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

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

Housing Australia Future Fund Bill 2023
Treasury Laws Amendment (Housing Measures No. 1) Bill 2023

Purpose	The Housing Australia Future Fund Bill 2023 seeks to establish the Housing Australia Future Fund to create a funding source to support and increase social and affordable housing, as well as other acute housing needs. The Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 seeks to amend the *National Housing Finance and Investment Corporation Act 2018* to improve the affordability and accessibility of housing for Australians.
Portfolio	Finance
Introduced	House of Representatives on 9 February 2023

Significant matters in delegated legislation
Exemption from disallowance[1]

1.2 Clause 10 of the Housing Australia Future Fund Bill 2023 (HAFF Bill) provides for the establishment of a Housing Australia Future Fund Special Account (the Special Account). Clause 13 of the HAFF Bill sets out a list of purposes for which money may be credited from the Special Account, including paying for the acquisition of financial assets, paying the expenses of an investment of the Housing Australia Future Fund, paying for the acquisition of derivatives, and paying or discharging the costs, expenses and other obligations incurred by the Future Fund Board.

1.3 Under subclause 11(1) of the HAFF Bill, $10 billion will be credited into the Special Account upon commencement of the bill. However, subclause 11(2) provides that the responsible Ministers[2] may determine additional specified amounts to be

1 Clause 11 of the Housing Australia Future Fund Bill 2023. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

2 Defined under clause 5 as the Treasurer and the Finance Minister.

credited into the Special Account. Subclause 11(3) states that these determinations are legislative instruments but are not subject to the usual parliamentary disallowance process.

1.4 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 exceptional circumstances can be shown which would justify an exemption. In addition, the Senate resolved that 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.[3]

1.5 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its recent review of the *Biosecurity Act 2015*,[4] and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[5]

1.6 In light of these comments and the resolution of the Senate, the committee expects the explanatory materials for a bill exempting delegated legislation from disallowance to set out the exceptional circumstances which justify the exemption and how they apply to the provision in question. The committee's already significant scrutiny concerns in relation to an unjustified exemption from disallowance are heightened when the instrument in question would allow the crediting of a potentially significant amount of public money, as in this case. In this instance the explanatory memorandum states:

> A determination under subclause 11(2) is expected to be made only in limited circumstances following the initial credit provided for by subclause 11(1). Amounts credited under subclause 11(2) are expected to be provided from other Appropriation Acts. In this respect, the determination would be a tool for the Government to manage its financial arrangements. Disallowance could also undermine commercial certainty, given that once an amount is credited to the HAFF Special Account, the Future Fund Board

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

4 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.

5 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).

> would be able to invest the amount in any financial assets under clause 39 of the HAFF Bill.
>
> Providing for a determination under subclause 11(2) to be a legislative instrument that is not disallowable would be consistent with arrangements for other investment funds managed by the Future Fund Board (see Item 3 of Schedule 1 of the Future Fund Act, section 15 of the MRFF Act, section 14 of the FDF Act, and section 13 of the DRF Act).[6]

1.7 While the committee acknowledges that it may be necessary to delegate legislative power in order to build capacity in relation to government programs which necessitate significant involvement from the states, the committee does not consider that this explanation has provided sufficient detail to justify exempting instruments made under subclause 11(2) from disallowance.

1.8 The committee reiterates its general concerns in relation to exempting instruments from disallowance due to a desire to provide certainty. While the committee acknowledges that the possibility of disallowance presents some degree of uncertainty, the committee notes that this level of uncertainty is in many ways inherent to lawmaking within Australia's system of representative government and applies equally to primary legislation which is subject at any time to amendment or repeal by the Parliament. A balance must be struck between protecting against uncertainty and allowing parliamentary scrutiny over executive made law. As a general principle, the committee does not consider that the difficulties associated with the small degree of uncertainty inherent in the disallowance process outweigh the significance of abrogating or limiting parliamentary oversight of executive made law by exempting an instrument from disallowance. The committee notes that the explanatory memorandum has not explained why this general principle would not apply in this case.

1.9 The committee further notes the explanation that the determination is intended to be an administrative rather than legislative decision, and that it would only be exercised in limited circumstances. However, the committee does not consider that the explanatory memorandum has included enough information to demonstrate why this is the case or why only exercising a power in limited circumstances justifies exempting an instrument from disallowance. For example, the committee considers that it would have been more appropriate to outline why the usual appropriations process is not adequate given the very large sums involved, why a disallowance process would undermine the fund's capacity to make good investments in the public interest, and why a disallowance process might place the fund at a disadvantage. The committee also considers that it would have been more appropriate to provide evidence that appropriate modifications to the disallowance process were considered prior to an exemption being set out within the bill.

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6 Explanatory memorandum, p. 13.

1.10 In light of the above, the committee requests the minister's further detailed advice in relation to the exceptional circumstances that are said to justify exempting an instrument made under subclause 11(2) from the usual parliamentary disallowance process.

Section 96 grants to the states[7]

1.11 Subclause 18(3) of the HAFF Bill provides that a designated Minister may make a grant of financial assistance to a state or territory in relation to acute housing needs, social housing or affordable housing. A grant of financial assistance may not amount to a loan,[8] and must not be made before 1 July 2023.[9] The terms and conditions on which financial assistance may be granted must be set out in a written agreement between the Commonwealth and the state or territory.[10] Certain information relating to grants must be published online, including the amount of each grant, the total amount included in all clause 18 grants, and the total amount that is due, but has not yet been paid, under all clause 18 grants.[11]

1.12 Similarly, item 5 of Schedule 2 to the Treasury Laws Amendment (Housing Measures No. 1) Bill 2023 (Treasury Laws Housing Bill) amends an existing power within the *National Housing Finance and Investment Corporation Act 2018* (NHFIC Act) which allows the Commonwealth to provide grants of financial assistance to the states and territories.[12] As in the case of the HAFF Bill, the terms and conditions on which those grants may be made will be set out in a written agreement.[13] The amended form of this provision, as introduced by the Treasury Laws Housing Bill, would allow the Commonwealth to make grants to the states for the purposes of improving, directly or indirectly, housing outcomes. The committee commented on the original version of this provision in *Scrutiny Digest 3 of 2018.*[14] However, it does not appear that any of the committee's scrutiny concerns have been addressed in relation to the new form of the power.

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7 Subclause 18(3) of the HAFF Bill; Schedule 2, item 5, proposed subsection 8(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

8 Subclause 18(6).

9 Subclause 18(8).

10 Subclause 19(2).

11 Clause 24.

12 Schedule 2, item 5, proposed subsection 8(1A)(b).

13 Schedule 2, item 8, proposed subsection 10(5).

14 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018* (21 March 2018), pp. 28-30.

1.13 The committee notes that section 96 of the Constitution confers on the Parliament the power to make grants of financial assistance to the states and to determine the terms and conditions attached 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. More generally, 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.

1.14 In this regard, the committee is concerned that the HAFF Bill contains very little guidance on its face as to how the broad power to make grants 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. It is also not clear to the committee from the explanation provided within the bill's explanatory materials how the criteria for the award of the grants will be developed, whether standard criteria will apply, whether the processes for developing criteria are set out in non-legislative documents, such as the Commonwealth Grants Rules and Guidelines 2017, and why criteria cannot be fully set out on the face of the bill.

1.15 The committee is also concerned that there is no requirement to table in the Senate written agreements between the Commonwealth and the states and territories. Such a requirement would ensure that senators are at least made aware of, and have an opportunity to debate, any agreements made under subclause 18(3) of the HAFF 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 made available through other means, for example, by being published online.

1.16 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 provides no explanation, merely re-stating the effect of the provision.

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

- **how the criteria for the award of grants of financial assistance will be developed, noting that there is limited guidance on the face of the Housing Australia Future Fund Bill 2023 (HAFF Bill) as to how the power to make grants is to be exercised;**

- **whether the HAFF 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 HAFF Bill can be amended to include a requirement that written agreements with the states and territories for grants of financial assistance made under subclause 18(3) are:**
  - **tabled in the Parliament within 15 sitting days after being made; and**
  - **published on the internet within 30 days after being made.**

Exemption from disallowance[15]

1.18 Subclause 41(1) of the HAFF Bill provides that the responsible Ministers may give the Future Fund Board written directions about the performance of its Housing Australia Future Fund investment functions. These directions are to be collectively known as the Housing Australia Future Fund Investment Mandate (the Investment Mandate).[16] An Investment Mandate direction could cover a broad range of significant matters, including the policies to be pursued in relation to matters of risk and return and the allocation of financial assets.[17] If the Future Fund Board fails to comply with the Investment Mandate they must report on that fact to the minister.[18] The minister may subsequently ask for a written explanation. These directions are legislative instruments, but a note under clause 41 clarifies that the directions are not subject to disallowance or sunsetting due to the operation of the Legislation (Exemptions and Other Matters) Regulation 2015.

1.19 A similar power is set out at section 12 of the NHFIC Act. Instruments made under section 12 of the NHFIC Act are also exempt from disallowance. Item 8 of Schedule 2 to the Treasury Laws Housing Bill would amend the NHFIC Act to more clearly set out the circumstances in which an entity may apply for a loan, grant, guarantee or for capacity building in circumstances where an Investment Mandate under the NHFIC Act provides that Housing Australia must consider such an application.

1.20 As noted above, the committee's expectation is that any exemption from disallowance will be extensively justified within the explanatory materials to the bill. Such a justification should include a discussion of the exceptional circumstances that

15 Clause 41. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

16 Subclause 41(3).

17 Subclause 41(4).

18 Clause 45.

are said to justify the exemption. In this instance, the explanatory memorandum to the HAFF Bill states:

> The Government considers it is appropriate that a direction under subclause 41(1) of the HAFF Bill is not subject to disallowance. These directions are operational in character. The HAFF Bill would provide adequate scrutiny of directions comprising the HAFF Investment Mandate through mandated consultation with the Future Fund Board (clause 44). Exemption from disallowance together with consultation would give the Future Fund Board necessary certainty when investing through the HAFF. While it would be possible to provide that a direction under subclause 41(1) does not come into effect until disallowance periods have expired, this approach would significantly impede the ability of Government to make urgent changes to the HAFF Investment Mandate in the national interest.[19]

1.21 As noted above, the committee has generally not considered that a desire for certainty is a sufficient justification for exempting an instrument from disallowance. In this case, the committee does not consider that the explanatory memorandum has adequately explained why the need for certainty is of such an exceptional nature as to justify removing democratic oversight over a law of the Commonwealth. In addition, it is not clear why there would be a need for urgency given that it appears there is sufficient time to draft the first mandate.

1.22 In light of the above, the committee requests the minister's further detailed advice in relation to the exceptional circumstances that are said to justify exempting an Investment Mandate from the usual parliamentary disallowance process.

Tabling of documents in Parliament[20]

1.23 Before giving the Future Fund Board an Investment Mandate direction under subclause 41(1), paragraph 44(1)(a) provides that the minister must send a draft direction to the Future Fund Board. The Future Fund Board may then make a submission on the draft direction which the minister is required to consider.[21]

1.24 Subclause 44(2) provides that any submission made by the Future Fund Board on a draft direction must be tabled in each House of the Parliament along with the direction. The committee notes that no timeframe is specified setting out when the minister must table the submission after they receive it.

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19 Explanatory memorandum, p. 30.

20 Subclause 44(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

21 Paragraphs 44(1)(b) and (c).

1.25 The committee therefore requests the minister's advice as to whether the bill could be amended to provide that a submission made by the Future Fund Board in accordance with paragraph 44(1)(b) must be tabled in both Houses of the Parliament within an explicitly stated timeline, for example, within 15 sitting days of the minister receiving a submission.

Migration Amendment (Aggregate Sentences) Bill 2023

Purpose	This bill seeks to amend the *Migration Act 1958* to amend the approach taken in that Act to sentencing for offences. This is being done in response to the decision of the Full Court of the Federal Court of Australia in *Pearson v Minister for Home Affairs* [2022] FCAFC 203.
Portfolio	Home Affairs
Introduced	Finally passed both Houses on 13 February 2023

Retrospective validation[22]

1.26 Section 501 of the *Migration Act 1958* (the Migration Act) relates to the refusal or cancellation of visas on character grounds. Subsections 501(2) and 501(3) of the Migration Act provide the Minister with discretionary powers to refuse to grant a visa, or to cancel a visa, if, among other things, the Minister reasonably suspects the relevant person does not pass the character test. Relevantly, paragraph 501(6)(a) provides that a person will not pass the character test if they have a 'substantial criminal record'. Subparagraph 501(3A)(a)(i) requires the Minister to cancel a visa if the Minister reasonably suspects that a person does not pass the test because they have a substantial criminal record. Paragraph 501(7)(c) provides that a person has a substantial criminal record if they have been sentenced to a term of imprisonment of 12 months or more. A person who has a substantial criminal record will automatically fail the character test, regardless of any mitigating factors which attended their offending.

1.27 In *Pearson v Minister for Home Affairs* (*Pearson*),[23] the Federal Court unanimously held that an aggregate sentence imposing a term of imprisonment does not, in and of itself, constitute a 'substantial criminal record' within the meaning given by paragraph 501(7)(c) of the Migration Act. The Court noted:

> The aggregate sentence of itself will say little to nothing about the seriousness of the individual offences for which indicative sentences have been given. Further, in the case where a sentencing judge fails to provide indicative sentences for individual offences, an aggregate sentence of imprisonment is not invalidated (s 53A(5)). In such circumstances, there could be no objective means by which the Minister could reach any

22 Schedule 1, item 1, proposed section 5AB; Schedule 1, item 4. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

23 *Pearson v Minister for Home Affairs* [2022] FCAFC 203.

reasonable suspicion, on the basis of s 501(7)(c), as to whether a person's visa ought to be mandatorily cancelled.[24]

1.28 This bill amends the Migration Act to instead provide that the Act applies in the same way to a single sentence, irrespective of whether the sentence was for one offence or multiple offences. The explanatory memorandum states that this outcome is intended to apply regardless of the perceived seriousness of any individual offence.[25] In the context of section 501, this means that any person who has received a single sentence of 12 months imprisonment, or more, would fail the character test even if that term of imprisonment was imposed for multiple convictions.

1.29 Item 3 of Schedule 1 to the bill provides that the amendment introduced by the bill applies in relation to things that came into existence or were obtained before commencement of the bill, offences that occurred before commencement, and applications made before commencement. Additionally, item 4 of Schedule 1 to the bill retrospectively validates decisions which were rendered invalid by the decision in *Pearson*. For example, item 4 operates to retrospectively validate mandatory cancellation decisions made under subsection 501(3A) of the Migration Act, which were made on the basis of an aggregate sentence prior to the decision in *Pearson*.

1.30 The committee notes that a basic principle of the rule of law is that the law must be sufficiently clear such that individuals subject to it can regulate their conduct accordingly. As a general rule, therefore, laws should only operate prospectively. Introducing laws retrospectively undermines legal clarity, certainty and reasonably formed expectations. Another core tenet of the rule of law is that government decision-makers are subject to the law. Retrospective validation of administrative decisions, if overused, can also undermine public confidence in this element of the rule of law. Related to this point, the committee also notes that retrospective validation of decisions made by officers of the Commonwealth is apt to deprive the constitutionally entrenched minimum provision of judicial review of its practical utility. The committee therefore has long-standing scrutiny concerns in relation to provisions which have the effect of applying retrospectively or retrospectively validating administrative decisions. These concerns will be particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

1.31 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. If an individual's interests will, or may, be affected by the retrospective application of a provision, the

24 *Pearson v Minister for Home Affairs* [2022] FCAFC 203 [45].

