The Senate

Standing Committee for the Scrutiny of Bills

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Contents

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.

Education Legislation Amendment (Startup Year and Other Measures) Bill 2023

Purpose	This bill seeks to amend the *Higher Education Support Act 2003* (HESA) to create a new form of Higher Education Loan Program (HELP) assistance, SY-HELP, and to list Avondale University as a Table B provider under HESA. The Bill also amends the *Australian Research Council Act 2001* to apply current indexation rates to existing appropriation amounts and to insert a new funding cap for the financial year commencing 1 July 2025.
Portfolio	Education
Introduced	House of Representatives on 9 March 2023

Availability of merits review[1]

1.2 Item 25 of Schedule 1 to the bill seeks to amend the *Higher Education Support Act 2003* to introduce Part 3-7 SY-HELP assistance which would provide for a new form of Higher Education Loan Program assistance, SY-HELP, for students in accelerator program courses at Australian universities and university colleges.

1.3 Proposed section 128B-1 outlines the criteria regarding who is entitled to SY-HELP assistance, including that the student meets the citizenship or residency requirements under proposed section 128B-30. Proposed section 128B-30 outlines the citizenship or residency requirements a student must meet to be entitled to SY-HELP assistance. Proposed subsection 128B-30(6) provides that, despite the other requirements in section 128B-30, a student does not meet the citizenship or residency requirements in relation to an accelerator program course if the higher education

1 Schedule 1, item 25, proposed subsection 128B-30(6) and proposed section 128E-30. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

provider reasonably expects that the student will not undertake in Australia any of the accelerator program course.

1.4 Proposed section 128E-30 further provides that an amount of SY-HELP assistance that a person received for an accelerator program course with a higher education provider is reversed if the Secretary of the Department of Education is satisfied that the person was not entitled to receive SY-HELP assistance for the course with the provider. The effect of a reversal of SY-HELP assistance is that the higher education provider must pay back to the Commonwealth the amount paid to the provider for the course, and pay to the person who received the assistance the amount the person paid in relation to the accelerator program course fee.[2] The person is also discharged from all liability to pay or account for the amount of SY-HELP assistance received.[3] A decision to reverse SY-HELP assistance may therefore be beneficial in some circumstances, for example where a student is not able to complete the course. However, the decision may also be detrimental in other circumstances, for example where a person is relying on the SY-HELP assistance to undertake a course of study. A decision not to reverse SY-HELP assistance may similarly be detrimental or beneficial to an individual, depending on their specific circumstances.

1.5 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. The committee's usual expectation is that such justifications are provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*. The committee expects any justification for excluding merits review to be set out clearly within the explanatory materials to the bill.

1.6 In this case, it does not appear that the decisions under proposed subsection 128B-30(6) and proposed section 128E-30 are subject to merits review. The committee notes that a number of other decisions in Part 3-7 which determine whether a student is entitled to SY-HELP assistance are reviewable decisions. For example: a decision that a student is not a genuine student in relation to the course;[4] a decision that a new accelerator program course will impose an unreasonable study load on a student;[5] and a decision whether SY-HELP assistance be reversed if special circumstances apply to a person.[6]

1.7 It is unclear to the committee why a decision under proposed subsection 128B-30(6) and proposed section 128E-30 are not reviewable decisions

2 Schedule 1, item 25, proposed section 128D-5.

3 Schedule 1, item 25, proposed section 128D-10.

4 Schedule 1, item 25, proposed subsection 128B-10(1).

5 Schedule 1, item 25, proposed subsection 128B-15(2).

6 Schedule 1, item 25, proposed section 128E-1.

when they appear to similarly impact the ability of a student to access SY-HELP assistance. The explanatory memorandum to the bill does not comment on why merits review is not available for these decisions.

1.8 In light of the above, the committee requests the minister's advice as to why it is necessary and appropriate not to provide that independent merits review will be available in relation to a decision made under subsection 128B-30(6) and section 128E-30 of the bill.

Financial Accountability Regime Bill 2023

Purpose	This bill introduces a new accountability regime for the banking, insurance and superannuation industries. The new accountability regime will provide for a strengthened accountability framework for financial entities in the banking, insurance and superannuation industries, and for related purposes.
Portfolio	Treasury
Introduced	House of Representatives on 8 March 2023

1.9 The Financial Accountability Regime Bill 2021 (the 2021 bill) was introduced in the House of Representatives on 28 October 2021 and lapsed at the dissolution of the previous Parliament. The Financial Accountability Regime Bill 2022 (the 2022 bill) was then introduced in identical form in the House of Representatives on 8 September 2022. The committee raised scrutiny concerns in relation to these bills in *Scrutiny Digest 17 of 2021*,[7] *Scrutiny Digest 2 of 2022,*[8] *Scrutiny Digest 5 of 2022,*[9] and *Scrutiny Digest 6 of 2022*.[10]

1.10 This bill, the Financial Accountability Regime Bill 2023 (the 2023 bill), has now been introduced in almost identical form. The majority of the committee's scrutiny concerns in relation to the earlier bills appear not to have been addressed in relation to the 2023 bill.

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2021* (24 November 2021) pp. 14–21.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2022* (18 March 2022) pp. 65–78.

9 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2022* (28 September 2022) pp. 10–19.

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2022* (26 October 2022) pp. 66–73.

Broad discretionary powers
Significant matters in delegated legislation[11]

1.11 Chapter 2 of the bill sets out the obligations that will apply to accountable persons[12] and accountable entities[13] under the new Financial Accountability Regime. Broadly speaking, the obligations imposed by Chapter 2 relate to the following areas:

- **accountability obligations**,[14] requiring entities in the banking, insurance and superannuation industries to conduct their business in a certain way;
- **key personnel obligations**,[15] requiring entities in the banking, insurance and superannuation industries to nominate senior executives to be responsible for all areas of business operations;
- **deferred remuneration obligations**,[16] requiring entities to defer a minimum amount of remuneration for senior executives for at least four years and to reduce variable remuneration; and
- **notification obligations**,[17] requiring entities to notify the Regulator[18] in relation to some aspects of their business and setting up an enhanced notification scheme.

