



Senate Standing

Committee for the Scrutiny of Bills

Scrutiny Digest 13 of 2023

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Senator Nick McKim	AG, Tasmania
Senator Paul Scarr	LP, Queensland
Senator Tony Sheldon	ALP, New South Wales
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Committee information

Terms of reference

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

- (i) trespass unduly on personal rights and liberties;
- (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
- (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
- (iv) inappropriately delegate legislative powers; or
- (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

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

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

Publications

It is the committee's usual practice to table a *Scrutiny Digest* (the Digest) each sitting week of the Senate. The Digest contains the committee's scrutiny comments in relation to bills introduced in the previous sitting week as well as commentary on amendments to bills and certain explanatory material. The Digest also contains responses received in relation to matters that the committee has previously considered, as well as the committee's comments on these responses. The Digest is generally tabled in the Senate on the Wednesday afternoon of each sitting week and is available online after tabling.

General information

Any senator who wishes to draw matters to the attention of the committee under its terms of reference is invited to do so. The committee also forwards any comments it has made on a bill to any relevant Senate legislation committee for information.

Report snapshot¹

Chapter 1: Initial scrutiny

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¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report Snapshot, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 203.

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.

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023²

Purpose	<p>The bill seeks to make numerous amendments to the <i>Fair Work Act 2009</i> including:</p> <ul style="list-style-type: none"> • by replacing the existing definition of 'casual employee' introducing a new employee choice pathway for eligible employees to change to permanent employment; • introducing a new criminal offence of wage theft; and • allowing the Fair Work Commission to set minimum standards orders for employee-like workers including in the gig economy. <p>The bill also seeks to amend the <i>Safety, Rehabilitation and Compensation Act 1988</i>, the <i>Asbestos Safety and Eradication Agency Act 2013</i>, and the <i>Work Health and Safety Act 2011</i>.</p>
Portfolio	Employment and Workplace Relations
Introduced	House of Representatives on 4 September 2023
Bill status	Before the House of Representatives

Exemption from disallowance³

1.2 The bill provides that a number of determinations made by the Fair Work Commission (FWC) are legislative instruments which are exempt from disallowance. These are detailed below:

² This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 204.

³ Schedule 1, item 61, proposed subsection 202(7); Schedule 1, item 62, proposed subsection 205(6); Schedule 1, item 64, proposed subsection 737(3); Schedule 1, item 70, proposed subsection 768BK(4); and Schedule 1, item 308, proposed section 101. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

- Schedule 1, item 61, proposed subsection 202(7) - a determination made by the Fair Work Commission (FWC) of the model flexibility term for enterprise agreements made under proposed subsection 202(5);
- Schedule 1, item 62, proposed subsection 205(6) - a determination made by the FWC of the model consultation term for enterprise agreements made under proposed subsection 205(3);
- Schedule 1, item 64, proposed subsection 737(3) - a determination made by the FWC of a model term for dealing with disputes for enterprise agreements made under proposed subsection 737(1);
- Schedule 1, item 70, proposed subsection 768BK(4) – a determination made by the FWC of a model term for settling disputes about matters arising under a copied State instrument for a transferring employee made under proposed subsection 768BK(1A); and
- Schedule 1, item 308, proposed section 101 - determinations made by the FWC under new subsections 202(5), 205(3), 737(1) or 768BK(1A) prior to the commencement of part 5 of schedule 1 to the bill.

1.3 Disallowance is the primary means by which the Parliament exercises control over the legislative power that it has delegated to the executive. Exempting an instrument from disallowance therefore has significant implications for parliamentary scrutiny. In June 2021, the Senate acknowledged these implications and resolved that delegated legislation should be subject to disallowance unless exceptional circumstances can be shown which would justify an exemption. In addition, the Senate resolved that any claim that circumstances justify such an exemption will be subject to rigorous scrutiny, with the expectation that the claim will only be justified in rare cases.⁴

1.4 The Senate's resolution is consistent with concerns about the inappropriate exemption of delegated legislation from disallowance expressed by this committee in its recent review of the *Biosecurity Act 2015*,⁵ and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.⁶

1.5 In light of these comments and the resolution of the Senate, the committee expects that any exemption of delegated legislation from the usual disallowance

⁴ Senate resolution 53B. See *Journals of the Senate*, No. 101, 16 June 2021, pp. 3581–3582.

⁵ See Chapter 4 of Senate Standing Committee for the Scrutiny of Bills, [Review of exemption from disallowance provisions in the Biosecurity Act 2015: Scrutiny Digest 7 of 2021](#) (12 May 2021) pp. 33–44; and [Scrutiny Digest 1 of 2022](#) (4 February 2022) pp. 76–86.

⁶ 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).

process should be fully justified in the explanatory memorandum. This justification should include an explanation of the exceptional circumstances that are said to justify the exemption and how they apply to the circumstances of the provision in question.

1.6 In relation to proposed subsection 202(7), the explanatory memorandum states:

As Australia's workplace relations tribunal, the FWC has expert and technical knowledge of contemporary workplace relations and operates independently of political processes. The determination would be required to be made following consideration of submissions by the public, thereby mandating public participation in the process. The model term would play a limited role in creating rights or obligations in circumstances where an enterprise agreement does not contain a compliant flexibility term.

Ensuring the model term is not disallowable would also avoid the risk of the model term being disallowed after an enterprise agreement has proceeded to a vote by employees on the basis that the model term determined by the FWC would be included. Were this to occur, questions as to genuine agreement may arise on the basis that an important term of the agreement would not be included. This situation may also cause commercial uncertainty and frustrate bargaining processes.⁷

1.7 A similar justification is provided in the explanatory memorandum for each of the other specified exemptions from disallowance. In relation to proposed section 101, the explanatory memorandum further explains that:

This exemption from disallowance is appropriate to avoid the commercial uncertainty, and potential impact on bargaining and enterprise agreement approval processes, that would arise if FWC model terms were disallowed in circumstances where no such terms were prescribed by the FW Regulations.⁸

1.8 Noting the expectation that exemption from disallowance is only appropriate in rare cases, the committee remains concerned that the bill facilitates the making of several instruments which will be exempt from parliamentary disallowance. While the explanatory memorandum has provided some justification for these exemptions which may indicate exceptional circumstances apply, it is the view of the committee that these arguments have not been sufficiently made out.

1.9 The committee therefore requests the minister's advice as to the appropriateness and necessity of the exemptions from disallowance for legislative instruments made under proposed subsections 202(5), 205(3), 737(1) and 768BK(1A).

⁷ Explanatory memorandum, p. 91.

⁸ Explanatory memorandum, p. 259.

Retrospective application⁹

1.10 Item 73 of part 6 of schedule 1 to the bill seeks to insert part 2-7A into the *Fair Work Act 2009* (FW Act). Part 6 of schedule 1 to the bill would commence on the day after the Act receives Royal Assent.

1.11 Proposed part 2-7A would provide for orders to be made regulating various labour hire arrangements. This part also provides for anti-avoidance provisions which attract civil penalties up to 600 penalty units.¹⁰

1.12 In relation to the anti-avoidance provisions, the explanatory memorandum states:

The anti-avoidance provisions would apply retrospectively, with application from the date the Bill is introduced in the Parliament. This means penalties may apply in relation to conduct engaged in before the Bill commences. This is reasonable and proportionate to prevent businesses from taking steps to avoid obligations under new Part 2-7A. before the Bill commences. Parties will be on notice about their obligations as the legislation will be publicly available when it is introduced.¹¹

1.13 The committee has long-standing scrutiny concerns about provisions which apply retrospectively. Such provisions challenge the basic rule of law principle that the law should be capable of being known in advance. Underlying this principle is the importance of enabling people to rely on the law at the time of a relevant action or decision and protecting those affected by government decisions from arbitrary decision-making. These concerns will be particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

1.14 Generally, where proposed legislation will have a retrospective effect, the committee expects the explanatory materials to set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and, if so, the extent to which their interests are likely to be affected. If an individual's interests will, or may, be affected by the retrospective application of a provision, the explanatory memorandum should set out the exceptional circumstances that nevertheless justify the use of retrospectivity.

1.15 The committee is concerned that the explanatory memorandum fails to consider whether any persons are likely to be adversely affected by the retrospective commencement of proposed part 2-7A and, if so, the extent to which their interests are likely to be affected. These concerns are heightened given the substantial civil penalties relevant to the anti-avoidance provisions. From a scrutiny perspective, the committee does not consider that the information provided in the explanatory

⁹ Schedule 1, part 6, item 73, proposed Part 2-7A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

¹⁰ Item 74, proposed subsection 539(2).

¹¹ Explanatory memorandum, pp. 30–31.

memorandum addresses in sufficient detail the retrospective application of part 6 of Schedule 1 to the bill.

1.16 The committee requests the minister's detailed advice regarding why it is necessary and appropriate for the anti-avoidance provisions in proposed part 2-7A in schedule 1 to the bill to apply retrospectively.

1.17 The committee's consideration of this matter would be assisted if the advice contained information regarding whether there will be a detrimental effect for any individuals, and if so the extent of that detriment and the number of individuals.

Significant penalties

Strict liability offence

Absolute liability offence¹²

1.18 Schedule 1, item 220, proposed subsection 327A(1) prescribes that an employer commits an offence if:

- they are required to pay an amount to, or on behalf of, or for the benefit of, an employee under the FW Act, fair work instruments, or transitional instrument (proposed paragraph 327A(1)(a)); and
- the amount is not a superannuation contribution or an amount covered by subsection 327A(2) (327A(1)(b)); and
- the employer engages in conduct (proposed paragraph 327(1)(c)) which results in a failure to pay the required amount on or before the day it is due for payment (proposed paragraph 327(1)(d)).

1.19 Proposed subsection 327A(3) prescribes the fault element of absolute liability applies to paragraphs 327(1)(a) and (b). Proposed subsection 327A(5) prescribes a criminal penalty of up to 10 years imprisonment.

1.20 In relation to the imposition of absolute liability, the explanatory memorandum states:

Absolute liability applies to the physical elements in proposed paragraphs (1)(a) and (b) because in most applicable instances the person concerned will not possess any fault element concerning these physical elements, and accordingly the offence would become almost unenforceable if the prosecution were obliged to demonstrate fault. Further, the person's degree of culpability under this offence is not materially affected by absence of the subject fault. (The fault element for paragraphs (1)(c) and (d) is intention, which requires the prosecution to prove that the required

¹² Schedule 1, item 220, proposed section 327A; Schedule 4, item 1, proposed section 30A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

conduct was intention, and that there was a resulting intention to fail to pay the required amount, or underpay.) The defence of mistake of fact should not be available to the defendant for paragraphs (1)(a) and (1)(b) and accordingly absolute liability, and not strict liability, is the appropriate application.¹³

1.21 In relation to the penalty amount, the explanatory memorandum states:

New subsection 327A(5) sets out the maximum penalty for an offence against the new offence provision for wage theft, which may include a term of imprisonment of up to 10 years, in addition to a fine of up to the specified amount, set out in the provision. The *Guide to Framing Commonwealth Offences* was applied in determining to criminalise the requisite conduct, and set the maximum penalty for an offence. In setting the maximum term of imprisonment for an offence, regard was had to offences of a similar nature, particularly offences of theft and fraud under the general law (for example, the offence of general dishonesty in section 135.1 of the Criminal Code, among others).¹⁴

1.22 Schedule 4, item 1, proposed subsection 30A(1) inserts a new offence into the *Work Health and Safety Act 2011* (WHS Act) which provides that a person commits an offence if:

- the person is conducting a business or undertaking, or is an officer of a person conducting a business or undertaking (30A(1)(a)); and
- the person has a health and safety duty (30A(1)(b)); and
- the person intentionally engages in conduct (30A(1)(c)); and
- the conduct breaches the health and safety duty (30A(1)(d)); and
- the conduct causes the death of an individual (30A(1)(e)); and
- the person was reckless, or negligent, as to whether the conduct would cause the death of an individual (30A(1)(f)).

1.23 The explanatory memorandum notes that due to the operation of subsection 12F(2) of the *Work Health and Safety Act 2011* (WHS Act), strict liability applies to the elements of the offence set out in proposed paragraphs 30A(1)(a),(b) and (d). The offence carries a penalty of up to 25 years imprisonment, or, for a body corporate, \$18,000,000.

1.24 In addition, the committee notes that the effect of part 6 of schedule 4 to the bill is to increase penalties for all Commonwealth work health and safety (WHS) offences. The explanatory memorandum explains that this includes a 'general 39.03

¹³ Explanatory memorandum, p. 154.

¹⁴ Explanatory memorandum, pp. 154–155.

per cent increase in monetary penalties' which 'represents the average increase in penalty units for non-WHS offences across all jurisdictions since 2011'.¹⁵

1.25 In relation to the imposition of strict liability the explanatory memorandum states:

Strict liability is appropriate for this element as the element is analogous to a jurisdictional element – that is, the element does not go to the substance of the offence. New paragraph 30A(1)(a) would ensure the offence only captures those within the Commonwealth's WHS jurisdiction.

...

As with paragraph 30A(1)(a), this element is analogous to a jurisdictional element as it does not go to the substance of the offence, but ensures the offence only captures those subject to the Commonwealth's WHS jurisdiction.

...

New paragraph 30A(1)(d) would require the conduct to have breached the health and safety duty. Due to the operation of subsection 12F(2) of the WHS Act, strict liability applies to this element. While breach of duty is central to the offence, it would not be appropriate to apply a fault element to this element. Most offences in the WHS Act, including the Category 2 and Category 3 offences are strict liability.

Including strict liability as a feature of offences was carefully considered when the WHS Act was first introduced as the presumption of innocence can be seen to be impinged by removing the requirement for the prosecution to prove fault in relation to one or more physical elements of an offence. WHS offences arise in a regulatory context where, for reasons such as public safety, and the public interest in ensuring that regulatory schemes are observed, the sanction of criminal penalties is justified. The offences also arise in a context where a defendant can reasonably be expected, because of their professional involvement, to know what the requirements of the law are, and the mental, or fault, element can be justifiably excluded. The rationale is that people who owe WHS duties such as employers, persons in control of aspects of work, and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public. The industrial manslaughter offence would apply to PCBUs, and 'officers' (the most senior persons in an organisation).¹⁶

¹⁵ Explanatory memorandum, p. 298.

¹⁶ Explanatory memorandum, pp. 284–285.

1.26 In relation to the penalty in proposed subsection 12F(2), the explanatory memorandum states:

New subsection 30A(1) would prescribe the penalties for an industrial manslaughter offence. The new penalties are a maximum of 25 years imprisonment for individuals and a fine of \$18 million for bodies corporate or the Commonwealth. The maximum penalty for individuals found guilty of industrial manslaughter (25 years' imprisonment) reflects manslaughter penalties in the Criminal Code. This is consistent with the Guide which states that where an offence is comparable to an offence in the Criminal Code, the penalty under the Criminal Code should be adopted.