25 Explanatory memorandum, p. 2.

explanatory memorandum should set out the exceptional circumstances that nevertheless justify the use of retrospectivity.

1.32 In this instance, the explanatory memorandum states that the retrospective validation of past decisions '…upholds community safety in relation to persons with a history of serious offending and the principle that persons seeking to migrate to Australia should uphold Australia's laws.'[26] The statement of compatibility notes that the effect of the bill will be that several persons who were released as a result of the *Pearson* decision will once again be subject to immigration detention.[27] The statement of compatibility also states that 'perverse' situations are apt to arise as a result of the *Pearson* decision because section 501 could operate to provide that persons who automatically fail the character test may have received shorter sentences than persons who do not automatically fail the test.[28]

1.33 However, the committee notes that it could similarly be argued that the amendment introduced by this bill is apt to introduce perverse situations. As the Court noted in *Pearson*:

> Self-evidently, an aggregate sentence may be arrived at after conviction of a series of lesser offences, none of which on their own could render a person liable to have his or her visa mandatorily cancelled.[29]

1.34 The approach taken by the bill is to introduce a fixed rule leading to automatic cancellation of a visa for persons who have received a sentence of 12 months or greater, regardless of the circumstances of the particular case at hand. This approach is explicitly intended to reduce the flexibility available to the Minister, noting that it would still have been available to the Minister to exercise their discretionary powers under either subsections 501(2) or 501(3) to cancel a visa. The committee notes, however, that the introduction of a fixed rule leading to automatic cancellation of a visa is likely to introduce anomalies given the particularity and fact specificity involved in sentencing decisions. In addition, the committee notes that in some ways the approach taken by the bill reduces consistency, noting that certain jurisdictions do not allow for aggregate sentences to be imposed, with the effect that paragraph 501(7)(c) of the Migration Act may apply differently to persons who were convicted in different jurisdictions. Thus in this legislative context, the importance of consistency does not itself suggest a sufficient justification for retrospectivity.

1.35 The explanatory memorandum provides a further justification for the retrospective validation introduced by the bill, explaining that:

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26 Explanatory memorandum, p. 3.

27 Statement of compatibility, p. 16.

28 Statement of compatibility, p. 13.

29 *Pearson v Minister for Home Affairs* [2022] FCAFC 203 [47].

> The Bill does not change, limit or expand the circumstances in which aggregate sentences are considered for all relevant purposes of the Migration Act. This Bill simply confirms the Government's long-held understanding that aggregate sentences can be taken into account for all relevant purposes under the Migration Act.[30]

1.36 Although the committee accepts that retrospectivity may be necessary to respond to unanticipated court rulings, the committee takes the view that retrospective application of the law should not be the default position but rather, should only be introduced in exceptional and well-justified circumstances. The mere fact that a court interpretation was not expected or is considered by the executive to introduce anomalies into a legislative scheme is not sufficient, in and of itself, to justify retrospective validation. The fact that a court's interpretation of the law may differ from the understanding of the executive is part and parcel of the routine operation of Australia's constitutional system of government which is premised on the separation of judicial power.

1.37 The committee's view is that bills which propose to alter court rulings with retrospective effect should be justified with reference not only to exceptional circumstances but also to the effect that too frequent a resort to retrospective validity may have on public confidence that the government is bound by the law.

1.38 In this context, the committee notes that judicial review is entrenched by section 75(v) of the Constitution to ensure that executive decisions are not given legal force which they do not have in law. Subclauses 4(3) and 4(4) of the bill indicate that the validation provisions apply 'for all purposes'. However, the explanatory materials do not specifically indicate how these provisions apply in relation to instances where cancellation decisions have been successfully invalidated by a court or where proceedings have been instituted.

1.39 Given the significant issues canvassed above and the speed with which the bill passed through the Parliament, the committee considers that senators may not have been provided an adequate opportunity to thoroughly consider the minister's justification for the bill, as stated in the explanatory memorandum. The committee notes that the need for urgent retrospective legislative action does not appear well justified, particularly given that the explanatory materials do not canvass other alternatives that might have been implemented to respond to the *Pearson* decision and to ensure the safety of the Australian community. In this regard, the committee reiterates that the 'automatic' cancellation for visas under subparagraph 501(3A)(a)(i) on the basis of a substantial criminal record is not the only path available under the Migration Act for visa cancellation. It is unclear why these alternatives could not have provided a workable solution in this case.

30 Explanatory memorandum, p. 2.

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

- **what alternative approaches were available to respond to the *Pearson* decision and the general concern for community safety; and**
- **in light of the potential effect of retrospective validation on the integrity of Australia's rule of law system and the significant impact of this bill on individuals, why these alternative approaches could not have been implemented in this case; and**
- **how the retrospective validation of decisions under the *Migration Act 1958* is intended to interact with decisions which have been successfully invalidated by a court or where proceedings have been instituted.**

Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Bill 2023

Purpose	This bill seeks to amend the *Migration Act 1958* to allow the minister to implement a visa pre-application process, involving random selection of eligible persons who will then be permitted to apply for a relevant visa
Portfolio	Home Affairs
Introduced	House of Representatives on 16 February 2023

Significant matters in delegated legislation

Automated decision-making[31]

1.41 The bill proposes to establish a new framework for a visa pre-application process. However, much of the detail of this framework is left to delegated legislation. The bill seeks to insert proposed subsection 46C(1) into the *Migration Act 1958.* Proposed subsection 46C(1) provides that the Minister may arrange for a visa pre-application process to be conducted in relation to one or more visas, if the necessary regulations are in force. The explanatory memorandum explains that a visa pre-application process involves the random selection of eligible persons who can then apply for a relevant visa.[32]

1.42 Proposed subsection 46C(14) provides that the Minister may, by legislative instrument, determine rules that apply in relation to the conduct of a specified visa pre-application process. Proposed subsection 46C(15) provides that a determination made under subsection 46C(14) must deal with eligibility requirements for the registration of a person as a registered participant in a visa pre-application process and also provides a list of non-exhaustive factors the Minister may include. These factors relate to arrangements for the conduct of the visa pre-application process and the registration of persons as registered participants, including the manner in which a person may register. Paragraph 46C(21)(c) provides that an eligibility requirement for the registration of a person as a registered participant must be objective.

1.43 The bill also seeks to insert additional provisions that a ministerial determination may deal with. Proposed subsection 46C(17) provides that a determination may provide for different rules for different visa pre-application processes. Proposed subsection 46C(18) provides that a determination may provide

31 Schedule 1, item 3, proposed section 46C and subsection 46C(11). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii) and (iv).

32 Explanatory memorandum, p. 2.

for different rules for different classes of person. Proposed subsection 46C(11) would allow the Minister to arrange for the use of a computer program to conduct a visa pre-application process or part of a visa pre-application process.

1.44 The committee's view is that significant matters should generally be included in primary legislation unless a sound justification for the use of delegated legislation is provided. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill. The committee considers that leaving significant elements of a legislative scheme to delegated legislation may considerably limit the ability of Parliament to exercise appropriate oversight of legislative schemes. Broad powers providing for the executive to set out the key details of a visa application scheme are one such significant matter. This is particularly so considering that it is proposed to use a computer program to make decisions under the scheme.

1.45 The committee notes that administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by a computer rather than by a person—may lead to legal error. Automated systems for making non-discretionary decisions may not raise similar concerns in relation to legal error,[33] however, even in these cases, automated processes may reduce transparency. In addition, non-discretionary decisions which are made through automated processes should generally still be subject to appropriate safeguards, such as a requirement that a person may substitute a decision made by an automated process that they consider on reasonable grounds to have been made incorrectly.

1.46 Given these concerns, the committee considers that the explanatory materials for bills which propose to allow for the use of automated processes should explain whether all of the relevant decisions are non-discretionary and what safeguards are in place in relation to the use of automated process. The committee also considers that it is generally more appropriate to include safeguards relating to the use of automated processes within a bill, rather than within delegated legislation.

1.47 In this case, the decision to be made (who can apply for a particular visa) is intended to be a randomised process, and the eligibility requirements for the registration of a person must be objective. The relevant decisions are therefore intended to be non-discretionary.

1.48 The explanatory memorandum does not explain why it is proposed to include this process in delegated legislation, though in relation to a number of provisions the

33 Commonwealth Ombudsman, *Automated Decision-making Better Practice Guide*, March 2020, p. 9.

explanatory materials raise a desire for flexibility in approach.[34] In relation to the use of a computer program, the explanatory memorandum states that:

> …the initial registration to participate in a ballot will require completion of an online form, and the random selections of registered participants in the ballot will be undertaken by a computer program. Officers of the Department of Home Affairs will determine the number and timing of the occasions when computer selections will occur and also the number of persons to be selected by the computer on each occasion. Operating on the basis of those instructions, the computer will undertake random selections from among the persons who are registered participants in the ballot when the selections occur.
>
> …
>
> New subsection 46C(15) provides that a ministerial determination must deal with eligibility requirements for the registration of a person in a ballot. These will be objective matters such as the kind of passport that must be held and the person's age.[35]

1.49 While the visa pre-application process is intended to be non-discretionary and therefore may be appropriate to automate, the committee nevertheless considers that safeguards in relation to the development and application of the automated process should be included in the bill rather than relying on delegated legislation. This is particularly so given the significant impact this decision could have on individuals and their ability to apply for potentially any category of visa.

1.50 In line with the Commonwealth Ombudsman's *Automated Decision-making Better Practice Guide*,[36] not only is integrity of the system important, but transparency and accountability of the system is necessary. Given this, the absence of any safeguards on the face of the bill in relation to the use of automated processes is a matter of concern to the committee.

1.51 The committee notes that, aside from the requirement in proposed paragraph 46C(21)(c) that the eligibility requirements for the registration of a person as a registered participant must be objective, there is nothing further in the bill to ensure the integrity of any automated system. Further, there is no guidance in the explanatory memorandum on how a computerised system may operate or what kind of transparency mechanisms are in place to ensure the correct running of the system.

1.52 The committee considers that given the significance of the proposed scheme on an individuals' ability to apply for various categories of visa, further safeguards on

34 Explanatory memorandum, pp. 8 and 10.

35 Explanatory memorandum, p. 9.

36 Commonwealth Ombudsman, *Automated Decision-making Better Practice Guide*, March 2020, pp. 25-27.

the operation of automated processes should be included within the bill itself and could include:

- ensuring publicly available information about the use and operation of the automated system;
- allowing a departmental officer to review data inputted to ensure any mistakes made by an individual do not preclude them from eligibility; and
- ongoing monitoring and evaluation of the computer system to ensure it is operating as intended.

1.53 It is further noted that while the bill has been introduced in anticipation of the creation of the Pacific Engagement Visa, the bill provides for the power to undertake visa pre-application processes in relation to *any* visa. The committee considers that the rationale for allowing the visa pre-application process to apply to any visa has not been sufficiently explained within the bill's explanatory materials. The committee's concerns in relation to the inclusion of significant matters in delegated legislation are heightened given the potentially broad application of the regulation making powers introduced by the bill.

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

- **why it is considered necessary and appropriate to include much of the detail of the operation and requirements of a visa pre-application process in delegated legislation;**
- **what safeguards are in place, if any, to ensure that automated decisions will be made appropriately and not subject to legal error;**
- **whether the bill can be amended to include specific safeguards that ensure the transparency and integrity of any automated system used; and**
- **why it is considered necessary to provide for such a general power to create visa pre-application processes in relation to any category of visa.**

Treasury Laws Amendment (2023 Measures No.1) Bill 2023

Purpose	Schedule 1 to the bill seeks to amend amends the *Corporations Act 2001* to amend the process by which ASIC deals with applications for the Financial Advisers Register. Schedule 2 to the bill seeks to provides the Australian Accounting Standards Board with functions to develop and formulate sustainability standards. Schedule 3 to the bill seeks to implement several recommendations of the Tax Practitioners Board Review. Schedule 4 to the bill amends the income tax system in relation to the tax treatment of off-market share buy-backs and in respect of selective share cancellations. Schedule 5 to the bill seeks to amend the *Income Tax Assessment Act 1997* to prevent certain distributions that are funded by capital raisings from being frankable.
Portfolio	Treasury
Introduced	House of Representatives on 16 February 2023

Automated decision-making[37]

1.55 Item 25 of Schedule 1 to the bill proposes to introduce proposed section 921ZF into the *Corporations Act 2001* to allow for the Australian Securities and Investments Commission (ASIC) to use assisted decision making. Proposed subsection 921ZF(1) provides that ASIC may arrange for the use, under ASIC's control, of processes to assist decision making (such as computer applications and systems) for any purposes for which ASIC may make decisions in the performance or exercise of ASIC's functions or powers under Division 8C of the *Corporations Act 2001*. Division 8C relates to the registration of relevant providers.[38] Proposed subsection 921ZF(2) provides that a decision made under subsection 921ZF(1) using assisted decision making is taken to

37 Schedule 1, item 25, proposed section 921ZF. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

38 A 'relevant provider' is defined in section 910A of the *Corporations Act 2001* to mean a person who is an individual and is either a financial services licensee, an authorised representative of a financial services licensee, an employee or director of a financial services licensee, or an employee or director of a related body corporate of a financial services licensee, and is authorised to provide personal advice to retail clients, as the licensee or on behalf of the licensee, in relation to relevant financial products.

be a decision made by ASIC. Proposed subsection 921ZF(3) provides that ASIC may substitute a decision for a decision made with the assistance of a process under subsection 921ZF(1) if ASIC is satisfied that the initial decision is incorrect.

1.56 Administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by a computer rather than by a person—may lead to legal error. While automated systems for making decisions may be suitable where they involve non-discretionary elements,[39] automated processes may reduce transparency and be affected by error.

1.57 Where a bill includes a provision which enables decisions to be made through an automated process, the committee expects the explanatory memorandum to the bill to address:

- why it is considered necessary and appropriate to provide for automated decision-making of the particular decision;
- how default administrative law principles and requirements will be maintained in the making of automated decisions;
- what safeguards are in place to ensure that automated decisions will be made appropriately and will not be subject to legal error, and whether these safeguards are contained in law or policy; and
- if a broad power to allow automated decision-making is included in the bill, why it would not be appropriate to limit the power to particular decisions.

1.58 In this instance, the explanatory memorandum states that:

> The requirement for relevant providers to be registered requires ASIC to make a large number of decisions in response to registration applications. ASIC is required to decide for each registration application that it receives, either to approve or refuse the application.
>
> The use of assisted decision-making processes, including computer automated and computer-assisted decision making, enables ASIC to deliver a high standard of service in an effective and efficient manner. The new law provides a sound legislative basis to ensure these benefits can be realised. The decision-making process lends itself to automation because the circumstances in which ASIC must approve or refuse an application are prescribed.[40]

1.59 The explanatory memorandum further notes some safeguards that exist to ensure the appropriate use of assisted decision-making processes, stating:

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39 Commonwealth Ombudsman, *Automated Decision-making Better Practice Guide*, March 2020, p. 9.

40 Explanatory memorandum, p. 11.

- the use of such processes must be arranged by ASIC and used under its control;
- any decision made by such processes must comply with all of the requirements of the legislative provisions under which the decision was made. This means, for instance, that any review mechanism applicable to the decision remains in place; and
- ASIC may change a decision made by an assisted decision-making process if it is satisfied that the decision is wrong. In this circumstance, a person would not need to request a review of the incorrect decision because ASIC is able to change the decision on its own motion.[41]

1.60 The committee welcomes the inclusion of these safeguards. However, while the committee acknowledges the high volume of decisions ASIC is required to make to register relevant providers, it is unclear to the committee why the power to allow assisted decision-making could not be narrowed to particular decisions. The committee is concerned that these provisions allow ASIC to use assisted decision making for *any* purposes for which ASIC may make decisions under Division 8C.