1.12 Clause 16 of the bill allows exemptions to be granted in relation to any of the obligations set out in Chapter 2. In its previous comments, the committee raised concerns about the breadth of this power which, in its previous formulation, would have allowed the Minister to grant exemptions with no explicit legislative limits on the exercise of the power. In addition, previous versions of clause 16 did not set out any relevant criteria or considerations that the Minister could elect to consider prior to granting an exemption.

1.13 The committee recommended that clause 16 be amended to provide limits on the exercise of the exemption power or, at a minimum, to provide legislative guidance in relation to the power. The committee acknowledged that a certain degree of administrative flexibility may be necessary when deciding whether to grant

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11 Clause 16. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (iv).

12 Defined at clause 10.

13 Defined at clause 9.

14 Part 3 of Chapter 2.

15 Part 4 of Chapter 2.

16 Part 5 of Chapter 2.

17 Part 6 of Chapter 2.

18 Defined at clause 8 to mean either the Australian Prudential Regulation Authority or the Australian Securities and Investments Commission but, if the context requires the reference to be particularly to one of those bodies, then Regulator means that body.

exemptions or what conditions may apply to those exemptions. However, the committee noted that it would be possible to provide this flexibility while still maintaining some limits on the exercise of the power. The committee provided some examples of possible amendments, including amending the bill to:

- provide an inclusive list of criteria specifying circumstances in which an exemption may be granted;
- setting out general guidance in relation to the conditions which may apply to an exemption;
- include a requirement that an exemption is no longer in force if the circumstances under which it was originally granted no longer exist;
- include a requirement that an application for a new exemption must be made where changes to the exemption are required; or
- include a requirement that instruments made under subclause 16(2) be time-limited to ensure an appropriate level of parliamentary oversight.[19]

1.14 In response, the Assistant Treasurer noted that it would not be appropriate to provide any limits, or even a list of non-mandatory considerations, in relation to the exercise of the clause 16 exemptions power because of the need for flexibility and to avoid constraining the use of the power.[20]

1.15 The 2023 bill has proposed a revised version of clause 16 to provide that the Minister may only exempt an accountable entity, or a class of accountable entities, if they are satisfied that it would be unreasonable for the accountable entity to be required to comply with Chapter 2. In addition, the power under subclause 16(1) is now exercisable by notifiable instrument, rather than by written notice, and the Minister must provide a statement setting out their reasons for the exemption.

1.16 The committee welcomes these changes which provide appropriate limits on the exercise of the Minister's exemptions power and would allow for a higher degree of scrutiny over any decision made under subclause 16(1).

1.17 The committee is of the opinion that future reviews of the Financial Accountability Regime should consider further amendments to clause 16 to ensure that exemptions remain appropriate over time. For example, by providing that:

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19 Noting, in particular, the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation on this issue. For example, in Senate Standing Committee for the Scrutiny of Delegated Legislation, *Delegated Legislation Monitor 5 of 2022* (7 September 2022) pp. 50-53, the committee requested that the Financial Sector Reform (Hayne Royal Commission Response) (Hawking of Financial Products) Regulations 2021 be amended to provide that the exemptions specified in that instrument cease to operate three years after they commence.

20 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2022* (26 October 2022) pp. 66–68.

exemptions are time-limited; exemptions must be reviewed after a certain period; or accountable entities are required to notify the Minister if the circumstances which made it unreasonable for them to comply with Chapter 2 have changed. The committee also considers that any future review of the exemptions power should consider amendments to ensure that any conditions that may attach to a clause 16 exemption are applied consistently across accountable entities.

1.18 The committee welcomes changes to clause 16 of the bill which provide limits on the exercise of the previously broad power to grant exemptions, by providing that the Minister may only grant an exemption where they consider that it would be unreasonable for the accountable entity to be required to comply with Chapter 2.

1.19 The committee further welcomes changes to subclause 16(1) of the bill which allow for a higher degree of scrutiny over a decision to grant an exemption.

1.20 The committee considers that future reviews of the Financial Accountability Regime should consider further amendments to clause 16 to ensure that exemptions remain appropriate over time, and to ensure that any conditions that may attach to a clause 16 exemption are applied consistently across accountable entities.

Tabling of documents in Parliament
Significant matters in delegated legislation[21]

1.21 Division 1 of Part 2 of Chapter 3 of the bill deals with administrative arrangements. Clause 37 of the bill provides that the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) must enter into an arrangement relating to the administration of the bill within six months of commencement. Subclause 37(2) provides that the arrangement must include provisions relating to the matters specified in any rules made by the Minister (Minister rules), which are disallowable legislative instruments. Once entered into, the arrangement must be published online.[22] If no arrangement is entered into within 6 months of commencement, the Minister may determine an arrangement by notifiable instrument. A failure to comply with clause 37 does not invalidate the performance or exercise of a function or power by either APRA or ASIC.[23]

1.22 The bill does not require arrangements entered into under clause 37 to be tabled in the Parliament. The committee's consistent scrutiny view is that tabling documents in the Parliament is important to parliamentary scrutiny, as it alerts

21 Clause 37. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

22 Subclause 37(3).

23 Subclause 37(5).

parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public or are only published online. Tabling reports on the operation of regulatory schemes promotes transparency and accountability. As such, the committee expects there to be appropriate justification within the explanatory memorandum to the bill for failing to mandate tabling requirements.