The maximum monetary penalty of \$18 million reflects the seriousness of the offence and is consistent with the penalty for industrial manslaughter in the model Act. This penalty provides a clear and effective punishment that acts as a deterrent against breaching WHS duties.¹⁷

1.27 In relation to the increase in penalties across the Commonwealth WHS offences, the explanatory memorandum states:

The significant increase to penalties for the Category 1 offence in this Part exceeds the similar increase in the recent amendments to the model Act. The decision to depart from the model Act was made to ensure the coherence of the Commonwealth WHS offence penalty scheme. Workplace fatalities could be prosecuted as either an industrial manslaughter offence or a Category 1 offence. Adopting the model penalty for Category 1 would conflict with the principle set out in the Guide which holds that a penalty should be consistent with penalties of a similar kind or of a similar seriousness.¹⁸

1.28 Under general principles of the common law, fault is required to be proven before a person can be found guilty of a criminal offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill states that an offence is one of strict or absolute liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having to prove that the defendant had the intention to engage in the relevant conduct or was reckless or negligent while doing so.

1.29 As the imposition of strict or absolute liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict or absolute liability, including

¹⁷ Explanatory memorandum, p. 286.

¹⁸ Explanatory memorandum, p. 298.

outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.¹⁹

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

- **why it is necessary and appropriate to impose absolute liability on the offence of wage theft in proposed subsection 327A(1) of the *Fair Work Act 2009* noting that the offence carries a criminal penalty of up to 10 years imprisonment; and**
- **why it is necessary and appropriate to impose strict liability on the offence of industrial manslaughter in proposed subsection 30A(1) of the *Work Health and Safety Act 2011* noting that the offence carries a criminal penalty of up to 25 years imprisonment.**
- **The committee's consideration of this information would be assisted if the response made reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.**

Abrogation of privilege against self-incrimination²⁰

1.31 Section 713 of the FW Act abrogates the privilege against self-incrimination by providing that a person is not excused from giving information, producing a record or document, or answering a question, under paragraph 709(d) or subsection 712(1), or under a Fair Work Ombudsman (FWO) notice, on the grounds that to do so might tend to incriminate the person or otherwise expose the person to a penalty or other liability. Subsections 713(2) and (3), and section 713A, provide for circumstances in which use and derivative use immunity apply.

1.32 Item 228 of schedule 1 to the bill seeks to add proposed subsection 713(4) to the FW Act. This would remove the use immunity provided for in subsections 713(2) and (3) of the FW Act in relation to an employee record that is made under section 535 (proposed paragraph 713(3)(a)), or a copy of a pay slip created in relation to an employee (proposed paragraph 713(4)(b)). Item 230 would insert proposed subsection 713A(2) into the FW Act with the effect of removing derivative use immunity for the same documents.

¹⁹ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011.

²⁰ Schedule 1, item 228, proposed subsection 713(4), item 229, proposed section 713A, and item 230 proposed subsection 713A(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

1.33 In this regard, the explanatory memorandum states:

These items would create an exception to the immunities conferred by these sections, in relation to:

- an employee record in relation to an employee that is made under section 535; or
- a copy of a pay slip created in relation to an employee. Pay slips are required to be issued to employees under section 536.

The rationale is that employee records that are required to be kept under the FW Act, section 535, or copies of payslips that are required to be issued under the FW Act, section 536, should be able to be tendered as evidence before a court, including criminal proceedings. In other words, the regulator should not be prevented from tendering evidence of employee records or pay slips against an individual, just because they were produced by notice or other coercive process. Further, as the regulator will be undertaking criminal investigations, and these records will be central to being able to prove the offence, providing immunity would mean the regulator is unable to properly discharge their function in respect of criminal underpayments.²¹

1.34 The committee considers that the privilege against self-incrimination is an important right under the common law and any abrogation of that right represents a significant loss to personal liberty. In this instance, the committee notes the narrow scope of evidence that is excluded from the existing use and derivative use immunities in the FW Act.

1.35 In light of the above, the committee requests the minister's advice as to why it is necessary and appropriate for proposed subsection 713(4) to remove use immunity, and for proposed subsection 713A(2) to remove derivative use immunity, in relation to employee pay slips and records.

1.36 The committee's consideration of this information would be assisted if the response made reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Incorporation of external materials as existing from time to time²²

1.37 Schedule 1, item 248, proposed subsection 15S(2) provides that regulations prescribing the meaning of the road transport industry may prescribe an industry by applying, adopting or incorporating any matter contained in a modern award as in force or existing from time to time.

²¹ Explanatory memorandum, pp. 158–159.

²² Schedule 1, item 248, proposed subsection 15S(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

1.38 The explanatory memorandum provides no explanation as to why it would be necessary for the material to apply as in force or existing from time to time.

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

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

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

1.41 Noting the above comments, the committee requests the minister's advice as to:

- **the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 15S(2);**
- **whether these documents will be made freely available to all persons interested in the law; and**
- **why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.**

Availability of merits review²³

1.42 Schedule 1, item 249, proposed section 536JY provides that the FWC may make a minimum standards order for employee-like workers performing digital platform work or for regulated road transport contractors. Minimum standards orders may determine the standards and conditions in relation to, for example, payment terms, working hours, and insurance, as set out in proposed subsection 536KL of the bill.

²³ Schedule 1, item 249, proposed section 536LA. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

1.43 Proposed subsection 536LA(1) provides that regulations may make provisions for internal merits review by the FWC of decisions to make or vary minimum standards orders. Proposed subsection 536LA(4) sets out matters that the regulations could prescribe, including, for example, application circumstances, who is eligible for review, time frames, and enforcement of decisions.

1.44 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*²⁴

1.45 In relation to merits review, the explanatory memorandum explains:

The purpose of this section would be to provide for a mechanism, subject to regulations being made, to allow for the internal review of a FWC decision to make or vary an RTMSO [road transport minimum standards order] in certain circumstances. This would reflect the fact that RTMSOs when made by the FWC are binding on the parties, and can only be varied or revoked by application consistent with the requirements of Part 3A-2. The alternative would be to apply to a court for injunctive relief, which would be unnecessarily confrontational and potentially longer and more expensive.

Taking a future-focused approach, there may be circumstances where a particular party considers that the FWC has erred in its decision-making and, subject to the parameters set by regulation, apply for a reconsideration, confirmation, revocation, variation or set aside/substitution of a decision before it comes into, or soon after comes into, force.

As this is a novel jurisdiction and there is no precedent for internal review for the decisions of an Expert Panel or Full Bench under the FW Act, it is to be determined whether internal review is necessary, and if so, what shape it should take. Enabling regulations to provide for this would mean that any internal review mechanism, if established, would be fit for purpose and responsive to emerging issues.²⁵

1.46 Minimum standards orders made by the FWC appear to be decisions of a type which will, or are likely to, affect individual interests. The committee therefore welcomes the consideration provided to prescribing internal merits review of minimum standards orders made by the FWC. However, noting the explanation provided in the explanatory memorandum, it seems clear to the committee that it is envisaged that internal merits review is appropriate and necessary in this context. It is therefore unclear to the committee in what circumstances merits review may be

²⁴ Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999)

²⁵ Explanatory memorandum, p. 209.

deemed not justified, and therefore unclear why these matters could not have been provided for on the face of the bill.

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

- **the circumstances in which internal merits review of road transport minimum standards orders may not be considered appropriate; and**
- **whether consideration was given to the bill providing that internal merits review must be provided for these decisions.**

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

Significant matters in delegated legislation²⁶

1.49 Proposed subsection 536LJ(1) requires the minister to make a digital labour platform deactivation code by legislative instrument. Proposed subsection 536LJ(2) prescribes matters that the code must provide for, including the circumstances in which work is performed on a regular basis (proposed paragraph 536LJ(2)(a)) and the reasons for deactivation (proposed paragraph 536LJ(2)(b)). In addition, proposed subsection 536LN(1) provides that the minister may make a road transport industry termination code by legislative instrument, with proposed subsection 536LN(2) setting out the matters which must be dealt with by the code.

1.50 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. Conditions as to the 'deactivation' of employee-like digital platform workers or road transport industry workers, including valid reasons for 'deactivation', are significant matters which may affect the rights and liberties of individuals.

1.51 In this instance, the explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.52 In light of the above, the committee requests the minister's detailed advice as to why it is considered necessary and appropriate to leave the digital labour platform deactivation code, and the road transport industry termination code to delegated legislation, rather than primary legislation.

²⁶ Schedule 1, item, 249, proposed sections 536LJ and 536LN. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

Fees in delegated legislation²⁷

1.53 Proposed subsection 536LV(1) provides that an application to the FWC under division 5 of part 16 of the bill must be accompanied by any fee prescribed by the regulations. Proposed subsection 536LV(2) provides that the regulations may prescribe the application fee, a method for indexation, and the circumstances in which all or part of the fee may be waived or refunded.

1.54 Proposed subsection 536NE provides that an application to the FWC under division 3 of part 16 must be accompanied by any fee prescribed by the regulations. Proposed subsection 536NE(2) provides that the regulations may prescribe the application fee, a method for indexation, and the circumstances in which all or part of the fee may be waived or refunded.

1.55 Proposed subsection 306R(1) provides that an application under proposed subsection 306P(4) (relating to an application to the FWC to resolve a workplace dispute) must be accompanied by any fee prescribed by the regulations. Proposed subsection 306(2) provides that the regulations may prescribe the application fee, a method for indexation, and the circumstances in which all or part of the fee may be waived or refunded.

1.56 In relation to the proposed sections 536NE and 536LV, the explanatory memorandum notes that '[t]he intent is that the FWC would be a low-cost jurisdiction'.²⁸ In relation to proposed section 306R, the explanatory memorandum notes that '[a]s a result of section 15A of the [*Acts Interpretation Act 1901*] AI Act, as in force on 25 June 2009 (see section 40A of the FW Act), this regulation-making power cannot be read as authorising the imposition of a tax'.²⁹

1.57 The committee has longstanding scrutiny concerns regarding provisions which allow fees to be calculated within delegated legislation where the bill contains no cap on the maximum fee amount, or any information or guidance as to how the fee will be calculated. The committee expects that any proposal to include fees within delegated legislation should be justified within the explanatory materials for the bill.

1.58 There is no guidance in the bill as to how the fee amount might be determined, and no explanation has been provided as to why it is necessary to charge a fee for these applications. It is possible to: explicitly state on the face of the bill that the amount of fee be limited to cost recovery; to set a maximum limit on the fee that may be imposed; to prescribe a formula by which the fee amount is calculated; or, in the case of indexation, to include the method of calculating indexation on the face of the

²⁷ Schedule 1, item, 249, proposed section 536NE; schedule 1, item 73, proposed section 306R; schedule 1, item 249, proposed section 536LV. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

²⁸ Explanatory memorandum, pp. 219 and 237.

²⁹ Explanatory memorandum, p. 115.

bill. In some legislation, a provision is included which provides that 'a fee must not be such as to amount to taxation'.

1.59 Further, the Office of Parliamentary Council Drafting Direction 3.6 states that:

AGS has advised that it is inherent in the concept of a 'fee' that the liability does not amount to taxation. However, it is quite common to put such a provision in anyway to avoid confusion and to emphasise the point that we are dealing with fees and not taxes. AGS has expressed the view that such a provision is useful as it may warn administrators that there is some limit on the level and type of fee which may be imposed.³⁰

1.60 While the committee notes that the setting of the level of fees is often left to delegated legislation, the committee requests the minister's advice as to whether consideration has been given to providing greater legislative guidance as to how the fee amount (and the method of indexation, if any) is to be determined for fees prescribed as a result of proposed subsections 536LV(1), 536NE(1), and 306R(1).

Procedural fairness³¹

1.61 Proposed subsection 536MC(2) permits the FWC to make an order for costs against a representative of a person who is a party to an application for an unfair deactivation or unfair termination remedy made under proposed section 536LU. This would be for costs incurred by the other party to the matter if the FWC is satisfied that the representative caused those costs to be incurred, either because:

- they encouraged a person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success; or
- of an unreasonable act or omission by the representative in connection with the conduct or continuation of the matter.

1.62 The explanatory memorandum states:

This section is designed to deter lawyers and paid agents from encouraging others to bring speculative unfair deactivation or unfair termination claims, particularly claims they know have no reasonable prospects of success, or to unreasonably encourage a party to defend a claim or make a jurisdictional argument where there is no prospect of the argument succeeding.³²

³⁰ Office of Parliamentary Counsel, *Drafting Direction 3.6*, October 2012, p. 38.

³¹ Schedule 1, item 249, proposed section 536MC. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

³² Explanatory memorandum, p. 223.

1.63 Further, the statement of compatibility with human rights explains:

Costs could only be awarded under the new provision if a party's unreasonable act or omission relating to the conduct or continuation of the matter caused the other party to incur costs. This is targeted towards litigants who pursue or defend unfair termination or unfair deactivation claims in an unreasonable manner. This would also disincentivise a party with 'deeper pockets' from acting unreasonably to increase the other party's own costs in an attempt to discourage parties from bringing proceedings against them or encourage a party to settle on unfavourable terms. In this respect the measure will enhance the right to a fair hearing.³³

1.64 The committee is concerned that the effect of proposed section 536MC may go beyond deterring representatives from bringing claims with no reasonable prospects of success. The threat of a costs order may have a chilling effect on representatives and affect their willingness to represent parties to such matters. In the committee's view, this would disadvantage individuals and could effectively prevent them from bringing a claim in relation to unfair deactivation or unfair termination due to a lack of knowledge as to their appeal rights and processes. The committee also considers that this could cause applicants to appear before the FWC without adequate representation, which could both disadvantage the applicant and affect the efficacy of the process.

1.65 In this instance, it is unclear to the committee why this provision is necessary. The committee notes that consideration of applications for claims of unfair deactivation or termination as provided for in proposed subsection 536LU is a new jurisdiction for the FWC. Therefore, it appears unlikely that costs orders are necessary to address an existing problem with spurious cases being brought in this context. Further, the explanatory memorandum does not provide any evidence or examples to indicate the appropriateness of these costs orders.

1.66 In light of the above, the committee requests the minister's advice as to why it is necessary and appropriate for proposed section 536MC to provide that costs orders can be made against representatives who encouraged claims for unfair deactivation or termination which had no reasonable prospects of success.

³³ Explanatory memorandum, p. 29.

Primary Industries (Services) Levies Bill 2023

Primary Industries (Excise) Levies Bill 2023

Primary Industries (Customs) Charges Bill 2023³⁴

Purpose	The Primary Industries (Excise) Levies Bill 2023, the Primary Industries (Customs) Charges Bill 2023, and the Primary Industries (Services) Levies Bill 2023 (together, the Imposition Bills) form part of a package of Bills seeking to modernise the agricultural levies legislative framework. The Imposition Bills would enable excise levies, customs charges and services levies to be imposed as part of the agricultural levy system.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 18 October 2023
Bill status	Before the House of Representatives

Significant matters in delegated legislation³⁵

1.67 Clause 16 of the Primary Industries (Excise) Levies Bill 2023 (Excise Bill) seeks to provide that the rate of a levy is worked out in accordance with the regulations. Similarly, clause 13 of the Primary Industries (Customs) Charges Bill 2023 (Customs Bill) seeks to provide that the rate of a charge is worked out in accordance with the regulations, and clause 10 of the Primary Industry (Services) Levies Bill 2023 (Services Bill) seeks to provide that the rate of a levy is worked out in accordance with the regulations.