1.61 The breadth of decisions that may be engaged and the lack of specificity about the kinds of assisted decision-making processes that may be adopted makes it difficult to assess whether the use of assisted decision making in individual cases is appropriate. The committee considers that the safeguards included are important in protecting the integrity of any assisted decision-making process. However, given the breadth of decisions this may be applied to, it is unclear whether the safeguards will be effective in all cases.

1.62 The committee requests the Assistant Treasurer's detailed advice as to:

- **why it is considered necessary and appropriate to allow the use of automated decision-making for *any* decision;**
- **what processes ASIC has in place to ensure the integrity and transparency of any assisted decision-making process, and whether these will be included in law or policy;**
- **whether all of the relevant decisions made using assisted decision-making processes will be non-discretionary and, if not, what processes are in place to ensure decision-making will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and**
- **what processes ASIC has in place to identify potentially incorrect decisions made through an assisted decision-making process.**

41 Explanatory memorandum, p. 11.

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

1.63 The committee notes that the following private senators' and private 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
Criminal Code Amendment (Inciting Illegal Disruptive Activities) Bill 2023	Schedule 1, item 3, proposed subsection 474.51(1)	The provision may raise scrutiny concerns under principle (i) in relation to significant penalties which have not been adequately justified within the explanatory memorandum.
	Schedule 1, item 3, proposed subsections 474.49(4), 474.50(4), and 474.51(4)	The provisions may raise scrutiny concerns under principle (i) in relation to the reversal of the evidential burden of proof.
Migration Amendment (Strengthening the Character Test) Bill 2023[42]	Schedule 1, items 5 and 6	The provisions may raise scrutiny concerns under principle (i) in relation to trespass on personal rights and liberties, and principle (ii) in relation to the inclusion of broad discretionary powers.
Northern Territory Safe Measures Bill 2023	Proposed subsections 170E(2), 170E(4), 170E(5), 170E(7), 170F(2), 170F(4), 170F(5), 170F(9) and proposed subsection 170J(2)	The provisions may raise scrutiny concerns under principle (i) in relation to the reversal of the legal burden of proof.
	Proposed subsections 170E(1), 170F(1), and 170F(7)	The provisions may raise scrutiny concerns under principle (i) in relation to significant penalties.

42 This bill appears to be identical to the Migration Amendment (Strengthening the Character Test) Bill 2021, introduced in the House of Representatives on 24 November 2021. See the committee's scrutiny concerns in Senate Scrutiny of Bills Committee, *Scrutiny Digest 18 of 2021* (1 December 2021) pp. 21–24 and the committee's comments on a similar bill in Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2018* (14 November 2018) pp. 8–12.

Bills with no committee comment

1.64 The committee has no comment in relation to the following bills which were introduced into the Parliament between 6 – 16 February 2023:

- Australia Council Amendment (Creative Australia) Bill 2023
- Commonwealth Electoral Amendment (Cleaning up Political Donations) Bill 2023
- Electoral Legislation Amendment (Lowering the Voting Age) Bill 2023
- Fair Work Amendment (Prohibiting COVID-19 Vaccine Discrimination) Bill 2023
- Migration (Visa Pre-application Process) Charge Bill 2023
- Migration Amendment (Evacuation to Safety) Bill 2023
- National Housing Supply and Affordability Council Bill 2023
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Stop PEP11 and Protect Our Coast) Bill 2023
- Royal Commissions Amendment (Enhancing Engagement) Bill 2023
- Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Bill 2023

Commentary on amendments and explanatory materials

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

- Higher Education Support Amendment (2022 Measures No. 1) Bill 2022;[43]
- National Housing Supply and Affordability Council Bill 2023;[44] and
- Treasury Laws Amendment (Modernising Business Communications and other Measures) Bill 2022.[45]

43 On 8 February 2023, the Senate agreed to 5 Opposition amendments to the bill.

44 On 16 February 2023, Dr Haines moved amendments (1) to (4) and (7) to the bill. Additionally, Ms Le moved an amendment to the bill.

45 On 6 February 2023, the Assistant Treasurer (Mr Jones) presented 2 amendments and a supplementary explanatory memorandum to the bill.
On 7 February 2023, the Assistant Minister for Trade and Assistant Minister for Manufacturing (Senator Ayres) tabled a revised explanatory memorandum to the bill.

Chapter 2

Commentary on ministerial responses

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

Export Control Amendment (Streamlining Administrative Processes) Bill 2022

Purpose	This bill seeks to amend the *Export Control Act 2020* to ensure an appropriately flexible and fit-for-purpose information-sharing framework, and to improve administrative processes and clarify the intent of a provision of the Act.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 30 November 2022
Bill status	Before the Senate

Privacy

Significant matters in delegated legislation[1]

2.2 Schedule 1 to the bill seeks to set out new information disclosure requirements for the Export Control Framework. The explanatory memorandum states that the intention of Schedule 1 is to provide for specific authorisations for the use and disclosure of relevant information, while ensuring that protected information is afforded appropriate safeguards.[2] Much of the detail as to how the new information disclosure scheme would work is proposed to be set out in delegated legislation.

2.3 In *Scrutiny Digest 1 of 2023* the committee requested the minister's more detailed advice in relation to why it is both necessary and appropriate to include new rule-making powers in proposed section 397E, proposed paragraph 397F(1)(e), and in the definition of 'entrusted person' in the proposed amendment to section 12.

1 Schedule 1, item 12. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iv).

2 Explanatory memorandum, p. 5.

2.4 The committee also requested the minister's advice in relation to the appropriateness of amending the bill to provide enforceable consultation requirements in relation to these new rule-making powers.[3]

Minister's response[4]

2.5 The minister advised that the proposed rule-making power to prescribe other Commonwealth officers as an 'entrusted person' is necessary to ensure that non-departmental officers can be authorised to use and disclose information in appropriate circumstances, such as when an officer has been seconded to an inter-agency taskforce.

2.6 In relation to the broad rule-making power at proposed section 397E, the minister advised that one of the reasons for the rule-making power in proposed section 397E is to cover those classes of person who only have functions and powers under the various export control rules, but who are not mentioned in the *Export Control Act 2020* (the Export Act). For example, the minister advised that qualified marine surveyors may be required to exercise information disclosure powers but do not have functions or powers specified within the Export Act. Qualified marine surveyors perform functions and powers pursuant to the Export Control (Plants and Plant Products) Rules 2021 in carrying out bulk vessel surveys for the purpose of deciding whether the vessel is suitable to transport prescribed plants or plant products but do not carry out functions under the Act or any other legislative instrument made under the general Export Control Framework.

2.7 The minister further advised that the broad rulemaking power set out at proposed section 397E is necessary given the structure of the export control legislation, which provides for the rules to specify the detailed arrangements for each export commodity with only high-level information included within the Act itself.

2.8 Finally, the minister advised that it is not necessary to provide enforceable consultation requirements in relation to the new rulemaking powers, given the consultation requirements that are already present in the *Legislation Act 2003.*

Committee comment

2.9 The committee thanks the minister for this response.

2.10 However, the committee remains concerned about the breadth of the information disclosure powers proposed to be introduced by the bill, and by the level of detail which the bill proposes to include within delegated legislation. In particular, the committee notes that the bill would authorise non-Commonwealth employees to

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3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 6–9.

4 The minister responded to the committee's comments in a letter dated 21 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

exercise the extensive new information disclosure powers,[5] and that the bill would authorise disclosure in a wide variety of circumstances, including to foreign governments,[6] and in circumstances specified within the rules.[7]

2.11 The committee notes that the minister's response did not address the use of information disclosure powers by non-Commonwealth employees.

2.12 Further, while acknowledging that some degree of flexibility is required in order to respond appropriately to rapidly changing circumstances, the committee does not consider that the minister's explanation adequately addresses why broad rule making powers, such as those set out at proposed section 397E, are either necessary or appropriate in this context. As previously noted, the committee considers that the justification provided in the explanatory memorandum is not sufficient. That is, the committee considers that the argument that new rulemaking powers are necessary due to a general uncertainty of future regulatory needs is overbroad in the context of the Export Act. The committee notes that the minister's response did not fully address this aspect of the committee's concerns.

2.13 The committee thanks the minister for their inclusion of helpful examples outlining the types of persons who may be covered by rules made under proposed section 397E. However, the committee considers that it would be possible to allow the rules to cover classes of person who only have functions and powers under the various export control rules while still maintaining appropriate limits on any new rulemaking powers.

2.14 In relation to the minister's advice on the consultation requirements within the *Legislation Act 2003,* the committees notes that it generally looks favourably on the inclusion of enforceable consultation requirements beyond the default requirements set out within that Act when significant matters are proposed to be included within delegated legislation. The committee's concerns are heightened in this instance given that the detail proposed to be included within delegated legislation is proposed to be included within rules made by the Secretary, rather than within regulations.

2.15 The committee requests the minister's further justification in relation to allowing non-Commonwealth employees to exercise broadly drafted information disclosure powers. The committee's consideration of this justification will be assisted if the minister outlines what safeguards are in place in relation to this aspect of the new disclosure powers, and whether those safeguards are contained in law or policy.

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5 For example, proposed subsection 388(2) of the bill would allow 'third-party authorised officers' and 'nominated export permit issuers' to exercise these powers.

6 Schedule 1, item 12, proposed section 389.

7 Schedule 1, item 12, proposed section 397E.

Reversal of the evidential burden of proof[8]

2.16 Item 12 of Schedule 1 to the bill seeks to insert proposed section 397G into the Export Act to provide that it is an offence to use or disclose protected information.

2.17 Proposed subsection 397G(3) provides that this offence does not apply if the use or disclosure of the information is required, or authorised by the Export Act or a law of the Commonwealth, or a state or territory law that is prescribed by the rules. Similarly, proposed subsection 397G(4) provides that the offence does not apply if the use or disclosure occurred in good faith and was undertaken in the performance of functions and duties or assisting another person in the performance of their functions or duties.

2.18 A defendant would bear the evidential burden of proof in relation to both of these defences.

2.19 In *Scrutiny Digest 1 of 2023* 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. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[9]

2.20 The committee suggested that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence. The committee also requested the minister's advice in relation to this matter.[10]

Minister's response[11]

2.21 In relation to the offence-specific defence at proposed subsection 397G(3), the minister advised that, in circumstances where a defendant used or disclosed information in reliance on a law, information about which law they were purporting to rely on is peculiarly within the knowledge of the defendant.

2.22 Similarly, the minister advised that the offence-specific defence at proposed subsection 397G(4) is justified because information about whether the defendant

8 Schedule 1, item 12, proposed subsections 397G(3) and (4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

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

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 9–11.

11 The minister responded to the committee's comments in a letter dated 21 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

acted in good faith is information which is peculiarly within the knowledge of the defendant who would be expected to understand their reasons for disclosure as part of their employment duties. The minister considered that whether a defendant has acted in good faith would require consideration of the defendant's subjective belief about why they considered they were authorised to use or disclose the information when performing their functions or duties or assisting another person in the performance of their functions or duties.

2.23 The minister also noted that these provisions are consistent with similar provisions which are proposed to be introduced into the *Biosecurity Act 2015* by the Biosecurity Amendment (Strengthening Biosecurity) Bill 2022, and that this consistency is important to ensure that departmental officers can work across both legislative regimes.

Committee comment

2.24 The committee thanks the minister for this response.

2.25 However, the committee does not agree that information about whether a particular disclosure was made in accordance with a certain Commonwealth or state or territory law could be said to be peculiarly within the knowledge of a defendant. Rather, this appears to be a matter of law which the prosecution could readily ascertain. The committee therefore continues to have concerns in relation to the reversal of the evidential burden of proof under proposed subsection 397G(3).

2.26 The committee notes that minister's advice in relation to proposed subsection 397G(4).

2.27 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 under proposed subsection 397G(3).

2.28 In relation to the reversal of the evidential burden of proof under proposed subsection 397G(4), the committee makes no further comment.

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

Purpose	This bill seeks to amend the *Higher Education Support Act 2003* to allow the minister to make grants: • to support arrangements to increase industry-led postgraduate research; and • to assist higher education providers to undertake programs of research which: ○ progress the development of technologies and services to a state of commercial investor readiness; and ○ are in sectors aligned with areas of national priority.
Portfolio	Education
Introduced	House of Representatives on 1 December 2022
Bill status	Before the Senate

Tabling of documents in Parliament[12]

2.29 Item 3 of Schedule 1 to the bill seeks to insert proposed section 42-1 into the *Higher Education Support Act 2003* (Higher Education Support Act). Proposed section 42-1 provides that the Australia's Economic Accelerator (AEA) Advisory Board must make a research commercialisation strategy which will be in force for 5 years.

2.30 Proposed section 42-5 provides that the AEA Advisory Board must also formulate an annual investment plan. It appears that investment plans made under proposed section 42-5 are not intended to be legislative instruments. However, there is nothing on the face of the bill clarifying this matter.

2.31 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to whether the bill could be amended to provide that:

- the research commercialisation strategy must be tabled in both Houses of the Parliament within 15 sitting days of the minister receiving a strategy; and

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

- the investment plan formulated by the Australia's Economic Accelerator Advisory Board is required to be tabled in each House of the Parliament.[13]

Minister's response[14]

2.32 The minister advised that tabling the research commercialisation strategy within 15 sitting days of the minister receiving a strategy might impact the ability of the minister to properly scrutinise the document and seek expert advice where appropriate.

2.33 The minister advised that the research commercialisation strategy will be tabled as soon as practicable after full consideration and quality assurance processes have been completed.

2.34 The minister also advised that the investment plan will contain several written policies which may, from time to time, contain certain sensitive commercial and financial information, and therefore that it may not be appropriate to table these documents in both Houses of Parliament due to the risks associated with that information being broadly disseminated.

Committee comment

2.35 The committee thanks the minister for this response.

2.36 Whilst noting the minister's response, the committee reiterates its consistent scrutiny view that tabling documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. The committee considers that it would be more appropriate if the investment plan were tabled in both Houses of the Parliament, with any sensitive information being redacted. Tabling the investment plan would promote transparency and accountability.

2.37 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 investment plan is required to be tabled in each House of the Parliament.

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13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 12–13.

14 The minister responded to the committee's comments in a letter dated 22 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Reversal of the evidential burden of proof[15]

2.38 Item 7 of Schedule 1 to the bill seeks to insert proposed section 181-15 into the Higher Education Support Act to provide exceptions to an offence for an officer to disclose or make a copy of certain information relating to Australia's Economic Accelerator program where:

- the information was obtained in the course of the officer's employment;
- the information is personal information; and
- the information is likely to cause competitive detriment to a person or is likely to found an action by a person for a breach of a duty of confidence.

2.39 In *Scrutiny Digest 1 of 2023* the committee requested the minister's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.

2.40 The committee suggests that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence. The committee also requested the minister's advice in relation to this matter.[16]

Minister's response[17]

2.41 The minister advised that the offence-specific defences under proposed subsections 181-15(3) and (4) of the bill recreate the 'lawful authority' defence of general applicability found in section 10.5 of the *Criminal Code Act 1995* (the Criminal Code) and referred to in the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.[18]

2.42 The minister advised that the exceptions to the offences under proposed section 181-15 do not extend to any scenarios where the general Criminal Code defence of lawful authority does not already apply. The minister further advised that given the exceptions are intended to operate identically to the existing defence of lawful authority, it is appropriate to use offence-specific defences in this circumstance.

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

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 13–15.