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

1.24 In this instance, the explanatory memorandum provides the same explanation that was previously provided for the 2022 bill and which the committee found to be insufficient. The explanatory memorandum states:

> To ensure a cohesive approach, APRA and ASIC must enter into an arrangement outlining their general approach to administering and enforcing the Financial Accountability Regime within 6 months of the commencement of the Financial Accountability Regime Bill 2023. If this does not occur, the Minister may determine an arrangement for this purpose.[24]

1.25 As previously noted, it is not clear from this explanation why a clause 37 arrangement is not required to be tabled in the Parliament and why it is necessary and appropriate to leave details relating to provisions that must be included within such an arrangement to the Minister rules. Given the committee's strongly expressed views, the committee is disappointed that no attempt has been made to further justify the approach taken to the administration of the bill under clause 37.

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

1.27 The committee is further concerned that there is no evidence on the face of the bill, or within the explanatory memorandum, that the committee's previously stated concerns have been taken into account in the drafting of this provision.

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24 Explanatory memorandum, p. 29.

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

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

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

Reversal of the evidential burden of proof[25]

1.30 The 2023 bill seeks to establish several defences which reverse the evidential burden of proof. These defences are set out in subclauses 68(3) and 72(2) of the bill.

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

1.32 Similarly, subsection 56(2) of the *Australian Prudential Regulation Authority Act 1998* currently provides that it is an offence if a person discloses protected information or produces a protected document within the meaning of that Act. Subclause 72(2) seeks to provide that it is a defence to this offence if the disclosure was authorised by clause 69, 70, 71, 73, 74 or 75 of the bill.

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

1.34 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[26] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.35 The committee notes that the explanations provided for these justifications in the explanatory memorandum are the same as those previously found insufficient by

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

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

the committee in relation to the 2021 and 2022 bills. Indeed, as with both earlier bills, there is no explanation within the explanatory materials for reversing the evidential burden of proof in relation to the exception set out in subclause 68(3), with the explanatory memorandum merely re-stating the operation of the provision.[27]

1.36 The relevant test is that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where it is *peculiarly* within the knowledge of the defendant.[28] In this instance, it does not appear that several of the matters relevant to a subclause 68(3) or subclause 72(2) defence would be peculiarly within the knowledge of the defendant.

1.37 In particular, it appears that whether information had already been made lawfully available to the public,[29] whether the Regulator had allowed the disclosure,[30] whether the disclosure was in accordance with a provision of the *Australian Prudential Regulation Authority Act 1998*[31] or the *Australian Securities and Investments Commission Act 2001,*[32] or whether an order or direction has or has not been given by a court or tribunal would all be matters that are readily ascertainable by the prosecution.[33]

1.38 Finally, it is not clear to the committee why the exception provided by clause 74, that the disclosure is made in circumstances prescribed by the Minister rules, can be said to be peculiarly in the knowledge of the defendant when there is no indication or guidance within the bill as to the circumstances that may be prescribed within the rules. The committee considers that the content of any exception, exemption, excuse, qualification or justification to a criminal offence should be included within primary legislation unless a sound justification for the use of delegated legislation is provided.

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

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27 Explanatory memorandum, p. 44.

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

29 See clause 69.

30 See clause 70.

31 See clause 72.

32 See clause 73.

33 Paragraph 68(3)(b).

1.40 The committee further notes that not only has no explanation been provided for clause 74 in the explanatory memorandum for this bill, or for the two previous bills, previous responses provided to the committee on this issue have failed to address, or even mention, clause 74. The committee notes that this is now the fifth occasion on which concerns have been raised in relation to this provision.

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

1.42 The committee also draws its scrutiny concerns in relation to clause 74 to the attention of the Senate. Noting that this clause would allow the elements of a criminal defence to be set out within delegated legislation and that no explanation for this power has been provided.

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

Incorporation of documents as in force from time to time[34]

1.44 Subclause 31(5) of the bill provides that the Minister rules may provide for a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time.

1.45 At a general level, the committee will have scrutiny concerns where provisions in a bill allow the incorporation of legislative provisions by reference to other documents because such an approach raises the prospect of changes being made to the law in the absence of parliamentary scrutiny. Where an external document is incorporated as in force 'from time to time', this means that any future changes to that document operates to change the law without any involvement from the Parliament. In addition to the implications for parliamentary scrutiny, such provisions can create uncertainty in the law and may mean that those obliged to obey the law have inadequate access to its terms. In particular, the committee will be concerned where relevant information, including standards, accounting principles or industry databases, is not publicly available or is available only if a fee is paid.

1.46 As a matter of general principle, the committee considers that any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law, it should be stated within the explanatory memorandum or within the bill that the material will be freely available and how it may be accessed.

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34 Subclause 31(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

The committee also expects the explanatory memorandum to the bill to explain why it is necessary and appropriate to incorporate documents as in force from time to time.

1.47 In this instance, the explanatory memorandum provides the same explanation as provided under the 2021 and 2022 bills, stating:

> The Minister can make rules to prescribe the threshold for determining which accountable entities will need to comply with the enhanced notification requirements.
> …
> These rules may incorporate a matter contained in an instrument or writing as in force from time to time if it is published on a website maintained by the Regulator. This is necessary to ensure that the rules align with current standards or guidance. The rules can only incorporate material as it exists from time to time from non-legislative instrument if that material is published by APRA and ASIC on their websites. This limitation will ensure only credible, relevant material may be incorporated.[35]

1.48 It is not clear to the committee from this explanation why it is necessary to allow the rules to incorporate documents as in force or existing from time to time. The committee notes that this incorporation power may allow changes to be made to the circumstances in which an accountable entity can be said to have met the enhanced notification threshold, without any involvement from the Parliament.

1.49 In *Scrutiny Digest 2 of 2022,* the committee noted the advice of the then Treasurer in relation to the 2021 bill that:

> The incorporation power allows the Minister rules to pick up and align with existing standards or guidance such as those issued by APRA. This material is freely available on its website, as it sets out the regulator's expectations for best practice compliance and accountability.[36]

1.50 It is unclear to the committee why this advice has not been included in the explanatory memorandum for the 2023 bill and whether it still applies to the incorporation power set out in subclause 31(5). In addition, it is not clear from this advice whether *all* material incorporated into the law under subclause 31(5) will be free and available online.