1.68 The committee considers that it is for the Parliament, rather than the makers of delegated legislation, to set rates of tax. At a minimum, some guidance in relation to the amount of a fee that may be imposed in delegated legislation should be included in the enabling Act. Where a bill leaves the setting of the rate of a fee to delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to do so. Further, if there is no limit on the amount of the fee that may be imposed, the explanatory memorandum should include why it would not be appropriate to include such a limitation on the face of the bill. The committee also expects that the bill will include a provision clarifying that the fee must not be such as to amount to taxation.

³⁴ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Primary Industries (Services) Levies Bill 2023, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 205.

³⁵ Clause 16 of the Excise Bill, clause 13 of the Customs Bill and clause 10 of the Services Bill. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(v).

1.69 In this instance, neither the bills nor their shared explanatory memorandum provide a cap that will be applicable to the levies and charges. However, the explanatory memorandum explains:

Consultation with industry about levy rates is an important feature of the agricultural levy system and would remain so under the modernised legislative framework. Consistent with current practice, it is expected that a levy rate would only rarely, if ever, be set or amended without clear evidence that this was supported by the majority of levy payers. That evidence is typically provided to government through a levy proposal prepared in accordance with the government's Levy Guidelines: How to establish or amend agricultural levies. Updated guidelines would be released prior to commencement of the proposed Act, and published on the department's website.³⁶

1.70 While acknowledging the explanation in the explanatory memorandum and the safeguard provided by the requirement for consultation, the committee remains concerned that the rate of a levy or charge may be set by the makers of delegated legislation without any limits or guidance as to the amount on the face of the bill.

1.71 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing the rates of levies under clause 16 of the Primary Industries (Excise) Levies Bill 2023 and clause 10 of the Primary Industry (Services) Levies Bill 2023, and charges under clause 13 of the Primary Industries (Customs) Charges Bill 2023 to be worked out in accordance with the regulations.

³⁶ Explanatory Memorandum, p. 29.

Primary Industries Levies and Charges Collection Bill 2023³⁷

Purpose	The bill seeks to establish a collection and compliance framework for levies and charges collected under the agriculture levy system.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 18 October 2023
Bill status	Before the House of Representatives

Coercive powers

Infringement notices

Broad delegation of administrative powers³⁸

1.72 Clause 20 seeks to empower a compliance officer to exercise a range of monitoring powers under Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) in relation to: the provisions of this bill or the rules; or an offence against the *Crimes Act 1914* (Crimes Act) or the *Criminal Code 1995* (Criminal Code) that relates to this bill or its rules.

1.73 Subclause 20(10) seeks to provide that a compliance officer can be assisted by other persons in carrying out their duties or functions under the Regulatory Powers Act in relation to the bill. Subclause 20(11) seeks to provide that both an authorised person and a person assisting can use such force against things as is necessary and reasonable in the circumstances.

1.74 Clause 21 of the bill seeks to provide a mirroring provision enabling the investigatory powers in Part 3 of the Regulatory Powers Act to apply in relation to the bill's offence and civil offence provisions, and offences against the Crimes Act or the Criminal Code that relate to this bill or its rules.

1.75 Clause 23 of the bill seeks to provide that the following provisions of the bill are subject to an infringement notice under Part 5 of the Regulatory Powers Act:

- subclauses 17(1), (2), (3) or (4) (penalties for failure to give return or notice under the rules);
- subclauses 18(1) or (2) (penalties for failure to make or keep records under the rules);

³⁷ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Primary Industries Levies and Charges Collection Bill 2023, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 206.

³⁸ Clauses 20, 21 and 23. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (ii).

- subclauses 26(4) or (5) (Secretary may require information or documents);
- subclauses 47(1),(3),(5) or (8) (civil penalty provisions for false or misleading information or documents).

1.76 Further, subclause 23(2) seeks to provide that for the purposes of Part 5 of the Regulatory Powers Act, a compliance officer is an infringement officer.

1.77 Clause 4 of the bill seeks to define a compliance officer as either the Secretary or an Australian Public Service (APS) employee in the department appointed by the Secretary under clause 52 of the bill.

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

1.79 The explanatory memorandum to the bill does not explain or justify why it is necessary and appropriate for a compliance officer to be any APS employee in the department, regardless of their position, skills, experience or qualifications. In relation to the person assisting a compliance office, the explanatory memorandum notes that other persons may be needed to assist compliance officers if:

- there are no other compliance officers available;
- the premises that are to be monitored are large;
- there is a large amount of material to be reviewed;
- the other person has relevant skills or familiarity with the material;
- or things are difficult or heavy to move without assistance.³⁹

1.80 While this appears to justify why the authorisation may be needed from a practical perspective, it does not provide any information about safeguards or limits as to who an assisting person may be.

1.81 The committee's concerns in relation to this broad delegation are heightened due to the coercive nature of the powers which permit compliance officers and persons assisting to use such force against things as is necessary and reasonable in the circumstances.

³⁹ Explanatory memorandum, pp. 40–41

1.82 In relation to authorised officers issuing infringement notices, the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide to Framing Commonwealth Offences)* states:

The legitimacy of an infringement notice scheme depends on the existence of a properly managed process for the issuing of notices. This includes ensuring that notices are only issued by those authorised to issue notices and that there is proper accountability for the exercise for those powers.

A common approach is to require that the person issuing the notice possess special attributes, qualifications or qualities. A provision that allows 'a person' or 'an APS employee' to issue a notice is likely to be inappropriate. Further, if the power to issue a notice can be delegated, the delegation should be restricted to persons of suitable seniority and expertise.⁴⁰

1.83 As noted above, in this instance a compliance officer and therefore, an infringement officer can be any APS employee of the department appointed under clause 52 of the bill.

1.84 The committee's view is that an infringement officer for the purposes of the bill should be limited to APS employees who possess the appropriate skills, knowledge and qualifications to perform these functions and duties. However, in this regard, there is no further guidance in the explanatory memorandum to clarify who it is envisaged a compliance officer may be, and it is therefore difficult for the committee to assess the appropriateness of this authorisation.

1.85 The committee requests the minister's advice as to:

- **why it is necessary and appropriate for any APS employee of the department to be conferred monitoring and investigative powers as a compliance officer, or person assisting a compliance officer, and as an infringement officer; and**
- **whether the bill can be amended to require that the only employees in possession of the appropriate training, qualifications, skills or experience be designated compliance officers or persons assisting compliance officers.**

Privacy⁴¹

1.86 Division 3 of Part 5 of the bill seeks to set out authorised uses and disclosures of relevant levy/charge information. Levy/charge information is defined in clause 4 as information obtained by a person under the bill or rules, or obtained or generated by

⁴⁰ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p. 60.

⁴¹ Part 5, Division 3. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

a person in the course of administering the bill or rules, or assisting another person to do so.

1.87 A note to Division 3 confirms that each provision in Division 3 that authorises the use or disclosure of information would also provide an authorisation for the purposes of the *Privacy Act 1988* (Privacy Act) and other laws.

1.88 There are a range of proposed authorised disclosures of levy/charge information by entrusted persons set out in Division 3. These would include: disclosures in the process of administering the bill⁴²; disclosures to Commonwealth entities⁴³; disclosures under other laws⁴⁴; disclosures for law enforcement⁴⁵; and other purposes.

1.89 Of these provisions, only two types of disclosures (permitted by clause 28) would be prevented from disclosing personal information, as per subclause 28(4). This is in relation to information disclosed for agricultural research and policy, and information disclosed by staff for the performance of functions of the Australian Bureau of Agricultural and Resource Economics and Sciences under subclauses 28(2) and (3).

1.90 Secondary use of information received by a declared recipient body or a statutory recipient body under clause 32 would also be permitted for a range of specified purposes under clause 42, such as for maintaining a register of levy or charge payers.

1.91 In relation to privacy, the explanatory memorandum states:

By requiring persons to provide information or documents, the Bill may incidentally require the provision of personal information.⁴⁶

1.92 The committee welcomes the safeguards provided in relation to the application of the Privacy Act and the Australian Privacy Principles. From the information provided in the explanatory memorandum, it appears to the committee that personal information may therefore be required to be collected and disclosed under proposed Division 3 of Part 5. However, the scope of the personal information that may be captured under this division is unclear. It is also unclear whether personal information could be captured within the definition of levy/charge information.

1.93 In light of the above the committee requests the minister's advice as to:

- **whether personal information may be captured within the authorised uses and disclosures set out in relation to relevant levy/charge information in Division 3 of Part 5 of the bill; and, if so;**

⁴² Clause 28.

⁴³ Clause 29.

⁴⁴ Clause 30.

⁴⁵ Clause 33.

⁴⁶ Explanatory memorandum, p. 15.

- **the anticipated scope or type of personal information that would be collected, used and disclosed.**
-

Reversal of the evidential burden of proof⁴⁷

1.94 Subclause 45(1) proposes to prescribe a criminal offence when an entrusted person has obtained or generated information for the purposes of administering or assisting a person to administer the bill or the rules, the information is commercially sensitive the disclosure of which could reasonably be expected to found an action by a person for a breach of a duty of confidence, and the entrusted person uses or discloses the information. The offence carries a maximum penalty of 12 months imprisonment.⁴⁸

1.95 Subclauses 45(4) and (5) set out proposed offence-specific defences for the offences in subclauses 45(1) and (2). Subclause 45(4) seeks to provide that the offences do not apply if the use or disclosure of the information is required or authorised by the bill or another Commonwealth law, or a law of a State or Territory prescribed by the rules made for the purposes of this paragraph. Subclause 45(5) seeks to provide that the offences do not apply if the person uses or discloses the information in good faith for the purposes of administering or assisting a person to administer the bill or the rules, or monitoring compliance or assisting a person to monitor compliance with the bill or the rules. A note to each subclause confirms that the evidential burden of proof is reversed in relation to each of these proposed defences.

1.96 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.⁴⁹ 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.

1.97 The committee notes that the *Guide to Framing Commonwealth Offences*⁵⁰ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

⁴⁷ Clause 45. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

⁴⁸ Subclause 45(2) provides a mirror civil offence with a maximum penalty of 60 penalty units.

⁴⁹ 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.

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

- 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.⁵¹

1.98 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. The explanatory memorandum states:

A person who seeks to rely on the exceptions in subsection 45(4) or (5) bears the evidential burden of proving the exception. These defences reverse the usual burden of proof because the relevant matters would be peculiarly within the knowledge of the defendant. It would be significantly more difficult and costly for the Commonwealth (as the prosecution or applicant) to prove the relevant matters. Information about which law the defendant was purporting to rely on or whether the defendant acted in good faith in using or disclosing the information would be peculiarly within the knowledge of the defendant, who would be expected to understand their reasons for disclosure.

The reversal of the evidential burden of proof in relation to these defences is consistent with general principles of criminal responsibility. Under subsection 13.3(3) of the Criminal Code, a defendant who wants to rely on any exception, provided by the law creating an offence, bears an evidential burden in relation to that matter. The exception need not accompany the description of the offence.⁵²

1.99 In this case, it is not apparent that the matters in proposed subclause 45(4) are matters *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to establish the matters than for the defendant to establish them. For example, whether or not conduct is authorised by the bill, its rules, or a Commonwealth or State or Territory law is not, in the committee's view, a matter that is peculiarly within the defendant's knowledge. Further, the explanatory memorandum does not justify why the prosecution would not be able to obtain this information. While it may be more difficult and costly for the prosecution to do so, this does not in and of itself equate to these matters being peculiarly within the knowledge of the defendant.

1.100 In relation to the defence in proposed subclause 45(5) for good faith, the committee notes that this is a subjective term and whether or not a defendant acted in good faith is open to interpretation. The explanatory memorandum does not

⁵¹ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p. 50.

⁵² Explanatory memorandum, p. 73.

provide any further guidance or discussion as to matters or factors that may go towards indicating that a defendant has acted in good faith in this context.

1.101 These matters therefore appear to be matters more appropriately included as an element of the offence.

1.102 The committee requests the minister's advice as to why it is proposed to use an offence-specific defence for the criminal offence in subclause 45(1).

1.103 The committee suggests that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted by if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

Automated decision-making⁵³

1.104 Subclause 53(1) seeks to provide that the Secretary may arrange for the use, under the Secretary's control, of computer programs for any purpose for which the Secretary may, under the bill or the rules, make a decision of a kind specified in the rules for the purposes of this subsection. Subclause 53(2) would require the Secretary to take all reasonable steps to ensure that each decision made by a computer program is a decision the Secretary could validly make under the bill or rules. Subclause 53(4) also seeks to provide that the Secretary may substitute a computer-made decision if they are satisfied that the decision is not the correct or preferable decision.

1.105 The committee notes that administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions, and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.106 The committee notes that clause 48 of the bill provides for internal merits review of listed decisions made under the bill, and clause 49 also provides for external merits review by the Administrative Appeals Tribunal of listed decisions. For example:

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

- decisions made under proposed clause 9 and proposed clause 11 to refuse to remit an amount that a person is liable to pay by way of penalty;
- decisions made under proposed subclause 31(4) to grant or refuse to grant a person or body an approval; or
- a decision made under proposed subclause 44(3) to specify conditions in an approval.

1.107 That provision has been made for these listed decisions made under the bill to be both internally and externally reviewable indicates that these decisions are complex and discretionary, and are therefore, more vulnerable to legal error due to the imposition of automated decision-making.

1.108 In relation to the use of automated decision-making, the explanatory memorandum states:

The inclusion of this provision provides flexibility to automate the making of suitable decisions as technology advances in the future. Decisions made by computers, where appropriate, can provide greater speed and consistency, provide cost-effectiveness and reduce administrative burden. Given the cost-recovered nature of administration of the agricultural levy system, using computer programs for appropriate decisions could result in greater availability of levy funds for disbursement.

It is intended that any arrangement made by the Secretary for the use of computer programs would be documented to provide clarity and accountability.

Subsection 53(2) would be a safeguarding provision to provide that the Secretary must take all reasonable steps to ensure that each decision made by the operation of a computer program under an arrangement made under subsection 53(1) is a decision that the Secretary could validly make under the Act or the rules.⁵⁴

1.109 The committee notes that proposed subclause 53(1) provides that the rules will specify which decisions made under the bill will be subject to automated decision-making. In light of the potential effects on administrative decision-making outlined above, the committee is of the view that none of the decisions listed in clauses 48 and 49 may be appropriate for automated decision-making.

1.110 The committee notes that it would be useful for the explanatory materials to explain how automated decision-making will comply with relevant administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).

⁵⁴ Explanatory memorandum, p. 83.

1.111 As the explanatory materials do not appear to adequately address this matter, the committee requests the minister's detailed advice as to:

- **why it is considered necessary and appropriate to permit the Secretary to arrange for the use of computer programs to make decisions in relation to any decision specified in the rules; and**
- **whether consideration has been given to prohibiting the decisions listed in proposed clauses 48 and 49 from being prescribed by the rules as being decisions to which automated decision-making apply; and**
- **whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).**

Vicarious liability⁵⁵

1.112 Subclause 56(1) seeks to provide that the bill and the rules apply to a partnership as if it were a person. Subclause 56(4) seeks to provide that an offence against the bill or rules is taken to have been committed by each partner in the partnership who, at the time of the offence, did the conduct or act, aided, abetted, counselled or procured the relevant act or omission, or was in any way knowingly concerned in, or party to, the relevant act or omission whether directly or indirectly. Subclause 56(5) seeks to provide a mirror provision for the contravention of civil penalties in the bill and rules.