17 The minister responded to the committee's comments in a letter dated 22 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

18 'Lawful authority' is a defence of general application to a criminal offence and is neither an element of the relevant offence or an offence-specific defence as referred to in *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, pp. 48–49.

Committee comment

2.43 The committee thanks the minister for this response.

2.44 The committee notes the minister's advice that the exceptions under proposed subsection 181-15(3) and (4) are consistent with the Criminal Code and the *Commonwealth Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

2.45 However, the committee notes that, unlike the general defences set out in the Criminal Code, the offence-specific defence set out at proposed subsections 181-15(3) and (4) reverse the evidential burden of proof. Given that the minister has not explained how the matters contained within those defences are peculiarly within the knowledge of the defendant, the committee does not consider that the minister has adequately addressed the committee's concerns.

2.46 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 181-15(3) and (4) in relation to matters that do not appear to be peculiarly within the knowledge of the defendant.

Inspector-General of Intelligence and Security and Other Legislation Amendment (Modernisation) Bill 2022

Purpose	This bill seeks to amend the *Inspector-General of Intelligence and Security Act 1986* to ensure that the Inspector-General of Intelligence and Security's enabling legislation is adapted to contemporary circumstances and supports appropriate information sharing.
Portfolio	Attorney-General
Introduced	House of Representatives on 30 November 2022
Bill status	Before the House of Representatives

Abrogation of privilege against self-incrimination[19]

2.47 Subsection 18(1) of the *Inspector-General of Intelligence and Security Act 1986* (the Act) empowers the Inspector-General to require a person to give them information or documents relevant to a matter that is being inquired into by the Inspector-General under the Act. Subsection 18(6) provides for a limited use immunity, providing that the giving of information, production of a document or the answer to a question is not admissible in evidence against a person except in a prosecution for:

- an offence against section 18;
- an offence against section 137.1 of the Criminal Code that relates to section 18;
- an offence against section 6 of the *Crimes Act 1914*; or
- an offence against sections 11.1, 11.4 or 11.5 of the Criminal Code.

2.48 Item 87 of Schedule 1 to the bill introduces paragraph 18(6)(ca) to add that an offence against sections 137.2 (false or misleading information and documents), 145.1 (using forged document) or 149.1 (obstruction of Commonwealth public officials) of the Criminal Code would also constitute exceptions under subsection 18(6). Item 88 of Schedule 1 introduces paragraph 18(6)(cb) to provide for an offence against Division 3 of Part III of the *Crimes Act 1914* (offences relating to evidence and witnesses) that

19 Schedule 1, part 1, items 87 and 88, proposed paragraphs 18(6)(ca) and 18(6)(cb). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

relates to section 18 as an additional exception to the use immunity already provided under subsection 18(6).

2.49 These amendments expand the offences a person could be prosecuted for after being compelled to provide information under subsection 18(1).

2.50 In *Scrutiny Digest 1 of 2023* the committee requested the Attorney-General's more detailed advice regarding:

- whether the bill could be amended to provide derivate use immunity; or
- at a minimum, provide that the Inspector-General 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.[20]

Attorney-General's response[21]

2.51 The Attorney-General advised that the ability for the Inspector-General of Intelligence and Security (IGIS) to use and disclose information derived from information obtained in abrogation of the privilege against self-incrimination is necessary to review the activities of intelligence agencies for legality, propriety and consistency with human rights, in circumstances where those activities might not otherwise have an avenue for review. The Attorney-General noted this is particularly important in respect of covert powers, with the benefit of effective oversight outweighing the impacts on the privilege against self-incrimination.

2.52 The Attorney-General advised that given these reasons, he does not consider it necessary to provide derivative use immunity or to require the IGIS to consider whether less coercive avenues are available to obtain the information prior to compelling a person to provide information.

Committee comment

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

2.54 The committee notes the Attorney-General's advice that given the function of the IGIS to provide oversight over intelligence agencies, it is not considered appropriate to provide for derivate use immunities or necessary to consider less coercive avenues to obtaining information prior to compelling a person to provide information.

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20 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 16–18.

21 The Attorney-General responded to the committee's comments in a letter dated 23 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.55 The committee reiterates its position that abrogating the privilege against self-incrimination undermines an important common law principle. There may be circumstances in which the privilege against self-incrimination can be overridden, such as where the public benefit in doing so significantly outweighs the loss of personal liberty. Nevertheless, derivate use immunity, which operates to prevent information obtained indirectly from being used in criminal proceedings against an individual, is an important safeguard in protecting individual rights and therefore the consequences of not providing it must be considered carefully in this balance.

2.56 The committee does not consider that the Attorney-General's response has adequately explained why it is appropriate not to provide derivative use immunity in this case, noting that such a justification should include consideration of the significant loss of personal liberty not providing derivative use immunity may imply for affected persons.

2.57 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination in circumstances where derivate use immunity is not provided.

Broad delegation of administrative powers or functions[22]

2.58 Item 129 of Schedule 1 to the bill seeks to insert proposed subsection 32AA(1A) into the Act to allow the Inspector-General to delegate any or all of their functions or powers under any other provision of the Act (other than subsection 32(3)), or any other Act, to a member of staff assisting the Inspector-General engaged under the *Public Service Act 1999* who the Inspector-General believes has appropriate expertise relating to the function or power delegated.

2.59 In *Scrutiny Digest 1 of 2023* the committee requested the Attorney-General's advice regarding whether subsection 32AA(1A) of the bill could be amended to limit the class of persons to whom powers or functions may be delegated or to set out with more specificity the powers or functions that may be delegated.[23]

Attorney-General's response[24]

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22 Schedule 1, item 129, proposed subsection 32AA(1A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 18–19.

24 The Attorney-General responded to the committee's comments in a letter dated 23 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.60 The Attorney-General advised that the bill clearly articulates the scope of the functions that can be delegated, limits the delegation to those persons who have appropriate expertise, and states that delegated functions would be exercised in accordance with written directions. The Attorney-General noted that there is a strong practical need for these powers and functions to be delegated.

Committee comment

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

2.62 The committee notes the Attorney-General's advice that the delegation powers set out in the bill are necessary and appropriately limited. However, while the committee acknowledges it is sometimes appropriate to delegate powers to a wide range of staff to allow for administrative efficiency, the committee remains concerned about the breadth of the powers or functions that can be delegated and to whom they can be delegated.

2.63 It is unclear to the committee from the Attorney-General's response why such a broad scope to delegate powers is necessary or, if the broad scope is necessary, why it is appropriate to delegate these powers or functions to such a broad class of people. While the committee acknowledges that flexibility is often needed in relation to delegations powers, it considers that it would still be possible to provide this flexibility with appropriate limits being placed on the exercise of the power. While the Attorney-General has advised that the bill limits the delegation to those persons who have appropriate expertise, it is unclear what the Inspector-General must consider before they believe someone has appropriate expertise.

2.64 The committee considers it preferable to limit on the face of the bill the class of persons to whom powers or functions can be delegated. Given the importance of the powers that may be delegated, the committee considers that it would have been appropriate to, at a minimum, provide some guidance as to how the Inspector-General may determine someone has appropriate expertise in relation to a delegated function or power.

2.65 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing a broad power to delegate all or any of the Inspector-General's functions or powers under any provision of the *Inspector-General of Intelligence and Security Act 1986,* other than subsection 32(3), to any staff member whom the Inspector-General believes has the appropriate expertise.

National Reconstruction Fund Corporation Bill 2022

Purpose	This bill seeks to establish the National Reconstruction Fund Corporation to support, diversify and transform Australia's industry and economy to secure future prosperity and drive sustainable economic growth.
Portfolio	Industry, Science and Resources
Introduced	House of Representatives on 30 November 2022
Bill status	Before the House of Representatives

Section 96 Commonwealth grants to the states[25]

2.66 This bill seeks to establish a National Reconstruction Fund Corporation (the Corporation). Clause 63 of the bill sets out the Corporation's investment functions in greater detail, including by providing that the Corporation may provide financial accommodation to the states and territories where financial accommodation relates to an economic priority area and is provided by way of a grant of financial assistance.[26] Clause 66 provides that the terms and conditions on which financial accommodation to a state or territory is provided must be set out in a written agreement between the Corporation and the state or territory.

2.67 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to confer a broad power to make grants of financial assistance in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised;
- 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 for grants of financial assistance made under clause 66 are:
  - tabled in the Parliament within 15 sitting days after being made; and
  - published on the internet within 30 days after being made.[27]

25 Clause 63. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

26 Paragraph 63(1)(d).

27 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 22–23.

Minister's response[28]

2.68 The minister advised that, while the legal mechanism to make payments to the states would be considered a 'grant' under section 96 of the *Constitution*, these payments would be subject to terms and conditions consistent with the forms of financial accommodation set out in the bill. To this end, the minister advised that paragraph 63(1)(d) of the bill, read jointly with the definition of 'financial accommodation',[29] gives the Corporation the power to provide various forms of debt to states and territories, including loans and guarantees but specifically not equity interests or monetary grants. In light of the requirements for 'financial accommodation' set out in the bill and the information provided in the explanatory memorandum about those requirements, the minister did not consider it necessary to provide further guidance about how financial accommodation might specifically be provided to the states.

2.69 The minister also advised that any agreement with a state or territory in relation to financial accommodation would contain commercial terms, which may also affect the interests of other entities. The minister advised that, as a result, and consistent with its nature as a commercial entity, it would be inappropriate for the Corporation to table its agreements for the provision of financial accommodation with any counterparties including the states and territories.

2.70 The minister also noted the accountability mechanisms provided for by the bill and elsewhere within primary legislation. For example, the Corporation is subject to the standard disclosure requirements under the *Public Governance, Performance and Accountability Act 2013*, and requirements within the bill to include certain information in each annual report, to report to the Ministers any failure to comply with the Investment Mandate, and to publish quarterly investment reports. The minister considered that the degree of accountability provided by these provisions and by processes such as Senate Estimates was appropriate.

Committee comment

2.71 The committee thanks the minister for this response.

2.72 The committee notes the minister's advice that, in practicality, the bill would not provide the Corporation with the power to make monetary grants, but rather, would provide a power to provide various forms of debt to states and territories, including loans and guarantees. The committee also notes the minister's advice in

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28 The minister responded to the committee's comments in a letter dated 22 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

29 See clause 5.

relation to the general requirements relating to this form of financial accommodation within the bill.

2.73 While welcoming this advice, the committee notes that its scrutiny concerns relate specifically to the appropriateness of delegating Parliament's constitutional power to provide grants to the states to the executive, in circumstances in which there is little information as to the terms and conditions of those grants within primary legislation. While acknowledging the limitations that apply to what a grant may relate to, the committee remains concerned that there is no information as to the terms and conditions which may be attached to such a grant.

2.74 In relation to the minister's advice that tabling the written agreements with the states and territories in relation to grants of financial assistance is not necessary, the committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are otherwise not available if the documents are merely available online. The committee notes that tabling documents within a House of Parliament is an important element of parliamentary scrutiny and oversight. This is particularly significant in this context in which parliamentary scrutiny over grants agreements contributes to the maintenance of the Parliament's role under section 96 of the Constitution.

2.75 From a scrutiny perspective, the committee does not consider that public reporting obligations are sufficient to address the committee's scrutiny concerns relating to not providing for agreements to be tabled in the Parliament, particularly noting that the public reporting processes noted by the minister do not appear to relate to the aspect of the bill highlighted by the committee. The committee considers that it would be possible to, at a minimum, table information relating to written agreements with any commercially sensitive information removed.

2.76 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of conferring on the Corporation a broad power to make grants to the states in circumstances where there is no guidance in the bill as to the terms and conditions on which grants may be made, and no requirement to table written agreements with the states containing those terms and conditions in the Parliament.

Exemption from disallowance
Broad discretionary power[30]

2.77 Clause 51 provides for the establishment of the National Reconstruction Fund Corporation Special Account (the Special Account). The explanatory memorandum states that it is intended that returns on investments made by the Corporation will be credited into the Special Account and subsequently made available for future investments.[31] Subclause 52(1) provides that $5 billion must be credited into the Special Account upon commencement of the Act. In addition, subclause 52(2) empowers the Ministers[32] to determine a specified amount to be credited to the Special Account. The amount that may be credited under subclause 52(2) is substantial, noting that, in addition to the $5 billion credited upon commencement of the Act, subclause 52(4) provides that the Ministers must ensure the total of the amounts credited to the account before 2 July 2029 is equal to $10 billion. Subclause 52(5) provides that while such a determination is a legislative instrument, it is not subject to disallowance.

2.78 In *Scrutiny Digest 1 of 2023* the committee requested the minister's detailed advice as to whether the bill could be amended to:

- limit the Ministers' broad discretionary power to credit amounts to the National Reconstruction Fund Corporation Special Account under subclause 52(2), including consideration of amending the bill to set limits on the amounts that may be credited under subclause 52(2), or, at a minimum, to provide an inclusive list of matters which the Ministers may take into account prior to making a determination; and
- provide that determinations made under subclause 52(2) are subject to disallowance to ensure that they receive appropriate parliamentary oversight.[33]

Minister's response[34]

2.79 The minister advised that the design of the $15 billion statutory credit mechanism is intended to:

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30 Clause 52. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

31 Explanatory memorandum, p. 27.

32 Defined under clause 5 as meaning the Minister administering the Act and the Finance Minister.

33 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 23–26.

34 The minister responded to the committee's comments in a letter dated 22 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

- signal and assure a total investment envelope, with a commitment to industry that government is addressing market gaps through a clear mandate to crowd in private sector finance to support, transform and diversify seven priority areas of the Australian economy; and
- strengthen the independence of the Corporation in line with its legislative framework, enabling it to deliver $15 billion in total investment as and when most appropriate and to develop a medium-long term investment pipeline that is not tied to restrictive annual or biennial statutory credits.

2.80 The minister advised that, given the above, the Ministers' power to credit the remaining $10 billion (once the initial $5 billion has been credited at commencement) therefore primarily deals with the timing of credits to the Special Account, with a view to facilitating the effective management of the Corporation's cashflows.

2.81 The minister noted that, while these credits may be in amounts and at times determined by the Ministers, there is certainty that the total amount must be equal to $10 billion before 2 July 2029. Any amounts to be credited beyond the $10 billion that the Ministers are required to effect by legislative instrument would need to be appropriated by the Parliament.

2.82 Finally, the minister advised that the Corporation's investment cashflows may vary considerably over the course of the initial seven years of operation depending on the market conditions across its seven priority areas. For example, the minister noted that the Corporation may see the need to either 'frontload' or 'backload' its investments in response to emerging opportunities in several different sectors. The minister considered that providing for the Ministers' ability to credit the Special Account via a non-disallowable determination under subclause 52(2), rather than appropriating the full amount at the outset, or providing for an inflexible schedule in the Bill, allows the government to better manage these variations.

2.83 On this basis, the minister did not consider it necessary to amend the bill to limit the Ministers' discretionary powers to credit amounts to the Special Account.

Committee comment

2.84 The committee thanks the minister for this response.

2.85 The committee notes the minister's advice that the operational requirements for flexibility mean that it would be inappropriate to credit the Special Account via a schedule within a bill rather than within a legislative instrument.

2.86 The committee also notes the minister's advice that crediting instruments made under clause 52 would primarily relate to the timing of credits to the Special Account and that significant limits on the exercise of the power are present in the bill, including the total amount that may be credited and the date by which this must occur.

2.87 The committee acknowledges the need for setting this detail out within delegated legislation and the limits placed on the delegated legislation making power

in this instance. However, the committee notes that its concerns related primarily to providing that instruments made under clause 52 are not subject to the usual parliamentary disallowance process. It is in this context that the committee requested the minister's advice about the discretion afforded to the Ministers to make legislative instruments under that clause.