1.51 The committee notes that it may be justified to not ensure that all incorporated material is freely and readily available, but that an assessment of this is only possible where the explanatory materials for the bill explain why such an approach is necessary.

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35 Explanatory memorandum, pp. 28–29.

36 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2022* (18 March 2022) p. 77.

1.52 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing that the Minister rules may provide for a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time, in circumstances where it is not clear that incorporated material will be freely and readily available, and where no justification for the incorporation power has been provided in the explanatory memorandum.

Financial Accountability Regime (Consequential Amendments) Bill 2023

Purpose	Schedules 1 and 2 to this bill make consequential amendments to relevant Acts to support the new Financial Accountability Regime.
Portfolio	Treasury
Introduced	House of Representatives on 8 March 2023

The Financial Sector Reform (Hayne Royal Commission Response No. 3) Bill 2021 (the 2021 bill) was introduced in the House of Representatives on 28 October 2021 and lapsed at the dissolution of the previous Parliament. An almost identical bill, the Financial Sector Reform Bill 2022 (the 2022 bill), was subsequently introduced in the House of Representatives on 8 September 2022.

1.53 This bill, the Financial Accountability Regime (Consequential Amendments) Bill 2023 (the 2023 bill), mirrors Schedules 1 and 2 of the 2021 and 2022 bills. The committee raised scrutiny concerns in relation to provisions within Schedules 1 and 2 in *Scrutiny Digest 17 of 2021*,[37] *Scrutiny Digest 2 of 2022,*[38] *Scrutiny Digest 5 of 2022,*[39] and *Scrutiny Digest 6 of 2022*.[40] The committee's scrutiny concerns appear not to have been addressed and are therefore repeated below.

Reversal of the evidential burden of proof[41]

1.54 The 2023 bill seeks to establish several defences which reverse the evidential burden of proof. These defences are set out under items 10 and 17 of Schedule 1 to the bill.

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

37 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 17 of 2021* (24 November 2021) pp. 22–24.

38 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2022* (18 March 2022) pp. 79–82.

39 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2022* (28 September 2022) pp. 20–27.

40 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2022*, (26 October 2022) pp. 74–79.

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

officer discloses protected information or produces a protected document within the meaning of that Act. Item 10 of Schedule 1 to the bill seeks to insert a number of new defences to this offence.[42]

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

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

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

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

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

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

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

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

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

1.64 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[43] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.65 The explanatory memorandum for the bill merely repeats the same justification which the committee has previously found to be insufficient, arguing that the relevant matters to be adduced would be peculiarly within the knowledge of the defendant.[44]

1.66 As implied by this justification, the relevant test, as set out in the *Guide to Framing Commonwealth Offences,*[45] is that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where it is peculiarly within the knowledge of the defendant.[46] In this instance, it does not appear that several of the matters relevant to the defences set out at proposed subsections 56(7G), (7H), (7J), (7K), (7L) and 127(7A) would be peculiarly within the knowledge of the defendant, noting that elements of these defences seem to relate to matters of public fact or to questions of law. For example, it would appear that whether information had been shared between APRA and ASIC in accordance with clause 39 of the Financial Accountability Regime Bill 2023 would be a matter that the prosecution could readily ascertain. The committee has made this point repeatedly and notes that it has not received any explanation regarding this issue.

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

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

44 Explanatory memorandum, p. 31.

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

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

Social Security (Administration) Amendment (Income Management Reform) Bill 2023

Purpose	This bill seeks to amend the *Social Security (Administration) Act 1999* to reform the Income Management scheme. This builds on amendments already introduced under the *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022*.
Portfolio	Social Services
Introduced	House of Representatives on 9 March 2023

Significant matters in delegated legislation[47]

1.68 This bill is intended to introduce changes in relation to the Income Management regime (IM regime). Specifically, the bill aims to transition participants within this scheme to a new 'Enhanced Income Management regime' (Enhanced IM regime). This builds on changes already introduced by the *Social Security (Administration) Amendment (Repeal of Cashless Debit Card and Other Measures) Act 2022.* Changes introduced by that Act included transitioning participants in the Northern Territory and Cape York regions to the Enhanced IM regime. Among other things, the Enhanced IM regime will offer participants a 'SmartCard' instead of a 'BasicsCard'. The SmartCard is intended to provide a greater choice of functions, including tap to pay, online shopping, and BPAY bill payments. The new card also includes a PIN number.

1.69 Criteria for participants of the IM regime are set out in Part 3B of the *Social Security (Administration) Act 1999* (Social Security Act). Participants include:

- persons who are identified in a child protection notice;[48]
- persons defined as 'vulnerable welfare payment recipients',[49] disengaged youth,[50] or 'long term welfare payment recipients';[51]

47 Schedule 1, item 32, proposed subsections 123SDA(2) and (6). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

48 *Social Security (Administration) Act 1999,* section 123UC.

49 *Social Security (Administration) Act 1999,* section 123UCA.

50 *Social Security (Administration) Act 1999,* section 123UCB.

51 *Social Security (Administration) Act 1999,* section 123UCC.

- persons who have an eligible care child who is required to be, but is not, enrolled at a primary or secondary school;[52]
- persons who meet the school attendance criteria;[53] and
- persons who are the subject of a State or Territory referral notice.[54]

1.70 Many participants within the IM regime are compulsorily subject to the scheme.

1.71 The approach taken within the bill largely mirrors the approach taken within Part 3B of the Social Security Act. That is, the Enhanced IM regime will set out the same criteria for scheme participants as exists under the IM regime. The explanatory memorandum states that all new entrants to income management will be directed to the new Enhanced IM regime.[55]

1.72 Much of the detail of the framework established by the bill is left to delegated legislation, or to non-legislative determinations. This is consistent with the approach taken within Part 3B of the Social Security Act. However, certain provisions within the bill introduce what appear to be new delegated legislation making powers.