1.113 Clause 57 is a mirror provision seeking to impose vicarious liability in relation to trusts, and clause 58 is a mirror provision seeking to impose vicarious liability in relation to unincorporated bodies or associations.

1.114 Vicarious liability is the liability imposed on one person for the wrongful act of another on the basis of the legal relationship between them. Clauses 56, 57 and 58 appear to impose vicarious liability on other members of the partnerships, trusts or unincorporated bodies or associations. The *Guide to Framing Commonwealth Offences* states that 'vicarious, collective or deemed liability should only be used in situations where it can be strictly justified...this is because it cuts across the fundamental principle that an individual should be responsible only for his or her own acts and omissions'.⁵⁶

⁵⁵ Clauses 56, 57 and 58. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

⁵⁶ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p 33.

1.115 The committee has consistently taken the view that vicarious liability should only be used where the consequences for the offence are so serious that the normal requirement for proof of fault can be put aside.

1.116 In this instance, there is nothing in the explanatory memorandum which explains why it is necessary and appropriate for vicarious liability to be imposed in this context.

1.117 As neither the statement of compatibility nor the explanatory memorandum address this issue, the committee seeks the minister's advice as to the rationale for imposing vicarious liability in clauses 56, 57 and 58, and whether the principles identified in the *Guide to Framing Commonwealth Offences*⁵⁷ have been considered.

Parliamentary oversight

1.118 Clause 59 of the bill would empower the secretary to make rules under the bill by way of legislative instrument. In addition, subclause 59(4) would provide that the rules may also confer on the minister or the secretary a power to make a legislative instrument, a notifiable instrument or other written instrument.

1.119 In relation to this power, the explanatory memorandum notes:

Subsection 59(4) would provide that the rules may confer instrument making powers on the Minister or the Secretary. This power could be exercised for procedural matters, for example, enabling approved forms under the rules. This provision would also allow for future collection rules to be made as Australia's agricultural, fisheries and forestry sectors grow and change.⁵⁸

1.120 The committee notes that notifiable instruments are not subject to the tabling, disallowance or sunseting requirements that typically apply to legislative instruments. As such, there would be no parliamentary scrutiny of any notifiable instruments made by the minister or secretary under the rules as provided by subclause 59(4).

1.121 The committee is of the view that the power to create further non-legislative instruments is more appropriate for inclusion on the face of the bill to allow for appropriate parliamentary consideration and oversight.

1.122 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to provide the power for the minister or secretary to make notifiable and other written non-legislative instruments on the face of the bill.

⁵⁷ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp 32–33.

⁵⁸ Explanatory memorandum, p. 86.

Primary Industries Levies and Charges Disbursement Bill 2023⁵⁹

Purpose	The bill seeks to enable disbursement of amounts of agricultural levy and charge components for investment in strategic activities for the benefit of levied industries. It also seeks to provide a mechanism for the Commonwealth to make matching payments for research and development.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 18 October 2023
Bill status	Before the House of Representatives

Instruments not subject to an appropriate level of parliamentary oversight⁶⁰

1.123 Subclause 39(1) seeks to provide that the minister may, by writing, declare a body to be a recipient body. The effect of being declared a recipient body is that a company can receive money from the Commonwealth under Part 2 of the bill (levy and charge amounts and matching payments). Subclause 39(8) of the bill seeks to provide that a declaration made under subclause 39(1) is not a legislative instrument.

1.124 Noting the impact that a declaration made under subclause 39(1) may have, the committee considers that it may be appropriate for the bill to specifically include consultation requirements around the declaration of a recipient body. In this instance, it would be helpful for the bill to specify particular bodies to consult with, or to require that the minister must be satisfied that appropriate consultation has been undertaken, before making a declaration under subclause 39(1).

1.125 The committee notes that subclause 39(2) seeks to provide that the rules may make provision in relation to the declaration of bodies as recipient bodies, and that it may be intended for consultation requirements to be set out in the rules. As legislative instruments, the making of rules under subclause 39(2) are not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill. While it may be necessary for the rules to include some detail as to making provision for the declaration of bodies as recipient bodies, the committee considers it is likely appropriate for the bill to specifically include consultation requirements. This would provide a stronger safeguard than the requirement set out in section 17 of the

⁵⁹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Primary Industries Levies and Charges Disbursement Bill 2023, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 207.

⁶⁰ Clause 39. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

Legislation Act 2003 which provides that, prior to an instrument being made, the rule-maker must be satisfied that appropriate consultation was undertaken.

1.126 As instruments made under subclause 39(1) 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. In this case, the explanatory memorandum explains that a declaration under subsection 39(1) is merely declaratory of the law and is not a legislative instrument within the meaning of section 8 of the *Legislation Act 2003*.

1.127 Noting the lack of parliamentary oversight over such declarations, the committee requests the minister's advice as to whether the bill can be amended to include a requirement for consultation to occur prior to the declaration of a body as a declared recipient under subclause 39(1) of the bill.

Significant penalties⁶¹

1.128 Subclause 72(1) seeks to provide that an entrusted person may disclose relevant National Residue Survey (NRS) information to a person who holds an approval in force under this section. Subclause 72(9) seeks to provide that a person commits an offence if, while the person holds an approval in force under this section, the person receives relevant NRS information, the information is protected information,⁶² the person uses or discloses that information, and the use or disclosure is not in accordance with the approval. The penalty would be 12 months imprisonment.

1.129 Similarly, subclause 81(1) seeks to create an offence for the use or disclosure of protected information if:

- the person is or has been an entrusted person;
- has obtained or generated information in the course of or for the purposes of carrying out or administering particular activities under the Act;
- the information is protected information;⁶³ and

⁶¹ Subclauses 72(9) and 81(1). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

⁶² Protected information, for the purpose of subclause 72(9), is defined in subclause 72(10) to mean information (including commercially sensitive information) the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence, and information the disclosure of which could reasonably be expected to prejudice constitutional trade or commerce.

⁶³ Protected information, for the purpose of subclause 81(1), is defined in subclause 81(3) to mean information (including commercially sensitive information) the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence, and information the disclosure of which could reasonably be expected to prejudice constitutional trade or commerce.

- the person uses or discloses the information. The penalty is 12 months imprisonment.

1.130 The committee's expectation is that the rationale for the imposition of significant penalties, especially those that involve imprisonment, will be fully outlined in the explanatory memorandum. The committee expects the explanatory memorandum to the bill to address why it is appropriate to impose significant penalties, whether the penalties are broadly equivalent to the penalties for similar offences in Commonwealth legislation, and if not, why not, and whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide to Framing Commonwealth Offences)*.⁶⁴

1.131 In this case, in relation to the subclause 72(9) offence, the explanatory memorandum merely restates the penalty for the offence without any justification as to why it is appropriate.⁶⁵ In relation to subclause 81(1), the explanatory memorandum explains that the penalty 'has been set to deter non-compliance with the section and provide proportionate and appropriate punishment for a person's wrongdoing'.⁶⁶

1.132 In both cases, it is not sufficiently clear to the committee why a penalty of 12 months imprisonment has been set and whether it is appropriate.

1.133 As the explanatory memorandum does not appear to provide sufficient justification, the committee requests the minister's detailed advice as to why it is considered appropriate to impose a significant penalty of 12 months imprisonment for the offences in subclause 72(9) and 81(1), by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.

Reversal of evidential burden of proof⁶⁷

1.134 As noted above, subclause 81(1) seeks to create an offence for the use or disclosure of protected information in particular circumstances. Subclauses 81(4) and (5) would provide exceptions to this offence.

1.135 Subclause 81(4) seeks to provide that the offence would not apply if the use or disclosure of the information is required or authorised by this Act or another law of

⁶⁴ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011.

⁶⁵ Explanatory memorandum, p. 71.

⁶⁶ Explanatory memorandum, p. 74.

⁶⁷ Subclauses 81(4) and 81(5). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

the Commonwealth, or a law of a state or territory prescribed by the rules made for the purposes of this paragraph.

1.136 Subclause 81(5) seeks to provide that the offence would not apply if the person uses or discloses the information in good faith for the purposes of carrying out activities covered by paragraph 66(1)(a) and paid for with amounts debited from the National Residue Survey Special Account,⁶⁸ or in the purported administering or assisting a person in the purported administering of Part 5 of the bill. A note to each subclause confirms that the evidential burden of proof is reversed in relation to each of these proposed defences.

1.137 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.⁶⁹ 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.

1.138 The committee notes that the *Guide to Framing Commonwealth Offences* provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁷⁰

1.139 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. In this case, the explanatory memorandum for both exceptions merely restates the exception and notes that the defendant bears an evidential burden.⁷¹

1.140 In this case, it is not apparent that the matters in proposed subclause 81(4) are matters *peculiarly* within the defendant's knowledge, or that it would be significantly more difficult or costly for the prosecution to disprove the matters than for the defendant to establish them. For example, whether or not conduct is authorised by the Act, or a Commonwealth, state or territory law is not, in the committee's view, a matter that is peculiarly within the defendant's knowledge.

⁶⁸ Paragraph 66(1)(a) lists activities towards which payments from the National Residue Survey Special Account can be made.

⁶⁹ 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.

⁷⁰ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, p. 50.

⁷¹ Explanatory memorandum, p. 75.

Further, the explanatory memorandum does not justify why the prosecution would not be able to obtain this information. While it may be more difficult and costly for the prosecution to do so, this does not in and of itself equate to these matters being peculiarly within the knowledge of the defendant.

1.141 In relation to the exception in proposed subclause 81(5) for good faith, the committee notes that this is a subjective term and whether or not a defendant acted in good faith is open to interpretation. The explanatory memorandum does not provide any further guidance or discussion as to matters or factors that may go towards indicating that a defendant has acted in good faith in this context.

1.142 These matters therefore appear to be matters more appropriately included as an element of the offence.

1.143 The committee requests the minister's advice as to why it is appropriate to reverse the evidential burden of proof under subclauses 81(4) and 81(5).

1.144 The committee suggests that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence in subclause 81(1). The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted by explicitly addressing relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

Parliamentary oversight⁷²

1.145 Subclause 90(1) seeks to empower the minister to make rules under the Act by way of legislative instrument. In addition, subclause 90(2) would provide that the rules may also confer on the minister or the secretary a power to make a legislative instrument, a notifiable instrument or other written instrument.

1.146 In relation to this power, the explanatory memorandum notes that the purpose is 'to provide flexibility to deal with certain circumstances where they arise'.⁷³

1.147 The committee notes that notifiable instruments are not subject to the tabling, disallowance or sunseting requirements that typically apply to legislative instruments. As such, there would be no parliamentary scrutiny of any notifiable instruments made by the minister or secretary under the rules as provided by subclause 90(2).

1.148 The committee is of the view that the power to create further non-legislative instruments is more appropriate for inclusion on the face of the bill to allow for appropriate parliamentary consideration and oversight.

⁷² Subclause 90(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

⁷³ Explanatory memorandum, p. 81.

1.149 In light of the above, the committee requests the minister's advice as to whether the bill can be amended to provide the power for the minister or secretary to make notifiable and other written non-legislative instruments in relation to particular matters on the face of the bill.

Private senators' and members' bills that may raise scrutiny concerns⁷⁴

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 bills' proponents.

Bill	Relevant provisions	Potential scrutiny concerns
Brisbane Airport Curfew and Demand Management Bill 2023	Subclauses 10(2)(b), 11(2)(b), 12(2)(b)	The provisions may raise scrutiny concerns under principle (i) trespass unduly on personal rights and liberties in relation to significant penalties.
	Clause 77	The provisions may raise scrutiny concerns under principle (ii) Inappropriately defined administrative powers in relation to broad delegation of administrative powers.
	Subclause 45(6)	The provisions may raise scrutiny concerns under principle (v) appropriate parliamentary scrutiny in relation to Instruments not subject to an appropriate level of parliamentary oversight.
Childhood Gender Transition Prohibition Bill 2023	Subclauses 11(4) and 11(5)	The provisions may raise scrutiny concerns under principle (iii) appropriate review of decisions in relation to availability of merits review.

⁷⁴ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 208.

Bills with no committee comment⁷⁵

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

- Crown References Amendment Bill 2023
- Economic Inclusion Advisory Committee Bill 2023
- Environment Protection and Biodiversity Conservation Amendment (Expanding the Water Trigger) Bill 2023
- Health Insurance Amendment (Professional Services Review Scheme No. 2) Bill 2023
- Paid Parental Leave Amendment (More Support for Working Families) Bill 2023
- Primary Industries (Consequential Amendments and Transitional Provisions) Bill 2023
- Social Security and Other Legislation Amendment (Supporting the Transition to Work) Bill 2023

⁷⁵ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 209.

Commentary on amendments and explanatory materials⁷⁶

Family Law Amendment Bill 2023⁷⁷

1.150 The committee thanks the assistant minister for tabling an addendum to the explanatory memorandum, which includes key information requested by the committee in relation to trespass on rights and liberties, and fees and taxes in delegated legislation. The committee also notes the information included in the addendum addressing the imposition of reversed evidential burdens of proof.

1.151 In regard to amendments to the bill made by the government, the committee notes amendment 20⁷⁸ imposes a reversed legal burden of proof on defendants in relation to a reasonable excuse for contraventions of a child-related order. The committee is concerned that in this instance, the additional explanatory materials do not sufficiently address this imposition. However, noting that the bill has now passed both Houses the committee makes no further comment.

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

- Counter-Terrorism and Other Legislation Amendment Bill 2023
 - On 19 October 2023 the House of Representatives agreed to two Government amendments, and the Assistant Minister for Defence (the Hon Mr Thistlethwaite MP) tabled a supplementary explanatory memorandum to the bill.
- Family Law Amendment (Information Sharing) Bill 2023
 - On 17 October 2023, the Assistant Minister for Education (Senator the Hon Anthony Chisholm) tabled a supplementary explanatory memorandum and replacement supplementary explanatory memorandum to the bill. On 19 October 2023, the Senate agreed to five Government amendments to the bill.

⁷⁶ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 210.

⁷⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2023* (10 May 2023), pp. 23–24; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2023* (14 June 2023), pp. 57–58; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 8 of 2023* (2 August 2023) pp. 44–46.

⁷⁸ Government amendments sheet RU122, amendment 20.

- Higher Education Support Amendment (Response to the Australian Universities Accord Interim Report) Bill 2023
 - On 19 October 2023, the Senate agreed to one independent amendment to the bill from Senator Pocock.
- Migration Amendment (Australia's Engagement in the Pacific and Other Measures) Bill 2023
 - On 18 October 2023, the Senate agreed to two independent amendments to the bill from Senator Pocock.
- National Occupational Respiratory Disease Registry Bill 2023
 - On 19 October 2023, the Senate agreed to one Greens amendment to the bill.
- Water Amendment (Restoring Our Rivers) Bill 2023
 - On 18 October 2023, the House of Representatives agreed to 31 Government and 4 Independent (Ms Sharkie MP, Dr Haines MP) amendments to the bill, and the Minister for the Environment and Water (the Hon Tanya Plibersek MP) tabled a supplementary explanatory memorandum to the bill.

