

The Senate

Standing
Committee for the
Scrutiny of Bills

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Contents

Membership of the committee	iii
Introduction	vii
Chapter 1 – Initial scrutiny	
Comment bills	
Biosecurity Amendment (Advanced Compliance Measures) Bill 2023	1
Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023.....	4
Environment Protection (Sea Dumping) Amendment (Using New Technologies to Fight Climate Change) Bill 2023	10
Intelligence Services Legislation Amendment Bill 2023	14
Migration Amendment (Strengthening Employer Compliance) Bill 2023.....	21
National Occupational Respiratory Disease Registry Bill 2023.....	27
Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023.....	30
Private Senators' and Members' bills that may raise scrutiny concerns	34
Broadcasting Services Amendment (Healthy Kids Advertising) Bill 2023	
Freeze on Rent and Rate Increase Bill 2023	
Interactive Gambling Amendment (Ban on Gambling Advertisements) Bill 2023	
Migration Amendment (Overseas Organ Transplant Disclosure and Other Measures) Bill 2023	
Bills with no committee comment	35
Australian Capital Territory (Self-Government) Amendment Bill 2023	
Classification (Publications, Films and Computer Games) Amendment (Industry Self-Classification and Other Measures) Bill 2023	
Intellectual Property Laws Amendment (Regulator Performance) Bill 2023	
International Organisations (Privileges and Immunities) Amendment Bill 2023	
National Occupational Respiratory Disease Registry (Consequential Amendments) Bill 2023	
Treasury Laws Amendment (Making Multinationals Pay Their Fair Share— Integrity and Transparency) Bill 2023	

Commentary on amendments and explanatory materials.....	36
Education Legislation Amendment (Startup Year and Other Measures) Bill 2023	
Nature Repair Market Bill 2023	
Social Security (Administration) Amendment (Income Management Reform) Bill 2023	
Treasury Laws Amendment (2022 Measures No. 4) Bill 2022	
Treasury Laws Amendment (Refining and Improving Our Tax System) Bill 2023	

Chapter 2 – Commentary on ministerial responses

Appropriation Bill (No. 1) 2023-2024	
Appropriation Bill (No. 2) 2023-2024	38
Creative Australia Bill 2023	41
Family Law Amendment Bill 2023.....	44
Greenhouse and Energy Minimum Standards Amendment (Administrative Changes) Bill 2023	47
Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023.....	50
Migration Amendment (Giving Documents and Other Measures) Bill 2023.....	53
Nature Repair Market Bill 2023	57
Nature Repair Market (Consequential Amendments) Bill 2023.....	65
Public Service Amendment Bill 2023	68
Veterans’ Affairs Legislation Amendment (Miscellaneous Measures No. 2) Bill 2023	74

Chapter 3 – Scrutiny of standing appropriations 77

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, standing order 24 enables Senators to ask the responsible minister why in the Senate chamber, for an explanation 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.

Biosecurity Amendment (Advanced Compliance Measures) Bill 2023¹

Purpose	This bill seeks to amend the <i>Biosecurity Act 2015</i> to: provide for greater access to information related to the biosecurity risk of travellers; alter provisions relating to approved arrangements; increase certain civil penalties; and create strict liability offences.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 21 June 2023

Privacy²

1.2 Schedule 1 seeks to introduce proposed subsection 196(3A) to the *Biosecurity Act 2015* (Biosecurity Act) which alters the Director of Biosecurity (the Director)'s existing power to require a person on an incoming aircraft or vessel to provide information to assess the biosecurity risk associated with them or goods in their possession.³ Item 7 of schedule 1 grants the Director the power to require any person included in a class of persons intending to enter or entering Australian territory on an incoming aircraft or vessel to produce an Australian travel document (which includes a passport) or a passport or travel document issued by another country.⁴ This may only be done for two purposes under proposed paragraph 196(3A)(a), which are:

- to assess the level of biosecurity risk associated with the person and any goods that the person has with the person; and

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Biosecurity Amendment (Advanced Compliance Measures) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 116.

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

3 *Biosecurity Act 2015*, subsection 196(1).

4 Schedule 1, item 7, proposed subsection 196(3B).

- the future profiling, or future assessment, of biosecurity risks.

1.3 Proposed subsection 196(3A) would also grant the Director the power to scan any document produced for either of the above purposes,⁵ and to collect and retain personal information obtained as a part of that production or scanning for either or both of the above purposes.⁶

1.4 The committee considers that where a bill provides for the collection, use or disclosure of personal information, the explanatory materials to the bill should address why it is appropriate to do so and what safeguards are in place to protect the personal information, and whether these are set out in law or policy. This includes whether the *Privacy Act 1988* (Privacy Act) applies to the information that is collected, stored and disclosed.

1.5 The statement of compatibility explains:

Both purposes relate to assessing biosecurity risks, both in the present and in the future which is a reasonable and legitimate objective. As noted, the collection of information via the scanning of a travel document provides for a more effective, efficient and targeted management of biosecurity risk with the ultimate aim of protecting Australia, its people, plant and animals, its environment and economy. A biosecurity officer may not require the provision of a travel document, the scanning of the same and the retention of information from this process for any purpose other than the limited purposes set out in new subparagraphs 196(3A)(a)(i) and (ii). Further, it is intended that the information obtained from the process enabled by proposed subsection 196(3A) will only be held as long as is necessary to meet the purposes outlined above.

Additionally, Part 2 of Chapter 11 of the Act includes protections relating to the collection, storage and disclosure of protected information, which would include information collected as part of a process envisaged by new subsection 196(3A). This includes offences and a civil penalty for the unauthorised use or disclosure of protected information, such as sensitive personal information. As such, any sensitive personal information obtained by the exercise of power under new subsection 196(3A) would be protected by the robust information management framework in the Act.⁷

1.6 In this instance, while the committee notes that the scanning and collection of information from a passport or travel document that is produced is considered necessary for the management of biosecurity risk, the committee is concerned that the explanatory materials do not clarify the nature of personal information that may be collected. The information that is collected from produced documents will also

5 Schedule 1, item 7, proposed paragraph 196(3A)(b).

6 Schedule 1, item 7, proposed paragraph 196(3A)(c).

7 Statement of compatibility, p. 91.

inform the level of biosecurity risk associated with a person and the future profiling or assessment of biosecurity risks under proposed paragraph 196(3A)(a). The committee's concerns are heightened in this instance given the information that is collected will be used to determine the biosecurity risk associated with an individual, including future profiling of risk, which is not explained.

1.7 Further, though the committee notes that there are protections applicable to the use and disclosure of information obtained from passports and travel documents in part 2 of chapter 11 of the Biosecurity Act, the explanatory materials to the bill do not clarify whether the Privacy Act applies to the information that is collected. In relation to the collection of information, the explanatory materials explain that the information will only be held for as long as is necessary to meet the purposes outlined.⁸ However, without clarification as to the application of the Privacy Act, it is not clear to the committee whether the information must be securely destroyed or de-identified in accordance with Australian Privacy Principle 11.2.⁹

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

- **the nature of personal information that can be collected and used from the production or scanning of a passport or travel document in accordance with proposed subsection 196(3A) and to whom that information can be disclosed;**
- **the meaning of the 'future profiling, or future assessment, of biosecurity risks'; and**
- **whether the *Privacy Act 1988* applies to personal information that is collected in accordance with proposed subsection 196(3A).**

8 Statement of compatibility, p. 91.

9 *Privacy Act 1988*, Australian Privacy Principle 11.2.

Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023¹⁰

Purpose	Seeks to amend the <i>Criminal Code Act 1995</i> to: extend the foreign bribery offence to include the bribery of candidates for public office and bribery conducted to obtain a personal advantage; remove the requirement that a benefit or business advantage be ‘not legitimately due’ and replace it with the concept of ‘improperly influencing’ a foreign public official; remove the requirement that the foreign public official be influenced in the exercise of their official duties; clarify that the foreign bribery offence does not require the prosecution to prove that the accused had a specific business, or business or personal advantage, in mind, and that the business, or business or personal advantage, can be obtained for someone else; and create an offence of failure of a body corporate to prevent foreign bribery by an associate; and <i>Income Tax Assessment Act 1997</i> to preserve the existing rule which prohibits a person from claiming as a deduction for a loss or outgoing a bribe to a foreign public official.
Portfolio	Attorney-General
Introduced	House of Representatives on 22 June 2023

Reversal of the evidential burden of proof¹¹

1.9 Item 6 of Schedule 1 to the bill seeks to substitute section 70.2 of the *Criminal Code 1995* (the Code). Substituted section 70.2 expands the remit of the offence of bribing a foreign public official. It is an offence under substituted section 70.2 for a person to do any of the following with the intention of improperly influencing a foreign public official in order to obtain or retain business or a business or personal advantage:

- provide a benefit to another person;
- cause a benefit to be provided to another person;
- offer to provide, or promises to provide, a benefit to another person; or

10 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 117.

11 Schedule 1, item 6, substituted section 70.2. The committee draws senators’ attention to this provision pursuant to Senate standing order 24(1)(a)(i).

- cause an offer of the provision of a benefit, or a promise of a benefit, to be made to another person.

1.10 The offence carries a maximum penalty of either 10 years imprisonment, or a fine of 10,000 penalty units, or both for an individual.¹²

1.11 Item 7 of Schedule 1 to the bill seeks to introduce proposed subsection 70.3(2A) which creates a defence to the offence under substituted section 70.2. The defence provides that the offence is not committed if:

- the person's conduct occurred in relation to a foreign public official; and
- the relevant foreign public official meets the definition of foreign public official under the Code; and
- a written law is in force in the place where the conducted occurred permits the provision of the benefit to the relevant foreign public official.

1.12 A defendant bears the evidential burden of proof in relation to this defence.

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

1.14 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*, which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.¹³

1.15 The explanatory memorandum explains:

This offence-specific defence is appropriate because:

- The defendant would be in a better position to adduce evidence of the written foreign law he or she relied on when offering or providing the benefit. The defendant could readily provide evidence of the existence of the foreign law and their reliance on it to support their case.

12 Schedule 1, item 6, substituted subsection 70.2(3).

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

- It would be difficult for the prosecution to prove the non-existence of a law in a foreign jurisdiction. For example, this would require the prosecution to seek evidence of any written law.
- The question of whether the benefit was required or permitted under a foreign country's written law is not central to the question of culpability for the offence. The essential elements of the proposed foreign bribery offence are that the defendant provided, offered or caused to be provided or offered, a benefit to another person with the intention of improperly influencing a foreign public official in order to obtain or retain business or a business or personal advantage.¹⁴

1.16 The committee considers that although the defendant may be able to adduce evidence of the existence of the foreign law, simple convenience is not enough to address the requirements of the *Guide to Framing Commonwealth Offences*. In this instance, is it not apparent that the relevant matters would be peculiarly in the defendant's knowledge or that it would be significantly more difficult or costly for prosecution to disprove the existence of a written law permitting the provision of the benefit. The committee considers that it is possible for the prosecution to seek advice as needed regarding legal provisions in a foreign country and that the existence of a written law in itself reflects that it cannot be peculiar to the defendant's knowledge.

1.17 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 70.3(2A).

Reversal of legal burden of proof Absolute liability offences¹⁵

1.18 Item 8 of Schedule 1 of the bill introduces proposed subsection 70.5A(1), which creates an offence if a person who is an associate of a body corporate that is a constitutional corporation commits an offence against section 70.2 or engages in conduct outside Australia, that, if engaged in Australia would constitute an offence against section 70.2. The conduct must be committed by the associate for the profit or gain of the body corporate.

1.19 Proposed subsection 70.5A(2) applies absolute liability to the following elements of the offence:

- the body corporate is a constitutional corporation and that it is taken to be registered in a Territory under section 119A of the *Corporations Act 2001*; and

14 Explanatory memorandum, p. 16.

15 Schedule 1, item 8, proposed subsections 70.5A(1) and (2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

- the associate of the body corporate commits an offence against section 70.2 of the Code; and
- the associate of the body corporate engages in conduct outside Australia that, if engaged in Australia, would constitute an offence against section 70.2.¹⁶

1.20 Proposed subsection 70.5A(1) introduces an exception to the offence which requires the defendant to bear the legal burden of proof as to whether the body corporate had in place adequate procedures designed to prevent:

- the commission of an offence by any associate of the body corporate against section 70.2; and
- any associate of the body corporate engaging in conduct outside Australia, that, if engaged in Australia would constitute an offence against section 70.2.

1.21 Under general principles of the criminal law, for each physical element of an offence, a fault (mental) element must be proved before a person can be found guilty of the offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill provides that an offence is one of absolute liability, this removes the requirement for the prosecution to prove the defendant's fault. The application of absolute liability also prevents the defence of honest and reasonable mistake of fact from being raised, a defence that remains available where strict liability is applied.

1.22 As the application of absolute liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of absolute liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.¹⁷

1.23 The explanatory memorandum explains:

In this case, applying absolute liability to the above elements of the offence in subsection 70.5A(1) is necessary to ensure the effectiveness of the new offence. In particular, it ensures that the prosecution does not need to establish any fault element in order to prove the offence. Accordingly, a corporation will not be able to avoid criminal liability committed by its associate for the profit or gain of the corporation because one or more fault elements could not be attributed to it. In this way, the offence incentivises corporations to actively ensure they have adequate procedures in place to prevent foreign bribery occurring. The defence of 'adequate procedures' is discussed further below. Applying absolute liability in this way is appropriate to capture the distinct nature of corporate misconduct where it is a form of omission.

16 Schedule 1, item 8, proposed subsection 70.5A(2).

17 Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p. 23.

The application of absolute liability to paragraph 70.5A(1)(a) is necessary as this aspect of the offence is a jurisdictional element. It is not appropriate for the defence of mistake of fact to apply to the offence elements in paragraph 70.5A(1)(b). It is sufficient that the fault elements of the underlying conduct by the associate described in those subparagraphs need to be established by the prosecution.¹⁸

1.24 At common law, it is also ordinarily the duty of the prosecution to prove all elements of an offence. 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 one or more elements of an offence, interfere with this common law right.

1.25 As the reversal of the burden of proof undermines the right to be presumed innocent until proven guilty, the committee expects there to be a full justification each time the burden is reversed, with the rights of people affected being the paramount consideration.