2.88 The committee does not consider that the explanation provided has satisfactorily outlined the *exceptional* circumstances that justify exempting crediting instruments from disallowance. Given the limited parliamentary oversight over these instruments, the committee therefore also continues to be concerned about the breadth of the Ministers' powers to make determinations under subclause 52(2).

2.89 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the Ministers with a broad discretionary power to make non-disallowable legislative instruments under subclause 52(2) of the bill.

Significant matters in delegated legislation
Exemption from disallowance[35]

2.90 Clause 71 provides that the Ministers may, by legislative instrument, give the Board directions about the performance of the Corporation's investment functions or powers by way of an investment mandate. A direction issued under clause 71 could cover a broad range of significant matters.

2.91 In *Scrutiny Digest 1 of 2023* the committee requested the minister's detailed advice as to whether the bill could be amended to provide that investment mandates are subject to disallowance to ensure that they receive an appropriate level of parliamentary oversight.[36]

Minister's response[37]

2.92 The minister advised that Investment Mandates made under clause 71 of the Bill would not authorise Commonwealth expenditure but is instead intended to provide directions to the Board on how it exercises the Corporation's investment functions and powers, with a primary focus on financial parameters such as the target

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35 Clause 71. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 26–28.

37 The minister responded to the committee's comments in a letter dated 22 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

portfolio rate of return, portfolio risk appetite, and minimum financing levels in certain priority areas. The minister noted that expenditure is authorised within the bill.

2.93 The minister advised that it is appropriate that such directions be issued as a non-disallowable instrument because this allows the government of the day, in consultation with the Corporation's Board, to flexibly adjust the Mandate's parameters in response to evolving economic and regulatory conditions, and to provide certainty to the Corporation when those parameters are set that they will not be changed without further consultation. The minister further noted that ministerial directions being exempt from disallowance is an established operational model that is consistent with similar Commonwealth specialist investment vehicles such as the Clean Energy Finance Corporation, Northern Australia Infrastructure Facility, and National Housing Financing and Investment Corporation, all of which are guided by non-disallowable investment mandates.

Committee comment

2.94 The committee thanks the minister for this response.

2.95 The committee notes the minister's advice in relation to the intended use of an Investment Mandate made under clause 71. The committee also notes the need for flexibility in this context.

2.96 However, the committee does not consider that the minister's response has adequately addressed the exceptional circumstances that justify the exemption of an Investment Mandate from disallowance. While it may be appropriate to include the relevant matters within a legislative instrument to ensure the required flexibility, it is not clear to the committee from the explanation provided why exempting the instrument from disallowance is necessary to achieve this goal. Moreover, the committee does not generally consider certainty to be a sufficient justification, of itself, for exempting an instrument from disallowance.

2.97 While the committee acknowledges that the possibility of disallowance presents some degree of uncertainty, the committee notes that this level of uncertainty is in many ways inherent to lawmaking within Australia's system of representative government and applies equally to primary legislation which is subject at any time to amendment or repeal by the Parliament.

2.98 In relation to the minister's advice that Investment Mandates are routinely exempt from parliamentary disallowance, the committee notes the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation (Delegated Legislation Committee) which has expressed particular concern about broad classes of exemptions from disallowance based exclusively on the form of a relevant instrument.[38] In this context, the Delegated Legislation Committee has emphasised

38 See, for example, Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 5 of 2022* (7 September 2022) p. 103.

that any exclusion from parliamentary oversight should be justified on its own merits,[39] and that exemptions should be provided by primary legislation, rather than delegated legislation.[40] The committee shares this view.

2.99 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the Ministers with a power to make non-disallowable Investment Mandates under subclause 71 of the bill.

Broad delegation of administrative powers or functions[41]

2.100 Subclause 90(1) states that the Chief Executive Officer of the Corporation (CEO) may delegate any of the CEO's functions or powers under the bill to a member of staff referred to in clause 46. Similarly, subclause 90(2) states that if the Corporation or the Board delegates a power or function under either subclause 88(1) or 89(1) then the CEO may subdelegate that power or function to a member of staff referred to in clause 46.

2.101 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to:

- why it is necessary and appropriate to allow the CEO to make a delegation under subclause 90(1), or a subdelegation under subclause 90(2), to any member of staff referred to under clause 46; and
- whether the bill can be amended to provide legislative guidance as to the scope of powers that might be delegated, or to further limit the categories of people to whom those powers might be delegated.[42]

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

40 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (16 March 2021) pp. 100–101.

41 Subclauses 90(1) and 90(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii).

42 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 28–29.

Minister's response[43]

2.102 The minister advised that it is envisaged the CEO would carefully consider the skills and experience of relevant staff before making any delegation or subdelegation and that the CEO would be held accountable by the Board for monitoring and managing the activities of staff who perform activities that have been delegated or subdelegated. For example, the minister noted that under clause 39 of the bill, the CEO's appointment may be terminated at any time by the Board, subject to consultation with the Ministers under subclause 39(2).

2.103 The minister further advised that the circumstances in which delegations may be necessary are difficult to predict, particularly where the Corporation is intended to operate independently, and the CEO and Board will therefore be responsible for determining the Corporation's staffing and the allocation of duties to those staff. For this reason, the minister considered it inappropriate to be prescriptive as to the categories of powers that the CEO may delegate or subdelegate, or the class of persons to whom they could be delegated or subdelegated. The minister also noted that some powers will be exercised routinely and may appropriately be exercised by relatively junior staff, while others, including significant spending decisions, would reasonably be expected to be limited to very senior members of staff.

Committee comment

2.104 The committee thanks the minister for this response.

2.105 The committee notes the minister's advice that it may be difficult to be prescriptive as to the categories of powers that the CEO may delegate or subdelegate, or the class of persons to whom they could be delegated or subdelegated. However, it is not clear to the committee from this advice why at least high-level guidance could not be included within the bill in relation to these matters. For example, the committee considers that it would be possible to, at a minimum, provide that delegates or subdelegates possess the appropriate training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions.

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

43 The minister responded to the committee's comments in a letter dated 22 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Private Health Insurance Legislation Amendment (Medical Device and Human Tissue Product List and Cost Recovery) Bill 2022

Purpose	This bill is part of a package of three bills supporting the implementation of the 2021-22 Budget measure, Modernising and Improving the Private Health Insurance Prostheses List. The bill seeks to amend the *Private Health Insurance Act 2007* to better define the products that may be eligible for inclusion on the Prostheses List.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 1 December 2022
Bill status	Before the Senate

Broad discretionary power[44]

2.107 Item 4 of Schedule 2 to the bill seeks to insert an amended form of section 72-20 into the *Private Health Insurance Act 2007* (the PHI Act). Proposed section 72-20 would provide the minister with a discretionary power to remove a kind of medical device or human tissue product from the list in the Private Health Insurance (Medical Devices and Human Tissue Products) Rules. This discretionary power is exercisable where a person who is liable to pay a cost-recovery fee or a levy has failed to do so.[45] Similarly, proposed section 72-25 would provide the minister with a discretionary power to direct that activities not be carried out where a person has failed to pay a cost-recovery fee or a levy.

2.108 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to whether the bill could be amended to provide a list of considerations, or limitations, in relation to the broad discretionary powers set out at proposed section 72-20 and proposed section 72-25 of the bill. For example, by providing that the minister may, or must, consider whether removing a listing would adversely affect patient health,

44 Schedule 2, item 4, proposed sections 72-20 and 72-25. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

45 Existing subsection 72-15(3) of the *Private Health Insurance Act 2007* currently provides a similar power. The committee notes that consistency with existing provisions is not a sufficient justification for the inclusion of broad discretionary powers.

whether retaining a listing would be in the best interests of patients and clinicians and whether retaining or removing a listing would be in the public interest.[46]

Minister's response[47]

2.109 The minister advised that the government will be moving amendments to the bill to guide the discretionary powers in sections 72-20 and 72-25 of the bill. The minister advised that amendments to the bill would require the minister to have regard to whether the exercise of the discretionary powers would adversely affect the interests of policy holders (patients) or significantly and adversely limit the professional freedom of medical practitioners (clinicians).

Committee comment

2.110 The committee thanks the minister for this response.

2.111 The committee welcomes the minister's undertaking to amend the bill in response to scrutiny issues raised in *Scrutiny Digest 1 of 2023*.

2.112 In light of the minister's undertaking the committee makes no further comment on this matter.

46 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 30–31.

47 The minister responded to the committee's comments in a letter dated 27 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Public Interest Disclosure Amendment (Review) Bill 2022

Purpose	This bill seeks to amend the *Public Interest Disclosure Act 2013* in order to deliver priority reforms to the existing Commonwealth public sector whistleblowing framework established by the *Public Interest Disclosure Act 2013*.
Portfolio	Attorney-General
Introduced	House of Representative on 30 November 2022
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[48]

2.113 Item 46 of Schedule 1, part 3 of the bill seeks to substitute section 19 of the *Public Interest Disclosure Act 2013* (PID Act) to amend an existing offence for reprisals in relation to disclosures. Proposed subsection 19(1) provides that a person commits an offence in relation to another person if the first person engages in conduct resulting in detriment to the second person, and when the conduct is engaged in, the first person believes or suspects that the second person or any other person has made, may have made, proposes to make or could make a public interest disclosure, and the belief or suspicion is the reason or part of the reason for engaging in the conduct. Proposed subsection 19(2) provides it is an offence in relation to another person if the first person engages in conduct that consists of, or results in, a threat to cause detriment and the second person is reckless as to whether the second person fears that the threat would be carried out.

2.114 Proposed subsection 19(4) provides a defence to the offence provisions in subsections 19(1) and 19(2) if the conduct engaged in by the first person is administrative action that is reasonable to protect the second person from detriment. The note to proposed subsection 19(4) states that the defendant bears the evidential burden in relation to the matter.

2.115 In *Scrutiny Digest 1 of 2023* the committee requested the Attorney-General's advice as to why determining whether conduct is reasonable administrative action is considered *peculiarly* within the knowledge of the defendant.

2.116 The committee suggested that it may be appropriate for the bill to be amended to provide that a reasonable administrative action is specified as not an

48 Schedule 1, part 3, item 46, proposed section 19. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

element of the offence, rather than as an exception to the offence. The committee also requested the Attorney-General's advice in relation to this matter.[49]

Attorney-General's response[50]

2.117 The Attorney-General advised that the reversal of the evidential burden of proof is justified in this instance because the reason why a person engaged in certain conduct is information that will be peculiarly within their knowledge.

2.118 The Attorney-General acknowledged that the question of whether particular administrative action was 'reasonable' to protect a person is an objective test. However, the Attorney-General also noted that whether a particular action was reasonable would generally be informed by considerations such as:

- whether the defendant apprehended that there was a risk that the person would be subjected to reprisal action and, if so, the likelihood of that risk and the reasons for that apprehension;
- what, if any, alternative means may have existed within the particular work environment to protect the discloser from reprisal action;
- any likely secondary benefits or risks associated with any such alternative means of protecting the discloser, and
- the reasons for which the defendant elected to take the administrative action.

2.119 The Attorney-General advised that the facts that inform these considerations will typically be peculiarly within the knowledge of the defendant. For example, in the case where the defendant is alleged to have engaged in reprisal action by changing the discloser's supervision arrangements, matters that would be peculiarly within the defendant's knowledge would likely include:

- the defendant's assessment of the risk of reprisal action at the time that they took the administrative action, and the facts known to the defendant that informed that assessment;
- the defendant's understanding of the professional and personal relationships between supervisors within the relevant work area (which may be relevant to the question of whether assigning a particular supervisor would be likely to mitigate any risk of reprisal) and the skills, capabilities and expertise of each supervisor (which may be relevant to the question of whether a particular supervisor would be an appropriate, alternative supervisor), and

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49 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 32–33.

50 The Attorney-General responded to the committee's comments in a letter dated 24 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

- the professional judgments made by the defendant, in reaching their decision to take particular administrative action.

2.120 The Attorney-General noted that once the defendant has adduced evidence that suggests a reasonable possibility that their conduct constituted administrative action that was reasonable to protect a person from detriment, or has pointed to evidence already adduced by the prosecution that suggests that reasonable possibility, the onus will shift back to the prosecution to disprove this beyond a reasonable doubt. Whether the conduct was reasonable administrative action will ultimately be a matter for the court to determine.

2.121 In relation to the committee's request to amend the bill to provide that a reasonable administrative constitutes an element of the offence, rather than an exception to the offence, the Attorney-General advised that this would be inappropriate because this would be an unjustifiably difficult onus for the prosecution to discharge. In this context, the Attorney-General noted:

> Existing section 13 of the *Public Interest Disclosure Act 2013* (Cth) (PID Act) provides the definition of 'takes a reprisal' for the purposes of the Act. The current formulation of that section provides that a person does not take a reprisal to the extent that the person takes administrative action that is reasonable to protect the other person from detriment, as per existing subsection 13(3). The offence for taking a reprisal is contained separately in existing section 19, which provides that a person commits an offence if the person takes a reprisal (as defined in section 13) against another person. The prosecution must prove the elements of the offence beyond reasonable doubt.
>
> Consequently, a prosecutor must prove that the relevant conduct was not reasonable administrative action (as per the definition in existing subsection 13(3)) in order for conduct to constitute 'taking a reprisal' under the section 19 offence. That is, the prosecution must prove beyond reasonable doubt that the defendant was aware there was a substantial risk the conduct was not administrative action that is reasonable to protect the second person from detriment and, in all the circumstances known to the defendant, it was unjustifiable to take that risk. This is an unjustifiably difficult onus for the prosecution to discharge.
>
> Reframing reasonable administrative action as a defence to the reprisal offence, rather than being an element of the offence, enables the evidential burden of proof for the defence to be reversed to address the difficulty that is otherwise faced by the prosecution. Proposed subsection 19(4) places the onus on the defendant to point to evidence that suggests a reasonable possibility that their action was reasonable administrative action in the circumstances, in recognition that the reasons for the conduct will be peculiarly within their knowledge. Once this evidence is adduced, the onus will shift back to the prosecution to prove beyond reasonable doubt that the conduct was not reasonable administrative action.

2.122 Finally, the Attorney-General advised that additional information will be included in the explanatory memorandum to clarify the intended operation of the reverse onus of proof in relation to the defence of reasonable administrative action.

Committee comment

2.123 The committee thanks the Attorney-General for this detailed response.

2.124 The committee acknowledges the Attorney-General's advice that many of the matters that may be required to be adduced in order to make out a defence under section 19 that relevant conduct constitutes 'reasonable administrative action' could be peculiarly within the knowledge of the defendant. However, the committee notes that given the vagueness of the defence it is equally possible to conceive of a list of relevant matters which would not be peculiarly within the knowledge of a potential defendant.

2.125 Given the generality of the defence set out at proposed section 19, the committee does not consider that it is appropriate to reverse the evidential burden of proof in this instance. The committee considers that it would have been more appropriate to provide a more specific defence at proposed section 19, or to have relied on the general defences set out in the *Criminal Code*. The committee's concerns are heightened given that the 'reasonableness' element of the defence would require a defendant to raise evidence to prove an objective legal test on the balance of probabilities.

2.126 The committee welcomes the Attorney-General's undertaking to update the explanatory memorandum for the bill.

2.127 The committee otherwise draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to an offence under proposed section 19 of the *Public Interest Disclosure Act 2013*.