1.73 For example, proposed section 123SDA of the bill specifies when persons residing in areas other than the Northern Territory are subject to the enhanced income management regime. Proposed subsection 123SDA(1) provides criteria which would apply to disengaged youth, while proposed subsection 123SDA(5) sets out a list of criteria in relation to long-term welfare payment recipients. Proposed paragraphs 123SDA(1)(a) and 123SDA(5)(a) provide that, among other things, one of the criteria for eligibility is that the person's usual place of residence is within a state or territory, or a particular area within a state or territory, that is specified within a legislative instrument. Proposed subsections 123SDA(2) and 123SDA(6) provide the Minister with the power to determine an area for the purposes of paragraphs 123SDA(1)(a) and 123SDA(5)(a).

1.74 The explanatory memorandum for the bill does not justify allowing these matters to be set out within delegated legislation, nor explain why additional criteria is necessary.[56] The committee is concerned about this lack of justification, given the significant impact that becoming a participant within the Enhanced IM regime may have on a person. It is also unclear to the committee whether these powers introduce new criteria for scheme participants when compared to the existing IM regime and, if

52 *Social Security (Administration) Act 1999,* section 123UD.

53 *Social Security (Administration) Act 1999,* section 123UE.

54 *Social Security (Administration) Act 1999,* section 123UF and section 123UFA.

55 Explanatory memorandum, p. 2; statement of compatibility, p. 64.

56 Explanatory memorandum, pp. 28–32.

so, why this approach is necessary. The committee is also concerned about the lack of limits or guidance on the exercise of the power on the face of the bill.

1.75 In light of the above the committee requests the minister's detailed advice in relation to:

- **whether the criteria for the entry of participants to the Enhanced Income Management Regime set out at proposed section 123SDA is new compared to the criteria set out for the Income Management Regime; and**
- **if this is the case, why additional criteria are necessary; and**
- **why it is necessary and appropriate to provide delegated legislation making powers at proposed subsections 123SDA(2) and 123SDA(6).**

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

1.76 The committee notes that the following private members' bill may raise scrutiny concerns under Senate standing order 24. Should this bill proceed to further stages of debate, the committee may request further information from the bill proponent.

Bill	Relevant provisions	Potential scrutiny concerns
Transparent and Quality Public Appointments Bill 2023	Clause 49	The provision may raise scrutiny concerns under principle (i) in relation to immunity from civil liability.

Bills with no committee comment

1.77 The committee has no comment in relation to the following bills which were introduced into the Parliament between 6 – 9 March 2023:

- Ending Native Forest Logging Bill 2023
- Financial Services Compensation Scheme of Last Resort Levy Bill 2023
- Financial Services Compensation Scheme of Last Resort Levy (Collection) Bill 2023
- Governor-General Amendment (Cessation of Allowances in the Public Interest) Bill 2023
- Improving Access to Medicinal Cannabis Bill 2023
- National Health Amendment (Effect of Prosecution—Approved Pharmacist Corporations) Bill 2023
- National Vocational Education and Training Regulator (Data Streamlining) Amendment Bill 2023
- Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Bill 2023

Commentary on amendments and explanatory materials

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

1.78 On 7 March 2023, one government amendment was made to the bill in the Senate.

1.79 The committee welcomes the Senate amendment to the bill which appears to address the committee's scrutiny concerns relating to broad discretionary powers.

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

1.80 On 9 March 2023, three government amendments were made to the bill in the Senate.

1.81 The committee welcomes the Senate amendments to the bill which appear to address the committee's scrutiny concerns relating to the exclusion of the natural justice hearing rule in releasing therapeutic goods information to the public.

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

- Higher Education Support Amendment (Australia's Economic Accelerator) Bill 2022[57]
- National Reconstruction Fund Corporation Bill 2022[58]

57 On 6 March 2023, the Senate agreed to one Australian Greens amendment to the bill.

58 On 9 March 2023, the House of Representatives agreed to two crossbench amendments 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.

Crimes Amendment (Penalty Unit) Bill 2022

Purpose	This bill seeks to amend the *Crimes Act 1914* to increase the amount of the Commonwealth penalty unit from $222 to $275, with effect from 1 January 2023.
Portfolio	Attorney-General
Introduced	House of Representatives on 9 November 2022
Bill status	Passed both Houses

Significant penalties[1]

2.2 Item 1 of Schedule 1 to the bill amends the definition of 'penalty unit' in subsection 4AA(1) of the *Crimes Act 1914* (Crimes Act) to increase the amount of a single unit from $222 to $275. Commonwealth pecuniary criminal and civil penalty provisions are generally expressed in terms of penalty units, with the penalty amount calculated by multiplying the value of a penalty unit as prescribed by the Crimes Act by the number of penalty units applicable.[2] The effect of this amendment is therefore to increase the maximum civil and criminal penalties that apply across the majority of Commonwealth legislation.

2.3 The amendment took effect on 1 January 2023.

2.4 The committee initially scrutinised this bill in *Scrutiny Digest 8 of 2022* and requested the minister's advice.[3] The committee considered the minister's response in *Scrutiny Digest 1 of 2023* and requested the minister's further advice as to why it is both necessary and appropriate to increase the amount of a Commonwealth penalty unit by almost 24 percent, noting the limited explanation provided in the explanatory

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

2 However, it is sometimes appropriate to express a penalty in individual dollar amounts, see Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 42–43.

3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2022* (30 November 2022) pp. 1–2.

materials for the increase and that the increase will apply in addition to the usual indexation process.[4]

Attorney-General's response[5]

2.5 The Attorney-General advised that the amount of the penalty unit has been increased four times by legislative amendment and once by automatic indexation since it was first instituted in 1992, increasing from $100 to $222. The Attorney-General advised that these increases represent an increase of 122%, while average incomes have increased by 137% during the same period.