1.26 In relation to the reversal of the legal burden of proof, the explanatory memorandum explains:

The defendant bears a legal burden in relation to this matter. The justification for imposing this legal burden on the body corporate is that it would create a strong positive incentive for corporations to adopt measures to prevent foreign bribery. The standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities (section 13.5 of the Criminal Code).¹⁹

1.27 It is not clear to the committee why it is appropriate to apply absolute liability to subparagraphs 70.5A(1)(b)(i) and 70.5A(1)(b)(ii). Although the committee notes that the offence is only applicable to a body corporate and that the offences are designed to incentivise corporations to ensure adequate procedures exist to prevent any associates of the body corporate from committing a foreign bribery offence, the committee does not consider that the explanatory memorandum sufficiently justifies the requirement to apply absolute liability to the offence elements and remove the requirement for prosecution to establish a fault element. It is also not apparent to the committee why it is appropriate in this instance to remove the defence of honest and reasonable mistake of fact from being applicable. The committee considers that the explanation provided does not sufficiently address the requirements outlined in the *Guide to Framing Commonwealth Offences*.

1.28 Further, the committee notes that the justification provided in relation to the reversal of the legal burden of proof in the explanatory memorandum is insufficient and does not address the requirements of the *Guide to Framing Commonwealth*

18 Explanatory memorandum, p. 18.

19 Explanatory memorandum, p. 19.

Offences as well. Noting this, it is not clear to the committee why there is a reversal of legal burden of proof in this instance, rather than evidential, and how any reversal of burden of proof is appropriate.

1.29 Although the committee notes the defendant in this instance would be a body corporate, the committee is concerned at the application of absolute liability to various elements of the offence and at the reversal of the legal burden of proof without sufficient justification in the explanatory memorandum that accords with the *Guide to Framing Commonwealth Offences*.

1.30 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of applying absolute liability to elements of the offence and reversing the legal burden of proof in proposed section 70.5A.

Environment Protection (Sea Dumping) Amendment (Using New Technologies to Fight Climate Change) Bill 2023²⁰

Purpose	This bill seeks to give effect to Australia's obligations arising out of the 2009 and 2013 amendments to the 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972. This bill amends the <i>Environment Protection (Sea Dumping) Act 1981</i> to: enable a permit to be granted for the export of carbon dioxide streams from carbon dioxide capture processes for the purpose of sequestration into a sub-seabed geological formation; enable a permit to be granted for the placement of wastes or other matter for a marine geoengineering activity for the purpose of scientific research; and make minor consequential and technical amendments.
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representatives on 22 June 2023

Reversal of evidential burden of proof²¹

1.31 Section 10C of the *Environment Protection (Sea Dumping) Act 1981* (the Act) provides that it is an offence if, otherwise than in accordance with a permit, a person loads controlled material on a vessel, aircraft or platform in Australia or Australian waters for the purpose of dumping or incineration. Item 2 of Schedule 1 to the bill seeks to insert proposed subsection 15(2A) into the Act to create a new defence to the section 10C offence.

1.32 Proposed subsection 15(2A) provides that section 10C does not apply in relation to the loading of controlled material on a vessel, aircraft or platform if:

- the controlled material is carbon dioxide streams from carbon capture processes for sequestration into a sub-seabed geological formation; and
- if the loading is for the purpose of the export of the carbon dioxide streams from Australia to another country; and

20 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Environment Protection (Sea Dumping) Amendment (Using New Technologies to Fight Climate Change) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 118.

21 Schedule 1, item 2, proposed subsection 15(2A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

- there is a permit in place for that export.²²

1.33 Item 17 of Schedule 1 seeks to insert proposed section 10CA, which creates a new offence if a person:

- loads wastes or other matter on a vessel, aircraft or platform in Australia; and
- knows or is reckless as to whether the wastes or other matters will be placed into Australian waters; and
- knows or is reckless as to whether the placement will not be in accordance with a permit.

1.34 Item 25 of Schedule 1 seeks to insert proposed subsection 15(2B) into the Act to create a new defence to the offence under proposed section 10CA. Proposed subsection 15(2B) provides that proposed section 10CA does not apply in relation to loading for the purpose of the placement of wastes or other matter into waters that are not Australian waters, if that placement will be in accordance with a permit granted (by a party other than Australia) in accordance with the London Protocol (the Protocol).

1.35 Similarly, item 18 of Schedule 1 seeks to insert proposed section 10DA, which creates an offence if a person:

- exports wastes or other matter from Australia to another country; and
- knows or is reckless as to whether the wastes or other matter will be placed into Australian waters; and
- knows or is reckless as to whether the placement will not be in accordance with a permit.

1.36 Item 25 of Schedule 1 also inserts proposed subsection 15(2C) into the Act, which creates a new defence to the offence under proposed section 10DA. Proposed subsection 15(2B) provides that proposed section 10DA does not apply in relation to exporting for the purpose of the placement of wastes or other matter into waters that are not Australian waters, if that placement will be in accordance with a permit granted (by a party other than Australia) in accordance with the Protocol.

1.37 The offence under section 10C of the Act and the offences under proposed sections 10CA and 10DA all carry maximum penalties of up to 10 years imprisonment or 2,000 penalty units in the case of seriously harmful material and, in any other case, up to 1 year imprisonment or 250 penalty units. A defendant would bear the evidential burden of proof in relation to the defence introduced by proposed subsections 15(2A), 15(2B) and 15(2C) respectively.²³

22 Proposed subsection 15(2A).

23 *Environment Protection (Sea Dumping) Act 1981*, subsection 15(4).

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

1.39 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*, which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.²⁴

1.40 The explanatory memorandum states:

Existing subsection 15(4) has the effect that a person who seeks to rely on the exception at new subsection 15(2A) bears an evidential burden in relation to the matters in that subsection. The reversal is justified in these instances, as the matter to be proved (that is, whether the person holds a permit) is a matter that would be peculiarly in the knowledge of the defendant. In the event of a prosecution, it would be significantly more difficult and costly for the prosecution to disprove all possible circumstances than it would be for a defendant to establish the existence of one potential circumstance. The reversal in these circumstances is consistent with the principles set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (the Commonwealth Guide to Framing Offences).²⁵

1.41 The explanatory memorandum provides a similar explanation to the above in relation to proposed subsections 15(2B) and 15(2C).²⁶

1.42 In this instance, it is not apparent that the relevant matters would be peculiarly within the defendant's knowledge, or that it would be more difficult or costly for the prosecution to establish the matters than for the defendant to establish them. For example, the committee considers that the prosecution would be able to identify whether a permit has been granted for the purpose of loading controlled material on a vessel, aircraft or platform for the purpose of export from Australia to another country and therefore it is not peculiarly within the defendant's knowledge.

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

25 Explanatory memorandum, p. 7.

26 Explanatory memorandum, pp. 16-17.

1.43 The committee also considers that the explanatory memorandum has not sufficiently justified why it is significantly more costly or difficult for prosecution to disprove this matter, particularly in the case of the defence under proposed subsection 15(2A) as such a permit would be granted in Australia by a minister and would be identifiable. Even in the instance of the defences under proposed subsections 15(2B) and 15(2C), where permits for the placement of wastes may be issued by parties to the Protocol other than Australia, it is unclear to the committee how the knowledge of a permit is peculiarly within the defendant's knowledge and is significantly more costly or difficult for prosecution to disprove.

1.44 As the explanatory materials do not adequately address this issue, the committee requests the minister's detailed justification as to why it is proposed to introduce subsection 15(2A) as an exception to the section 10C offence in the *Environment Protection (Sea Dumping) Act 1981*, with the consequence that the defendant bears the evidential burden of proving an exception. The committee also requests the minister's detailed justification as to why the defendant bears the evidential burden of proving an exception under subsections 15(2B) and 15(2C) in relation to the offences under sections 10CA and 10DA respectively.

Intelligence Services Legislation Amendment Bill 2023²⁷

Purpose	<p>The bill would amend the <i>Intelligence Services Act 2001</i> and the <i>Inspector-General of Intelligence and Security Act 1986</i> to expand the jurisdictions of the Inspector-General of Intelligence and Security (IGIS) and the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to include four additional agencies: the Australian Criminal Intelligence Commission, the Australian Federal Police, Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Department of Home Affairs.</p> <p>The bill also seeks to strengthen the relationship between the PJCIS, the IGIS and the Independent National Security Legislation Monitor, including by providing the PJCIS with a power to request the IGIS conduct an inquiry, providing an own-motion power to the PJCIS to review certain legislation and a requirement that the IGIS and the Director-General of National Intelligence provide briefings to the PJCIS.</p>
Portfolio	Attorney-General
Introduced	House of Representatives on 22 June 2023

Significant matters in delegated legislation²⁸

1.45 Item 6 of Schedule 1 to the bill seeks to insert proposed section 3A into the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). Proposed section 3A would provide definitions for the intelligence functions of three national intelligence community agencies: the Australian Federal Police, Australian Transaction Reports and Analysis Centre (AUSTRAC) and the Department of Home Affairs. Under subsection 8(3A) of the IGIS Act, the Inspector-General of Intelligence and Security (IGIS) has the function of inquiring into certain matters to the extent that they relate to an intelligence function of an agency. The definition of intelligence function is therefore relevant to establishing the jurisdiction of the IGIS.

1.46 The intelligence functions of the Australian Federal Police and of AUSTRAC are set out in some detail in proposed subsections 3A(1) to (3). By contrast, subsection 3A(4) states that the intelligence function for the Department of Home Affairs has the meaning given by the regulations.

²⁷ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Intelligence Services Legislation Amendment Bill 2003, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 119.

²⁸ Schedule 1, item 6, proposed subsections 3A(4) to (6). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

1.47 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Jurisdiction conferring provisions such as proposed section 3A are one such significant matter. In this instance, the explanatory memorandum states:

Home Affairs is a department of State and as such is subject to changes to its mandate through executive action, in contrast to statutory agencies (such as the ACIC, AFP and AUSTRAC) who have a legislatively prescribed set of functions.

Many of Home Affairs' intelligence functions are not legislated and cannot be directly linked to specific legislated functions, instead being provided for in the Administrative Arrangement Order. This means that Home Affairs' intelligence functions may change, including to add new intelligence functions, quickly and with potential frequency.

For these reasons it is more appropriate for Home Affairs' intelligence functions to be prescribed in regulations. This would allow for a more detailed definition of Home Affairs' intelligence functions, while ensuring flexibility as regulations can be more readily updated to accurately reflect any changes in the structure of Home Affairs or its intelligence functions, such as the allocation of additional functions that may be considered intelligence functions.²⁹

1.48 The committee acknowledges the need to treat departments of state differently from statutory agencies. However, the committee considers that it would still be possible to include at least some level of detail within the bill to constrain, or guide, the making of regulations under proposed subsections 3A(4) or (5). In addition, it is not clear why those intelligence functions of the Department of Home Affairs, which are legislated, could not have been included within the bill. The committee acknowledges that it may be appropriate in this instance to include some of the detail of the Department of Home Affairs' intelligence functions within the regulations, but notes that including high-level detail within the bill would not prevent this.

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

- **why it is considered both necessary and appropriate to set the meaning of 'intelligence functions', as it applies to the Department of Home Affairs, out within delegated legislation; and**
- **whether the bill could be amended so that:**
 - **any intelligence functions of the Department of Home Affairs which are already legislated are set out within the bill; and**

29 Explanatory memorandum, pp. 24-25.

- **to provide further high-level guidance about the use of the regulation-making powers set out at proposed subsections 3A(4) and (5).**

Reversal of the evidential burden³⁰

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

1.51 All of the defences established by the bill will apply to existing information disclosure offences, which make it an offence for persons to make a record of, disclose or use certain kinds of information in certain circumstances. It is a defence for each of these defences if the person used, disclosed or made a record of the information in connection with the performance of their functions or duties or exercising their powers. The bill would also provide additional defences whereby the relevant offence does not apply if the affected person uses or discloses the information for the purpose of an IGIS official exercising a power or performing a function or duty.

1.52 The explanatory memorandum states that these amendments are intended to clarify that the relevant information can be provided to IGIS without limitation.³¹

1.53 The defendant would bear the evidential burden for both the existing defences and the new defences introduced by the bill.

1.54 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.³² 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.

1.55 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

30 Various provisions of Schedule 1. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

31 See, for example, explanatory memorandum, p. 59.

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

1.56 The committee notes that the relevant test, as set out in the *Guide to Framing Commonwealth Offences*,³³ is that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.³⁴

1.57 While the explanatory memorandum outlines the policy reasons justifying the existence of the new defences established by the bill, no justification has been provided for any of the accompanying reversals of the evidential burden. From the information provided, it does not appear that the matters a defendant would be required to adduce under the new defences are matters that would be peculiarly within their knowledge.

1.58 The committee therefore requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.

1.59 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*.

Immunity from civil and criminal liability³⁵

1.60 Item 4 of Schedule 4 to the bill seeks to insert proposed section 476.7 into the *Criminal Code Act 1995*, the effect of which would be to exempt persons from civil and criminal liability for certain 'computer related conduct'.

1.61 More specifically, the new section would provide immunities in two different circumstances. Proposed subsection 476.7(1) provides that a defence official would not be liable for engaging in conduct where the official held a reasonable belief that the conduct was likely to cause a computer-related act, event, circumstance or result to take place outside Australia. 'Defence official' refers to a wide range of persons, and would include a member of the ADF, a defence civilian, an employee of the Department of Defence, a consultant or contractor to the department, or any other

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

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

35 Schedule 4, item 4, proposed section 476.7. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

person specified in a class of persons by the secretary or Chief of the ADF by legislative instrument.³⁶

1.62 Proposed subsection 476.7(2) provides that a person is not subject to any civil or criminal liability for undertaking conduct related to authorised ADF activities taking place outside Australia, where the conduct taken together with a computer-related act, event or circumstance, could amount to an offence and would not have amounted to an offence in the absence of the computer-related conduct.

1.63 'Computer related conduct' is defined under proposed section 476.1 to mean a range of acts, events, circumstances or results involving the use of computers, including electronic communication, or the act of possessing, controlling, modifying, accessing, producing, supplying, or obtaining computer data.