Broad delegation of administrative powers or functions[51]

2.128 Item 18 of Schedule 2 to the bill substitutes section 77 to expand the delegation powers of the Ombudsman and the Inspector-General of Intelligence and Security (IGIS). This provision allows the Ombudsman and the IGIS to delegate any or all of their functions or powers under the PID Act to a public official belonging to the agency.

2.129 In *Scrutiny Digest 1 of 2023* the committee requested the Attorney-General's advice as to why it is necessary and appropriate to allow any or all of the powers or

51 Schedule 2, item 18, proposed section 77. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

functions of a principal officer to be delegated to a public official who belongs to the agency (which includes any APS employee at any level and contractors).

2.130 The committee requested the Attorney-General's advice as to whether the bill could be amended to:

- require that a principal officer, when making a delegation under proposed subsection 77(1), must be satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated powers or functions; and
- limit the delegation of a principal officer's powers or functions to specified categories of people.[52]

Attorney General's response[53]

2.131 The Attorney-General advised that allowing principal officers to delegate any or all of their functions or powers to APS employees of any level is necessary to facilitate effective investigations for all agencies under the PID Act. The PID Act applies broadly across the Commonwealth public sector, including both small and large agencies. The principal officer is primarily responsible for conducting investigations under the PID Act. The Attorney-General advised that, in some cases, there may be a real or perceived risk of bias or conflict of interest during an investigation in an agency where there is a limited pool of appropriately senior or experienced staff to conduct an investigation.

2.132 In addition, the Attorney-General considered that it may also hinder efficient investigation of disclosures if agencies are unable to delegate these functions and powers to a lower level, particularly if there are limited numbers of senior staff with appropriate expertise in an agency. Given this, the Attorney-General considered that allowing a principal officer to delegate their functions or powers under the PID Act to an APS employee of any level in the agency, or a contractor, will assist in managing these issues by broadening the scope of staff who can conduct an investigation, or part of an investigation.

2.133 The Attorney-General also advised that this broad delegation power is necessary to allow a principal officer to delegate parts of their powers to staff with appropriate expertise as needed. For example, a principal officer may need to delegate fact-finding aspects of the investigation to an APS employee of a non-senior level, whilst retaining ultimate principal officer decision-making power for the final investigation report. The Attorney-General considered that this flexibility ensures that

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52 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 33–35.

53 The Attorney-General responded to the committee's comments in a letter dated 24 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

the most appropriate officer in an agency can undertake components of the PID investigation as required by that particular agency, which would not be possible by legislatively confining the scope of powers or class of persons to whom these powers may be delegated.

2.134 Additionally, the Attorney-General noted that the principal officer's powers and functions are not coercive in nature. Instead, they are primarily focused on investigating disclosures within their own agency and preparing reports.

2.135 The Attorney-General advised that the approach taken within the bill would also provide greater flexibility to the Ombudsman and the IGIS to delegate their functions under the PID Act, including to undertake PID investigations. In this context, the Attorney-General noted that the engagement of contractors to undertake specific work is a common practice in Commonwealth agencies because some disclosures require expertise in a particular area or type of investigation, for which it would be appropriate to engage external contractors in order to harness the necessary expertise to address disclosures of wrongdoing.

2.136 In relation to the committee's query as to whether the bill could be amended, the Attorney-General considered that an amendment was not necessary because this might reduce flexibility. The Attorney-General also noted that:

> The delegation provision is intended to allow the principal officer to delegate any of their functions or powers under the Act as required. The principal officer, when delegating functions or powers under the Act, can consider the training, qualifications and experience of a person to ensure this is appropriate to the powers and functions they would be exercising under the delegation. The Bill does not prevent the principal officer from considering such matters as part of a delegation. However, the principal officer will likely need to balance a range of considerations when making a delegation. In particular, the Bill and Act place several positive obligations on the principal officer, including the duty to provide ongoing training about the PID Act relating to integrity and accountability, and the duty to establish procedures for facilitating and dealing with public interest disclosures relating to the agency. Further, the established procedures for dealing with public interest disclosures, such as the need to complete investigations within 90 days, will need to be taken into account when making any delegation decisions.
>
> …
>
> The PID Act applies broadly across the Commonwealth public sector, and therefore, requires additional flexibility to accommodate investigations across both small and large agencies. The level of principal officer delegates varies across agencies. Smaller agencies in particular require flexibility when delegating principal officer functions and powers, as the size of the agency can mean that there are limited persons to whom functions and powers can be delegated, and it may not always be possible for the principal officer to delegate functions to persons of a particular level.

2.137 The Attorney-General advised that additional information will be included in the explanatory memorandum to clarify the points raised above.

Committee comment

2.138 The committee thanks the Attorney-General for this detailed response.

2.139 The committee notes the Attorney-General's advice in relation to the operational needs for flexibility in this context. However, the committee considers that it would be possible to provide the necessary flexibility while still maintaining appropriate limits over the exercise of the delegations power.

2.140 While it may be inappropriate to provide a restrictive list of the classes of persons who may be delegates or subdelegates, it is not clear to the committee why it would not be possible to at least provide that delegates have the appropriate skills, training, qualifications and experience. As noted by the Attorney-General, this is a particularly important consideration in the context of delegating powers or functions to external contractors.

2.141 The committee welcomes the Attorney-General's undertaking to update the explanatory memorandum for the bill.

2.142 The committee otherwise draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of delegating the principal officer's powers to a broad class of people with no accompanying legislative requirement that delegates have the appropriate training, qualifications, skills or experience.

Immunity from civil and criminal liability[54]

2.143 Item 40 of Schedule 1, part 3 of the bill seeks to insert subsections 12A(3)-(5) into the PID Act. These proposed subsections provide immunity from civil, criminal or administrative action (including disciplinary action) and immunity from enforcement of remedies or rights to witnesses.

2.144 Item 19 of Schedule 2 to the bill seeks to insert proposed paragraph 78(1)(c) into the PID Act to extend immunity from any disciplinary action, or criminal or civil liability.

2.145 In *Scrutiny Digest 1 of 2023* the committee requested the Attorney-General's more detailed advice as to why it is considered necessary and appropriate to give an individual providing assistance in relation to a public interest disclosure under proposed section 12A, and a person assisting a principal officer of an agency or a

54 Schedule 1, part 3, item 40, proposed subsections 12A(3)-(5) and schedule 2, item 19, proposed paragraph 78(1)(c). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

delegate of the principal officer under proposed paragraph 78(1)(c), with immunity from civil liability, such 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.[55]

Attorney General's response[56]

2.146 The Attorney-General advised that introducing new immunities from civil and criminal liability is necessary to ensure witnesses to wrongdoing feel confident to come forward and provide assistance in relation to a disclosure investigation. The Attorney-General noted that the PID Act does not provide immunities to witnesses who voluntarily provide information without being requested to do so but that a disclosure investigation may be hampered if a witness does not provide this assistance. In this context, the Attorney-General noted that providing strong protections to witnesses who voluntarily provide information, produce a document or answer a question in relation to an investigation, supports them to come forward and helps agencies conduct more comprehensive investigations. The Attorney-General advised that this ultimately reduces the possibility that wrongdoing will go unaddressed.

2.147 The Attorney-General noted that the immunities provided to public officials under the bill correspond to the obligations on these officials to use their best endeavours to assist:

- the principal officer of an agency in the conduct of an investigation; and
- any other public official to exercise a right, or perform a function under the PID Act.

2.148 The Attorney-General considered that providing immunities to public officials who assist a principal officer or their delegate with performing functions or exercising powers under the Act is appropriate in light of these obligations. The Attorney-General advised that this approach works to support a pro-disclosure culture in which public officials are encouraged to report wrongdoing, and are provided with appropriate protections when doing so.

2.149 In relation to the committee's request for advice on what alternative protections are afforded to affected individuals, noting that the normal rules of civil liability have been limited by the bill, the Attorney-General noted that:

- affected individuals will continue to have access to legal remedies where false or misleading statements have been made about them;

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55 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 35–37.

56 The Attorney-General responded to the committee's comments in a letter dated 24 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

- affected individuals will continue to have access to legal remedies where a relevant action was not undertaken in good faith; and
- affected individuals must be afforded procedural fairness in the course of a disclosure investigation.

Committee comment

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

2.151 The committee notes the Attorney-General's advice that the immunities from civil liability proposed to be introduced by the bill are necessary to support a pro-disclosure culture in which public officials are encouraged to report wrongdoing.

2.152 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*).

2.153 In light of the detailed information provided by the Attorney-General, the committee makes no further comment on this issue.

Referendum (Machinery Provisions) Amendment Bill 2022

Purpose	This bill seeks to amend the *Referendum (Machinery Provisions) Act 1984* to ensure a consistent voter experience across elections and referendums.
Portfolio	Finance
Introduced	House of Representatives on 1 December 2022
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof[57]

2.154 Item 2 of Schedule 3 to the bill seeks to amend the *Referendum (Machinery Provisions) Act 1984* (Referendum Act) to insert proposed section 3AA. Proposed subsection 3AA(1) defines a referendum matter as a matter communicated or intended to be communicated for the dominant purpose of influencing the way electors vote at a referendum. Proposed subsection 3AA(4) makes it an offence for the communication or intended communication of a referendum matter. Proposed subsection 3AA(6) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the matter is not a referendum matter.

2.155 A defendant bears an evidential burden in relation to this defence.

2.156 In *Scrutiny Digest 1 of 2023* 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.

2.157 The committee suggested that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence. The committee also requested the minister's advice in relation to this matter.[58]

Minister's response[59]

2.158 The minister reiterated the advice provided at paragraph 73 of the explanatory memorandum that the relevant matters would be peculiarly within the

57 Schedule 2, item 2, proposed subsection 3AA(6). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

58 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 38–39.

59 The minister responded to the committee's comments in a letter dated 7 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

knowledge of the defendant and would be significantly more difficult and costly for the prosecution to prove than for the defendant to establish. On this basis, the minister considered that it was necessary and appropriate to reverse the evidential burden of proof in this instance.

Committee comment

2.159 The committee thanks the minister for this response.

2.160 However, the committee does not consider that this response has adequately addressed its concerns. The committee notes that it had already considered the explanation in the explanatory memorandum and concluded that it did not provide a sufficient justification for reversing the evidential burden of proof. Restating the advice provided in the explanatory memorandum is therefore not sufficient.

2.161 Reversals of the evidential burden of proof are generally not appropriate unless the matters that must be adduced are peculiarly within the knowledge of the defendant. The committee provided several examples of matters which do not appear to be peculiarly within the knowledge of the defendant, however the minister's response did not address these examples.

2.162 The minister concluded that the approach taken in the bill is consistent with the guidance provided in the *Guide to Framing Commonwealth Offences.* However, the minister has not provided any advice to demonstrate why this is the case.

2.163 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to the matters set out under proposed subsection 3AA(4) of the *Referendum (Machinery Provisions) Act 1984.*

Henry VIII clause – modification of primary legislation by delegated legislation[60]

2.164 Item 9 of Schedule 6 to the bill seeks to insert proposed section 144A into the Referendum Act. Proposed subsection 144A(1) provides that the section will apply if an emergency is declared under a Commonwealth emergency law and the Electoral Commissioner is satisfied on reasonable grounds that the emergency to which the declaration relates would interfere with the due conduct of a referendum in a geographical area to which the declaration applies.Under proposed subsection 144A(2) the Electoral Commissioner may, by legislative instrument, modify the operation of the Referendum Act, or specified provisions of the Referendum Act, if satisfied on reasonable grounds that it is necessary or conducive to ensure the due conduct of the referendum in the emergency area. Proposed subsection 144A(3)

60 Schedule 6, item 9, proposed section 144A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

provides that the Electoral Commissioner may, by legislative instrument, modify the operation of the Referendum Act to provide that persons may travel and conduct activities for the referendum despite a prescribed kind of Commonwealth, state or territory law.

2.165 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to why it is considered necessary and appropriate to allow delegated legislation to modify the operation of the Referendum Act.[61]

Minister's response[62]

2.166 The minister reiterated the advice provided in the explanatory memorandum. Namely, that the power to modify the operation of the Referendum Act by legislative instrument is necessary to enable the Australian Electoral Commission to conduct a referendum safely by minimising the risk of harm to voters, employees and contractors when a Commonwealth emergency law is in force, while maintaining transparency of the referendum process.

2.167 The minister also noted that the power to modify primary legislation is limited in several important respects, including that the Electoral Commissioner must notify in writing both the Prime Minister and the Leader of the Opposition of the Commissioner's intention to make such an instrument.

Committee comment

2.168 The committee thanks the minister for this response.

2.169 However, as noted above, re-stating the explanation provided in the explanatory memorandum is not sufficient where the committee has previously considered that explanation. Similarly, the committee had already considered the legislative limits on the modification power which have been noted by the minister and concluded that they, of themselves, were not sufficient to address the scrutiny concerns raised by the committee.

2.170 The committee therefore does not consider that the minister has adequately addressed the committee's concerns.

2.171 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing delegated legislation to modify the operation of the *Referendum (Machinery Provisions) Act 1984*.

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

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61 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 40–41.

62 The minister responded to the committee's comments in a letter dated 7 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Broad discretionary power
Significant matters in delegated legislation[63]

2.173 As outlined above, proposed section 144A provides that the proposed power to modify electoral law will apply if an emergency is declared under a Commonwealth emergency law and the Electoral Commissioner is satisfied on reasonable grounds that the emergency to which the declaration relates would interfere with the due conduct of a referendum in a geographical area to which the declaration applies. Proposed subsection 144A(8) sets out the relevant Commonwealth emergency laws, including the *Biosecurity Act 2015* and the *National Emergency Declaration Act 2020*. Proposed subsection 144A(9) provides that the minister may, by legislative instrument, specify additional laws for the definition of Commonwealth emergency laws.

2.174 In *Scrutiny Digest 1 of 2023* the committee requested the minister's more detailed advice as to:

- why it is considered necessary and appropriate to provide the minister with a broad discretionary power to add legislation to the definition of Commonwealth emergency law by delegated legislation; and
- whether the bill can be amended to provide at least high-level guidance on the face of the bill as to the circumstances when the power in proposed subsection 144A(9) should be exercised.[64]

Minister's response[65]

2.175 The minister advised that the minister's power to specify a law is limited to specifying an existing Commonwealth law under which an emergency can be declared.

2.176 The use of delegated legislation by the minister under subsection 144A(9) would facilitate a timely response to unforeseen emergencies to assist the Electoral Commissioner in ensuring the safe and successful delivery of a referendum. It is necessary and appropriate that responses to unforeseen emergencies occur in a timely manner, particularly during the referendum period.

2.177 The minister also advised that amending the bill to provide high-level guidance as to the circumstances in which the power in subsection 144A(9) could be used is not appropriate due to the evolving and uncertain nature of emergencies.

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63 Schedule 6, item 9, proposed subsection 144A(9). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (iv).

64 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 41–42.

65 The minister responded to the committee's comments in a letter dated 7 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Committee comment

2.178 The committee thanks the minister for this response.

2.179 However, the committee reiterates its scrutiny view that significant matters relating to the conduct of elections should be included in primary legislation, unless a sound justification is provided for the use of delegated legislation.

2.180 While the committee acknowledges the minister's advice in relation to the appropriateness of using delegated legislation, it remains unclear to the committee why at least high-level guidance as to when additional legislation can be specified by legislative instrument cannot be included in the primary legislation. For example, it is not clear why at least an *inclusive* list of considerations could not be provided to assist in interpreting the scope of terms used in the bill, rather than an exhaustive definition.

2.181 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the minister with a broad discretionary power to add legislation to the definition of 'Commonwealth emergency law' by delegated legislation.