2.6 The Attorney-General advised that increasing the penalty unit amount over time in order to broadly align it with income levels ensures that fines remain an effective deterrent. The Attorney-General considered that this is vital given that fines are the most common sentencing disposition imposed by courts in Commonwealth matters, occurring in 31% of sentencing matters in the 2020-21 financial year. The Attorney-General noted that many of these sentences are imposed in the areas of financial, tax and fraud related crimes.

2.7 The Attorney-General advised that the public expects that courts have appropriate punishments available to them when sentencing individuals and corporations. The Attorney-General noted that penalties that do not have an appropriate maximum can be seen as a mere cost of doing business and cease to operate as a deterrent, particularly in the case of corporations.

2.8 Finally, the Attorney-General noted that the court is required to impose the most appropriate sentence, taking into account the relevant circumstances of each case. In this context, the maximum penalty will indicate the seriousness with which the offence is regarded by Parliament and the community but the actual fine imposed will in most cases be lower.

Committee comment

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

2.10 The committee notes that the percentage increases flagged by the Attorney-General are dated to before the increase introduced by the Crimes Amendment (Penalty Unit) Bill 2022. With the changes introduced by the bill, the amount of the Commonwealth penalty unit has increased by 175% when compared to an increase of average incomes by 137%. With the automatic increase due to occur

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4 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 87–89.

5 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 3 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

from July 2023, the difference between these two percentage rates may become more pronounced.

2.11 The committee accepts that it is important that penalty unit amounts are increased over time to align with income levels. Indeed, the committee's concerns relate to this point, noting that the increase proposed by the bill raises the amount of the penalty unit at a rate significantly above the rate which incomes are increasing. While there may be legitimate reasons for taking this approach, very little justification has been provided in this instance.

2.12 The committee also considers that it is inappropriate to only consider penalty unit amounts in the context of average incomes. Rather, it would be more appropriate to consider real wage increases, which reflect the amount of inflation over a given period. The committee notes that the Attorney General's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* refers to inflation in this context, but not to average incomes, stating that 'expressing a penalty in penalty units (rather than a dollar figure) facilitates the uniform adjustment of penalties across legislation from time to time to reflect the changing value of money.'[6]

2.13 Given the slower growth in real wages compared to average income over the relevant period, the discrepancy between the growth in the amount of a Commonwealth penalty unit and a person's income is more significant than the percentages stated by the Attorney-General would imply. The committee also notes that average income is not necessarily representative of general income levels given income inequality rates, and that other considerations are therefore likely to be relevant in determining an appropriate Commonwealth penalty unit amount.

2.14 The committee accepts that it is necessary to ensure that the amount of a Commonwealth penalty unit is adequate in ensuring effective deterrence. However, neither the explanatory memorandum for the bill nor the Attorney-General's response has provided evidence to demonstrate either that the previous amount was insufficient or that the new amount is required to ensure deterrence. The committee also notes that no explanation has been provided for how the amount of the increase was determined despite two requests being made for this information.

2.15 The Attorney-General has advised that concerns about deterrence relate particularly to the conduct of corporations rather than individuals. However, the committee notes that the Attorney-General's advice related in large part to the average income for individuals, a figure which does not relate directly to corporations. The committee also notes that if there is a specific concern that fines being imposed by the courts under financial, tax and fraud related crimes are inadequate to ensure

6 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 42

deterrence, it is open to the government to instead increase the number of penalty units applying to those particular crimes.

2.16 As the increase introduced by the bill is significantly above that which would have occurred under the automatic indexation process, the committee expects a thorough justification for the increase to be included within the explanatory memorandum. This is particularly so as legislated penalty unit amounts may no longer align with the original intent, noting that these amounts would have been determined based on a general understanding of the way in which penalty unit increases would occur.

2.17 At a minimum, the committee considers that it would have been appropriate had the increase introduced by the bill been justified with reference to evidence: that the previous amount of the penalty unit was not acting as an effective deterrent; evidence that the new amount constitutes an effective deterrent; and information explaining how the new amount was determined.

2.18 The committee continues to have concerns about increasing the amount of a Commonwealth penalty unit by almost 24 percent, noting the limited explanation provided in the explanatory materials for the increase and that the increase will apply in addition to the automatic indexation process.

2.19 However, as the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Treasury Laws Amendment (Consumer Data Right) Bill 2022

Purpose	This bill seeks to amend the *Competition and Consumer Act 2010* to introduce reforms to the Consumer Data Right (CDR) framework, referred to as 'action initiation' reforms, which would enable consumers to direct accredited persons to instruct on actions on their behalf using the CDR framework.
Portfolio	Treasury
Introduced	House of Representatives on 30 November 2022
Bill status	Before the Senate

Reversal of the evidential burden of proof[7]

2.20 Item 78 of Schedule 1 to the bill seeks to introduce new subparagraphs 56BN(1)(c)(iii) and (iv) into the section 56BN offence currently set out in the *Competition and Consumer Act 2010* (the Act). Section 56BN provides for an offence where a person engages in conduct that the person knows is misleading or deceptive and the conduct has the effect of making another person believe a person is a Consumer Data Right (CDR) consumer for CDR data, or is acting in accordance with a valid request or consent for the disclosure of CDR data. This amendment adds that it is also an offence if the effect of the conduct is making another person believe a person is a CDR consumer for CDR action, or believe a person has satisfied any criteria under the consumer data rules for the making of a request, the giving of a valid instruction or the processing of a valid instruction, for the performance of a CDR action. Subsection 56BN(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the conduct is not misleading or deceptive in a material particular. A defendant bears the evidential burden of proof in relation to this defence.[8]

2.21 In *Scrutiny Digest 1 of 2023* the committee requested the Assistant Treasurer's advice in relation to the inclusion of subsection 56BN(2) as an offence-specific defence, rather than as an element of the offence.[9]

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7 Schedule 1, item 78, proposed subparagraphs 56BN(1)(c)(iii) and (iv). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

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

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 55–56.