1.64 The committee expects that if a bill seeks to provide immunity from civil or criminal liability this will be soundly justified. In relation to the immunity provided under proposed subsection 476.1(1), the explanatory memorandum states:

This is to ensure the Australian Defence Force can continue to operate efficiently in an increasingly challenging online environment, where it is not always possible to reliably determine the geographic location of a device or computer, especially with adversaries able to take measures to obfuscate their location.

These amendments respond to the increasingly complex cyber environment, which Australian Defence Force officials are required to operate within, and ensure the Australian Defence Force can employ the full extent of their offensive and defensive cyber capabilities when engaging in military operations. The ability to engage in conduct both inside and outside Australia that causes a computer-related act outside Australia is necessary to ensure that the Australian Defence Force can perform routine activities such as computer intelligence gathering and exploitation, and generate offensive and defensive effects through cyber capabilities where necessary. Cyber capabilities are employed by the Australian Defence Force in the same way as other weapon systems and are increasingly integrated into the overall schemes of manoeuvre and applications of joint effects.

The amendments will ensure that the Australian Defence Force are supported by a strong legal basis to generate military effects in authorised activities, that cause an effect outside Australia, as required as part of modern warfare.

The exemption under subsection 476.7(1) will apply to a defence official engaging in conduct inside or outside Australia. This is critical to ensure that there is no artificial distinction between the location of defence officials undertaking these activities offshore, and those located within Australia – both are integral to defensive or offensive cyber capabilities being utilised

36 Schedule 4, item 4, proposed subsection 476.7(8).

by the Australian Defence Force. Regardless of the location of the defence official engaging in this conduct, it is still essential that the conduct was engaged in the proper performance of authorised Australian Defence Force activities and was engaged in on the reasonable belief that it is likely to cause a computer-related effect outside Australia.

Authorised Australian Defence Force activities are those undertaken across the cooperation, competition and conflict spectrum, in connection with the defence or security of Australia. These activities are done in accordance with operational orders, rules of engagement and target directives as issued by the Chief of the Defence Force.³⁷

1.65 The explanatory memorandum also noted that the amendments are intended to address recommendation 72 of the *Comprehensive Review of the Legal Framework of the National Intelligence Community* by Mr Dennis Richardson AC. A similar explanation is provided in relation to proposed subsection 476.7(2).

1.66 The committee acknowledges this explanation.

1.67 However, the committee notes that the proposed immunity differs in a number of respects from that recommended in the *Comprehensive Review of the Legal Framework of the National Intelligence Community* (National Intelligence Review). The immunity set out in the bill would apply to any defence official, whether inside or outside Australia, who holds a reasonable belief that their conduct is likely to cause a computer-related act to take place outside Australia. In addition, the new section would render a defence official immune from both civil and criminal liability. By contrast, the National Intelligence Review recommended that the immunity apply only to ADF members, be limited to immunity from the criminal offences set out in Part 10.7 of the Criminal Code, and only apply to acts done outside of Australia in the course of approved ADF operations and within legally approved rules of engagement.

1.68 The immunity introduced by this bill appears broader than the one recommended within the National Intelligence Review. Although the explanatory memorandum does provide some detail in relation to the location of the defence officials on whom an immunity would be conferred, the explanatory memorandum largely neglects to explain why it is considered either necessary or appropriate to depart from the National Intelligence Review recommendation. The committee notes that it would have been helpful had the explanatory memorandum covered these issues.

1.69 The committee requests the minister's more detailed advice as to why the immunities conferred under proposed subsections 476.7(1) and 476.7(2) are both necessary and appropriate.

1.70 The committee's consideration of this matter will be assisted if the minister's response justifies why the immunity conferred by the bill differs from that

37 Explanatory memorandum, pp. 159-160.

recommended in the National Intelligence Review. Namely, the committee requests the minister's advice as to:

- **why conferring civil immunity is both necessary and appropriate;**
- **why conferring criminal immunity beyond the offences set out in Part 10.7 of the Criminal Code is both necessary and appropriate;**
- **why it is necessary and appropriate to provide that the immunity would extend to persons other than ADF members, including employees of the Department of Defence, consultants, contractors, or persons specified by legislative instrument;**
- **why it is necessary and appropriate to confer immunity on persons who are undertaking actions inside Australia, including why the threshold test of whether a computer-related event is 'likely' to take place outside of Australia is the appropriate test;**
- **whether processes are in place to ensure that decisions as to whether the relevant conduct is likely to cause a computer-related event to take place outside of Australia are undertaken in a robust and consistent manner; and**
- **why it is necessary and appropriate to confer an immunity on persons who are undertaking conduct that is preparatory to, in support of, or otherwise directly connected with, authorised ADF activities outside Australia.**

Migration Amendment (Strengthening Employer Compliance) Bill 2023³⁸

Purpose	<p>The Bill seeks to strengthen the legislative framework in the <i>Migration Act 1958</i> to improve employer compliance and protect temporary migrant workers from exploitation.</p> <p>New employer sanctions introduced by the bill include criminal offences and civil penalties related to exploitative work arrangements. The bill also increases existing maximum penalties relating to sponsorship obligations.</p> <p>The bill implements recommendations 19 and 20 from the <i>Report of the Migrant Workers' Taskforce (March 2019)</i>.</p>
Portfolio	Home Affairs
Introduced	House of Representatives on 22 June 2023

Privacy

Significant matters in delegated legislation³⁹

1.71 Part 2 of Schedule 1 to the bill introduces a number of amendments which would allow the Minister, or their delegate, to prohibit certain employers from employing any additional non-citizens. These persons are designated as 'prohibited employers'.

1.72 Such a declaration may be made where the person is subject to a 'migrant worker sanction', and the sanction was imposed no more than five years prior. A person may become subject to a migrant worker sanction for a variety of reasons including upon being convicted of a range of work-related offences under the *Fair Work Act 2009*, being subject to certain civil penalties or contraventions of the *Fair Work Act 2009*, or contravening enforceable undertakings imposed under that Act. In addition, a migrant worker sanction may be imposed on the basis of the Minister being satisfied of certain matters, including that the person had failed to satisfy their sponsorship or that the person failed to comply with a compliance notice without reasonable excuse.

1.73 Importantly, the circumstances in which conviction for a particular offence, or contravention of a civil penalty provision or enforceable undertaking, could result in a

38 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Strengthening Employer Compliance) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 120.

39 Schedule 1, Part 2. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iv).

person being subject to a migrant worker sanction would be set out in regulations rather than within the bill itself. The committee is concerned about this use of delegated legislation given the significant consequences that may occur upon being declared a prohibited employer. A declaration that a person is a prohibited employer would prevent a person from employing additional non-citizens, or from having a material role in decisions by a body corporate or other body that allows a non-citizen to begin work.⁴⁰ Breach of the prohibition would be an offence punishable by imprisonment for two years or 360 penalty units or both, or a civil penalty punishable by 240 penalty units.

1.74 The committee's view is that significant matters, such as this, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In relation to the delegated legislation making powers at proposed subsection 245AYF(3) the explanatory memorandum states:

The design of this power seeks to ensure that only appropriate offences can be prescribed, and once prescribed, can only enliven the Minister's power to impose a migrant worker sanction in appropriate circumstances. Regulations made under this provision will be subject to disallowance.

The purpose of this regulation-making power is to provide the Government with the ability to respond to changes to workplace laws and to the dynamic and shifting nature of migrant worker exploitation, ensuring that the scheme continues to remain fit for purpose in the future. Focusing the scope and application of the power aligns with scrutiny principles and best practice for provision of matters in delegated legislation, and ensures that the regulation-making power is appropriately targeted to achieving the scheme's overarching objectives as a measure under the legislative framework that supports migration, namely the Migration Act.⁴¹

1.75 While acknowledging this explanation, the committee notes that it has not generally considered flexibility to be a sufficient justification, of itself, for including significant matters within delegated legislation. The committee is particularly concerned in this case given that there is substantial scope for the regulations to alter who may be subject to a migrant worker sanction. The committee considers that it would have been helpful had the explanatory materials outlined examples of the kinds of circumstances that it is contemplated may be prescribed within the regulations.

1.76 In addition, the committee is concerned by the impact of the amendments on individual privacy. Under proposed section 245AYM, the minister is required to publish identifying information in relation to a prohibited employer online, except in prescribed circumstances.⁴² This information includes the name of the person, the

40 Schedule 1, Part 2, item 5, proposed section 245AYL.

41 Explanatory memorandum, p. 34.

42 Schedule 1, Part 2, item 5, proposed section 245AYM.

reasons they have been declared a prohibited employer and any other information that the Minister considers is reasonably necessary to identify the person. Under subsection 245AYM(5), the Minister is not required to arrange for the removal of this information when the person stops being a prohibited employer.

1.77 The explanatory memorandum states:

Relevantly, although the Minister is not required to arrange for the removal of this information, the intention is that such information would be removed from the Department's website as soon as reasonably practicable after the person stops being a prohibited employer.

APPs 10 and 13 outline an APP entity's responsibility to take reasonable steps to ensure information is accurate, up-to-date, complete and relevant, and to take action to correct any information that has become inaccurate or out of date. There are no authorised by law exemptions to these APPs, but rather compliance is required when reasonable in the circumstances.⁴³

1.78 The committee welcomes the stated intention to remove the information as soon as reasonably practicable. The committee also welcomes the existence of safeguards within the bill, such as the requirement at subsection (3) that personal information about any individual other than the prohibited employer must not be published.

1.79 However, it is not clear to the committee from this explanation why proposed subsection (5) is required. In addition, it is not clear why further safeguards cannot be included within the bill in relation to the appropriate use of personal information, such as a requirement that the Minister must consider an application from an affected person to take down their personal information.

1.80 The committee also considers that it would be appropriate to establish clear non-legislative processes to guide the appropriate use of personal information under proposed section 245AYM. For example, it is not clear from the face of the bill, or from the material included within the explanatory memorandum, whether there is a formal process in place to identify when a person has stopped being a prohibited employer or to ensure a consistent approach is taken as to which information should appropriately be included for publication under paragraph 245AYM(1)(c). The committee recommends that such processes be implemented.

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

- **why it is considered both necessary and appropriate to include the regulation making powers set out in Part 2 of Schedule 1 to the bill; and**

43 Explanatory memorandum, p. 46.

- **whether high-level guidance about the use of these powers can be included within the bill.**

1.82 The committee notes that its consideration of this issue will be assisted if the minister provides examples demonstrating what kinds of circumstances it is contemplated may be prescribed within the regulations.

1.83 The committee also requests the minister's advice as to:

- **why it is considered necessary and appropriate to include proposed subsection 245AYM(5), so that the Minister is not required to arrange for the removal of information when a person stops being a prohibited employer; and**
- **what safeguards are in place to ensure the appropriate exercise of publication powers under section 245AYM, and whether these are set out in law or policy.**

Immunity from civil liability⁴⁴

1.84 As noted above, proposed section 245AYM requires the Minister to publish certain information relating to prohibited employers on the Department's website. Proposed subsection 245AYM(4) provides that no civil liability arises in relation to the publication of information under section 245AYM, so long as the publication was undertaken in good faith.

1.85 This provision would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown. The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified.

1.86 In this instance, the explanatory memorandum states that providing immunity from liability 'ensures the integrity of the scheme by allowing persons to be confident that publishing information in good faith will not attract any civil liability'.⁴⁵

1.87 While acknowledging this explanation, the committee considers that it would have been more appropriate had the explanatory materials addressed the limited nature of the 'good faith' safeguard and why providing the immunity is nevertheless justified in light of the limited nature of this safeguard. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will

⁴⁴ Schedule 1, item 5, proposed subsection 245AYM(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

⁴⁵ Explanatory memorandum, p. 46.

therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.88 The committee draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing an 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.

Retrospective application⁴⁶

1.89 Item 36 of Schedule 1 to the bill provides that the amendments introduced under Part 5 of that Schedule apply to conduct engaged in before, on or after commencement. Part 5, which introduces the concept of compliance notices into the *Migration Act 1958* (Migration Act), would therefore have a retrospective application.

1.90 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.

1.91 In this instance, the explanatory memorandum states:

The introduction of compliance notices as an additional compliance tool to deal with conduct constituting a work-related offence or a contravention of a work-related provision is intended to provide an alternative to court proceedings, in an effort to encourage greater compliance by employers. Aside from the new work-related offences and civil penalty provisions introduced in this Bill, the work-related offences and work-related provisions in Subdivision C of Division 12 of Part 2 of the Migration Act are long-standing, well-established provisions.

There is limited excuse for employers, labour hire intermediaries and other parties involved in the employment of non-citizens to be unaware of these existing provisions. The establishment of the Migrant Workers' Taskforce was preceded by a significant number of high-profile cases revealing exploitation of migrant workers to a concerning level. These cases were highlighted by government investigations, public inquiries and media reports. Among other things, these cases exposed unacceptable gaps in Australia's legal system designed to treat all workers equally, regardless of their visa status.

...

46 Schedule 1, item 36. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

The application of the amendments to the Migration Act by this Part to conduct (including an omission) occurring before, on or after the commencement of the Schedule ensures that the ABF has the necessary tools to deal effectively with existing, and in some cases intractable, non-compliance with provisions of the Migration Act that are intended to protect migrant workers, as well as Australia's reputation as a destination of choice.

1.92 The committee acknowledges that retrospective application may be considered necessary in order to ensure compliance with the new regime. However, the committee considers that it would have been more appropriate had the explanatory memorandum also provided a detailed explanation of the extent to which the retrospective application of these provisions would affect individuals and why, in light of this potentially negative impact, the retrospective application was nevertheless considered justified.

1.93 The committee draws its concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of providing that the amendments introduced by Part 5 of Schedule 1 to the bill, relating to compliance notices, have a retrospective application.

National Occupational Respiratory Disease Registry Bill 2023⁴⁷

Purpose	This bill seeks to create a legislative framework for the establishment and ongoing management of the National Occupational Respiratory Disease Registry (the National Registry). The National Registry will provide access to information about occupational respiratory diseases and support the identification of industries, occupations, job tasks and workplaces where there is a risk of exposure to respiratory disease-causing agents.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 21 June 2023

Significant matters in delegated legislation

Privacy

Broad discretionary powers⁴⁸

1.94 The bill seeks to create a legislative framework for the establishment and ongoing management of the National Occupational Respiratory Disease Registry (the National Registry).