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

Broad discretionary power[66]

2.183 Item 2 of Schedule 5 to the bill seeks to insert proposed subsection 202AH(1) into the *Commonwealth Electoral Act 1918* (the Electoral Act) to provide that the Electoral Commissioner may declare that an elector is a 'designated elector' if the Electoral Commissioner reasonably suspects that the elector has voted more than once in a referendum. Proposed section 46AA provides that a designated elector may only vote by declaration vote, which includes a postal vote, a pre-poll declaration vote, an absent vote, or a provisional vote but does not include an ordinary vote or an ordinary pre-poll vote.

2.184 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to whether the bill can be amended to include at least high-level guidance as to the factors the Electoral Commissioner may take into account when determining that an elector should be declared a 'designated elector'.[67]

66 Schedule 5, item 2, proposed subsection 202AH(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

67 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 42–44.

Minister's response[68]

2.185 The minister advised that the designation of an elector does not deprive an elector of their legal right to cast a vote because designated electors may vote by declaration vote, which includes a postal vote, a pre-poll declaration vote, an absent vote, or a provisional vote. This also does not affect an elector's ability to vote early or through mobile polling.

2.186 The minister also advised that it would not be appropriate to amend the bill to include a list of factors the Electoral Commissioner may consider when determining that an elector should be declared a 'designated elector' because doing so may limit or prejudice the Electoral Commissioner's ability to appropriately consider extenuating circumstances and other operational matters.

Committee comment

2.187 The committee thanks the minister for this response.

2.188 While the committee notes that the bill would not deprive a designated elector of their right to vote, the committee considers that *any* significant impact on the right to vote should be appropriately justified and subject to sufficient safeguards. In this case, the committee considers that the limit on a person's right to vote that may result from providing the Electoral Commissioner with a power to declare that an elector is a 'designated elector' is sufficiently justified within the bill's explanatory materials. However, the committee is concerned that this power is not subject to sufficient safeguards, noting that that the bill provides no guidance on its face as to what considerations the Electoral Commissioner may take into account in forming a reasonable suspicion that an elector has voted more than once in a referendum.

2.189 The minister has advised that providing a list of considerations for the Electoral Commissioner to take into account may limit or prejudice the Electoral Commissioner's ability to appropriately consider extenuating circumstances and other operational matters. The committee does not consider that this is a convincing rationale for providing a broad discretionary power in relation to significant matters. The committee notes, for example, that the broad drafting of the Electoral Commissioner's power in fact allows a decision-maker to completely disregard 'operational matters', while an amendment could require, or suggest, consideration of such matters.

2.190 The explanatory memorandum for the bill notes that a reasonable suspicion may be informed by consideration of records of certified-lists, which contain multiple-marks recorded against an elector’s name as having voted more than once in a single

68 The minister responded to the committee's comments in a letter dated 7 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

election.[69] It is unclear why these matters could not be included as considerations within the bill.

2.191 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the Electoral Commissioner with a broad discretionary power to declare that a person is a 'designated elector'.

69 Explanatory memorandum, p. 42.

Safeguard Mechanism (Crediting) Amendment Bill 2022

Purpose	This bill seeks to amend the *National Greenhouse and Energy Reporting Act 2007* and the *Australian National Registry of Emissions Units Act 2011* to establish the framework for creating safeguard mechanism credit units, covering how credits are issued, purchased, and included in Australia's National Registry of Emissions Units.
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representatives on 30 November 2022
Bill status	Before the House of Representatives

Significant matters in delegated legislation[70]

2.192 This bill aims to amend the existing Safeguard Mechanism framework in several significant ways. In particular, the bill allows for the creation of a new unit, to be known as the Safeguard Mechanism Credit (SMC), that will operate alongside ACCUs and will allow for the crediting and trading of carbon credits.

2.193 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to:

- why it is considered necessary and appropriate to leave much of the information relating to the scope and operation of the amended Safeguard Mechanism framework to delegated legislation; and
- whether the bill can be amended to include further detail in relation to the framework on the face of the primary legislation.[71]

Minister's response[72]

2.194 The minister advised that the amended Safeguard Mechanism framework would rely on a large amount of technical detail, including detail relating to market dynamics, industry practices and available technologies. The minister advised that

70 Schedule 1. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

71 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 45–47.

72 The minister responded to the committee's comments in a letter dated 21 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

because of this high level of technical detail it is appropriate for much of the content of the Safeguard Mechanism framework to be set out in delegated legislation so that any changes in any of these factors can be reflected quickly, and not cause any unintended consequences or burden. The minister set out detailed commentary in relation to some of the matters proposed to be included within delegated legislation but ultimately concluded that it is not appropriate to amend the bill to include more detail of the framework on the face of the primary legislation.

2.195 The minister also noted that any delegated legislation would have to be consistent with the objects of the *National Greenhouse and Energy Reporting Act 2007* including the new object inserted by the bill.[73]

Issuance of Safeguard Mechanism Credit units

2.196 The minister advised that it is appropriate that the Safeguard Rules set out how baselines are calculated for the new framework because of the complexity involved, technical factors and flexibility required. For example, the minister advised that the Safeguard Rules specify around ninety production variables and that specifying these variables in delegated legislation provides the flexibility required to respond quickly to changes in activities carried out by industry or to technological advances.

2.197 The minister advised that it is expected that the Safeguard Mechanism would provide for some exceptions to the general rule that the number of SMCs issued is equal to the difference between the facility's covered emissions and its baseline. These exceptions relate to other matters that are set in the Safeguard Rules, including the setting of baselines, borrowing arrangements, and multi-year monitoring.

Requirements relating to applications

2.198 The minister advised that it is anticipated that the Safeguard Rules would provide for applications for emissions intensity determinations and applications for a facility to receive 'trade-exposed baseline adjusted' status.

2.199 The minister advised that it is appropriate for these application processes and audit requirement to be in the Safeguard Rules because of their close relationships with Safeguard Mechanism baselines and their interaction with other pieces of delegated legislation. The minister further advised that any changes to related legislation will enable the Safeguard Rules to be quickly updated so that the overall scheme is streamlined and does not cause any unnecessary regulatory burden.

Provisions relating to surrender of units

2.200 The minister advised that it is expected that the Safeguard Rules would be able to prevent facilities from surrendering credits in relation to monitoring periods that have not commenced. The minister also advised that the bill enables the Safeguard

73 See, Schedule 1, item 1, proposed subsection 3(2).

Rules to place limits on the number of specified kinds of units that can be surrendered and enables these rules to specify the number of specified kinds of units that must be surrendered in order to reduce the net emissions of a facility by one tonne.

2.201 The minister advised that providing for these matters in the Safeguard Rules allows for flexibility in case issues that affect these markets, or their integrity, arise. The minister advised that preventing Safeguard facilities from surrendering in relation to future compliance periods prevents them from bypassing any such rules in the event that they are made in the future.

Committee comment

2.202 The committee thanks the minister for this response.

2.203 The committee acknowledges that it is often appropriate to set out highly technical information within delegated legislation. The committee welcomes the detailed information provided by the minister in relation to some of these technical matters and acknowledges the complexity of the Safeguard Mechanism Framework.

2.204 However, the committee notes that the minister's response does not explain why the technical issues outlined by the minister would make it inappropriate to include further detail within the bill, other than the fact that flexibility is required in relation to some of these technical elements.

2.205 The committee has previously expressed the view that a desire for flexibility may be an appropriate justification for the inclusion of detail within delegated legislation in response to expected rapid changes in technology. However, in order for this justification to be accepted, the detail that is proposed to be included within delegated legislation should be rationally tied to the expected changes in technology and the explanatory materials for the bill should explain how and why this is the case. The expectation that a regulated industry will experience future changes in technology does not sufficiently justify including substantial elements of a scheme within delegated legislation without further explanation. The committee also notes that convenience is not an appropriate justification for the use of delegated legislation in place of an amending bill.[74] The committee considers that it would have been helpful had the explanatory materials for the bill directly addressed these issues.

2.206 The committee also reiterates its concerns that, in this case, it appears that much of the detail that is proposed to be left to delegated legislation cannot be characterised as technical in nature. The committee notes that the minister's response has not directly addressed the details of the Safeguard Mechanism Framework which

74 For example, the explanatory memorandum notes at page 3 that requirements relating to publication of holdings of ACCUs and SMCs in registry accounts will be included within the rules in order to allow for further consultation given stakeholder concerns on this issue. However, matters of significance such as this are generally more appropriately debated in Parliament in response to the introduction of an amending bill.

the committee identified as not relating to technical matters. For example, it remains unclear to the committee why an individual's right to review of a decision under proposed section 22XNA could not be set out within the bill.

2.207 In light of the above, the committee reiterates its 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 the Parliament to have appropriate oversight over new legislative schemes, noting that a legislative instrument is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

2.208 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*).

2.209 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key details in relation to the implementation of the Safeguard Mechanism Framework to delegated legislation.

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

Telecommunications Legislation Amendment (Information Disclosure, National Interest and Other Measures) Bill 2022

Purpose	This bill seeks to amend the *Telecommunications Act 1997* to improve the operation of information disclosure provisions. The bill seeks to amend the record of disclosure requirements by increasing record keeping requirements to enable oversight of underlying laws or warrants which required or authorised a disclosure. In addition, the bill seeks to make two technical amendments to the *Telstra Corporation and Other Legislation Amendment Act 2021* to ensure that the obligations and measures in the Act will commence as originally intended.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 10 November 2022
Bill status	Before the Senate

Privacy[75]

2.211 Under Part 13 of the *Telecommunications Act 1997* (Telecommunications Act), carriers, carriage service providers and others are prohibited from disclosing certain information, including personal information, except in limited circumstances.[76] This includes where the use and disclosure of information is:

- made to deal with calls to emergency service numbers;[77] or
- reasonably necessary to prevent or reduce a serious and imminent threat to the life or health of a person.[78]

2.212 The bill would expand these exceptions. As a result, the committee considers that the bill has the potential to trespass on an individual's right to privacy.

75 Schedule 1, items 6, 7, 8 and 9, proposed subsection 285(1B) and proposed sections 287 and 300. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

76 See, for example, the primary use and disclosure offences set out in sections 276 and 277.

77 Section 285.

78 Sections 287 (primary use and disclosure) and 300 (secondary use and disclosure).

2.213 The committee initially scrutinised this bill in *Scrutiny Digest 8 of 2022* and requested the minister's advice.[79] The committee considered the minister's response in *Scrutiny Digest 1 of 2023* and requested the minister's further advice as to:

- whether the bill could be amended to explicitly limit who may receive information or a document under subsection 285(1B) or, at a minimum, whether the explanatory memorandum can be updated to clarify this; and
- whether the term 'affairs or personal particulars' can be defined in the *Telecommunications Act 1997* or, at a minimum, in the explanatory memorandum, including by providing examples of what may or may not be included in the definition.[80]

Minister's response[81]

2.214 The minister advised that information in the Integrated Public Number Database (IPND) including storage, transfer, use or disclosure of unlisted information is strictly regulated through the Telecommunications Act, legislative instruments and enforceable industry codes and standards, and in practice information is limited to emergency services.

2.215 The minister further advised that defining the term 'affairs or personal particulars' within the bill would reduce the scope of information to which a disclosure applies, and a general construction of the term is preferred to provide additional flexibility to safeguard and protect types of information that might otherwise not be captured.

2.216 The minister instead undertook to amend the explanatory memorandum to draw attention to the other instruments that constrain the disclosure of information in the IPND and to clarify the types of information covered by the term 'affairs or personal particulars'.

Committee comment

2.217 The committee thanks the minister for this response.

2.218 The committee notes the minister's advice that the explanatory memorandum to the bill will be amended to provide further information to help clarify the limited nature of the disclosure of information in the IPND and examples of what may constitute 'affairs or personal particulars'.

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79 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2022* (30 November 2022) pp. 3-6.

80 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 106-109.

81 The minister responded to the committee's comments in a letter dated 22 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.219 The committee welcomes the minister's undertaking to update the explanatory memorandum to the bill and makes no further comment on this matter.

Therapeutic Goods Amendment (2022 Measures No. 1) Bill 2022

Purpose	This bill seeks to amend the *Therapeutic Goods Act 1989* to: • enhance patient safety and improve the safe use of medical devices; • support innovation and investment in biologicals Australia through the introduction of a new marketing approval pathway for biologicals that are for export only; • support activities to relieve medicine shortages; • strengthen post-market monitoring and compliance; • reduce regulatory burden; • safeguard patient safety in relation to therapeutic goods advertising; and • make a number of more minor amendments.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 1 December 2022
Bill status	Before the Senate

Reversal of the evidential burden of proof[82]

2.220 Item 2 of Schedule 5 seeks to insert proposed section 45AC into the *Therapeutic Goods Act 1989* (the Act) to create an offence for failing to comply with a notice from the Secretary requiring the production of information or documents. Proposed subsection 45AC(3) provides an exception for the offence if the person has a reasonable excuse, and a note to the subsection states that the defendant bears an evidential burden in relation to the matter.

2.221 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to why it is proposed to use a defence of reasonable excuse (which reverses the evidential burden of proof) for proposed subsection 45AC(3).[83]

82 Schedule 5, item 2, proposed section 45AC. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

83 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 48–50.

Minister's response[84]

2.222 The minister advised that a defence of reasonable excuse is appropriate and in line with the *Guide to Framing Commonwealth Offences*, stating that there are many reasons that a person may not be able to provide the information or documents that will be outside the knowledge of the Therapeutic Goods Administration (TGA). The minister provided some examples of reasons that a person may not comply with a notice, including personal circumstances like illness or natural disasters, or if documents were stored at a location affect by fire or flood.

2.223 The minister further noted that: the defence is appropriate as it would be significantly more difficult and costly for the prosecution to prove a negative (that there was no reasonable excuse for a defendant); the general mistake of fact defence available under the *Criminal Code* would not apply to the circumstances; and given the wide range of circumstances where a person might reasonably be unable to comply with a notice, it was not possible to frame a more narrow defence or make an exception in the offence provision itself.

Committee comment

2.224 The committee thanks the minister for this response.

2.225 The committee notes the minister's advice that a defence of reasonable excuse is appropriate in this context as it would not be possible for the TGA to know the kinds of circumstances that may arise that may prevent someone from complying with a notice.

2.226 Nevertheless, the committee remains concerned that a defence of reasonable excuse is difficult to rely on because it is unclear to a defendant what needs to be established. While it is helpful the minister has provided some examples of circumstances that may constitute a reasonable excuse, the committee remains of the view that it is preferable to develop more specific defences rather than a general defence. It is not clear to the committee that all of these examples relate to matters that are peculiarly within the knowledge of the defendant, for example the existence of natural disasters appears to be a matter that the prosecution could readily ascertain. At a minimum, the committee considers it would be appropriate for examples of what may constitute a reasonable excuse to be included in the explanatory memorandum.

2.227 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

84 The minister responded to the committee's comments in a letter dated 21 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*). 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 and relying upon the defence of reasonable excuse rather than more specific defences.

Strict liability[85]

2.228 Item 2 of Schedule 5 proposes to introduce subsections 45AC(2) and 45AD(2) which contain strict liability offences for failure to comply with a notice, and giving false or misleading information or documents, respectively. Both of these provisions are subject to a penalty of 100 penalty units.

2.229 In *Scrutiny Digest 1 of 2023* the committee drew its scrutiny concerns to the attention of senators and left to the Senate as a whole the appropriateness of imposing a strict liability offence, noting that the penalties imposed under that offence are above what is recommended in the *Guide to Framing Commonwealth Offences*.

