition of a 'superannuation complaint' in the <i>Corporations Act 2001</i>.</li> </ul>
<p><b>Portfolio</b></p>	<p>Treasury</p>
<p><b>Introduced</b></p>	<p>House of Representatives on 13 September 2023</p>
<p><b>Bill status</b></p>	<p>Before the House of Representatives</p>

<sup>44</sup> This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Support for Small Business and Charities and Other Measures) Bill 2023, *Scrutiny Digest 14 of 2023*; [2023] AUSStaCSBSD 224.

## Reversal of the evidential burden of proof

### Significant matters in delegated legislation<sup>45</sup>

2.69 Existing subsection 426-120(1) of the *Taxation Administration Act 1953* (the Act) prescribes liability for an administrative penalty where trustees of an ancillary fund hold the fund out as being endorsed, entitled to be endorsed, or entitled to remain endorsed, as a deductible gift recipient, and the fund is not so endorsed or entitled. Item 12 of schedule 3 to the bill seeks to amend existing section 426-120 to extend the operation of this provision to both ancillary and community charity trust funds.

2.70 Item 11 of schedule 3 to the bill seeks to insert proposed section 426-118 into the Act. Proposed paragraph 426-118(a) provides that the minister must formulate community charity trust guidelines by legislative instrument. These instruments would set out rules that community charity trusts and their trustees must comply with if the trusts are to be, or remain, endorsed as deductible gift recipients. Proposed paragraph 426-118(b) provides that the charity trust guidelines must also set out the amount of the administrative penalty, or how to work out the amount of the administrative penalty<sup>46</sup> in relation to community charity trusts.

2.71 Existing subsection 426-120(3) of the Act prescribes that the penalty amount incurred under subsection 426-120(1) is specified in guidelines. Item 15 of schedule 3 to the bill seeks to amend existing subsection 426-120(3) of the Act to include community charity trust funds. As per proposed amended subsection 426-120(3), the penalty for the offence in subsection 426-120(1) would be:

- the amount specified in the applicable trust fund guidelines (proposed paragraph 426-120(3)(a)); or
- the amount worked out in accordance with the method specified in the applicable trust fund guidelines (proposed paragraph 426-120(3)(b)); and
- the guidelines may specify different penalties or methods for different circumstances. (426-120(3)).

2.72 Item 34 seeks to insert proposed section 426-195 into the Act. Proposed subsection 426-195(1) prescribes liability for an administrative penalty where a community charity corporation, or a director holds out that:

- the corporation is endorsed as a deductible gift recipient and the corporation is not so endorsed (proposed paragraph 426-195(1)(a)); or

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<sup>45</sup> Schedule 3, item 11, proposed section 426-118; item 15, proposed subsection 426-120(3); item 34, proposed section 426-185 and 426-195. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

<sup>46</sup> For the purposes of subsection 426-120(1).

- the corporation is entitled to remain endorsed as a deductible gift recipient but is not so entitled (proposed paragraph 426-195(1)(b)); or
- the corporation will be endorsed as a deductible gift recipient at a particular time and is not so endorsed (proposed paragraph 426-195(1)(c)).

2.73 Proposed subsection 426-195(2) provides that the penalty is the amount specified in the community charity corporation guidelines, or the amount worked out in accordance with the method specified in the community charity corporation guidelines. Proposed subsection 426-195(2) also provides that the guidelines may specify different penalties or methods for different circumstances. Proposed subsection 426-195(3) provides that a director who is liable to the penalty must not be reimbursed the penalty from the corporation.

2.74 In addition, proposed subsection 426-195(4) prescribes an offence-specific defence for the offence set out in proposed subsection 426-195(1). Proposed subsection 426-195(6) provides that the evidential burden of proof is reversed for persons relying on this defence.

2.75 Item 34 of schedule 3 to the bill also seeks to insert proposed section 426-185 into the Act. Proposed paragraph 426-185(a) provides that the minister must formulate community charity corporation guidelines by legislative instrument setting out rules that community charity corporations and their directors must comply with if the corporations are to be, or are to remain, endorsed as deductible gift recipients (DGR). Proposed paragraph 426-118(b) provides that the charity trust guidelines must also set out the amount of the administrative penalty, or how to work out the amount of the administrative penalty, under subsection 426-195(1) in relation to community charity corporations.

2.76 In *Scrutiny Digest 12 of 2023* the committee sought the minister's advice as to:

- the penalty amount(s) that it is anticipated will be set out in delegated legislation in relation to the specified provisions; and
- any further guidance as to how these penalties will be formulated, including whether the bill can be amended to include guidance, factors to be considered, or a cap on the amounts that can be set out in delegated legislation.

### ***Assistant Minister for Competition, Charities and Treasury's response<sup>47</sup>***

2.77 The Assistant Minister for Competition, Charities and Treasury (the assistant minister) advised that the penalty framework in delegated legislation for community

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<sup>47</sup> The minister responded to the committee's comments in a letter received by the committee on Monday 6 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to Scrutiny Digest 14).

charity trusts and corporations in this context will be closely modelled on the ancillary funds guidelines.

2.78 The assistant minister advised that the penalties in the ancillary funds guidelines were formulated in accordance with the Attorney-General Department's *Guide to Framing Commonwealth Offences* and are consistent with administrative penalties in similar contexts in other schemes. Further, as these are administrative penalties the decision to impose a penalty will be reviewable by the Administrative Appeals Tribunal.

2.79 The assistant minister noted that the relevant penalties in the ancillary funds guidelines range from 10 to 30 penalty units and the "administrative penalty provisions in the draft community charity guidelines, in turn, will be either identical or very similar".

***Committee comment***

2.80 The committee thanks the assistant minister for this further information.

**2.81 In light of the above, the committee makes no further comment on this matter.**

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## Chapter 3

### Scrutiny of standing appropriations<sup>48</sup>

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.<sup>49</sup> 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.<sup>50</sup>

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

**Senator Dean Smith**

**Chair**

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<sup>48</sup> This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 14 of 2023*; [2023] AUSStaCSBSD 225.

<sup>49</sup> 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*.

<sup>50</sup> For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).