Chapter 2

Commentary on ministerial responses

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

Interactive Gambling Amendment (Credit and Other Measures) Bill 2023⁷⁹

Purpose	The Interactive Gambling Amendment (Credit and Other Measures) Bill 2023 seeks to amend the <i>Interactive Gambling Act 2001</i> to prohibit the use of credit cards, credit related products and digital currency as payment methods for interactive wagering services. It also seeks to create a new criminal offence and civil penalty provision related to this ban and provide the Australian Communications and Media Authority with enhanced powers to enforce the ban.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 13 September 2023
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof⁸⁰

2.2 Item 9 of Schedule 1 to the bill seeks to introduce proposed subsection 15C(1A) to the *Interactive Gambling Act 2001* (the Act), which creates the offence of: intentionally providing a regulated interactive gambling service that is a wagering service; and accepting, or offering to accept, a prohibited payment method from a customer or prospective customer who is physically present in Australia. The offence carries a penalty of 500 penalty units.

2.3 Item 17 of Schedule 1 seeks to amend existing subsection 15C(5) of the Act to extend the application of the defence under this subsection to the offence under proposed subsection 15C(1A). This defence applies where a person did not know and

⁷⁹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Interactive Gambling Amendment (Credit and Other Measures) Bill 2023, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 211.

⁸⁰ Schedule 1, items 17 and 18, existing subsection 15C(5) and proposed subsection 15C(5A). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

could not with reasonable diligence have ascertained that the customer or prospective customer was physically present in Australia.⁸¹

2.4 Further, item 18 of Schedule 1 seeks to insert proposed subsection 15C(5A), which creates a new defence that applies to the offence under proposed subsection 15C(1A). The defence is applicable to persons where they did not know and could not, with reasonable diligence, have ascertained that they were accepting, or offering to accept, payment using a prohibited method.

2.5 A note to each of these defences clarifies that the evidential burden of proof is reversed.

2.6 In *Scrutiny Digest 12 of 2023*, the committee sought the Attorney-General's advice as to why it is proposed to use offence-specific defences (which reverses the evidential burden of proof) in relation to the offence under proposed subsection 15C(1A), and requested further guidance as to the operation of the defence as the explanatory materials do not adequately address this issue.⁸²

Minister for Communications response⁸³

2.7 The Minister for Communications (the minister) provided a justification in relation to the extension of the existing reversed evidential burden defence in subsection 15C(5) of the Act to apply to the new offence in proposed subsection 15C(1A) of the bill, with reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.⁸⁴ The minister advised that whether or not the defendant did not, or could not have known, that the customer was physically present in Australia is a matter likely to be within the knowledge of the defendant. The minister also noted the matters would be time-consuming and burdensome for the prosecution to disprove if the evidential burden were not reversed. Further, guidance to the Court as to how to determine that the person could have ascertained with reasonable diligence that the relevant customer was in Australia is already set out in existing subsection 15C(6).

2.8 In response to the committee's concerns about proposed subsection 15C(5A), the minister provided an excerpt from the explanatory memorandum which contains examples of the types of evidence a defendant could adduce. These include the wagering provider's procedures and systems and technical solutions to prevent payments by prohibited forms. The minister also advised that such knowledge would

⁸¹ *Interactive Gambling Act 2001*, subsection 15C(5).

⁸² Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2023* (18 October 2023) pp. 33 – 35.

⁸³ The minister responded to the committee's comments in a letter dated 31 October 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 13 of 2023*).

⁸⁴ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011).

not be readily available to anyone other than the defendant, and that it would be time-consuming and burdensome for the prosecution to have to disprove these matters.

Committee comment

2.9 The committee thanks the minister for this response.

2.10 In relation to the extension of the existing defence in subsection 15C(5) of the Act the committee notes the minister's advice that whether or not the defendant knew, or could have known, that the relevant person was physically in Australia, is likely to be within the knowledge of the defendant. In relation to proposed subsection 15C(5A), the committee notes the minister's advice that such knowledge would not be readily available to anyone other than the defendant.

2.11 The committee reiterates its view that whether or not a reversed evidential burden for an offence-specific defence will be appropriate is determined by whether or not matters are *peculiarly* within the knowledge of the defendant, not whether it is likely to be within the knowledge of the defendant.

2.12 The committee also notes the minister's advice that in this instance the relevant matters would be more time-consuming and burdensome for the prosecution to disprove. However, the committee reiterates its view that the appropriateness of a reversed evidential burden for an offence-specific defence is determined by whether the matters would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

2.13 In light of the above, the committee draws these matters to the attention of senators and leaves to the Senate as a whole the appropriateness of the reversal of the evidential burden of proof in relation to the new offence in proposed subsection 15C(1A).

Water Amendment (Restoring Our Rivers) Bill 2023⁸⁵

Purpose	This bill seeks to amend the <i>Water Act 2007</i> and Basin Plan 2012 to implement the Basin Plan in full, including recovering 450 gigalitres (GL) of additional environmental water, and to implement recommendations from the Water Market Reform: Final Roadmap, including introducing water markets reform measures aimed at improving the transparency and integrity of water markets.
Portfolio	Environment and Water
Introduced	House of Representatives on 6 September 2023
Bill status	Before the Senate

Significant matters in delegated legislation

Privacy

Broad delegation of administrative powers or functions⁸⁶

2.14 Schedule 3 to the bill seeks to amend the *Water Act 2007* (Water Act) to provide for a Water Markets Intermediaries Code (the Code) to regulate the conduct of eligible water market intermediaries towards participants and potential participants in the water market. Proposed section 100G provides that regulations may prescribe the Code and outlines what matters the Code may make provision for.⁸⁷ The Code may also make provision for pecuniary and civil penalties, not exceeding 600 penalty units.⁸⁸

2.15 While the bill sets out the kinds of matters that may be included in the Code, the detail of its content and operation is ultimately left to the Code itself which will be made through regulation. Certain provisions have been noted as being of particular concern, which include provisions that prescribe broad delegations of administrative powers.

⁸⁵ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Water Amendment (Restoring Our Rivers) Bill 2023, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 212.

⁸⁶ Schedule 3, proposed sections 100G and 100ZD. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i), (ii) and (iv).

⁸⁷ Proposed subsection 100G(2) outlines that these matters may include imposing an obligation upon eligible water markets intermediaries to act in the best interests of clients, the provision of information to clients, the retention of records for the purposes of the bill and trust accounting, holding clients' eligible tradeable water rights, holding professional indemnity insurance, and keeping client records.

⁸⁸ Proposed sections 100J and 100K.

2.16 In *Scrutiny Digest 12 of 2023*, the committee requested the Minister for Environment and Water's (the minister) advice as to:⁸⁹

- why it is considered appropriate to leave the content of the Water Markets Intermediaries Code (the Code) to regulation;
- why it is considered necessary and appropriate to confer various functions and powers in the Code to any person or body, whether or not a participant in the water market (unless it is a function or power providing an exemption to the Code);
- whether persons upon whom functions or powers are conferred will be required to possess the appropriate training, qualifications, skills or experience, and what safeguards are in place to ensure functions and powers are only exercised by appropriate persons;
- whether the *Privacy Act 1988* applies to any information that is collected, stored and disclosed under the Code; and
- whether other safeguards exist to protect an individual's personal information.

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

Minister for Environment and Water's response⁹⁰

2.18 The minister advised that the Code is intended to largely mirror the existing industry codes framework administered by the Australian Competition and Consumer Commission (ACCC) under Part IVB of the *Competition and Consumer Act 2010* (CC Act). Prescribing the Code in delegated legislation would ensure the water markets intermediaries are subject to the standard safeguards that apply in similar industries. The minister advised this approach would allow for greater flexibility to update the Code in accordance with best industry practices and to respond to changes in the regulatory landscape.

2.19 The minister advised that as the Code would be made in regulations, including proposed subsections 100G(3), 100G(4) and paragraph 100G(7)(b) would allow for conferrals of functions and powers on bodies to be added or updated efficiently. The minister also advised that it is intended that proposed section 100G may be used to confer function and powers on that would complement, not duplicate, the ACCC's proposed role as the appropriate enforcement agency and the purpose of the above subsections is for conferrals to bodies other than the ACCC. For example, dispute

⁸⁹ Senate Scrutiny of Bills Committee, [Scrutiny Digest 12 of 2023](#) (18 October 2023) pp. 2–5.

⁹⁰ The minister responded to the committee's comments in a letter dated 2 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 13 of 2023*).

resolution functions may be conferred on another body to complement the ACCC's role. However, any proposal to confer functions or powers on a body other than the ACCC would be expected to be subject to consultation with the ACCC, the Australian Water Brokers Association and more generally, water markets intermediaries and their clients.

2.20 Further, in relation to privacy, the minister advised that the bill would allow for the Code to provide obligations relating to the keeping and retention of personal information, as well as the power to compel information or documents to be given. This information may include personal information about intermediaries and their clients, such as a person's name, address, water account and other financial information. The minister advised that this information would be collected and stored by intermediaries and may be disclosed by intermediaries to the ACCC, as the regulator.

2.21 The minister advised that it is anticipated most intermediaries would be body corporates, ABN holders, partnerships or trusts, which are not covered under the *Privacy Act 1988*, but where applicable, the *Privacy Act 1988* would apply to personal information that is disclosed. Further, the bill would also provide other safeguards for where personal information has been obtained by the ACCC. Under the bill, information containing personal information would be classified as protected information and would be subject to the protections outlined in the CC Act.

Committee comment

2.22 The committee thanks the minister for this response.

2.23 While acknowledging the need for flexibility such that the Code can be updated in accordance with best industry practice and changing behaviours, the committee reiterates that without an awareness of what is in the Code itself, the committee remains concerned that it cannot assess the appropriateness of the provisions. The committee remains concerned that the Code may contain provisions that should be subject to the full range of parliamentary scrutiny that delegated legislation is not subject to.

2.24 However, the committee notes the advice provided by the minister in relation to provisions previously highlighted as being of particular concern to the committee.

2.25 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. The committee notes the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.26 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of leaving the content of the Water Markets Intermediaries Code to delegated legislation.

Significant penalties⁹¹

2.27 Proposed subsection 239AJ(2) provides that the ACCC may give written notice to a person to require them to give information, produce documents or appear before the ACCC, or a member of staff of the ACCC, to give evidence. Proposed subsection 239AJ(5) provides that refusal or failure to comply with a notice, or in purported compliance with the notice knowingly giving information or evidence that is false or misleading, holds a penalty of imprisonment of 2 years or 100 penalty units, or both.

2.28 The committee's concerns are heightened in this case given the penalties attach to an offence which reverses the evidential burden of proof in relation to particular elements of the offence. This would require the defendant to raise evidence about the matter. Further, in one instance the offence reverses the legal burden of proof, which requires the defendant to positively prove the matter.

2.29 In *Scrutiny Digest 12 of 2023*, the committee requested the minister's advice as to the appropriateness of the penalty in proposed subsection 239AJ(5), and whether it is broadly equivalent to the penalties for similar offences.⁹²

Minister for Environment and Water's response⁹³

2.30 The minister advised that the proposed maximum penalty in subsection 239AJ(5) would be appropriate as proposed section 239AJ would likely be the ACCC's primary tool for investigating contraventions of the water market integrity provisions in the Water Act such as insider trading and market manipulation. The minister advised that the penalty for proposed section 239AJ must be significant to avoid a potentially perverse outcome where a person could avoid detection of significant misconduct by not producing documents and be subject to a much smaller penalty.

2.31 Further, the minister advised that the penalty in proposed subsection 239AJ(5) is broadly equivalent to certain penalties in the *Australian Securities and Investments Commission Act 2001* (ASIC Act), which is a relevant comparison. The minister advised that the penalty for failing to comply with a requirement to appear to answer questions under section 19 or produce books or financial products under section 31 of the ASIC Act is 2 years imprisonment. Similarly, the penalty for failing to comply with

⁹¹ Proposed subsection 239AJ(5). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

⁹² Senate Scrutiny of Bills Committee, [Scrutiny Digest 12 of 2023](#) (18 October 2023) pp. 6–8.

⁹³ The minister responded to the committee's comments in a letter dated 2 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 13 of 2023*).

a requirement to provide certain information in relation to an acquisition or disposal of financial products under section 41 of the ASIC Act is 120 penalty units.

Committee comment

2.32 The committee thanks the minister for this advice.

2.33 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. The committee notes the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Procedural fairness⁹⁴

2.34 Proposed subsection 100ZA(1) provides that the ACCC may issue a public warning notice about the conduct of a person if:

- the ACCC has reasonable grounds to suspect the conduct may constitute a contravention of the Code;
- the ACCC is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct; and
- the ACCC is satisfied that it is in the public interest to issue the notice.

2.35 While there is likely a strong public interest in providing public warnings, the committee considers that public warning notices about the conduct of a person may engage procedural fairness and privacy concerns.

2.36 In *Scrutiny Digest 12 of 2023*, the committee requested the minister's advice as to whether procedural fairness exists in relation to the issuing of a public warning notice.⁹⁵

⁹⁴ Proposed subsection 100ZA(1). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

⁹⁵ Senate Scrutiny of Bills Committee, [Scrutiny Digest 12 of 2023](#) (18 October 2023) pp. 5–6.

Minister for Environment and Water's response⁹⁶

2.37 The minister advised that proposed subsection 100ZA(1) is based on section 223 of the Australian Consumer Law and would include information about the conduct that the ACCC has reasonable grounds to suspect may constitute a contravention of proposed Part 5 of the bill or the Code.

2.38 This provision would not seek to limit the fundamental common law right of procedural fairness as the ACCC's general principles in relation to enforcement and public warning notices include:

- taking into account procedural fairness and considering what is required to afford appropriate procedural fairness in the particular circumstances of each case; and
- in the context of section 223 of the Australian Consumer Law, considering whether there is an imminent need to issue a public warning notice to inform consumers so they can avoid suffering detriment and considering the likely impact on businesses involved.

2.39 The minister also advised that while proposed section 100ZA would be interpreted in its own statutory context and the particular circumstances of each case, the above considerations are likely to be relevant in the exercise of the power to issue a public warning notice under proposed section 100ZA.

Committee comment

2.40 The committee thanks the minister for this advice.

2.41 The committee notes that proposed subsection 100ZA(1) does not seek to limit the fundamental common law right to procedural fairness.

2.42 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. The committee notes the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

⁹⁶ The minister responded to the committee's comments in a letter dated 2 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 13 of 2023*).

Identity Verification Services Bill 2023⁹⁷

Purpose	The bill seeks to establish a legislative framework to support the operation of technical systems that will facilitate identity-matching services.
Portfolio	Attorney-General
Introduced	House of Representatives on 13 September 2023
Bill status	Before the Senate

Reversal of evidential burden of proof⁹⁸

2.43 The bill seeks to facilitate the exchange of identification information between the Commonwealth and state and territory governments, and certain other public and private sector entities.