1.95 The bill is characterised by the inclusion of 'framework provisions' which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scheme's scope and operation. The committee has longstanding concerns with framework provisions because they considerably limit the ability of Parliament to have an appropriate oversight over new legislative schemes.

1.96 For example, the bill would require a prescribed medical practitioner to notify diagnoses of a prescribed occupational respiratory disease and would allow for the voluntary notification of other occupational respiratory diseases.⁴⁹ Rather than substantively defining these terms which are integral to the operation of the scheme

47 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Occupational Respiratory Disease Registry Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 121.

48 The committee draws senators' attention to the framework nature of the bill pursuant to Senate standing order 24(1)(a)(i), (ii) and (iv).

49 Clauses 14-15. Where a practitioner is treating a patient for a prescribed occupational respiratory disease (which the patient was diagnosed with before this bill were to commence) they may, with the patient's consent, provide information about the patient to the registry if that information is not already included.

in the bill, clause 8 defines 'prescribed medical practitioner' and a 'prescribed occupational respiratory disease' to mean as prescribed in the rules.⁵⁰ The scheme further relies on these terms to determine penalties, for example a medical practitioner who fails to notify of a diagnosis or treatment of a prescribed occupational respiratory disease would be liable to a civil penalty of up to 30 penalty units (currently \$9,390),⁵¹ regardless of whether or not the patient has themselves consented to the notification.⁵² Further, the National Registry must include 'minimum notification information', and may include 'additional notification information', both of which may be determined by the Commonwealth Chief Medical Officer (CMO) by legislative instrument.⁵³ These matters go to the scope and operation of the scheme.

1.97 Where a bill includes significant matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. 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.

1.98 The committee acknowledges that it is sometimes appropriate to include certain administrative and technical matters within delegated legislation, particularly when establishing new legislative schemes. However, the committee is concerned that the explanatory memorandum has not sufficiently justified the framework nature of the bill. While some individual delegated legislation making powers may be justified on the basis of a need for flexibility in the face of ongoing developments in healthcare and disease management, this does not justify the overall framework nature of the bill.

1.99 The committee's concerns are heightened in this instance as the bill engages the right to privacy and appears to rely on a broad discretionary power to determine the nature of personal information to be provided. Establishing the National Registry requires the provision of personal information, including potentially identifying affected workers by name on the National Registry without their consent, and permitting the use and disclosure of that personal information. As noted above, the

50 Clause 8 defines 'prescribed medical practitioner' to mean a medical practitioner of a kind prescribed by the rules. Clause 8 defines a 'prescribed occupational respiratory disease' to mean an occupational respiratory disease as prescribed by the rules. An 'occupational respiratory disease' is defined to mean a medical condition associated with an individual's respiratory system that is likely to have been caused or exacerbated, in whole or in part, by the individual's work or workplace.

51 As of 1 July 2023, the value of one penalty unit increased to \$313, in accordance with subsection 4AA(3) of the *Crimes Act 1914*, which provides for indexation of penalty units.

52 Clauses 14.

53 Clause 12.

bill would provide for the CMO to make a legislative instrument defining two categories of information to be included: minimum and additional notification information.⁵⁴ These terms are not defined in the bill.

1.100 The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory materials and that guidance in relation to the exercise of the power should be included within the primary legislation.

1.101 The statement of compatibility states that 'minimum notification information' (which would be required to be provided) will include 'information identifying the individual diagnosed with an occupational respiratory disease, the respiratory disease, the individual's lung function, and the individual's belief as to where the last and main exposures occurred'.⁵⁵ However, it does not specify what 'identifying information' would include.

1.102 The explanatory statement further states that 'additional notification information' (which may only be provided with a patient's consent) may include 'information about an individual's relevant medical test results, demographic and lifestyle information including their smoking history, and details on each job where the individual believes they had an exposure to a respiratory disease-causing agent'.⁵⁶ Given the specificity with which these two categories of information are described in the explanatory materials, it is not clear why these definitions are not included in the bill itself. As drafted, the bill does not constrain the information which may be included in these categories.

1.103 The committee is concerned about the apparent lack of constraint in the bill on the CMO's discretionary powers to determine both minimum and additional information, and the implications this may have on patients' privacy.

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

- **why it is considered necessary and appropriate to leave much of the information relating to the scope and operation of the National Registry to delegated legislation;**
- **whether the bill can be amended to include further detail in relation to the National Registry on the face of the primary legislation; and**
- **what criteria or considerations exist that limit or constrain the exercise of the Commonwealth Chief Medical Officer's broad discretionary powers in determining minimum and additional information.**

54 Clause 12.

55 Statement of compatibility, p. 4.

56 Explanatory statement, p. 13.

Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023⁵⁷

Purpose	This bill seeks to implement recommendations identified by the Australian Law Reform Commission (ALRC) in Interim Reports A and B from the ALRC Review to simplify and improve the navigability of the law.
Portfolio	Treasury
Introduced	House of Representatives on 14 June 2023

Broad authorisation of administrative powers

Evidentiary certificate⁵⁸

1.105 Item 158 of Schedule 2 to the bill seeks to insert proposed section 601CW into the *Corporations Act 2001* (Corporations Act). This amendment is intended to make technical changes to Division 3 of Part 5D.6 of the Corporations Act, including by relocating the power of ASIC to delegate matters to staff members to a standalone provision.⁵⁹

1.106 Proposed section 601WC would provide the Australian Securities and Investments Commission (ASIC) with the power to authorise a person who is a member, or staff member, of ASIC to exercise powers or perform functions under sections 601WCA, 601WCB or 601WCC of the Corporations Act.

1.107 The committee has consistently drawn attention to legislation that allows the authorisation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications. In this case, the committee considers that it would have been more appropriate had the bill explicitly limited the authorisation power so that only ASIC members, or staff members, who have the appropriate skills, qualifications, training or experience were able to be authorised.

1.108 In addition, the committee notes that section 601WCA of the Corporations Act would allow a staff member to set out matters within an evidentiary certificate.⁶⁰ The

57 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (2023 Law Improvement Package No. 1) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 122.

58 Schedule 2, item 158, proposed section 601WC. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (ii).

59 Explanatory memorandum, p. 27.

60 Certificates that constitute prima facie evidence of the matters contained within them are known as evidentiary certificates.

committee notes that where an evidentiary certificate is issued, this allows evidence to be admitted into court which would need to be rebutted by the other party to the proceeding. While a person still retains the right to rebut or dispute those facts, that person assumes the burden of adducing evidence to do so. The use of evidentiary certificates therefore effectively reverses the evidential burden of proof, and may, if used in criminal proceedings, interfere with the common law right to be presumed innocent until proven guilty. The committee's concerns about the broad authorisation provided for under proposed section 601WC are heightened given the potential impact on rights and liberties that may result from the use of evidentiary certificates under Division 3 of Part DB.6 of the Corporations Act.

1.109 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing a broad authorisation of administrative powers under the *Corporations Act 2001*, including powers to set matters out within an evidentiary certificate.

Significant matters in delegated legislation⁶¹

1.110 Schedule 4 to the bill seeks to amend the *Insurance Acquisitions and Takeovers Act 1991*, the *Life Insurance Act 1995*, and the *Insurance Act 1973* to implement some of the recommendations of the thematic review of insurance instruments. Items 2 to 4 of schedule 4 seek to amend section 5 of the *Insurance Acquisitions and Takeovers Act 1991* (the IAT Act) which sets out matters that are taken to be contrary to the public interest in respect of an Australian-registered insurance company. This section is relevant to a number of public interest tests set out within Parts 3 and 4 of the IAT Act. For example, the public interest test is a relevant consideration for the Minister's decision to make a divestment or restraining order in respect of certain Australian-registered insurance companies under Division 4 of Part 4 of the IAT Act.

1.111 The ability of the Minister to determine matters relevant to the public interest test is intended to replace the Minister's power to determine decision-making principles under section 67 of the IAT Act. Section 67 is repealed by item 17 of Schedule 4 to the bill.

1.112 The committee's consistent scrutiny view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

1.113 In this instance, the explanatory memorandum states:

The thematic review of Insurance Instruments found that while the Decision-Making Principles are still required in some form, their application

61 Schedule 4, items 2, 3, 4, and 17. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

is unclear, and the IAT Act should be amended to clarify their intended operation and purpose; that is, to inform the public interest test pursuant to section 5 of the IAT Act.

To give effect to the findings of the review, Part 7 of the IAT Act containing the enabling provision for the Decision-Making Principles is repealed. This also results in the repeal of the Decision-Making Principles. This is replaced with the ability for the Minister to determine, by legislative instrument, matters which inform the public interest test.

...

The matters which inform the public interest test are appropriate to be prescribed in a legislative instrument to ensure that they can be updated quickly when required. This is because they will inform decisions concerning Australia's insurance industry, the stability of the financial system and Australia's national interest, so must be kept up to date with the most relevant and accurate matters for determining what is contrary to the public interest. The determination would be subject to disallowance and therefore would be subject to appropriate parliamentary scrutiny.⁶²

1.114 The committee acknowledges this explanation. The committee welcomes the establishment of a framework which explicitly sets out relevant considerations that the Minister is required to consider prior to determining whether a matter is contrary to the public interest. The committee considers that it is appropriate to limit the Minister's existing broad discretionary power to determine which matters are in the public interest.

1.115 However, the committee considers that it would have been more appropriate to include further detail in the bill guiding the exercise of the delegated legislation making powers set out at proposed subsection 5(6). For example, it would have been a relatively simple matter to set out, at a high-level, matters which may be relevant to determining whether a person is a fit and proper person. The committee is also concerned that the bill proposes to remove a significant level of detail from existing subsection 5(3) of the IAT Act. It is not clear from the explanation provided in the explanatory memorandum why this detail could not be set out within the primary legislation, alongside the new delegated legislation making powers. The matters listed at existing subsection 5(3) do not appear to be matters which require flexibility to amend should it become necessary to do so.

1.116 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key details of the public interest test set out in Parts 3 and 4 of the *Insurance Acquisitions and Takeovers Act 1991* to delegated legislation.

62 Explanatory memorandum, p. 46.

Significant matters in delegated legislation⁶³

1.117 The *Terrorism and Cyclone Insurance Act 2003* defines 'unauthorised foreign insurer' as having the same meaning as in the Insurance Regulations 2002. Given that these regulations are sunseting, item 136 of Schedule 4 to the bill seeks to preserve the definition of 'unauthorised foreign insurer' by providing that the term has the same meaning as prescribed by the regulations.

1.118 As noted above, the committee's consistent scrutiny view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Given that the definition of 'unauthorised foreign insurer' is instrumental in determining when cyclone risks must be reinsured under section 8A of the *Terrorism and Cyclone Insurance Act 2003*, the committee considers that it would have been more appropriate had the explanatory materials for the bill justified why this definition should continue to be set out in regulations, rather than transitioned into primary legislation.

1.119 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the definition of 'unauthorised foreign insurer' for the purposes of the *Terrorism and Cyclone Insurance Act 2003* to delegated legislation.

63 Schedule 4, item 136. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

Private senators' and members' bills that may raise scrutiny concerns¹

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

Bill	Relevant provisions	Potential scrutiny concerns
Broadcasting Services Amendment (Healthy Kids Advertising) Bill 2023	Item 3, proposed subsection 130AAA(2)	The bill may raise scrutiny concerns under principle (iv) in relation to significant matters in delegated legislation.
	Item 6, proposed subsection 205F(5BA)	The provisions may raise scrutiny concerns under principle (i) in relation to significant penalties which have not been adequately justified within the explanatory memorandum.
Freeze on Rent and Rate Increase Bill 2023	Item 5, proposed subsection 15DA(2)	The provisions may raise scrutiny concerns under principle (iv) in relation to significant matters in delegated legislation.
Interactive Gambling Amendment (Ban on Gambling Advertisements) Bill 2023	Item 4, proposed subsections 61FEQ(1), 61FEQ(3), 61FET(1) and 61FET(3)	The provisions may raise scrutiny concerns under principle (i) in relation to significant penalties which have not been adequately justified within the explanatory memorandum.
Migration Amendment (Overseas Organ Transplant Disclosure and Other Measures) Bill 2023	Schedule 1, item 1, proposed section 166A	The provisions may raise scrutiny concerns under principle (i) in relation to privacy.

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 123.

Bills with no committee comment¹

1.1 The committee has no comment in relation to the following bills which were introduced into the Parliament between 19 – 22 June 2023:

- Australian Capital Territory (Self-Government) Amendment Bill 2023
- Classification (Publications, Films and Computer Games) Amendment (Industry Self-Classification and Other Measures) Bill 2023
- Intellectual Property Laws Amendment (Regulator Performance) Bill 2023
- International Organisations (Privileges and Immunities) Amendment Bill 2023
- National Occupational Respiratory Disease Registry (Consequential Amendments) Bill 2023
- Treasury Laws Amendment (Making Multinationals Pay Their Fair Share—Integrity and Transparency) Bill 2023

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 124.

Commentary on amendments and explanatory materials¹

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

1.1 On 21 June 2023, the Minister for Education (the Hon Jason Clare MP) circulated a supplementary explanatory memorandum to the bill.

1.2 The committee thanks the minister for providing a correction to the explanatory memorandum, which includes key information requested by the committee in relation to the availability of independent merits review.²

Nature Repair Market Bill 2023

1.3 On 21 June 2023, the House of Representatives agreed to 93 Crossbench amendments to the bill.

1.4 The committee welcomes the House of Representatives amendments to the bill which appear to address the committee's concerns relating to parliamentary scrutiny and the requirement to table reports in Parliament.³

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

- Social Security (Administration) Amendment (Income Management Reform) Bill 2023;⁴

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 125.

2 Senate Standing Committee for the Scrutiny of Bills, [Digest 6 of 2023](#) (14 June 2023) pp. 51–54; Senate Standing Committee for the Scrutiny of Bills, [Digest 5 of 2023](#) (10 May 2023) pp. 56–60; Senate Standing Committee for the Scrutiny of Bills, [Digest 3 of 2023](#) (22 March 2023) pp. 1–3.