Assistant Treasurer's response[10]

2.22 The Assistant Treasurer advised that the subsection 56BN(2) offence-specific defence exists where the misleading particular is not material. The Assistant Treasurer advised that evidence about materiality would generally be peculiarly within the knowledge of the defendant, for example relating to the way the accredited person's business provides services with the use of CDR data. The Assistant Treasurer advised that it would be unduly onerous to require the prosecution to prove the materiality in the absence of evidence from the defendant. The Assistant Treasurer further advised that the offence in section 56BN is equivalent to like offence provisions in the *Criminal Code*.

Committee comment

2.23 The committee thanks the Assistant Treasurer for this response.

2.24 The committee notes the Assistant Treasurer's advice that the defence relies on information that would *generally* be peculiarly within the knowledge of the defendant. The committee however notes that this would suggest that there is information that is not peculiarly within the knowledge of the defendant. In particular, the committee suggests that information relating to business operational practices is not information peculiarly within a defendant's knowledge and is therefore ascertainable by the prosecution.

2.25 The committee reiterates that at common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[11] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

2.26 The committee considers that in this case it would be appropriate to include the subsection 56BN(2) defence as an element of the offence.

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 in relation to an offence under subsection 56BN(2) of the *Competition and Consumer Act 2010*.

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10 The Assistant Treasurer responded to the committee's comments in a letter dated 6 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

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

Incorporation of external material as in force from time to time[12]

2.28 Item 179 of Schedule 1 seeks to introduce proposed paragraph 56GB(1)(aa) to extend the power to make instruments as in force from time to time in paragraph 56GB(2)(b) to CDR declarations for types of CDR actions.

2.29 In *Scrutiny Digest 1 of 2023* the committee requested the Assistant Treasurer'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.[13]

Assistant Treasurer's response[14]

2.30 The Assistant Treasurer advised that where a CDR instrument refers to information in another instrument or writing, the location where a person may access it will be clear in the CDR instrument. The Assistant Treasurer noted, however, that there may be circumstances where it is necessary for a CDR instrument to refer to material such as an industry standard that may not be publicly available, for example because there is a fee for access. In these cases, the Assistant Treasurer advised that the costs to affected persons to access the materials will be relatively minor and far outweighed by the costs they would incur by needing to comply with bespoke standards rather than adopting existing ones.

2.31 The Assistant Treasurer also advised that data standards developed by the Data Standards Body will continue to be publicly available at no cost.

Committee comment

2.32 The committee thanks the Assistant Treasurer for this response.

2.33 The committee notes the Assistant Treasurer's advice that in some circumstances a CDR instrument may refer to material that is not publicly available and an individual may need to pay for access. The committee notes that, as a matter of general principle, any member of the public should be able to freely and readily access the terms of the law. Therefore, the committee's consistent scrutiny view is that where material is incorporated by reference into the law it should be freely and readily available to all those who may be interested in the law.

2.34 The committee considers that the department should endeavour to make all incorporated materials publicly available and that it would be appropriate for the department to make any external material incorporated in a legislative instrument

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12 Schedule 1, item 179, proposed paragraph 56GB(1)(aa). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

13 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 56–57.

14 The Assistant Treasurer responded to the committee's comments in a letter dated 6 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

available to members of the public, for example by arranging for the material to be viewed at a particular location. The committee suggests that the explanatory statement accompanying any legislative instrument that incorporates external material should include information on how the public can access any incorporated external material. The committee further expects that the explanatory memorandum for a bill which proposes to incorporate external material includes an undertaking to this effect.

2.35 In light of the information provided by the Assistant Treasurer, the committee makes no further comment on this matter.

Immunity from civil and criminal liability
Reversal of the evidential burden of proof[15]

2.36 Items 180 and 181 of Schedule 1 seek to insert an amended form of subsection 56GC(1) into the Act. Subsection 56GC(1) provides civil and criminal immunity for different CDR entities performing particular actions if performed in good faith, in compliance with the CDR provisions and in compliance with any law prescribed by the regulations. A defendant seeking to rely on this immunity bears an evidential burden in relation to a criminal prosecution.

2.37 The immunities provided for in proposed subsection 56GC(1) would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless a lack of good faith can be shown.

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

- why it is necessary and appropriate to confer immunity from civil and criminal proceedings on a potentially broad range of persons, so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown;
- where there is not a sufficient justification, consideration be given to amending the bill so that a more limited immunity is conferred; and
- why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.[16]

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15 Schedule 1, items 180 and 181, proposed subsection 56GC(1). 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. 57–59.

Assistant Treasurer's response[17]

2.39 In relation to immunity from liability, the Assistant Treasurer advised that to receive protection from liability, CDR participants must comply with the *Competition and Consumer Act 2010* and all relevant rules and standards, and they must act in good faith. The Assistant Treasurer advised that the intention behind section 56GC is that, for example, if the consumer suffers a loss for reasons other than the participant complying with the requirements of the CDR, the CDR should not displace ordinary rules of liability and allocation of loss.

2.40 The Assistant Treasurer further advised that the proposed immunity to CDR entities is an extension of the current arrangements for CDR data sharing and is consistent with the Final Report of the *Inquiry into the Future Directions for the Consumer Data Right*. Additionally, paragraph 56GC(1)(c) enables regulations to prescribe additional laws that participants must comply with to receive the protection which provides further safeguards.

2.41 In relation to the reverse evidential burden in subsection 56GC(2), the Assistant Treasurer advised that the matters are peculiarly within the knowledge of the defendant, as the defendant will know whether they received evidence of a valid consent or request and have otherwise met their obligations, and it would be unduly onerous to require the complainant to disprove good faith compliance with CDR provisions, in the absence of evidence by the defendant.