2.44 Subclause 30(1) seeks to make it an offence for an entrusted person who has obtained protected information in their capacity as an entrusted person to make a record of the information or to disclose the information to another person. Subclause 30(2) seeks to make it an offence for an entrusted person to access protected information. Subclause 30(3) provides an exception (offence-specific defence) to these offences, stating that the offence does not apply if the conduct is authorised by, or is in compliance with, a requirement under a Commonwealth, state or territory law. Each offence carries a maximum penalty of two years imprisonment.

2.45 A note to subclause 30(3) clarifies that subsection 13.3(3) of the *Criminal Code Act 1995* applies and 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.

2.46 In *Scrutiny Digest 12 of 2023*, the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) under subclause 30(3). The committee suggested that it may be appropriate for the bill to be amended to provide that these matters are specified as elements of the offence, and noted that its 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*.⁹⁹

⁹⁷ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Identity Verification Services Bill 2023, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 213.

⁹⁸ Subclause 30(3). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

⁹⁹ Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2023* (18 October 2023) pp. 28–32.

Acting Attorney-General's response¹⁰⁰

2.47 The Acting Attorney-General advised that the exceptions set out in the bill reflect that the criminal offences are only intended to apply where an entrusted person's conduct is not a proper or legitimate part of their work.

2.48 The Acting Attorney-General advised that it will be peculiarly within the defendant's knowledge as to the basis on which they believed they were authorised to access, make a record of, or disclose protected information in performing their duties.

2.49 The Acting Attorney-General also noted that the offences will only apply to entrusted persons which is a class of people limited to persons employed by, or contractors engaged to provide services to, the department. Entrusted officers will have received training and it is reasonable to expect that they will understand their obligations under the bill when dealing with protected information.

2.50 The Acting Attorney-General further advised that it will be significantly more difficult and costly for the prosecution to prove, beyond a reasonable doubt, that the entrusted person was not authorised to access, make a record of, or disclose protected information. This is because the prosecution would need to negative a significant number of facts, including that protected information was not disclosed for the purposes of the Act, in the course of performing the person's functions or duties, or that there was authority for their actions under a Commonwealth, state or territory law. The Acting Attorney-General advised that, on the other hand, if an entrusted person has a particular reason for thinking their conduct was authorised it would not be difficult for them to describe where they thought that authority arose.

Committee comment

2.51 The committee thanks the Acting Attorney-General for this response.

2.52 The committee considers that while it may be that only the defendant will know the basis on which they *believed* they were authorised to access, make a record of, or disclose protected information in performing their duties, the proper test is whether the matter that establishes an exception to the offence is peculiarly within the knowledge of the defendant. In this case, an exception is made out in subclause 30(3) where the conduct is authorised by, or in compliance with, a law of the Commonwealth or a state or territory, and not whether the defendant believed their conduct was authorised by, or in compliance with, such a law. The committee remains of the view that this is not peculiarly within the knowledge of the defendant as this is something knowable by the prosecution.

¹⁰⁰ The minister responded to the committee's comments in a letter dated 6 November 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2023* available at: http://www.aph.gov.au/senate_scrutiny_digest.

2.53 The committee notes the Acting Attorney-General's advice in relation to the significant difficulty and cost of disproving various facts and the relative ease with which an entrusted person could adduce evidence as to what authority authorised their conduct.

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

Identity Verification Services (Consequential Amendments) Bill 2023¹⁰¹

Purpose	The bill seeks to amend the <i>Australian Passports Act 2005</i> to provide a legal basis for the minister to disclose personal information to share or match information relating to the identity of a person for the purpose of participating in one of the following information sharing and matching services: <ul style="list-style-type: none"> • the document verification service or the face verification service; or • any other service specified, or of a kind specified, in a ministerial determination.
Portfolio	Attorney-General
Introduced	House of Representatives on 13 September 2023
Bill status	Before the Senate

Significant matters in delegated legislation

Privacy¹⁰²

2.55 Item 3 of the bill seeks to insert proposed subsection 46(da) into the *Australian Passports Act 2005* (the Act). Proposed subsection 46(da) provides that, on request, the minister may disclose personal information of a kind and to a person specified in a determination, for the purposes of participating in: (i) the Document Verification Service (DVS);¹⁰³ (ii) the Face Verification Service (FVS);¹⁰⁴ or (iii) any other service specified, or of a kind specified in the minister's determination; to share or match information relating to the identity of a person.

2.56 The committee notes that item 3 of the bill would expand the scope of this delegation of legislative power to also include the specification of services, or kinds of services, for which personal information may be disclosed.

¹⁰¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Identity Verification Services (Consequential Amendments) Bill 2023, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 214.

¹⁰² Schedule 1, item 3, proposed paragraph 46(da)(iii). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

¹⁰³ The Document Verification Service provides 1:1 matching to verify biographic information (such as a name or date of birth), with consent, against government issued identity credentials.

¹⁰⁴ The Face Verification Service provides 1:1 matching to verify biometric information, with consent, against a Commonwealth, state or territory issued identity credential (for example, a passport).

2.57 In *Scrutiny Digest 12 of 2023*, the committee requested the Attorney-General's more detailed advice as to:

- why it is both necessary and appropriate to expand, via ministerial determination, the purposes for which personal information may be disclosed under section 46 of the *Australian Passports Act 2005*;
- whether high-level guidance about what can be included in a ministerial determination under proposed paragraph 46(d)(iii) and any considerations the minister must make before making such a determination can be provided on the face of the bill; and
- what safeguards are in place to protect the disclosure of personal information under proposed paragraph 46(da)(iii), including whether the safeguards and limitations which apply to the disclosure of personal information under proposed paragraphs 46(da)(i) and (ii) will also apply.¹⁰⁵

Acting Attorney-General's response¹⁰⁶

2.58 In relation to why it is necessary and appropriate to expand the purposes for which personal information may be disclosed by ministerial determination, the Acting Attorney-General advised that the approach taken in this bill is appropriate and consistent with the policy intent and operation of section 46 of the *Australian Passports Act 2005*. The Acting Attorney-General advised that this ensures detail and administrative matters associated with the disclosure of personal information is provided in the minister's determination and that when enacting the *Australian Passports Act 2005*, the Parliament considered section 46 to be appropriate and reasonable.

2.59 The Acting Attorney-General further advised that significant matters are set out in the primary legislation and that the kind of personal information that can be disclosed, who it can be disclosed to and for what purpose are appropriate to set out in a determination. The Acting Attorney-General explained that these matters are detailed in nature and will support the effective administration of the *Australian Passports Act 2005*.

2.60 The Acting Attorney-General also advised that the strong privacy safeguards provided in the Identity Verification Services Bill 2023 would provide further limitations on the disclosure of personal information by the minister in accordance with any such determination. In accordance with the Identity Verification Services Bill 2023, all entities accessing the identity verification services will be required to comply with the privacy safeguards given effect to through a participation agreement.

¹⁰⁵ Senate Scrutiny of Bills Committee, *Scrutiny Digest 12 of 2023* (18 October 2023) pp. 24–27.

¹⁰⁶ The minister responded to the committee's comments in a letter dated 6 November 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2023* available at: http://www.apf.gov.au/senate_scrutiny_digest.

2.61 In relation to whether high-level guidance could be provided about what can be included in a ministerial determination under proposed paragraph 46(da)(iii) and any considerations the minister must make before making such a determination, the Acting Attorney-General advised that it is not necessary to include these matters in the bill. The Acting Attorney-General advised that it is intended to provide flexibility should the need arise for a new type of identity verification service to share or match information and any such service would operate in accordance with the legislative framework set out in the Identity Verification Services Bill 2023.

2.62 In relation to what safeguards are in place to protect disclosure of personal information under proposed paragraph 46(da)(iii), the Acting Attorney-General advised that the Identity Verification Services Bill 2023 includes strong privacy protections which will apply to all entities wishing to request identity verification through the identity verification services.

Committee comment

2.63 The committee thanks the Acting Attorney-General for this response.

2.64 While the committee considers that even if the approach in the bill is consistent with section 46 of the *Australian Passports Act 2005*, nevertheless the disclosure of personal information for the purposes of identity sharing or matching may be considered a significant matter. This is particularly so where the information sharing may be in relation to a service or a kind of service that is currently not known.

2.65 The committee notes the Acting Attorney-General's view that high-level guidance about what can be included in a ministerial determination under proposed paragraph 46(da)(iii) and any considerations the minister must make before making such a determination is not necessary. The committee considers that while flexibility may be helpful in managing technological advances, this does not negate the ability or utility of including further guidance in the bill or explanatory memorandum about what may be included or considerations the minister must take into account. The committee considers this to be particularly important given the privacy implications of listing new services or kinds of services in such a determination.

2.66 The committee notes that the Acting Attorney-General has advised that particular privacy safeguards in the Identity Verification Services Bill 2023 apply in relation to information disclosure under proposed subsection 46(da) of the bill. In response to the request for information about safeguards in place to protect disclosure of personal information under proposed paragraph 46(da)(iii), the committee notes the Acting Attorney-General's response indicated that the protections in the Identity Verification Services Bill 2023 apply. The committee considers it is unclear on the face of the bill that entities would be required to enter into a participation agreement for services other than the DVS or FVS. It is also unclear from the explanatory memorandum that these safeguards would apply to any other specified service or kind of service. If the intention is that the safeguards applicable for

the DVS and FVS similarly apply for any service or kind of service entered into under proposed paragraph 46(da)(iii), the committee considers that it would be helpful if the bill clarified that these safeguards are available or, at a minimum, that the explanatory memorandum was updated to reflect this.

2.67 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the Acting Attorney-General in relation to the privacy safeguards available for services or kinds of services that may be included under paragraph 46(da)(iii) be tabled in the Parliament as soon as practicable. The committee notes the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.68 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of expanding the purposes for which personal information may be disclosed by ministerial determination, with limited high-level guidance as to what can be included in a ministerial determination and any considerations that must be taken into account before such a determination is made.

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

Privacy¹⁰⁷

2.70 Item 5 of schedule 1 to the bill provides that the proposed amendments to section 46 of the Act made by schedule 1 apply in relation to any personal information disclosed after the commencement of this item, whether the information was obtained before or after that commencement. This relates to information disclosed for the purpose of participating in either the DVS, FVS or any other service specified, or of a kind specified, in the minister's determination.

2.71 Further, proposed section 46A empowers the minister to arrange for the use of computer programs to disclose personal information about a person participating in either the DVS or FVS. Item 7 of schedule 1 to the bill provides that proposed section 46A applies in relation to any personal information disclosed after the commencement of this item, whether the information was obtained before or after that commencement.

2.72 While in this instance the amendments in items 5 and 7 apply in relation to any personal information disclosed *after* commencement, the committee considers

¹⁰⁷ Schedule 1, item 5; schedule 1, item 6, proposed section 46A; schedule 1, item 7. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

that as these provisions relate to personal information obtained *before* commencement, it likely raises privacy concerns.

2.73 In *Scrutiny Digest 12 of 2023*, the committee requested the Attorney-General's advice as to whether it is appropriate for the bill to provide for the disclosure of personal information that was collected before the commencement of the bill, noting that information may be disclosed for purposes for which it was not initially collected for.

Acting Attorney-General's response¹⁰⁸

2.74 The Acting Attorney-General advised that items 5 and 7 are necessary to ensure that individuals can continue to use an Australian passport that was issued prior to the commencement of the bill when seeking to have their identity verified. If the disclosure of personal information is limited to information obtained after commencement of the bill, the Attorney-General advised that this will have serious and negative impacts on Australians and cause operational issues.

2.75 The Acting Attorney-General further advised that privacy safeguards and limitations in the Identity Verification Services Bill 2023 will ensure that any such disclosures are appropriate. In practice the disclosure of personal information on an Australian passport for identity verification purposes will occur in response to requests made with the relevant individual's consent.

Committee comment

2.76 The committee thanks the Acting Attorney-General for this response.

2.77 The committee notes the Acting Attorney-General's advice that while the information may be collected before the bill commenced, in practice the disclosure of personal information will only occur in response to requests made with an individual's consent.

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

¹⁰⁸ The minister responded to the committee's comments in a letter dated 6 November 2023. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 13 of 2023* available at: http://www.aph.gov.au/senate_scrutiny_digest.

Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023¹⁰⁹

Purpose	This bill seeks to amend the <i>Criminal Code Act 1995</i> to further strengthen Australia's counter-terrorism legislative framework to respond to new and evolving national security threats, including the complex motivations, strategies and tactics of violent extremists.
Portfolio	Attorney General
Introduced	House of Representatives on 14 June 2023
Bill status	Before the House of Representatives

Broad scope of offence provisions

Freedom of expression¹¹⁰

2.79 This bill seeks to introduce new criminal offences relating to the public display and trading of prohibited symbols. A 'prohibited symbol' is defined as the Islamic State flag, the Nazi hakenkreuz, the Nazi double sig rune, and something that so nearly resembles these things that it is likely to be confused with, or mistaken for, that thing.¹¹¹

2.80 Item 5 of Schedule 1 to the bill introduces proposed section 80.2H, which seeks to provide that a person commits an offence if they intentionally cause a prohibited symbol to be displayed in a public place and certain circumstances apply. A prohibited symbol is 'displayed in a public place' if it is capable of being seen by a member of the public who is in a public place or the prohibited symbol is included in a document, such as a newspaper or magazine, film, video or television program, that is available or distributed to the public or a section of the public (including via the internet). Proposed subsection 80.2H(9) provides that the offence would not apply where:

- a reasonable person would consider that the public display of the prohibited symbol is for a religious, academic, educational, artistic, literary or scientific purpose and not contrary to the public interest; or

¹⁰⁹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023, *Scrutiny Digest 13 of 2023*; [2023] AUSStaCSBSD 215.

¹¹⁰ Schedule 1, item 5, proposed subsections 80.2H(10), 80.2J(6), 80.2J(7), 80.2J(8), 80.2M(3) and 80.2M(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

¹¹¹ Schedule 1, item 5, proposed section 80.2E.

- for the purposes of making a news report or a current affairs report that is in the public interest and made by a professional journalist.

2.81 Proposed section 80.2J provides that a person commits an offence if:

- they trade in goods that depict or contain a prohibited symbol;
- the person knows that, or is reckless as to whether, the prohibited symbols are associated with Nazi ideology or global jihadist ideology; and
- one or more jurisdictional requirements apply.

2.82 A person is taken to trade in goods if they sell or prepare for supply, transport, guard or conceal, or possess the goods with the intention of selling the goods. There are also several defences to the offence, such as if the traded goods contain commentary on public affairs, the prohibited symbol only appears in the commentary and the making of the commentary is in the public interest.

2.83 Additionally, proposed section 80.2M provides that a person commits an offence if a person is given a direction from a police officer under subsection 80.2K(1) to cease displaying a prohibited symbol in a public place and the direction is not complied with before the time specified in the direction. Proposed subsections 80.2M(3)–(5) set out a number of defences to this offence, such as where the recipient takes all reasonable steps to cause the prohibited symbol to cease to be displayed or there are no such steps that can be taken by the recipient. The defendant would bear an evidential burden in relation to these defences and the maximum possible penalty applicable is 20 penalty units.