Minister's response[86]

2.230 The minister advised that the higher penalty imposed is justified in the context of the regulatory scheme for therapeutic goods and given the potentially significant consequences for public health and safety. The minister noted that the individuals to whom such notices could be issued may include medical practitioners or pharmacists running enterprises manufacturing or selling therapeutic goods. The minister considered that these individuals are likely well-resourced and, as such, it is important that the penalties are set at a level that allows a court to impose a penalty that will be more than merely the cost of doing business in order to ensure compliance.

Committee comment

2.231 The committee thanks the minister for this response.

2.232 The committee notes the minister's advice that a higher penalty is appropriate in this context given the significant public consequences of non-compliance and the likely category of individuals to whom this may apply.

2.233 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable, noting the importance of these explanatory

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85 Schedule 5, item 2, proposed subsection 45AD(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

86 The minister responded to the committee's comments in a letter dated 21 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

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*).

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

Procedural fairness[87]

2.235 Item 1 of Schedule 10 to the bill seeks to insert subsection 61(13) into the Act. This provision would provide that the Secretary is not required to observe any requirements of the natural justice hearing rule in relation to releasing information under section 61 of the Act. Section 61 of the Act provides that the Secretary may release certain kinds of information to the public and to various health, regulatory and law enforcement authorities, including for example: notifications concerning therapeutic goods that have been prohibited or severely restricted in Australia; the licensing status of manufacturers of therapeutic goods; contents of reports, conditions on assessment certificates; reported problems and complaints concerning therapeutic goods; investigations of complaints; decisions on registration or listing; and cases or possible cases of product tampering or counterfeit therapeutic goods.

2.236 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to:

- why it is considered necessary to provide a broad exclusion to procedural fairness within the bill, noting the flexibility that is already applied by the courts when considering the extent to which procedural fairness obligations might apply in a particular circumstance; and
- whether, at a minimum, the amendment can be narrowed to exclude procedural fairness to circumstances where disclosure is required for urgent public safety reasons.[88]

Minister's response[89]

2.237 The minister advised that a broad exclusion from procedural fairness is necessary given the importance of ensuring that all information about the safety, quality and efficacy or performance of therapeutic goods is communicated in a timely

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87 Schedule 10, item 1, proposed subsection 61(13). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

88 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 52–53.

89 The minister responded to the committee's comments in a letter dated 21 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

way, and the potentially significant consequences of delay on public health which could result from allowing the usual procedural fairness rules to apply. The minister noted that this justification is not limited to information that is clearly urgent, but is also relevant to the release of information that once shared with other departments or organisations may contribute to the identification of urgent safety concerns. The minister further advised that providing a requirement to consult third parties would impact information-sharing arrangements with international partners that assist in identifying safety issues with therapeutic goods.

2.238 In addition to these reasons, the minister advised of numerous practical reasons as to why, in their opinion, procedural fairness could not be provided, including that: the TGA release significant volumes of information to keep stakeholders up to date; the TGA receives verbal queries from stakeholders, for example about the stock of a medicine; the range of various kinds of information that may be released could create uncertainty as to the application of the rule in different possible contexts; it is difficult to consider the scope of procedural fairness obligations that would apply in practice; and challenges to the legality of already disclosed information may have a cooling effect on future potential releases of information, further risking public health and safety.

2.239 In relation to whether the amendment could be narrowed to exclude procedural fairness to circumstances where disclosure is required for urgent public safety reasons, the minister advised that a clear formulation for a narrower approach that would not pose safety concerns and that would be workable in practice could not be identified. In particular, the minister noted that: it would be administratively unworkable given the large range of information that may be released under section 61; it would be ambiguous and difficult to apply in practice, leading to delays that may pose a risk to public health; narrowing the exclusion would imply an intention that the natural justice hearing rule should apply in all other circumstances as the explicit exclusion would only apply in limited circumstances, and this would undermine the purpose of the proposed amendment; and a narrower approach to exclude the natural justice hearing rule would not be comprehensive due to the difficulty in identifying all possible circumstances in which disclosure may be needed for urgent public safety reasons.

Committee comment

2.240 The committee thanks the minister for this response.

2.241 The committee notes the minister's advice that providing for procedural fairness or narrowing its exclusion would be practically difficult in the context of the therapeutic goods regulatory scheme and may risk negative outcomes for public health and safety.

2.242 Nevertheless, the committee continues to have concerns in relation to the breadth of the exclusion. It is not clear to the committee why, in instances where information is released, whether subsequent notice is given to an affected party and

whether they are given an opportunity to be heard. It is also not clear to the committee what consideration has been given to the impact the exclusion of procedural fairness may have on individuals and what processes the TGA have adopted to minimise this impact.

2.243 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of excluding procedural fairness in relation to a decision to release information under section 61 of the *Therapeutic Goods Act 1989.*

Incorporation of external material as existing from time to time[90]

2.244 Items 12, 15, 16, 20 and 30 of Schedule 12 to the bill seek to introduce proposed subsections 3C(3), 26BF(6), 28(2AA), 36(5) and 61(8C) to provide that instruments made under these sections may incorporate any matter contained in an instrument or other writing as in force or existing from time to time.

2.245 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to whether material incorporated from time to time will be made freely and readily available to all persons interested in the law.[91]

Minister's response[92]

2.246 The minister advised that, wherever possible, material proposed to be incorporated in an instrument is freely and readily available to persons interested in the terms of the law, and that the instrument or its explanatory statement is able to explain this. However, the minister noted that this is not always possible, for example where various international benchmarks for quality and safety requirements relating to therapeutic goods are incorporated, but that it is anticipated that individuals who are required to comply with the incorporated material would have arrangements in place to ensure access in order to conduct or carry out their business.

2.247 In addition, the minister noted that the TGA also endeavours to ensure that where incorporated material is not freely available, members of the public may arrange to view the material at the TGA office in Fairbairn, ACT.

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90 Schedule 12, items 12, 15, 16, 20 and 30, proposed subsections 3C(3), 26BF(6), 28(2AA), 36(5) and 61(8C). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

91 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) p. 54.

92 The minister responded to the committee's comments in a letter dated 21 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Committee comment

2.248 The committee thanks the minister for this response.

2.249 The committee notes the minister's advice that material proposed to be incorporated in an instrument will be freely and readily available wherever possible, and if not, endeavours will be made to ensure it is freely available for viewing at the TGA office.

2.250 While the committee notes that many individuals who are required to comply with the incorporated material likely have access to these materials in order to conduct their business, the committee considers that the law should be accessible to *all* people interested in the terms of the law.

2.251 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.

2.252 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*).

Treasury Laws Amendment (Modernising Business Communications and Other Measures) Bill 2022

Purpose	This bill seeks to amend the *Corporations Act 2001* and other Commonwealth Acts to implement law improvement measures across four streams: • technology neutral communications in Schedule 1; • recommendations of the ALRC Review in Schedule 2; • the rationalisation of ASIC instruments in Schedule 3; and • minor and technical amendments in Schedule 4.
Portfolio	Treasury
Introduced	House of Representatives on 23 November 2022
Bill status	Before the Senate

Retrospective application[93]

2.253 The bill seeks to amend an existing exception to the National Credit Code. This would ensure that a 'specified charge' set out in a fixed credit contract is only calculated by reference to contracts for which the exception already applies. The bill also provides that the amendment applies retrospectively, capturing all contracts entered into on or after 13 June 2014.

2.254 In *Scrutiny Digest 1 of 2023* the committee requested the Assistant Treasurer's more detailed advice as to:

- why retrospective validation is sought in relation to the amendments introduced by item 103 of Schedule 4 to the bill; and
- whether any persons are likely to be adversely affected by the retrospective application of the provisions, and the extent to which their interests are likely to be affected.[94]

93 Schedule 4, item 103, regulation 51 and item 104, regulation 115. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

94 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 67–68.

Assistant Treasurer's response[95]

2.255 The Assistant Treasurer advised that retrospectivity is sought in relation to the amendments introduced by item 103 of Schedule 4 to ensure that the process for determining whether a continuing credit contract is exempt from the National Credit Code operates in accordance with the original policy intention and practice. Subsection 6(5) of the National Credit Code provides that the National Credit Code does not apply to the provision of credit under a continuing credit contract if the only charge that is or may be made for providing the credit is a periodic or other fixed charge that does not vary according to the amount of credit provided. However, the National Credit Code will apply if the charge exceeds the maximum charge prescribed in regulation 51 of the Credit Regulations.

2.256 The Assistant Treasurer advised that current regulation 51 came into effect on 13 June 2014, and the policy intention from that time has been that the calculation of the maximum charge occur only by reference to continuing credit contracts that already fall within the exception in subsection 6(5) of the National Credit Code. The Assistant Treasurer advised that in order to ensure consistency with the policy intention, which the regulator, industry and consumers have adopted in practice, Division 21 of the Bill seeks to repeal and replace regulation 51 to ensure the calculation of the maximum charge occur by reference to only eligible contracts.

2.257 The Assistant Treasurer further advised that the amendment to the exemption applies to a very small number of consumers, as it will only affect non-bank providers. The Assistant Treasurer noted that it is possible that some individual consumers who have particular kinds of credit from these providers may be adversely affected, as they would no longer be able to rely on the National Credit Code protections that the current drafting of regulation 51 affords them. However, the Assistant Treasurer considered it unlikely that any of these consumers would have accessed the protections in the National Credit Code, as the prevailing regulator, industry and consumer practice has been consistent with the original policy intention and the amendments in the bill.

Committee comment

2.258 The committee thanks the Assistant Treasurer for this response.

2.259 The committee notes that, from a rule of law perspective, individuals and entities should not be required to comply with laws that were invalidly made even where the intention of a bill may be to restore the position that was intended when the original law was made. The committee considers that any departure from this

95 The Assistant Treasurer responded to the committee's comments in a letter dated 24 February 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

position must be comprehensively justified within the explanatory materials for the bill. In this case, the committee notes the Assistant Treasurer's advice that it is unlikely individuals would be adversely affected by the retrospective application of the bill.

2.260 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*).

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

Work Health and Safety Amendment Bill 2022

Purpose	This bill seeks to amend the *Work Health and Safety Act 2011* to adopt recent amendments to the model Work Health and Safety Bill published by Safe Work Australia.
Portfolio	Employment and Workplace Relations
Introduced	House of Representatives on 1 December 2022
Bill status	Before the Senate

Broad scope of offence provisions
Significant penalties[96]

2.262 Item 4 of Schedule 1 to the bill amends paragraph 31(1)(c) of the *Work Health and Safety Act 2011* to broaden the concept of a 'Category 1 offence'. This amendment expands the offence to include negligence as an additional fault element.

2.263 The penalty for an individual committing a Category 1 offence is $300,000 or 5 years imprisonment or both. The penalty for an individual committing a Category 1 offence as a person, or an officer of a person, conducting a business or undertaking is $600,000 or 5 years imprisonment or both.[97]

2.264 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to why it is considered necessary and appropriate to include negligence as an additional fault element in paragraph 31(1)(c) of the *Work Health and Safety Act 2011*, including by reference to the considerations in the *Guide to Framing Commonwealth Offences.*[98]

Minister's response[99]

2.265 The minister advised that this measure gives effect to a recommendation of the *Review of the model Work Health and Safety laws - Final report* (the Boland Review). The Boland Review noted that there have been very few successful Category 1 prosecutions under harmonised work health and safety laws, in part due to difficulties associated with proving the fault element of recklessness. It was

96 Schedule 1, item 4, proposed paragraph 31(1)(c). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

97 *Work Health and Safety Act 2011*, subparagraphs 31(1)(c)(a)-(b).

98 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 69–70.

99 The minister responded to the committee's comments in a letter dated 1 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

considered that the threshold to prove the fault element of recklessness was too high, and thus difficult to establish, which meant the offence was not meeting its objective to ensure compliance through deterrence. Recommendation 23a of the Boland Review was that 'gross negligence' should be included as a fault element in the Category 1 offence.

2.266 In addition, the minister advised that the inclusion of negligence is also consistent with the considerations outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* which notes the use of negligence is supported where the context of negligence is a well-established indication of liability, such as in relation to work health and safety laws. This is because work health and safety duties require the proactive identification and management of risks. The minister also noted that negligence is important in this context because intent and recklessness can be difficult to prove, particularly in the case of larger businesses where decision making is diffuse.

2.267 Finally, the minister noted that the Category 1 offence includes significant penalties because of the harm that may result from such an offence. The minister noted that a breach of work health and safety duties can have very harmful consequences for workers, including serious injury, illness or death. While acknowledging that negligence would not usually attract significant financial penalties and imprisonment terms the minister considered that there is strong justification here because of the harm that may result from conducting resulting in a Category 1 offence.

Committee comment

2.268 The committee thanks the minister for this response.

2.269 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*).

2.270 In light of the detailed information provided by the minister, the committee makes no further comment on this issue.

Reversal of the evidential burden of proof[100]

2.271 Item 25 of Schedule 1 introduces proposed section 272A into the *Work Health and Safety Act 2011* to prohibit, without reasonable excuse, insurance and other

100 Schedule 1, item 25, new section 272A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

arrangements that cover the costs of a monetary penalty imposed on a person under the Act. Subsection 272A(2) places an evidential burden on the defendant to show a reasonable excuse.

2.272 In *Scrutiny Digest 1 of 2023* the committee requested the minister's advice as to why it is proposed to use a reasonable excuse defence (which reverse the evidential burden of proof) for proposed section 272A, rather than including the examples in the explanatory memorandum as more specific defences.[101]

Minister's response[102]

2.273 The minister reiterated the explanation provided in the explanatory memorandum for the bill, which notes that a reasonable excuse may be that the person granted the indemnity under duress, or entered the insurance contract based on negligent legal advice that led them to reasonably believe the contract did not cover monetary penalties under the WHS Act. The circumstances around the entering into a prohibited contract are matters which are likely to be peculiarly within the knowledge of the defendant and significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter. For example, a defendant may be able to produce minutes from a board meeting where the insurance was discussed or waive legal privilege to produce the advice.

2.274 The minister also noted that it is not possible to rely on the defences in the Criminal Code for this offence because the defence of mistake of fact does not necessarily cover all situations which would be covered by reasonable excuse. Moreover, the minister advised that, wherever possible, preference is given to alignment with the model work health and safety laws rather than bespoke drafting. Given this, the minister advised that drafting more specific defences raised the risk of misalignment of WHS law between jurisdictions.

Committee comment

2.275 The committee thanks the minister for this response.

2.276 The committee notes the minister's advice that the examples provided within the explanatory memorandum may be peculiarly within the knowledge of the defendant. However, the committees notes that, given the vagueness of the defence, it is equally possible to conceive of a list of relevant matters which would not be peculiarly within the knowledge of a potential defendant. It is also not clear to the committee why the examples provided within the explanatory memorandum could not be set out as defences within the bill.

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101 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 70–71.

102 The minister responded to the committee's comments in a letter dated 1 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.277 Further, the committee considers that it would be possible to draft more specific defences for a proposed section 272A offence without introducing inconsistencies into the WHS framework. Indeed, the committee notes that overly general defences have the potential to introduce inconsistencies given the multitude of interpretations which may be applied to such a defence.

2.278 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of reversing the evidential burden of proof in relation to an offence under proposed section 272A of the bill.

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 bills to the attention of Senators:

- Housing Australia Future Fund Bill 2023;[3] and
- Treasury Laws Amendment (2023 Measures No. 1) Bill 2023. [4]

Senator Dean Smith
Chair

3 Clause 10 of the bill provides for the establishment of the Housing Australia Future Fund Special Account, for the purpose of the *Public Governance, Performance and Accountability Act 2013*.

4 Proposed section 60-145 provides for the establishment of the Tax Practitioners Board Special Account.