3 Senate Standing Committee for the Scrutiny of Bills, [Digest 5 of 2023](#) (10 May 2023) pp. 34–40.

4 On 22 June 2023, the Senate agreed to three Australian Greens amendments to the bill.

- Treasury Laws Amendment (2022 Measures No. 4) Bill 2022;⁵ and
- Treasury Laws Amendment (Refining and Improving Our Tax System) Bill 2023.⁶

5 On 20 June 2023, the Senate agreed to two Government amendments to the bill and the Minister for Finance (Senator the Hon Katy Gallagher) tabled a supplementary explanatory memorandum relating to the government amendments to be moved to the bill.

6 On 21 June 2023, the Senate agreed to three Government and two Australian Greens amendments to the bill and the Assistant Minister for Infrastructure and Transport (Senator the Hon Carol Brown) tabled a supplementary explanatory memorandum relating to the government amendments to be moved 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.

Appropriation Bill (No. 1) 2023-2024

Appropriation Bill (No. 2) 2023-2024¹

Purpose	Appropriation Bill (No. 1) 2023-2024 seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government. Appropriation Bill (No. 2) 2023-2024 seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure.
Portfolio	Finance
Introduced	House of Representatives on 9 May 2023
Bill status	Finally passed both Houses on 22 June 2023

Parliamentary scrutiny—appropriations determined by the Finance Minister²

2.2 Clause 10 of Appropriation Bill (No. 1) 2023-2024 (Appropriation Bill No. 1) enables the Finance Minister to allocate additional funds to entities when satisfied that there is an urgent need for expenditure and the existing appropriations are inadequate. The allocated amount is referred to as the Advance to the Finance Minister (AFM). The additional amounts are allocated by a determination made by the Finance Minister (an AFM determination). AFM determinations are legislative instruments, but they are not subject to disallowance.

2.3 Subclause 10(2) of Appropriation Bill No. 1 provides that, when the Finance Minister makes such a determination, the Appropriation Bill has effect as if it were amended to make provision for the additional expenditure. Subclause 10(3) caps the amounts that may be determined under the AFM provision in Appropriation Bill No. 1

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Appropriation Bill (No. 1) 2023-2024, Appropriation Bill (No. 2) 2023-2024, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 126.

2 Clause 10 of the *Appropriation Bill (No. 1) 2023-2024*; clause 12 of the *Appropriation Bill (No. 2) 2023-2024*. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

at \$400 million. Identical provisions appear in Appropriation Bill (No. 2) 2023-2024 (Appropriation Bill No. 2), with a separate \$600 million cap in that bill.³

2.4 The amount available under the AFM provisions in these bills is closer to the levels available under previous annual appropriation bills before the COVID-19 pandemic.⁴ However, while the explanatory memorandum states the bills 'return the AFM provisions to conventional (pre-2020) levels',⁵ the committee notes that the AFM provisions in *Appropriation Act (No. 1) 2019-2020* and *Appropriation Act (No. 2) 2019-2020* together set a limit of \$675 million which is typical of AFM provisions in other pre-pandemic appropriation bills, while the caps in Appropriation Bills Nos. 1 and 2 together add up to \$1 billion. The committee notes that no explanation has been given in the explanatory memorandum as to why a higher amount than typical pre-pandemic levels is needed.

2.5 In *Scrutiny Digest 6 of 2023* the committee requested the minister's detailed advice as to why the caps to the additional amounts that may be allocated by the Finance Minister (AFM) in Appropriation Bills (No. 1) and (No. 2) 2023-2024 are significantly higher than the pre-pandemic AFM caps.⁶

Minister for Finance's response⁷

2.6 The Minister for Finance (the minister) advised that prior to the extraordinary arrangements introduced in 2020, and since 2008-09, the AFM provision in Appropriation Act (No. 1) was conventionally set at \$295 million, and in Appropriation Act (No. 2) at \$380 million.

2.7 The minister also advised that the 2023-2024 AFM provisions compared to the conventional (pre-2020) provisions include 'an appropriate increase to reflect the passage of time since the normal levels were last adjusted in 2008-09'. The minister

3 Clause 12 of the *Appropriation Bill (No. 2) 2023-2024*.

4 For example, subsection 10(3) of *Appropriation Act (No. 1) 2019-2020* set a cap of \$295 million and subsection 12(3) of *Appropriation Act (No. 2) 2019-2020* set a cap of \$380 million. Compare *Appropriation Act (No. 1) 2020-2021*, *Appropriation Act (No. 2) 2020-2021*, *Appropriation Act (No. 1) 2021-2022*, *Appropriation Act (No. 2) 2021-2022*, *Appropriation (Coronavirus Response) Act (No. 1) 2021-2022*, *Appropriation (Coronavirus Response) Act (No. 2) 2021-2022*, *Appropriation Act (No. 1) 2022-2023* and *Appropriation Act (No. 2) 2022-2023* which set Advance to the Finance Minister caps at \$4 billion, \$6 billion, \$2 billion, \$3 billion, \$2 billion, \$3 billion, \$2.4 billion and \$3.6 billion respectively.

5 Explanatory memorandum, p. 9.

6 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2023* (14 June 2023) pp. 5–8.

7 The minister responded to the committee's comments in a letter dated 26 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

concluded that she was 'satisfied that the AFM provisions...are not significantly higher than the AFM provisions in AFM pre-pandemic years'.

Committee comment

2.8 The committee thanks the minister for this response.

2.9 The committee welcomes the additional information that the AFM provisions have been adjusted for the first time since 2008-09. The committee considers that it would have been helpful for this information to have been included in the explanatory memorandum to the bill, noting that the explanatory memorandum as presented to the Parliament only indicated that the amounts in the AFM provisions had been returned to 'conventional (pre-2020) levels'.

2.10 The committee reiterates its view that in allowing the Finance Minister to allocate additional funds to entities via non-disallowable delegated legislation, the AFM provisions delegate significant legislative power to the executive, and that its scrutiny concerns are heightened given the non-disallowable nature of the determinations. Therefore, the provision of information in explanatory material provides the Parliament with important details to assist with scrutiny of AFM provisions. As such, an explanation of why the amount had been adjusted is information that should have been provided to assist with transparency and accountability.

2.11 The committee will continue to closely consider these important matters in its scrutiny of future Appropriation bills.

2.12 In light of the fact that both bills have already passed both Houses of the Parliament, the committee makes no further comment on the matter.

Creative Australia Bill 2023⁸

Purpose	This bill seeks to put in place legislation to provide for Creative Australia as a modern entity with expanded functions, responsibilities and a new governance structure.
Portfolio/Sponsor	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 25 May 2023
Bill status	Assent

Exemption from disallowance

2.13 Subclause 14(1) of the bill allows the minister to, by legislative instrument, give directions to the Australia Council Board in relation to: the performance of functions, and the exercise of powers of, Creative Australia; or requiring the provision of a report or advice on a matter that relates to any of Creative Australia's functions or powers. A note to subclause 14(1) clarifies that any direction given by the minister is not subject to the usual parliamentary disallowance procedure due to the operation of regulations made for the purposes of paragraph 44(2)(b) of the *Legislation Act 2003*.⁹

2.14 The explanatory memorandum to the bill does not provide an explanation as to why a ministerial direction is not subject to disallowance and merely restates the effect of this provision. Further, the explanatory memorandum states that the directions *are* subject to disallowance, creating an inconsistency with the primary legislation.

2.15 In *Scrutiny Digest 6 of 2023* the committee requested the minister's advice as to this inconsistency and suggested that it may be appropriate for the bill to be amended to provide that directions made under subclause 14(1) are subject to disallowance.¹⁰

8 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Creative Australia Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 127.

9 See table item 2, section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2023* (2 August 2023) pp. 16–18.

Minister for Infrastructure, Transport, Regional Development, Communications and the Arts' response¹¹

2.16 The Minister for Infrastructure, Transport, Regional Development, Communications and the Arts (the minister) advised that a correction to the explanatory memorandum has been tabled, which clarifies that any directions provided by the minister under clause 14 are legislative instruments which must be tabled in the Parliament and are not subject to disallowance.

2.17 The minister also advised that these directions may be in relation to the performance of functions and powers of Creative Australia, and that ministerial directions are not usually legislative instruments and do not need to be tabled or published on the Federal Register of Legislation. The minister has advised that although ministerial directions to Creative Australia are non-disallowable, the public and the Parliament will be empowered to hold the Government accountable as the directions will be tabled and published.

Committee comment

2.18 The committee thanks the minister for this response.

2.19 The committee notes the minister's advice that ministerial directions given to Creative Australia will be by legislative instrument that is non-disallowable but is required to be published and tabled in the Parliament.

2.20 The committee welcomes the clarification made by the minister through a correction to the explanatory memorandum but remains concerned that making a legislative instrument exempt from disallowance prevents proper parliamentary scrutiny. The committee reiterates that it does not consider the fact that an instrument will fall within one of the classes of exemption in the Legislation (Exemptions and Other Matters) Regulation 2015 is, of itself, a sufficient justification for excluding parliamentary disallowance.¹² The committee expects that the explanatory memorandum should provide a thorough justification for excluding disallowance.

2.21 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of a ministerial direction made under subclause 14(1) being exempt from disallowance.

11 The minister responded to the committee's comments in a letter dated 23 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

12 The committee further notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has recommended that the blanket exemption of instruments that are 'a direction by a Minister to any person or body' should be abolished. See Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (16 March 2021) p. 101.

Significant matters in delegated legislation

2.22 Subclause 80(1) provides that Creative Australia must not, without the written approval of the minister, acquire or dispose of any property, right or privilege, or enter into a contract for the construction of a building for Creative Australia, exceeding in amount or value the amount mentioned in subclause 80(2). Subclause 80(2) provides that the amount available to Creative Australia is either \$5 million or any other amount prescribed by the rules.

2.23 In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow the rules to prescribe any amount for the purposes of Creative Australia's financial transactions.

2.24 In *Scrutiny Digest 6 of 2023* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave a financial limit on transactions entered into by Creative Australia in delegated legislation rather than including it within the primary legislation.

Minister for Infrastructure, Transport, Regional Developments, Communications and the Arts' response

2.25 The minister advised that the bill already prescribes a limit on financial transactions of up to \$5 million and that flexibility to create a rule to prescribe a different amount has been included in this bill as it was in the *Australia Council Act 2013*. The minister advised that this enables the financial limit to be changed in the future without legislative amendment and that a rule of this nature must be tabled in Parliament and is subject to scrutiny, including disallowance by, Parliament.

Committee comment

2.26 The committee notes the minister's advice that the bill already prescribes a limit of \$5 million and that flexibility is required to create a rule to prescribe a different amount, as this was available under the *Australia Council Act 2013*. The committee also notes that as this is by legislative instrument, it is subject to parliamentary scrutiny, including disallowance.

2.27 However, the committee remains concerned that the monetary limit imposed on transactions entered into by Creative Australia can be amended by delegated legislation, rather than in the primary legislation. The committee considers this to be a significant matter and reiterates that delegated legislation is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

2.28 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of including a significant matter in delegated legislation under subclause 80(1).

Family Law Amendment Bill 2023¹³

Purpose	This bill seeks to amend the <i>Family Law Act 1975</i> , with some consequential amendments to the <i>Federal Circuit and Family Court of Australia Act 2021</i> . These amendments seek to make the family law system safer and simpler for separating families to navigate, and seek to ensure the best interests of children are placed at its centre.
Portfolio	Attorney-General
Introduced	House of Representatives on 29 March 2023
Bill status	Before the Senate

Undue trespass on personal rights and liberties¹⁴

2.29 Proposed section 114T provides that proceedings against subsections 114Q(1) or 114R(1) must not be commenced without the written consent of the Director of Public Prosecutions (DPP). This has the effect of limiting private prosecutions to individuals who have received the written consent of the DPP.

2.30 The committee initially scrutinised this bill in *Scrutiny Digest 5 of 2023* and requested the minister's advice.¹⁵ The committee considered the minister's response in *Scrutiny Digest 6 of 2023* and requested 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*).¹⁶

13 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Family Law Amendment Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 128.

14 Schedule 6, item 1, proposed sections 114Q, 114R and 114T. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

15 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 23–24.

16 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2023* (14 June 2023) pp. 57–58.

Attorney-General's response¹⁷

2.31 The Attorney-General advised that the explanatory materials for this bill will be updated to clarify that the prosecutorial safeguard of written consent from the DPP in relation to the offences contained under proposed subsections 114Q(1) and 114R(1) is required to prevent systems abuse as parties may commence private prosecutions for improper reasons.

Committee comment

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

2.33 The committee welcomes the Attorney-General's undertaking to update the explanatory materials to the bill to reflect the advice provided in relation to the offences under proposed subsections 114Q(1) and 114R(1).

2.34 The committee makes no further comment in relation to this issue in light of the advice provided by the Attorney-General.

Significant matters in delegated legislation¹⁸

2.35 Proposed section 11K seeks to allow regulations to be made to prescribe standards and requirements for family report writers. Proposed subsection 11K(2) provides for a non-exhaustive list of matters that may be included in regulations, including paragraph 11K(2)(i) which allows for the charging of fees to family report writers for services provided to them in connection with recognition, and maintenance of recognition, of their compliance.

2.36 The committee initially scrutinised this bill in *Scrutiny Digest 5 of 2023* and requested the minister's advice.¹⁹ The committee considered the minister's response in *Scrutiny Digest 6 of 2023* and requested the Attorney-General's advice as to whether the bill can be amended to clarify that any fee made in regulations under proposed paragraph 11K(2)(i) must not be such as to amount to taxation.²⁰

17 The minister responded to the committee's comments in a letter dated 29 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

18 Schedule 7, item 4, proposed section 11K. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

19 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023) pp. 24–25.

20 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2023* (14 June 2023) pp. 58–59.

Attorney-General's response²¹

2.37 The Attorney-General advised that it is not necessary to amend the bill to include a provision that clarifies that fees made in regulations under proposed paragraph 11K(2) must not be such as to amount to taxation. The Attorney-General advised that the explanatory materials will be updated to provide greater clarity that any fee imposed on a family report writer must not be such as to amount to taxation.