2.84 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to:

- whether the bill can be amended to include a written description of the symbols that are sought to be prohibited (such as that contained in the explanatory memorandum) and a graphic depiction of the symbols;
- whether the meaning of 'displayed in a public place' can be clarified further;
- whether the bill can be amended to include a safeguard on the exercise of a police officer's discretion to determine a reasonable period of time to comply with a direction, such as allowing an affected person opportunity to give an explanation as to why compliance is not possible in a proposed period of time; and
- whether the explanatory memorandum can be amended to include guidance as to what would constitute 'reasonable steps' in the context of a person causing the prohibited symbol to cease to be displayed.¹¹²

¹¹² Senate Scrutiny of Bills Committee, [Scrutiny Digest 9 of 2023](#) (9 August 2023) pp. 1–4.

Attorney-General's response¹¹³

2.85 The Attorney-General advised that written descriptions of the prohibited symbols are provided in the explanatory memorandum and the bill defines the prohibited symbols. The Attorney-General advised that graphic depictions of each symbol were not included in the legislation as it would be contrary to the intent of the public display offence for the legislation to display the symbols.

2.86 The Attorney-General advised that the bill currently defines a public place as including any place to which the public or section of the public have access as of right or by invitation, whether express or implied and includes 'both physical and online spaces that otherwise meets the definition'.

2.87 Further, in relation to a police officer's discretion to determine a reasonable period of time to comply with a direction, the Attorney-General advised that a police officer is unable to provide a direction where it would not be possible or it would be dangerous for a person to take those steps. The Attorney-General advised that this will ensure the most appropriate person is directed by the officer to remove the public display of the symbol. The Attorney-General also undertook to consider amending the bill to address this issue in light of recommendations from the Parliamentary Joint Committee on Intelligence and Security (PJCS) regarding the bill.

2.88 Finally, the Attorney-General advised that what constitutes 'reasonable steps' will depend on the circumstances and context in which the direction is issued but the explanatory memorandum could be amended to include some examples of reasonable and unreasonable steps.

Committee comment

2.89 The committee thanks the Attorney-General for this advice.

2.90 As the offence of publicly displaying a prohibited symbol includes symbols that so nearly resemble the Nazi hakenkreuz, the Nazi double sig rune and the Islamic State flag that it is likely to be confused with or mistaken for these symbols, the committee considers that including graphic depictions within the legislation would help minimise confusion as to what symbols specifically are prohibited and what symbols may be mistaken for them. However, the committee notes that, at a minimum, written descriptions of the prohibited symbols are provided in the explanatory memorandum, and the bill defines the prohibited symbols.

2.91 The committee welcomes the clarity provided by the Attorney-General that a police officer is unable to direct a person to take steps where it would not be possible or where it would be dangerous for a person to take those steps. However, it is unclear to the committee that this is a safeguard on a police officer's discretion to determine a reasonable period of time to comply with a direction to cease a public display of a

¹¹³ The minister responded to the committee's comments in a letter dated 30 October 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 13 of 2023*).

prohibited symbol. The committee reiterates its concern that the only option available to a person provided a direction in this instance would be to contest reasonableness by waiting for a prosecution or by seeking a declaration.

2.92 The committee thanks the Attorney-General for advising that the explanatory memorandum can be amended to include examples of reasonable and unreasonable steps when a person is directed to cease public display of a prohibited symbol.

2.93 In relation to the issues of including graphic depictions of prohibited symbols within the legislation and the definition of 'displayed in a public place' the committee makes no further comment.

2.94 The committee draws to the attention of senators and leaves to the Senate as a whole the appropriateness of not including a safeguard on a police officer's discretion to determine a reasonable period of time for a person to comply with a direction to cease public display of a prohibited symbol.

2.95 The committee requests that an addendum to the explanatory memorandum containing examples of reasonable and unreasonable steps to be taken to cease public display of a prohibited symbol 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*).

Reversal of the evidential burden of proof (Schedule 1)

Absolute liability offences¹¹⁴

2.96 Proposed subsection 80.2H(10) provides a number of defences to the offence under proposed subsection 80.2H(1), which include causing a public display of a prohibited symbol if it is necessary for enforcing a law of the Commonwealth, a State or Territory, a foreign country or part of a foreign country.¹¹⁵ This can also include conduct that is necessary for monitoring compliance with or investigating a contravention of a law of the same. Other defences under proposed subsection 80.2H(10) include:

- a person engaging in the conduct for the purposes of proceedings in a court or a tribunal;
- a person engaging in the conduct in connection with performance by a public official of the official's duties and functions and engaging in conduct

¹¹⁴ Schedule 1, item 5, proposed subsections 80.2H(10), 80.2J(6), 80.2J(7), 80.2J(8), 80.2M(3) and 80.2M(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

¹¹⁵ Schedule 1, item 5, proposed paragraph 80.2H(10)(a).

that is reasonable in the circumstances for the purpose of the public official performing that duty or function;

- a person engaging in the conduct in connection with an individual assisting a public official in relation to the performance of the public official's duties or functions and engaging in the conduct is reasonable in the circumstances for the purpose of the public official performing that duty or function; and
- a person displays a hate symbol or something that so nearly resembles a symbol and genuinely engages in this conduct for the purpose of opposing global jihadist ideology, Nazi ideology, fascism or a related ideology.

2.97 Similarly, proposed section 80.2J of the bill also provides that it is an offence to trade in goods that depict or contain a prohibited symbol which the person knows to be or is reckless as to being a prohibited symbol. Proposed subsections 80.2J(6), 80.2J(7) and 80.2J(8) provide various defences to this offence, including the following:

- under proposed subsection 80.2J(6), if the goods traded contain commentary on public affairs, that the prohibited symbols only appear in the commentary and if the trade is in relation to the commentary in which a prohibited symbol appears, making the commentary in the public interest; and
- under proposed subsection 80.2J(7), if the trading is for the purpose of enforcing, monitoring compliance with or investigation of a contravention of a law of the Commonwealth, a State or Territory, or a foreign country; and
- under proposed subsection 80.2J(8), if the trading is in connection with the performance of a public official's duties or functions and is reasonable in the circumstances for the purpose of the public official performing that duty or function.

2.98 Additionally, absolute liability applies to proposed paragraph 80.2J(1)(e), which requires proposed subsection 80.2J(5) to not apply in order for the offence of trading in prohibited symbols to be made out.

2.99 Proposed section 80.2M provides that it is an offence if a person fails to comply with a direction to cease the display of a prohibited symbol in public. Proposed subsection 80.2M(3) provides that it is a defence to this offence if:

- the conduct that caused the public display of the prohibited symbol was engaged for a purpose that is religious, academic, educational, artistic, literary or scientific; or
- the conduct was engaged in for the purpose of making a news report or current affairs report that is in the public interest and is made by a person working in a professional capacity.

2.100 Further, proposed subsection 80.2M(4) provides that for the purposes of the defence under proposed subsection 80.2M(3), it does not matter if the conduct referred to above is the conduct of the person given the direction.

2.101 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to:

- why it is appropriate to use offence-specific defences, which reverse the evidential burden of proof under proposed subsections 80.2H(10), 80.2J(6), 80.2J(7), 80.2J(8), 80.2M(3) and 80.2M(4);
- whether it is possible to disapply section 13.3 of the *Criminal Code Act 1995* (the Criminal Code) as an alternative to reversing the evidential burden of proof; and
- the Attorney-General's justification as to the application of absolute liability to proposed subsection 80.2J(5).¹¹⁶

Attorney-General's response

2.102 The Attorney-General advised that the defences under proposed subsection 80.2H(10) are justified as most focus on the purpose for which the person engaged in the conduct, which is likely to be peculiarly within the defendant's knowledge. The Attorney-General advised that it would be relatively straightforward for a person to meet this threshold compared to the prosecution.

2.103 The Attorney-General advised that as the defendant's purpose in performing conduct is peculiarly within their knowledge, it is a matter that the defendant is best placed to establish. As a result, it would not be appropriate to disapply section 13.3 of the Criminal Code. The Attorney-General also undertook to consider amending the bill to address this issue in light of recommendations from PJCIS regarding the bill.

2.104 Finally, the Attorney-General advised that subsection 80.2J(5) is intended to exempt bona fide journalism from the offence of trading in goods that depict or contain a prohibited symbol. The Attorney-General advised that prosecution would be required to prove:

- the goods being traded contained one or more news reports or current affairs reports;
- that each prohibited symbol that the goods depict or contain appears in such a report; and
- that a reasonable person would consider that the report was made by a person working in a professional capacity as a journalist and that disseminating the report is in the public interest.

¹¹⁶ Senate Scrutiny of Bills Committee, [Scrutiny Digest 9 of 2023](#) (9 August 2023) pp. 5–10.

2.105 The Attorney-General advised that a defendant's state of mind is not relevant to a determination of whether these circumstances exist as they relate to a what a reasonable person would consider.

Committee comment

2.106 The committee thanks the Attorney-General for this advice.

2.107 The committee reiterates its concerns that it is not appropriate for all the defences contained under proposed subsections 80.2H(10), 80.2J(6), 80.2J(7), 80.2J(8), 80.2M(3)(a) and (b) and 80.2M(4) to require the defendant to adduce evidentiary material that would relate to matters peculiarly within the defendant's knowledge.

2.108 For example, as noted by the committee in *Scrutiny Digest 9 of 2023*, in relation to the defence under proposed subsection 80.2M(3), it is not clear to the committee why a defendant should be required to provide evidence relating to the purpose or reason of the public display, given the purposes for which the public display is being made should be readily apparent. For example, it may be evident to the officer providing the direction that the display may be for a religious, academic, educational, artistic, literary, or scientific purpose or is for the purpose of making a news report or current affairs report that is in the public interest. This information could be ascertained from the context and features of the display. It therefore does not seem clear to the committee that such matters would be peculiarly within the defendant's knowledge.

2.109 Additionally, proposed subsection 80.2M(4) provides that the conduct that forms the public display does not necessarily have to be the conduct of the person subject to the direction. It is therefore unclear to the committee how that person could have any knowledge of the purpose of the conduct at all and provide evidence relating to its purpose, and should therefore have to bear the reversed burden.

2.110 In the case of the defences available under proposed subparagraphs 80.2H(10)(a), 80.2H(10)(b), and proposed subsection 80.2J(7), it is not apparent to the committee that the public display of a hate symbol being made in order to enforce a law would be peculiar to the defendant's knowledge as any requirement to comply with a law cannot be peculiar to a defendant's knowledge. Any knowledge relating to the enforcement of a law could also be identified and disproved by the prosecution in the course of investigation.

2.111 The committee maintains similar concerns in relation to other defences available under proposed subsections 80.2H(10) and 80.2J(8), where public displays of prohibited symbols occur as a result of the course of a public official's duties. It is apparent that the duties of a public official would not be peculiar to a that official's knowledge. The committee also remains concerns that under proposed subsection 80.2J(6), a defendant would be required to prove that a prohibited symbol appearing in commentary is in the public interest. What is in the public interest is not peculiar to any person's knowledge and relies on an objective criteria.

2.112 The committee notes that while knowledge or information relating to these evidentiary matters may be more readily available to the defendant for the defendant to provide or establish, this does not necessarily mean that it is significantly more costly or difficult for prosecution to disprove those matters.

2.113 It remains unclear to the committee why it is appropriate to reverse the evidential burden of proof in relation to the abovementioned offence-specific defences, and by extension, why it is not appropriate to disapply section 13.3 of the Criminal Code.

2.114 The committee requests the Attorney-General's further detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) under proposed subsections 80.2H(10)(a) and (b), 80.2J(6), 80.2J(7), 80.2J(8), and 80.2M(4).

2.115 The committee makes no further comment regarding the disapplication of section 13.3 of the *Criminal Code Act 1995* as an alternative to specifying these abovementioned defences as offence elements.

2.116 The committee makes no further comment in relation to the issue of the application of absolute liability to proposed subsection 80.2J(5).

Broad scope of offence provisions

Freedom of expression¹¹⁷

2.117 The bill seeks to create offences relating to the use of a carriage service¹¹⁸ (such as an internet or mobile telephone service) for violent extremist material, including accessing, obtaining, distributing, possessing and controlling such material.¹¹⁹ Violent extremist material includes, for example, material that describes, depicts, supports or facilitates 'serious violence' and is intended to advance a political, religious or ideological cause, and assist, encourage or induce a person to engage in, plan or prepare for an 'intimidatory act'.¹²⁰ The term 'serious violence' encompasses a range of actions, including actions that cause serious physical harm or death to a

¹¹⁷ Schedule 2, item 3, proposed sections 474.45B and 474.45C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

¹¹⁸ Carriage service means a service for carrying communications by means of guided and/or unguided electromagnetic energy: *Telecommunications Act 1997*, section 7 and *Criminal Code Act 1995*, Dictionary.

¹¹⁹ Schedule 2, item 3, proposed section 474.45B.

¹²⁰ Schedule 2, item 3. An 'intimidatory act' is defined in proposed subsection 474.45A(3) as a violent action, or threat of violent action, where the action is done, or the threat is made, with the intention of coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country (or part of the government); or intimidating the public or a section of the public.

person; cause serious damage to property; or seriously interfere with, disrupt or destroy an electronic system.¹²¹ A maximum penalty of five years imprisonment would apply to these offences¹²².

2.118 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to:

- whether the bill can be amended to include clarity as to what material is intended to be captured by the term 'violent extremist material' so as to constitute the offences under proposed subsections 474.45B(1) and 474.45C(1); and
- whether the bill can be amended to include clarity as to what is meant by 'accessing' violent extremist material.¹²³

Attorney-General's response

2.119 The Attorney-General advised that the definition of 'violent extremist material' is provided under proposed subsection 474.45A(1). The Attorney-General further advised that the definition of 'serious violence' is provided by subsection 100.1(2) of the Criminal Code. Guidance on the intended application of the term 'violent extremist material' is provided in the explanatory memorandum. The Attorney-General undertook to consider amending the bill to address this issue in light of recommendations from PJCIS regarding the bill.

2.120 The Attorney-General further advised that the Criminal Code defines 'access' for the purpose of Part 10.6 of the Criminal Code, in which the new violent extremist material provisions will be located. This definition includes:

- the display of material by a computer or any other output of the material from a computer; or
- the copying or moving of the material to any place in a computer or to a data storage device; or
- in the case of material that is a program—the execution of the program.

2.121 Finally, the Attorney-General undertook to consider amending the bill to address this issue in light of recommendations from PJCIS regarding the bill.

Committee comment

2.122 The committee thanks the Attorney-General for this advice.

¹²¹ Schedule 2, item 3, proposed subsection 474.45A(2); *Criminal Code Act 1995*, subsection 100.1(2).

¹²² Schedule 2, item 3, proposed subsections 474.45B(1) and 474.45C(1).

¹²³ Senate Scrutiny of Bills Committee, [Scrutiny Digest 9 of 2023](#) (9 August 2023) pp. 10–12.

2.123 The committee considers that including in the explanatory memorandum the definition of 'access' under section 473.1 the Criminal Code that is applicable to the offences under Schedule 2 of the bill, would be helpful.