Committee comment

2.42 The committee thanks the Assistant Treasurer for this response.

2.43 The committee notes the Assistant Treasurer's advice on the scope of the immunity from liability, the consistency of immunity with current arrangements for CDR data sharing, and the safeguards provided for in the regulations that can prescribe additional laws that must be complied with.

2.44 The committee acknowledges that there may be circumstances where it is appropriate to provide for civil and criminal immunity from liability, however given the impact such immunity can have on an individual to bring an action to enforce their legal rights, the committee expects the explanatory memorandum to address why it is appropriate to provide immunity from liability. The Assistant Treasurer's response explains the consistency of this approach, however does not explain why civil and criminal immunity is considered necessary in the context of the CDR scheme.

2.45 The committee notes the Assistant Treasurer's advice that the reverse evidential burden in subsection 56GC(2) is appropriate as the matters are peculiarly

17 The Assistant Treasurer responded to the committee's comments in a letter dated 6 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

within the defendant's knowledge and would be unduly onerous on the complainant. Nevertheless, the committee is of the view that knowledge of whether a valid consent or request has been received is not a matter *peculiarly* within the defendant's knowledge.

2.46 That it is difficult for the prosecution to prove a particular matter is generally not in and of itself a sufficient justification for placing the burden of proof on the defendant. As noted above, the duty of the prosecution to prove all elements of an offence is an important aspect of the right to be presumed innocent until proven guilty.

2.47 The committee expects that where civil and criminal immunity from liability is provided, the explanatory memorandum to the bill should address why it is appropriate to provide the immunity. The committee draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing for civil and criminal immunity from liability in circumstances where the necessity and appropriateness of the immunity in the CDR scheme has not been explained.

2.48 In relation to the reversal of the evidential burden of proof for an offence under subsection 56GC(2) of the *Competition and Consumer Act 2010*, the committee draws its scrutiny concerns to the attention of senators and leaves this matter to the Senate as a whole.

Broad discretionary power
Significant matters in delegated legislation[18]

2.49 Items 182 and 184 of Schedule 1 seek to allow the Australian Competition and Consumer Commission (ACCC) to exempt a person, by written notice, from certain provisions in relation to CDR actions.

2.50 The bill also provides for:

- a broad discretionary power for the ACCC to exempt persons from the operation of primary and delegated legislation; and
- a broad power for the regulations to exempt persons or classes of persons from the operation of primary and delegated legislation and to modify how that legislation would operate.

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

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18 Schedule 1, items 182 and 184, proposed subsections 56GD(2) and 56GE(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii) and (iv).

- why it is considered necessary and appropriate to provide a broad power to grant exemptions from the operation of the consumer data right scheme, including within delegated legislation; and
- whether the bill can be amended to include appropriate safeguards on the exercise of the discretionary power to provide those exemptions.[19]

Assistant Treasurer's response[20]

2.52 The Assistant Treasurer advised that the explanatory memorandum for the Treasury Laws Amendment (Consumer Data Right) Bill 2019 explained that the power to modify by regulations (section 56GE) is important to ensure the CDR system is dynamic and able to adapt quickly to a changing economy and the varied sectors within it. Given the CDR scheme's broad application, the Assistant Treasurer advised that it may lead to unintended results for particular participants. Further, enacting exemptions in the primary law to deal with this may not always be practicable and would increase the complexity of the primary law for all users despite only affecting a limited number of participants.

2.53 In relation to the ACCC's exemption power in section 56GD, the Assistant Treasurer advised that it provides the ACCC with the ability to ensure the CDR system does not operate in unintended or perverse ways in relation to individual participants.

2.54 The Assistant Treasurer advised that there are adequate safeguards regarding both of these powers, including that section 56GE regulations are disallowable instruments, and the ACCC may consider in its assessment of exemption applications under section 56GD a series of factors set out in ACCC guidance. Some of these factors include: consideration of the impact of the exemption on the CDR objectives; the nature and scope of the exemption sought; potential for unintended or perverse consequences; impact of the proposed exemption on the CDR ecosystem; the extent to which the applicant has previously met its CDR obligations; evidence provided to support the exemption; and that the ACCC may grant an exemption on the condition that applicants notify the ACCC in a timely manner of any material changes that may affect the exemption.

Committee comment

2.55 The committee thanks the Assistant Treasurer for this response.

2.56 The committee notes the Assistant Treasurer's advice that there are some safeguards in place, such as the ability of the Parliament to disallow a legislative

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19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2023* (8 February 2023) pp. 59–60.

20 The Assistant Treasurer responded to the committee's comments in a letter dated 6 March 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

instrument made under section 56GE, and the ACCC guidance on what it may consider when assessing exemptions under section 56GD.

2.57 While acknowledging this guidance material, the committee considers that non-legislative guidance which the ACCC has discretion whether to consider, is likely insufficient. The committee considers that at least some of the matters included within this guidance document, such as that the ACCC may grant an exemption on the condition that applicants notify the ACCC in a timely manner of any material changes that may affect the exemption, should be more appropriately included within the primary legislation. Leaving significant matters to delegated legislation limits the ability of the Parliament to exercise appropriate oversight of legislative schemes and without adequate safeguards this risks the inappropriate use of these powers.

2.58 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 grant exemptions from the operation of the consumer data right scheme, including within delegated legislation, and in circumstances where there are no legislative safeguards in place to ensure that such provisions are used appropriately.

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]

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

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

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

- Treasury Laws Amendment (Financial Services Compensation Scheme of Last Resort) Bill 2023.[3]

Senator Dean Smith
Chair

3 Schedule 1, item 3, proposed subsection 1069P(2) of the bill provides that the Consolidated Revenue Fund is appropriated for the purposes of providing payments to the financial services Compensation Scheme of Last Resort Operator.