Committee comment

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

2.39 While the committee is of the view that it is preferable to include clarification that fees made in regulations must not be such as to amount to taxation on the face of the bill, the committee nevertheless welcomes the Attorney-General's advice that the explanatory materials to the bill will be updated to provide greater clarity in relation to this issue.

2.40 The committee makes no further comment in relation to this issue in light of the advice provided by the Attorney-General.

21 The minister responded to the committee's comments in a letter dated 29 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Greenhouse and Energy Minimum Standards Amendment (Administrative Changes) Bill 2023²²

Purpose	This bill seeks to amend the <i>Greenhouse and Energy Minimum Standards Act 2012</i> to improve the Greenhouse and Energy Minimum Standards Regulator performance and reduce administrative burden.
Portfolio	Climate Change and Energy
Introduced	Senate on 15 June 2023
Bill status	Before the Senate

Significant matters in delegated legislation²³

2.41 Item 5 of Schedule 1 to the bill seeks to insert proposed subsection 27A(1) into the *Greenhouse and Energy Minimum Standards Act 2012* (the Act) to allow the Greenhouse and Energy Minimum Standards Regulator (the GEMS Regulator) to, by legislative instrument, declare that specified classes of products or specified models of GEMS products are taken to comply with one or more requirements, or one or more aspects of requirements, of a specified GEMS determination:

- in specified circumstances; or
- if specified conditions are complied with.

2.42 In *Scrutiny Digest 7 of 2023*, the committee requested the minister's advice as to whether the bill can be amended to provide for a review of the operation of declarations made under proposed subsection 27A(1) within a specified time; for example, within three years of the commencement of the declaration.²⁴

22 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Greenhouse and Energy Minimum Standards Amendment (Administrative Changes) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 129.

23 Schedule 1, Part 2, item 5, proposed subsection 27A(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

24 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 7 of 2023* (21 June 2023) pp. 1–2.

Minister for Climate Change and Energy's response²⁵

2.43 The Minister for Climate Change and Energy (the minister) advised that it is necessary and appropriate to leave declarations of compliance to delegated legislation because of the requirement for flexibility. As the regulatory regime may quickly change due to technological advances, consumer behaviours and international and domestic markets, the minister considers it necessary to ensure that the GEMS Regulator can respond to these changes and efficiently and effectively make and implement declarations under proposed subsection 27A(1). The minister advised that as a matter of administrative and regulatory best practice, the GEMS Regulator would be able to review declarations made at any time to respond to changing regulatory settings, or on a regular basis to ensure that a declaration remains fit for purpose. The minister advised that this flexibility would also allow the GEMS Regulator to best target areas of review in the context of the entire GEMS legislative framework.

2.44 The minister further advised that the GEMS Scheme is established by the Intergovernmental Agreement for the GEMS Legislative Scheme (the IGA). The Ministerial Council responsible for the IGA maintains the Inter-Jurisdictional Advisory Committee (the IJAC) to advise the Ministerial Council. The minister advised that to exercise the powers proposed under subsection 27A(1), the GEMS Regulator would engage with the IJAC to ensure the declaration made is fit for purpose and adjust the declaration as necessary based on IJAC feedback. Finally, the minister advised that to ensure ministerial oversight of any declaration made, the Ministerial Council responsible for the IGA would need to approve the new or revised GEMS requirements and timing for their introduction.

Committee comment

2.45 The committee thanks the minister for this response.

2.46 The committee notes the minister's advice that delegated legislation is appropriate and necessary to flexibly respond to changing regulatory settings and to efficiently and effectively make and implement declarations. The committee also notes the minister's advice regarding safeguards on the exercise of proposed subsection 27A(1).

2.47 While the committee has generally not accepted a desire for flexibility to be a sufficient justification for leaving significant matters to delegated legislation, the committee nevertheless welcomes the detailed information provided by the minister in relation to the administrative processes that regulate the making of new or revised GEMS requirements. The committee considers that it would be helpful for this information to be included in the explanatory memorandum to the bill.

25 The minister responded to the committee's comments in a letter dated 5 July 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.48 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*).

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

Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023²⁶

Purpose	This bill seeks to amend the <i>Inspector-General of Live Animal Exports Act 2019</i> by expanding the existing office of the Inspector-General of Live Animal Exports to provide an enhanced focus on animal welfare.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 24 May 2023
Bill status	Before the Senate

Broad discretionary powers

Privacy²⁷

2.50 Item 12 of Schedule 1 seeks to introduce proposed subsection 10(2A) to the *Inspector-General of Live Animal Exports Act 2019* (the Act), which provides that the Inspector-General of Animal Welfare and Live Animal Exports (the Inspector-General) has the power to do all things necessary or convenient to be done for, or in connection with, the performance of the Inspector-General's functions. Under substituted subsection 10(1), one of the functions of the Inspector-General is to conduct reviews of the performance of functions, or exercise of powers, by livestock export officials under the animal welfare and live animal export legislation and standards in relation to the export of livestock.

2.51 Proposed subsection 10C(2) provides that the Inspector-General is not subject to direction in relation to:

- the conduct of a review including the terms of reference for a review;
- how a review is to be conducted;
- the timing of a review;
- the priority to be given to a review; or
- the content of a report.

26 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Inspector-General of Live Animal Exports Amendment (Animal Welfare) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 130.

27 Schedule 1, Part 1, proposed subsections 10(2A) and 10C(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (ii).

2.52 In *Scrutiny Digest 6 of 2023*, the committee requested the minister's detailed advice as to:

- what criteria or considerations exist that limit or constrain the exercise of the Inspector-General's broad discretionary powers in proposed subsections 10(2A) and 10C(2), including whether these are contained in law or policy; and
- whether the bill can be amended to include safeguards to protect the disclosure of livestock export official's personal information.²⁸

Minister for Agriculture, Fisheries and Forestry's response²⁹

2.53 The Minister for Agriculture, Fisheries and Forestry (the minister) advised that the ancillary powers provided to the Inspector-General under proposed subsection 10(2A) to do all things necessary or convenient to be done for, or in connection with, the performance of the Inspector-General's functions are reasonably and appropriately constrained by the terms under substituted subsection 10(1) of the bill as they may only be exercised if necessary or convenient for the performance of the Inspector-General's functions. The minister advised that these functions are exhaustively delineated in new subsection 10(1) of the bill.

2.54 In relation to the independence conferred on the Inspector-General to conduct a review under proposed subsection 10C(2), the minister advised that the scope of the Inspector-General's independence is necessarily constrained by the limited range of the functions outlined on the face of the bill, which only allows the Inspector-General to conduct reviews in relation to the matters under subsection 10(1).

2.55 The minister further advised that proposed new section 3 of the bill provides expanded objects for the Act with a view to ensuring that the animal welfare and live animal export legislation and standards in relation to the export of livestock are complied with. Therefore, the performance of the Inspector-General's functions and powers are necessarily constrained by the objects of the Act and may only be performed or exercised in pursuance of these objects.

2.56 Finally, the minister advised that it is not necessary to amend to bill to include safeguards to protect the disclosure of livestock export official's personal information because any information or document will be regulated in compliance with the Act and the *Privacy Act 1988*. The minister also advised that the Act provides a robust

28 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2023* (14 June 2023) pp. 19–21.

29 The minister responded to the committee's comments in a letter dated 23 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

framework for the protection of personal information, such as disclosure of personal information only being possible in limited circumstances. These circumstances include:

- for the purposes of performing functions or exercising powers under the Act;
- for the purposes of law enforcement or court proceedings;
- where required to do so by an Australian law;
- if the disclosure is with the consent of the person to whom the information relates; and
- if the disclosure is to the person who gave the information.

Committee comment

2.57 The committee thanks the minister for this response.

2.58 The committee notes the minister's advice that the exercise of the Inspector-General's broad discretionary powers are necessarily and appropriately constrained under proposed subsection 10(1) and proposed section 3 of the bill. The committee also notes the minister's advice regarding the protection of personal information under the *Privacy Act 1988* and the Act.

2.59 The committee considers that it would be helpful to include this information in the explanatory memorandum to the bill, 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.

2.60 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*).

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

Migration Amendment (Giving Documents and Other Measures) Bill 2023³⁰

Purpose	This bill seeks to amend the <i>Migration Act 1958</i> to improve and clarify the intended operation of the legislative framework for the giving of notices and other documents, and to remove restrictions on certain non-citizens from lodging a valid application for a protection visa.
Portfolio	Home Affairs
Introduced	House of Representatives on 24 May 2023
Bill status	Assent

Procedural fairness³¹

2.62 Item 24 of Schedule 1 to the bill seeks to amend the *Migration Act 1958* (Migration Act) by inserting proposed section 494E which provides when documents are taken to comply with content requirements. Content requirements are the relevant statutory requirements for including particular information in the document.³² Where a document does not strictly comply with the relevant content requirements under the Migration Act or the Migration Regulations 1994, the document is nevertheless taken to have complied with those requirements if there is substantial compliance and the failure to strictly comply does not, or is not likely to, cause substantial prejudice to the person's rights (including, but not limited to, rights to seek review in connection with the matter to which the document relates).³³

2.63 As the operation of the provision means that it could validate a notice which does not state particular information required to be given to the person subject to the notice, the committee considers that this provision engages the right to procedural fairness.

2.64 In *Scrutiny Digest 6 of 2023*, the committee requested the minister's advice as to whether consideration has been given to framing the test of complying with content requirements in proposed section 494E in terms of the materiality of the error and, if

30 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Giving Documents and Other Measures) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 131.

31 Schedule 1, item 24, proposed section 494E. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

32 Proposed paragraph 494E(1)(b).

33 Item 24, proposed subsection 494E(2).

not, why it is considered necessary and appropriate to adopt a broader standard than what has been considered by the courts to result in jurisdictional error.³⁴

Minister for Home Affairs' response³⁵

2.65 The Minister for Home Affairs (the minister) advised that the concept of materiality is a developing concept, and its meaning continues to evolve in different statutory contexts. The minister advised that using the term 'material' in the new substantial compliance provision risks introducing a level of confusion and complexity to its interpretation.

2.66 The minister drew the committee's attention to *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Parata* [2021] FCAFC 46 (*Parata*), where the:

Court found that an erroneous denial of jurisdiction by the Administrative Appeals Tribunal (the AAT) following a notice that does not comply with 'content requirements' is sufficient, without more, to demonstrate jurisdictional error in the AAT's decision. In other words, a failure to comply with 'content requirements' would result in the Tribunal's 'no jurisdiction finding' being affected by jurisdictional error (without an additional requirement of materiality). That is so even if there is no evidence that the defect in the notice any way in fact caused or contributed an applicant to miss the deadline for lodging an application for review.

In that same judgment, the court used the term 'material' in the context of describing Parliament's intention when including the requirements in s 127 to include particular information.

2.67 The minister also stated that:

Used in this sense, the term 'material' is used to describe any information required by the Parliament to be included in a notice. On this approach, it might be argued that any error might be seen to be 'material'. Therefore, setting a threshold of 'material prejudice' could be an ineffective statutory test and fails to achieve the purpose of the legislation.

2.68 The minister concluded that:

for the purposes of the bill, it is considered that a more useful and readily understandable test is 'substantial' - it can be understood at face value. Using this term, as opposed to 'material prejudice', means it will not be necessary to turn to evolving case law on materiality to understand and

34 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 6 of 2023](#) (14 June 2023) pp. 22–24.

35 The minister responded to the committee's comments in a letter dated 20 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

apply section 494E. The Department considers it preferable to have a word used in the provision that is explicable on its face to the reader.

Committee comment

2.69 The committee thanks the minister for this response.

2.70 At its core, the threshold of materiality presumed to be required before a breach of a pre-condition or condition on jurisdiction (as articulated by the High Court) is readily understandable. The committee doubts whether replacing this concept with a threshold requirement of substantiality for the content requirements of the Migration Act will simplify the case law on when the breach of a statutory requirement results in an invalid decision. The reason for this is that both concepts need to be applied in the context of the particular statutory requirement breached and the factual circumstances of the case.

2.71 Although the committee acknowledges that 'setting a threshold of "material prejudice" could, in limited contexts, be an ineffective statutory test' given the approach taken by the majority in *Parata* and thus fail to achieve the purpose of the legislation,³⁶ this is because the substantial prejudice test may in some cases lead to procedural unfairness. The committee considers that the facts of *Parata* are illuminating in this respect. The minister argued before the Federal Court that breach of a content requirement to notify Mr Parata that he may seek review under Part 5 rather than Part 7 of the *Administrative Appeals Tribunal Act 1975* because there was no evidence that the defect had in fact caused the applicant to miss the deadline for lodging an application with the prescribed fee (he paid a lower incorrect fee).

2.72 The majority of the Court did not approach the case through the lens of materiality. In effect the Court read the legislation so that the normal presumption of a threshold of materiality did not apply. Of significance was the fact that the Migration Act prohibits the Administrative Appeals Tribunal from extending the time for making a valid application even if fairness would so require. Notably, the concurring reasons of Burley J held on the facts that there was a realistic possibility that had Mr Parata (who was in prison at all relevant times) received information that the decision was a Part 5 reviewable decision, he would have determined the correct fee and done so at the time he filed his application. As the primary judge observed, Mr Parata's payment of the lower fee was 'no doubt based upon an incorrect assumption that the decision was made under Part 9 of the Act'.³⁶ Although the error was considered material it is not clear to the Committee the test of substantial prejudice would be established.

2.73 The committee is thus concerned that the test of substantial prejudice will lead to persons being denied merits review even in circumstances where there is a realistic possibility that the breach of a content requirement resulted the loss of an

36 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Parata* [2021] FCAFC 46, [133].

opportunity to validly invoke the Administrative Appeals Tribunal's jurisdiction. That is especially so when the test is combined with inflexible time limits which a tribunal cannot extend no matter how strong the fairness-based case for doing so may be.

2.74 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the test of complying with the content requirements in proposed section 494E of the *Migration Act 1958*.