2.124 It remains unclear to the committee whether the definition of access provided by the Attorney-General could encompass inadvertently accessing violent extremist material that is displayed on a computer or some other output, such as through social media. The committee queries whether this would result in an individual committing an offence under proposed section 474.45B of the bill. The committee reiterates its concerns that it is unclear whether the broad definition of the term 'access' may result in ordinary people inadvertently accessing violent extremist material through everyday use of a computer or a carriage service.

2.125 The committee queries why the offence in proposed section 474.45B(1) is framed in a way that it may capture individuals inadvertently accessing violent extremist material through ordinary carriage service usage.

2.126 The committee makes no further comment on the definition of 'violent extremist material'.

2.127 The committee requests that an addendum to the explanatory memorandum including the definition of 'access' 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*).

2.128 The committee also requests the Attorney-General's further advice as to whether:

- **the definition of 'access' provided under section 473.1 of the Criminal Code can include inadvertently accessing violent extremist material through the ordinary use of a computer or carriage service; and**
- **what, if any, safeguards are in place for persons who contravene proposed subsection 474.45B(1) by inadvertently accessing violent extremist material, including, for example, whether any specific defences are available for a defendant to rely on.**

Reversal of legal burden of proof (Schedule 2)¹²⁴

2.129 Proposed subsection 474.45C(5) provides that if the prosecution proves possession or control of violent extremist material in the form of computer data, a presumption applies that the person used a carriage service to obtain or access the material, unless the defendant proves to the contrary. A legal burden of proof is

¹²⁴ Schedule 2, item 3, proposed subsection 474.45C(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

proposed to be placed on the defendant to rebut this presumption, requiring the defendant to prove, on the balance of probabilities, that they did not use a carriage service to obtain or access the material. The explanatory memorandum states that a defendant could rebut this presumption, for example, by producing evidence that proved they obtained or accessed the material from a portable data storage device that another person physically gave them.

2.130 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to why it is proposed to reverse the legal burden of proof in relation to proposed subsection 474.45C(5).¹²⁵

Attorney-General's response

2.131 The Attorney-General advised that the explanatory memorandum provides why the reversal of the legal burden is necessary and appropriate in these circumstances. This includes that, often, evidence that a carriage service was used to engage in the relevant criminal conduct is highly technical and can be circumstantial. The explanatory memorandum also provides that the element does not go to the substance of the offence or the person's culpability, but rather, is a jurisdictional element.

Committee comment

2.132 The committee thanks the Attorney-General for this advice.

2.133 The committee notes that in this instance, a reversed legal burden of proof requires the defendant to positively prove that they did not access violent extremist material through a carriage service, but by some other means. It would not be sufficient for the defendant to provide evidence that suggests a reasonable possibility that the defendant accessed violent extremist material by other means in these circumstances.

2.134 While the committee acknowledges the evidential material in relation to establishing the use of a carriage material may be peculiarly within the defendant's knowledge, and can be of a highly technical nature, the committee notes that a legal burden is a higher threshold for a defendant to meet and is not justified merely by the technical nature of the evidence. However, the committee notes the minister's advice that in this instance, the relevant element of the offence does not go to the defendant's culpability and is a jurisdictional element.

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

¹²⁵ Senate Scrutiny of Bills Committee, [Scrutiny Digest 9 of 2023](#) (9 August 2023) pp. 12 – 13.

Reversal of evidential burden of proof (Schedule 2)¹²⁶

2.136 Item 3 of Schedule 2 of the bill seeks to create two offences in relation to the use of a carriage service to access, possess or control violent extremist material. These offences include:

- using a carriage service to access violent extremist material, which carries a maximum penalty of 5 years (Division 474.45B of the Criminal Code); and
- possessing or controlling violent extremist material obtained or accessed using a carriage service, which carries a maximum penalty of 5 years (Division 474.45C of the Criminal Code).

2.137 Proposed section 474.45D provides various defences in respect of both offences. These defences include:

- that the conduct is necessary for enforcing, monitoring compliance with or investigation of a contravention of a law of the Commonwealth, a State or Territory, or a foreign country; or
- the conduct is necessary for conducting scientific, medical, academic or historical research, and is reasonable in the circumstances for the purpose of conducting such research; or
- the conduct is in connection with the performance of a public official's duties or functions and is reasonable in the circumstances for the purpose of the public official performing that duty or function; or
- the conduct is for the purpose of advocating the lawful procurement of a change to any matter established by law, policy or practice.

2.138 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to:

- why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to offences under proposed subsections 474.45B(1) and 474.45C(1); and
- whether it is possible to disapply section 13.3 of the Criminal Code as an alternative to specifying these abovementioned defences as offence elements.¹²⁷

Attorney-General's response

2.139 The Attorney-General advised that the defences in relation to the offences listed under proposed section 474.45D recognise that the defendant's purpose for

¹²⁶ Schedule 2, item 3, proposed subsection 474.45C(5). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

¹²⁷ Senate Scrutiny of Bills Committee, [Scrutiny Digest 9 of 2023](#) (9 August 2023) pp. 16-18.

dealing with violent extremist material is uniquely within the defendant's knowledge. As such, the defendant is best placed to adduce evidence demonstrating their purpose. The Attorney-General advised that a defendant could readily adduce evidence that they used a carriage service for violent extremist material, or possessed or controlled such material in the course of their employment.

2.140 Further, the Attorney-General advised that as the relevant matters are peculiarly within the defendant's knowledge, and are matters that the defendant is best placed to establish, it would not be appropriate to disapply section 13.3 of the Criminal Code to these matters. The Attorney-General undertook to consider amending the bill to address this issue in light of recommendations from PJCIS regarding the bill.

Committee comment

2.141 The committee thanks the Attorney-General for this advice.

2.142 The committee has articulated its concerns in relation to similar defences at paragraphs [2.106] to [2.116] above.

2.143 The committee reiterates its concerns that the matters relating to some of these defences are not of a nature that is peculiar to the defendant's knowledge or would be significantly more difficult or costly for prosecution to disprove than for the defendant to establish. The committee also considers that the need to reverse the burden of proof in relation to the defences under Schedule 2 of the bill has not sufficiently been justified with reference to the requirements in the *Attorney General's Department's Guide to Framing Commonwealth Offences Infringement Notices and Enforcement Powers (Guide to Framing Commonwealth Offences)*.¹²⁸

2.144 In relation to the defence under proposed paragraphs 474.45D(1)(a) and (b), it is not clear to the committee how evidentiary material required to prove that the defendant was possessing, controlling or accessing violent extremist material in the monitoring, compliance or enforcement of a law could be peculiarly within a defendant's knowledge. Any material relating to the monitoring, compliance or enforcement of a law cannot be peculiar to a person's knowledge and would be readily apparent to police in the course of investigation.

2.145 The committee maintains similar concerns in relation to the defence under proposed paragraph 474.45(1)(g). If violent extremist material is possessed, controlled or accessed in the course of a public official's duties, whether it reasonable in the circumstances, it is not apparent to the committee how evidentiary matter relating to this is peculiar to the defendant's knowledge. The committee also considers that it is possible for this information to be identified in the course of investigation and disproved by the prosecution.

¹²⁸ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) p. 50.

2.146 The committee notes that while knowledge or information relating to these evidentiary matters may be readily available to the defendant, this does not necessarily mean that it is significantly more costly or difficult for prosecution to disprove those matters.

2.147 It remains unclear to the committee why it is appropriate to reverse the evidential burden of proof in relation to the abovementioned offence-specific defences, and by extension, why it is not appropriate to disapply section 13.3 of the Criminal Code.

2.148 The committee requests the Attorney-General's further detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) under proposed paragraphs 474.45D(1)(a), (b) and (g).

2.149 The committee makes no further comment in relation to the issue of the disapplication of section 13.3 of the *Criminal Code Act 1995* as an alternative to specifying these abovementioned defences as offence elements.

Broad scope of offence provisions

Significant penalties in primary legislation (Schedule 3)¹²⁹

2.150 This bill seeks to amend the existing offence of advocating terrorism by expanding the definition of 'advocates' to include the additional conduct of:

- providing instruction on the doing of a terrorist act or the commission of a terrorism offence; and
- praising the doing of a terrorist act or the commission of a terrorism offence in circumstances where there is a substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or to commit a terrorism offence.¹³⁰

2.151 The bill retains the current definition for 'advocates' under existing subsection 80.2C(3), which includes the counselling, promoting, encouraging or urging the doing of a terrorist act or the commission of a terrorism offence. The bill also seeks to increase the maximum penalty for the offence of advocating terrorism from 5 years to up to 7 years.¹³¹

¹²⁹ Schedule 3, item 1, proposed subsection 80.2B(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

¹³⁰ Schedule 3, item 2, substituted section 80.2C(3).

¹³¹ Schedule 3, item 1, substituted subparagraph 80.2C(1)(a).

2.152 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to:¹³²

- whether the term advocates may be able to be defined with more specificity;
- whether the explanatory memorandum can be amended to include guidance with respect to the interpretation of key terms, including 'praises' and whether there is a 'substantial risk that such praise might have the effect of leading another person to engage in a terrorist act or commit a terrorism offence'; and
- what conduct is intended to be captured by the amended offence that is not already captured by current offences.

Attorney-General's response

2.153 The Attorney-General advised that the definition of 'advocates' under existing subsection 80.2C(3) would be expanded to including a third category of activity, which includes 'praising the doing of a terrorist act or the commission of a terrorism offence where such praise might have the effect of leading another person to engage in a terrorist act or to commit a terrorism offence'.

2.154 The Attorney-General advised that there is a wide range of conduct that may fall within the definition of advocates and the government does not consider it appropriate to limit the definition beyond the ordinary meaning of the words contained in the legislation. Rather, this should be a matter for a court to consider on a case-by-case basis.

2.155 The Attorney-General advised that the glorification of terrorism and violent extremism through praise has been of increasing concern to Commonwealth law enforcement and intelligence agencies in recent years. Such glorification and praise can incite others to imitate or seek to engage in similar behaviour, furthering radicalisation.

Committee comment

2.156 The committee thanks the Attorney-General for this advice. The committee notes, however, that it remains unclear why 'praise' is not already captured by the existing definition of 'advocates', which is inclusive of terms such as 'promotes' and 'engages'.

2.157 In light of the above information, the committee draws this matter to the attention of senators and leaves to the Senate as whole the appropriateness of the expansion of the definition of 'advocates' in this context.

¹³² Senate Scrutiny of Bills Committee, [Scrutiny Digest 9 of 2023](#) (9 August 2023) pp. 13–16.

Exemption from sunseting (Schedule 4)¹³³

2.158 Item 5 of Schedule 4 to the bill seeks to introduce proposed section 12, which amends the Legislation (Exemptions and Other Matters) Regulation 2015 (LEOM) by inserting table item 18C. Table item 18C has the effect of exempting regulations made under subsection 102.1(1) of the Criminal Code from the default 10-year sunseting period. Instruments that would be exempt from sunseting as a result of this amendment include terrorist organisation listings that would not expire unless delisted by the Australian Federal Police minister.¹³⁴

2.159 In *Scrutiny Digest 9 of 2023*, the committee requested the Attorney-General's advice as to what circumstances justify the exemption from sunseting for regulations made under subsection 102.1(1) of the Criminal Code.¹³⁵

Attorney-General's response

2.160 The Attorney-General advised that regulations made under subsection 102.1(1) of the Criminal Code are part of a broader counter-terrorism legislative framework which operate in accordance with the *Intergovernmental Agreement on Counter-terrorism Laws 2004* (IGA). The IGA supports a referral of powers to the Commonwealth, which provides the Commonwealth with the requisite power to legislate regarding terrorist organisation. The Attorney-General also advised that regulations proscribing an organisation as a terrorist organisation cannot be done unilaterally by the Commonwealth and can only be done with formal consultation with the states and territories. Regulations made under subsection 102.1(1) of the Criminal Code would meet the policy criteria to be exempt from sunseting in accordance with subsection 50(1) of the *Legislation Act 2003*.

2.161 Further, the Attorney-General advised that there are other safeguards to ensure terrorist organisation listings can be reviewed to ensure they remain appropriate. These safeguards include expanded parliamentary oversight by empowering the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to conduct own-motion reviews into listings instruments and providing that an individual or organisation may make an application for an organisation to be de-listed under subsection 102.7(1) of the Criminal Code, which would require the AFP Minister to review whether an organisation continues to meet the legislative thresholds for listing. The Attorney-General also advised that an instrument made to proscribe an organisation as a terrorist organisation would be subject to disallowance.

¹³³ Schedule 4, item 3, proposed section 12, table item 18C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

¹³⁴ Explanatory memorandum, p. 66.

¹³⁵ Senate Scrutiny of Bills Committee, [Scrutiny Digest 9 of 2023](#) (9 August 2023) pp. 18–19.

Committee comment

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

2.163 The committee welcomes the inclusion of safeguards such as PJCIS being enabled to conduct own-motion reviews into listings and any individual or organisation being able to make an application for an organisation to be de-listed. However, the committee does not consider that these mechanisms are a substitute for proper parliamentary oversight.

2.164 The committee notes that given the instrument is exempt from sunseting, there would only be one opportunity to disallow the instrument, following which the instrument would not be remade and therefore will not be reviewed in future. Further, the committee also does not consider that disallowance alone is a sufficient safeguard, as it is only one process, that when combined with other parliamentary processes, ensures appropriate parliamentary oversight.

2.165 The committee's concerns in this regard are heightened due to the significant impact that the regulations may have on individual rights and liberties and the seriousness of offences within this context. Sunseting is an important tool providing the parliament with oversight of such significant matters in delegated legislation. In this instance, the committee does not consider the necessity of working within an intergovernmental framework to override the importance of parliamentary scrutiny.

2.166 In light of the above the committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of exempting regulations made under subsection 102.1(1) of the Criminal Code (including terrorist organisation listings that would not expire unless delisted by the Australian Federal Police minister) from the default 10-year sunseting period.

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

Chapter 3

Scrutiny of standing appropriations¹³⁶

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.¹³⁷ 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.¹³⁸

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

¹³⁶ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, Scrutiny Digest 13 of 2023; [2023] AUSStaCSBSD 216.

¹³⁷ 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*.

¹³⁸ For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

- Primary Industries Levies and Charges Disbursement Bill 2023¹³⁹ – Clauses 47, 52, 62, and subclause 86(5)

Senator Raff Ciccone

Deputy Chair

¹³⁹ Clause 37 provides a power to allow the Consolidated Revenue Fund to be appropriated for the purposes of payments by the Commonwealth under subsection 15(1), 23(1), 26(1), 27(1) or 36(1) or (2). These relate to various levy or charge payments to recipient and statutory bodies and matching payments to recipient and statutory bodies. Clause 52 provides a power to allow the Consolidated Revenue Fund to be appropriated for the purposes of payments by the Commonwealth under subsection 44(1) or 48(1). These relate to biosecurity activity and response levy or charge payments to Animal Health Australia. Clause 62 provides a power to allow the Consolidated Revenue Fund to be appropriated for the purposes of payments by the Commonwealth under subsection 54(1) or 58(1). These relate to biosecurity activity and response levy or charge payments to Plant Health Australia. Clause 86(5) provides a power to allow the Consolidated Revenue Fund to be appropriated for the purposes of making payments under subsection 86(1). This provides for recovery by the Commonwealth of overpayments to a body under certain subsections of the Act.