Nature Repair Market Bill 2023³⁷

Purpose	This bill seeks to provide a framework for a voluntary national market that delivers improved biodiversity outcomes. This framework would facilitate private investment in biodiversity, including where carbon storage projects have biodiversity co-benefits.
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representatives on 29 March 2023
Bill status	Before the House of Representatives

Significant matters in delegated legislation³⁸

2.75 This bill sets out the framework for the new nature repair market. The nature repair market allows for eligible landholders to undertake projects to enhance or protect biodiversity through a tradeable certificate scheme and creates a public register to track biodiversity projects and certificates.

2.76 Much of the detail of how the nature repair market will operate is not set out within the bill but is instead left to delegated legislation.

2.77 In *Scrutiny Digest 5 of 2023*, the committee requested the minister's detailed advice as to:

- why it is considered necessary and appropriate to leave much of the information relating to the scope and operation of the nature repair market scheme to delegated legislation; and
- whether the bill can be amended to include further detail in relation to the scheme on the face of the primary legislation.³⁹

37 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Nature Repair Market Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 132.

38 The committee draws senators' attention to the framework nature of the bill pursuant to Senate standing order 24(1)(a)(iv).

39 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 5 of 2023](#) (10 May 2023) pp. 34–36.

Minister for the Environment and Water's response⁴⁰

2.78 The Minister for the Environment and Water (the minister) advised that it would not be appropriate to amend the bill to include further details in relation to matters relevant to the scope and operation of the nature repair market scheme as the purpose of leaving these matters to delegated legislation is to provide flexibility to adapt the legislative framework to different kinds of projects.

2.79 The minister advised that the matters relevant to the scope and operation of the nature repair market scheme relate to issues that are intended to be the subject of a co-design process, with opportunities for stakeholder and public engagement. The minister also advised that there is a need for tailored requirements for different kinds of biodiversity projects and that requirements may need to be updated to ensure they continue to be fit for purpose based on evolving technological developments and continue to comply with Australia's international obligations.

2.80 The minister also noted that determinations made by the Minister would be in the form of legislative instruments and therefore subject to the usual parliamentary disallowance process.

Committee comment

2.81 The committee thanks the minister for this response.

2.82 The committee notes the minister's advice that biodiversity assessment instruments are required to tailor requirements and circumstances to different kinds of projects. The committee also notes the minister's advice that the power to make provisions relating to what information is included in the Biodiversity Market Register is necessary to respond to evolving technological developments and international obligations.

2.83 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 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 committee notes that the justification provided by the minister that delegated legislation-making powers are necessary due to evolving technological developments appears to be overly broad in the context of the Nature Repair Market Act. The expectation that a regulated industry will experience future changes in technology

40 The minister responded to the committee's comments in a letter dated 21 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

does not sufficiently justify including substantial elements of a scheme within delegated legislation without further explanation.

2.84 The committee does not consider that the minister's response has sufficiently justified why it considered necessary and appropriate to leave much of the information relating to the scope and operation of the nature repair market scheme to delegated legislation. The committee further notes that the minister did not provide any additional information to what was already stated in the explanatory memorandum.

2.85 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving key details of the nature repair market scheme to delegated legislation.

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

Exemption from disallowance⁴¹

2.87 Clause 55 of the bill provides that the Climate Change Minister may, by legislative instrument, direct the Nature Repair Market Committee to have regard to one or more specified matters in giving advice about the making, variation, or revocation of a methodology determination. A note under clause 55 clarifies that a direction given by the Climate Change Minister is not subject to the usual parliamentary disallowance or sunseting procedures due to the operation of regulations made for the purposes of paragraphs 44(2)(b) of the *Legislation Act 2003*.⁴²

2.88 A similar power is set out at clause 65A of the bill. Clause 65A seeks to provide that a direction made by the Climate Change Minister is exempt from disallowance or sunseting.

2.89 In *Scrutiny Digest 5 of 2023* the committee requested the minister's detailed advice as to:

- why it is considered necessary and appropriate to provide that directions made under clauses 55 and 65A are not subject to disallowance; and
- whether the bill could be amended to provide that these directions are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.⁴³

41 Clauses 55 and 65A. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

42 See table item 2, section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015.

43 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 5 of 2023](#) (10 May 2023) pp. 37–38.

Minister for the Environment and Water's response⁴⁴

2.90 The minister advised that it is appropriate that ministerial directions given under clauses 55 or 65A of the bill are not subject to disallowance. The minister explained that this is an automatic exemption due to the operation of section 9 of the Legislation (Exemptions and Other Matters) Regulation 2015 and ensures executive control over the matters addressed by the Nature Repair Market Committee regarding making, varying or revoking a methodology determination or a biodiversity assessment instrument.

Committee comment

2.91 The committee thanks the minister for this response.

2.92 While the committee acknowledges that ministerial directions are routinely exempt from disallowance under the Legislation (Exemption and other Matters) Regulation 2015, the committee does not consider that this is a sufficient justification in itself for exempting an instrument from disallowance. Rather, each exemption must be individually justified based on the specified circumstance of the case at hand. To this end, the committee notes the Senate Standing Committee for the Scrutiny of Delegated Legislation has expressed particular concern about broad classes of exemption from disallowance based exclusively on the form of the relevant instrument,⁴⁵ emphasising that 'any exclusion from parliamentary oversight...requires that the grounds for exclusion be justified in individual cases, not merely stated'.⁴⁶

2.93 This issue has been highlighted recently in the committee's review of the *Biosecurity Act 2015*,⁴⁷ the inquiry of the Senate Standing Committee for the Scrutiny of Delegated Legislation into the exemption of delegated legislation from parliamentary oversight,⁴⁸ and a resolution of the Senate on 16 June 2021 emphasising that delegated legislation should be subject to disallowance and sunseting to permit

44 The minister responded to the committee's comments in a letter dated 21 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

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

46 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.

47 See *Review of exemption from disallowance provisions in the Biosecurity Act 2015; Scrutiny Digest 7 of 2021* (12 May 2021) chapter 4, pp. 33–34; *Scrutiny Digest 1 of 2022* (4 February 2022) chapter 4, pp. 76–86.

48 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.

appropriate parliamentary scrutiny and oversight unless there are exceptional circumstances.⁴⁹

2.94 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing the minister with a power to make non-disallowable directions under clauses 55 and 65A of the bill.

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

Tabling of documents in Parliament⁵⁰

2.96 Clause 172 provides that the Clean Energy Regulator (the Regulator) must, as soon as practicable after the end of a financial year, publish on its website a report about the activities of the Regulator during the financial year.

2.97 Similarly, clause 175 provides that the Secretary may publish on the Department's website a report, for a financial year, on certain matters pertaining to biodiversity certificates purchased by the Commonwealth and biodiversity conservation contracts.

2.98 The bill does not require the above reports to be tabled in the Parliament.

2.99 In *Scrutiny Digest 5 of 2023* the committee requested the minister's advice as to why it is appropriate not to include a requirement that reports written under clauses 172 and 175 be tabled in the Parliament.

Minister for the Environment and Water's response⁵¹

2.100 The minister advised that it is not appropriate to include a mandatory requirement for the reports written under clauses 172 and 175 to be tabled in the Parliament because the Climate Change Minister would have no power in relation to their content or publication, and neither the Regulator nor the Secretary have the power to table documents in Parliament.

2.101 The minister advised that the publication of the report under clause 175 is not mandatory as the matters concerning the Commonwealth's entry into biodiversity conservation contracts and the Commonwealth's purchase of biodiversity certificates

49 Senate resolution 53B. See *Journals of the Senate*, 16 June 2021, pp. 3581–3582.

50 Clauses 172 and 175. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

51 The minister responded to the committee's comments in a letter dated 21 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

may, in some cases, deal with commercial or other sensitive issues that would not be appropriate to publish. Therefore, it is not considered appropriate to include a requirement to table the report in both Houses of Parliament.

2.102 The minister noted that the Climate Change Minister must cause an independent review of the operation of the bill every five years, which must consider the extent to which the objects of the Act have been achieved. The minister further advised that an independent review would likely address similar matters that will be addressed in a clause 175 report and that a report made as part of an independent review would be required to be tabled in the Parliament.

Committee comment

2.103 The committee thanks the minister for this response.

2.104 The committee considers that just because a minister does not have the power to change the content of a report, it does not mean they are not able to table such a document in the Parliament to assist with transparency and accountability.

2.105 Further, while the committee acknowledges that reports written under clause 175 could include commercial or other sensitive issues, the committee considers that it would be possible to publish information relating to the Commonwealth's entry into biodiversity conservation contracts and the Commonwealth's purchase of biodiversity certificates with any commercially sensitive information redacted.

2.106 In this context, the committee reiterates its consistent scrutiny view that tabling documents in the 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.

2.107 The committee notes that amendments to clauses 172 and 175 were introduced on 19 June 2023 in the House of Representatives and were passed on 21 June 2023.⁵² These amendments require reports prepared under clauses 172 and 175 to be published on the Regulator's and Department's websites respectively, and to be tabled in the Parliament. The committee welcomes these amendments and considers that they adequately address the committee's concerns.

2.108 In light of the amendments passed, the committee makes no further comment on this matter.

52 On 21 June 2023, the House of Representatives agreed to 23 crossbench [amendments](#) to the bill, including amendments introduced by Kylea Tink MP.

Immunity from civil liability⁵³

2.109 Clause 228 provides that certain persons listed at subclauses 228(a) to (l) are protected from civil liability for damages for, or in relation to, an act or matter done, or omitted to be done, in good faith in the performance of functions or the exercise of powers under the bill.

2.110 This has the effect of removing any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that lack of good faith is shown.

2.111 In *Scrutiny Digest 5 of 2023* the committee requested the minister's more detailed advice as to why it is considered necessary and appropriate to confer immunity from liability for damages on such a broad class of persons, 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.⁵⁴

Minister for the Environment and Water's response⁵⁵

2.112 The minister advised that it is appropriate to confer immunity from civil liability on persons who would exercise and perform functions under the bill to ensure an efficient and effective administration of the bill. For example, immunity from damages for acts or matters where good faith is shown is considered necessary to maintain the integrity of the regulatory framework.

2.113 The minister advised that many decisions would be based on a complex matrix of scientific information. Therefore, the immunity from civil liability would ensure that persons exercising this judgement are able to do so in accordance with statutory processes and without risk of civil action.

2.114 The minister advised that acts or omissions that are not performed in good faith would be subject to potential civil proceedings and clause 228 would not protect the relevant persons from criminal proceedings.

2.115 The minister further advised that the immunity from civil liability proposed to be introduced by the bill is consistent with existing Commonwealth legislation.⁵⁶

53 Clause 228. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

54 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 5 of 2023](#) (10 May 2023) pp. 39–40.

55 The minister responded to the committee's comments in a letter dated 21 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

56 See, for example, section 180 of the *Recycling and Waste Reduction Act 2020*; section 430 of the *Export Control Act 2020*; section 441 of the *Biosecurity Act 2015*; and section 74T of the *Broadcasting Services Act 1992*.

Committee comment

2.116 The committee thanks the minister for this detailed response.

2.117 The committee notes the minister's advice that the immunity from civil liability afforded by clause 228 is appropriate to ensure efficient and effective administration when making complex decisions.

2.118 While the committee acknowledges that protecting certain persons from civil liability may be considered necessary for making complex decisions, the minister has not addressed what recourse, if any, affected persons may have to bring an action to enforce their legal rights in situations where a protected person has acted in good faith in the performance of functions or the exercise of powers under the bill.

2.119 The committee again reiterates its concern that the immunity conferred under clause 228 is conferred upon a broad range of persons.

2.120 Further, the committee notes that consistency with other legislation is generally not considered a sufficient justification, in itself, to confer immunity from civil liability.

2.121 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing immunity from civil liability to a broad class of persons under clause 228.

Nature Repair Market (Consequential Amendments) Bill 2023⁵⁷

Purpose	<p>This bill seeks to amend the <i>Clean Energy Regulator Act 2011</i> and the <i>National Greenhouse and Energy Reporting Act 2007</i> to support the commencement of the Nature Repair Market Bill 2023.</p> <p>The bill seeks to provide a framework for a voluntary national biodiversity market that would enable eligible landholders to undertake projects that enhance or protect biodiversity in native species and receive a tradeable certificate for doing so.</p>
Portfolio	Climate Change, Energy, the Environment and Water
Introduced	House of Representatives on 29 March 2023
Bill status	Before the House of Representatives

Broad delegation of administrative powers and functions⁵⁸

2.122 Item 7 of Schedule 1 to the bill seeks to insert proposed paragraphs 35(1)(f) and 35(1)(g) into the *Clean Energy Regulator Act 2011* (the Act) to expand the Regulator's delegation power. The amendments allow the Regulator to delegate any of its powers and functions to a person assisting the Regulator under section 37 and who is a Senior Executive Service (SES) employee or acting SES employee, or an APS employee who holds or performs the duties of an Executive Level 2 position or an equivalent position, in the Biodiversity Department.

2.123 In *Scrutiny Digest 5 of 2023* the committee requested the minister's more detailed advice as to:

- why it is considered necessary and appropriate to empower the Regulator to delegate any or all of its functions or powers to an Executive Level 2 employee in the Biodiversity Department rather than limiting the delegation to the Senior Executive Service level; and

57 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Nature Repair Market (Consequential Amendments) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 133.

58 Schedule 1, item 7, proposed paragraphs 35(1)(f) and 35(1)(g). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii).

- whether the bill could be amended to limit the functions and powers that may be delegated to an Executive Level 2 employee in the Biodiversity Department.⁵⁹

Minister for the Environment and Water's response⁶⁰

2.124 The Minister for the Environment and Water (the minister) advised that allowing the Regulator to delegate any of its powers and functions to APS employees of an Executive Level 2 will assist the ministers responsible for the Act and the Nature Repair Market bill (the NRM bill) to administer different departments.

2.125 The minister advised that the existing delegation of powers under paragraphs 35(1)(d) and (e) would only apply to officials of the Biodiversity Department responsible for the Act. The minister further noted that officers and employees of any public service agency can be made available to assist the Regulator,⁶¹ and for this reason it is important for the Regulator to be able to delegate its functions and powers specifically to officials of the Biodiversity Department that are responsible for, and hold expertise relevant to, the NRM bill. The minister advised that this would ensure efficiency in the administration of the NRM scheme.

2.126 The minister further advised that the approach taken within the bill is consistent with the *Australian Administrative Law Guide* which provides that it may be appropriate for an agency officer to make decisions, particularly where there is a limited exercise of discretion.⁶²

Committee comment

2.127 The committee thanks the minister for this response.

2.128 The committee notes the minister's advice that the delegation powers set out in the bill are necessary and appropriately limited to officials of the Biodiversity Department that hold expertise relevant to the NRM bill.

2.129 While the committee acknowledges it is sometimes appropriate to delegate powers to a wide range of staff to allow for administrative efficiency and, in line with the Administrative Law Guide, it may be appropriate for agency officers to make decisions, the committee nevertheless remains concerned about the breadth of the powers and functions that can be delegated. The committee considers that, as the bill

59 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 5 of 2023](#) (10 May 2023) pp. 41–43.

60 The minister responded to the committee's comments in a letter dated 21 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

61 *Clean Energy Regulator Act 2011*, section 37.

62 Attorney-General's Department, [Australian Administrative Law Policy Guide](#) (4 April 2017) pp. 11-12.

provides for the Regulator's powers and functions to be delegated beyond the SES level to Executive Level 2 employees, it is particularly important that such persons possess the appropriate training, qualifications, skills or experience to exercise those powers or functions.

2.130 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 any of the Regulator's powers and functions to an Executive Level 2 employee in the Biodiversity Department.

Public Service Amendment Bill 2023⁶³

Purpose	This bill seeks to amend the <i>Public Service Act 1999</i> to deliver enduring transformational change, and ensure the Australian Public Service is well placed to serve the Australian Government, the Parliament and the Australian public into the future.
Portfolio	Prime Minister and Cabinet
Introduced	House of Representatives on 14 June 2023
Bill status	Before the House of Representatives

Tabling of documents in Parliament⁶⁴

2.131 Item 8 of Schedule 1 seeks to introduce section 44A into the *Public Service Act 1999* (the Act) to provide the Australia Public Service Commissioner and the Secretary of the Prime Minister's Department with the power to cause a capability review of government agencies.

2.132 Item 10 of Schedule 1 seeks to introduce section 64A which requires the Secretaries Board⁶⁵ to cause long-term insights reports to be prepared in relation to one or more matters of public policy.

2.133 Item 12 of Schedule 1 seeks to insert section 78B, which requires the Agency Head of an Agency to prepare an action plan that sets out the Agency Head's response to the census results as they relate to the Agency.

2.134 The bill does not require any of the documents created under proposed sections 44A, 44B, 64A or 78B to be tabled in the Parliament.

2.135 In *Scrutiny Digest 7 of 2023* the committee requested the minister's advice as to:

- whether the bill can be amended to provide that the documents created under proposed sections 44A, 44B, 64A or 78B of the bill must be tabled in the Parliament; or

63 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Public Service Amendment Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 134.

64 Schedule 1, items 8, 10 and 12, proposed sections 44A, 44B 64A and 78B. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

65 *Public Service Act 1999*, section 64 provides that the 'Secretaries Board' consists of the Secretary of the Prime Minister's Department, the Secretary of each other Department, the Commissioner, and such other persons as are nominated in writing by the Secretary of the Prime Minister's Department.

- if the minister considers these documents are not appropriate for tabling in the Parliament, whether a justification can be provided as to why it is appropriate that the documents are not tabled.⁶⁶

Minister for the Public Service's response⁶⁷

2.136 The Minister for the Public Service (the minister) advised that reports prepared under sections 44A, 44B, 64A and 78B of the bill are required to be published and will be published in accordance with these sections. The minister has also advised that these documents are internally focused and would not be further serviced by tabling in the Parliament as these processes and resulting documents perform an enabling function, rather than one that requires the Parliament to act.

2.137 The minister also advised that as the bill requires publication of these documents on an Agency website, it is possible to maintain an appropriate level of public transparency in relation to this work and the bill would not be improved by requiring the tabling of these documents. Further, the minister advised that the bill does not preclude the tabling of documents, and so there is discretion to table these documents in the Parliament in appropriate circumstances.

Committee comment

2.138 The committee thanks the minister for this response.

2.139 The committee notes the minister's advice that the reports prepared under sections 44A, 44B, 64A and 78B of the bill are internally focused documents and would not be further serviced by tabling in the Parliament. The committee reiterates its view that, while the creation of these documents may not require the Parliament to act, they are relevant to understanding the performance of governmental departments and agencies. The documents proposed to be created include documents that appear to be directed at improving transparency and external scrutiny of performance of government agencies, which would be further aided by requiring them to be tabled in the Parliament.

2.140 The committee also notes the minister's advice that it is possible to maintain an appropriate level of public transparency in relation to these documents as they will be published on an Agency website in accordance with the requirements of the bill, and that tabling in the Parliament is possible in appropriate circumstances. Rather than relying on any discretion to table documents in the Parliament, the committee reiterates its consistent scrutiny view that tabling documents in the Parliament is

66 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 7 of 2023](#) (21 June 2023) pp. 3–5.

67 The minister responded to the committee's comments in a letter dated 3 July 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

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.

2.141 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of not requiring documents prepared under sections 44A, 44B, 64A and 78B to be tabled in each House of the Parliament.

Privacy⁶⁸

2.142 As noted above, item 8 of Schedule 1 of the bill seeks to introduce section 44A to provide that the Commissioner can cause capability reviews of Agencies to be undertaken. Proposed subsection 44A(11) provides an exception to the requirement to publish the report. A person who causes a capability review into an Agency to be undertaken and receives a written report of the review may remove material from the copy that is published or decide not to publish the report if publishing the material or the report would, or could, reasonably be expected to, damage the security, defence or the international relations of the Commonwealth.

2.143 In *Scrutiny Digest 7 of 2023* the committee requested the minister's detailed advice as to whether the bill can be amended to include safeguards to protect non-Senior Executive Service (SES) employees' personal information.⁶⁹

Minister for the Public Service's response⁷⁰

2.144 The minister advised that capability reviews will be informed by the views of Agency staff, which means that personal information may be collected in the initial analysis stages of consultation and will be subject to the *Privacy Act 1988* (Privacy Act). The minister also advised that the capability reports will present high-level findings and would not include publication of information which could reasonably identify an individual. The minister, however, has requested the Department of the Prime Minister and Cabinet to review whether it is appropriate to provide an amendment to the bill with regard to this matter.

Committee comment

2.145 The committee thanks the minister for this response.

68 Schedule 1, item 8, proposed section 44A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

69 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 7 of 2023](#) (21 June 2023) pp. 5–6.

70 The minister responded to the committee's comments in a letter dated 3 July 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.146 The committee notes the minister's advice that the information collected for the purpose of capability reviews will be subject to the Privacy Act. The committee also notes the minister's advice that the capability report will present high-level findings that are unlikely to include details that can reasonably identify an individual.

2.147 The committee welcomes the minister's advice that the Department of Prime Minister and Cabinet has been asked to review whether it is appropriate to amend the bill to ensure personal information of non-Senior Executive Service employees is protected, and reiterates its view that including privacy protections in the primary legislation is preferable.

2.148 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*).

Broad delegation of administrative powers or functions⁷¹

2.149 Under subsection 78(7) of the Act, an Agency Head may, in writing, delegate to another person any of the Agency Head's powers or functions under the Act (but cannot delegate the power to delegate). Subsection 78(8) further provides that an Agency Head cannot delegate powers or functions to an 'outsider' without the prior written consent of the Commissioner. An outsider means a person other than (a) an APS employee, or (b) a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth.

2.150 Item 11 of Schedule 1 of the bill seeks to introduce paragraph 78(8)(c) to include a member of the Australian Defence Force (ADF). This has the effect that a member of the ADF is not considered an 'outsider' for the purposes of an Agency Head's delegation power under subsection 78(7), and therefore an Agency Head may delegate any of their powers or functions to a member of the ADF without the written consent of the Commissioner.

71 Schedule 1, item 11, paragraph 78(8)©. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

2.151 In *Scrutiny Digest 7 of 2023* the committee requested the minister's advice as to:

- why it is necessary and appropriate to allow an Agency Head to make a delegation under subsection 78(7) of the *Public Service Act 1999* to any person who is not an 'outsider'; 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.⁷²

Minister for the Public Service's response⁷³

2.152 The minister advised that the bill incorporates an amendment to exclude members of the ADF from the definition of outsider for the purposes of an Agency head's delegation power, which will bring the Act in line with updates made to the Public Service Regulations 2023. The minister advised that the purpose of this change is to allow the Secretary of Defence and other Agency Heads to delegate their functions or powers to members of the ADF without the APS Commissioner's written approval, which will enable agencies whose workforces include members of the ADF to operate in an Integrated way.

2.153 The minister also advised that the delegation power for Agency Heads reflects that Agencies of different sizes may have differing operational requirements, and the Agency Head is best placed to determine who may exercise their employer powers or functions, and to which level their powers and functions are appropriate to delegate. Finally, the minister advised that limiting the scope of the powers that might be delegated is unlikely to be practicable, given the breadth of the agencies' functions, and given that some agencies are so small as to have very few members of the SES.

Committee comment

2.154 The committee thanks the minister for this response.

2.155 The committee notes the minister's advice that this amendment allows Agencies whose workforces include members of the ADF to operate in an integrated manner. The committee also notes the minister's advice that the Agency Head is best placed to determine delegation of powers and functions.

2.156 Nevertheless, the committee remains concerned that the bill allows the broad delegation of any powers by the Secretary of Defence and Agency Heads to any individual who is not an outsider, regardless of the nature of the power. The

72 Senate Scrutiny of Bills Committee, [Scrutiny Digest 7 of 2023](#) (21 June 2023) pp. 6–8.

73 The minister responded to the committee's comments in a letter dated 3 July 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

committee also remains concerned that, on the face of the bill, there is no requirement for the powers to be delegated to employees who have the appropriate skills, qualifications or experience. It remains unclear to the committee why the bill cannot be amended to require Agency Heads to delegate powers to SES employees or to individuals who possess the requisite skills, qualifications or experience.

2.157 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 any of an Agency Head's powers and functions to any person who is not an 'outsider'.

Veterans' Affairs Legislation Amendment (Miscellaneous Measures No. 2) Bill 2023⁷⁴

Purpose	This bill seeks to amend the following veterans' affairs legislation to modernise and streamline its operation: <ul style="list-style-type: none"> • <i>Veterans' Entitlements Act 1986</i>; • <i>Safety, Rehabilitation and Compensation (Defence-related Claims) Act 1988</i>; and • <i>Military Rehabilitation and Compensation Act 2004</i>.
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 25 May 2023
Bill status	Before the Senate

Instruments not subject to an appropriate level of parliamentary oversight⁷⁵

2.158 Subsection 8(8AC) of the *Social Security Act 1991* (Social Security Act) currently allows the Secretary of the Employment Department (the Secretary) to, by notifiable instrument, make determinations in relation to employment programs as exempt income for the purposes of the Social Security Act. Item 1 of Schedule 2 to the bill seeks to substitute subsection 8(8AC) to extend this arrangement to provide that the Secretary can also make determinations in relation to employment programs for the purposes of the *Veterans' Entitlements Act 1986*.

2.159 As instruments made under subsection 8(8AC) are specified to be notifiable instruments, they are not subject to the tabling, disallowance or sunseting requirements that apply to legislative instruments. As such, there is no parliamentary scrutiny of notifiable instruments.

2.160 In *Scrutiny Digest 6 of 2023* the committee requested the minister's advice as to:

- why it is considered appropriate that instruments made under subsection 8(8AC) of the *Social Security Act 1991* are notifiable instruments; and

74 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Veterans' Affairs Legislation Amendment (Miscellaneous Measures No. 2) Bill 2023, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD 135.

75 Schedule 2, item 1, proposed subsection 8(8AC). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

- whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.⁷⁶

Minister for Veterans' Affairs' response⁷⁷

2.161 The Minister for Veterans' Affairs (the minister) advised that the bill seeks to rely upon the same instruments as under the Social Security Act but for the purposes of equivalent Department of Veterans' Affairs payments. The minister advised that this is a minor amendment to ensure veterans undertaking employment programs have the same beneficial income-testing treatment as other Australians. The minister further advised that it is the government's intention that these schedules commence as soon as possible to ensure that veterans and their families are not disadvantaged. As such, the current design of the provision allows the Secretary to quickly determine an employment program is exempt to ensure that vulnerable groups receiving income support payments are not adversely affected.

2.162 The minister also noted the correspondence previously undertaken between the former Minister for Employment, Education and Skills and the committee when the arrangement was first introduced in the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021*.

Committee comment

2.163 The committee thanks the minister for this response.

2.164 While the committee notes the minister's advice that this amendment expands an existing arrangement and is intended to be beneficial for eligible veterans, as the committee previously stated in its concluding entry for the *Social Security Legislation Amendment (Streamlined Participation Requirements and Other Measures) Bill 2021*, the committee does not consider the fact that an instrument may have a beneficial effect or that similar powers are available in existing legislation to be a sufficient justification for not providing that instruments will be subject to disallowance.⁷⁸

2.165 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

76 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 6 of 2023](#) (14 June 2023) pp. 25–26.

77 The minister responded to the committee's comments in a letter dated 20 June 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 8 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

78 Senate Standing Committee for the Scrutiny of Bills, [Scrutiny Digest 11 of 2021](#) (4 August 2021) pp. 29–30.

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.⁷⁹

2.166 The committee also does not consider the fact that it is desirable that an instrument be made quickly to be a sufficient justification for providing that an instrument will be notifiable rather than legislative. The committee notes that legislative and notifiable instruments follow the same registration process,⁸⁰ and both commence at the start of the day after the instrument is registered (unless the instrument provides otherwise).⁸¹

2.167 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the Secretary of the Employment Department's power under subsection 8(8AC) of the *Social Security Act 1991* to make determinations which are not legislative instruments and therefore not subject to disallowance.

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

80 *Legislation Act 2003*, section 15H.

81 *Legislation Act 2003*, subsection 12(1).

Chapter 3

Scrutiny of standing appropriations¹

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.² 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.³

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

Senator Dean Smith
Chair

1 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Scrutiny of standing appropriations, *Scrutiny Digest 8 of 2023*; [2023] AUSStaCSBSD AUSStaCSBSD 136.

2 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*.

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