The Senate

Standing Committee for the Scrutiny of Bills

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Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Initial scrutiny

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

Customs Legislation Amendment (Controlled Trials and Other Measures) Bill 2022

Purpose	This bill seeks to amend the *Customs Act 1901* to facilitate time-limited trials with approved entities in a controlled regulatory environment.
Portfolio	Home Affairs
Introduced	House of Representatives on 30 November 2022

Significant matters in delegated legislation[1]

1.2 The bill seeks to amend the *Customs Act 1901* to insert proposed Part XB. Part XB is intended to set up a framework to facilitate trials of new technology, business models and approaches in relation to Australian trade and customs practices, with a view to inform the policy development and evidence base for future regulatory reform.

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

1.4 Many significant elements of the scope and operation of the approach that will be taken under the new time-limited trial scheme are left to delegated legislation. For example, proposed section 179K provides that the Comptroller-General may, by legislative instrument, determine qualification criteria that entities must meet in order to participate in any controlled trial. In addition, proposed section 179L provides that the Comptroller-General may, by legislative instrument, make rules that make provision for and in relation to a controlled trial. The rules made for this purpose may establish a controlled trial, outline the period of time in which that controlled trial is

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

in operation, extend the period of operation, and revoke a controlled trial so that it is no longer in operation. There are a number of other significant examples within the bill.[2]

1.5 The committee's position is that significant matters should be included within primary legislation unless a sound justification for the use of delegated legislation is provided. Where substantial elements of the scope and operation of a legislative scheme are proposed to be left to delegated legislation, the committee's already significant concerns will be further heightened. To this end, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.6 In this case, the explanatory materials do not provide any justification for the framework nature of the bill. However, explanations in relation to individual delegated legislation making powers have been provided. For example, in relation to proposed section 179K, the explanatory memorandum states:

> Such qualification criteria could be requirements similar to what is used in Part 2 of the Customs (Australian Trusted Trader Programme Rule) 2015.
>
> Examples of qualification criteria could be that an entity is able to pay all of its debts as they become liable, the entity satisfactorily complies with Customs-related laws, or that corporate entities have a registered ABN. This provision has effect of ensuring a degree of consistency and transparency in the expectations common for all trials.[3]

1.7 It is unclear to the committee why these examples could not be included on the face of the primary legislation to ensure a proper level of parliamentary oversight over the new time-limited trial scheme that is proposed to be established under Schedule 1. The committee acknowledges that it is appropriate to include certain administrative and technical matters within delegated legislation, particularly when establishing new legislative schemes. For example, highly technical scientific information may be included within delegated legislation on the basis that the law-making process should involve considerable input from experts within the executive. However, in this instance, it appears that substantial elements of the scope and operation of the legislative scheme proposed to be introduced by Schedule 1 of the bill will be left to delegated legislation. The committee considers that it would be more appropriate to include this information within the primary legislation. For example, by providing an inclusive list of matters that may constitute 'qualification criteria' within the bill.

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2 See, e.g., Schedule 1, item 4, proposed subsections 179C(4), 179D, 179E(c), 179H, and 197L.

3 Explanatory memorandum, p. 13.

1.8 In light of the above, the committee requests the minister's more detailed advice regarding:

- **why it is considered necessary and appropriate to leave almost all of the information relating to the scope and operation of the new Customs time-limited trial scheme to delegated legislation; and**
- **whether the bill can be amended to include further guidance regarding these matters on the face of the primary legislation.**

Exemption from disallowance[4]

1.9 Schedule 2 to the bill seeks to amend existing customs legislation to make a number of technical amendments, intended to align the *Customs Act 1901* (the Act) with current legislative practice. Currently, subsection 273EA(1) of the Act allows the Minister to, by notice in the *Gazette*, announce an intention to propose in the Parliament a Customs Tariff or Customs Tariff alteration at any time when the Parliament is prorogued or the House of Representatives has expired by effluxion of time, has been dissolved or is adjourned otherwise than for a period not exceeding 7 days. Schedule 2 would amend section 273EA to clarify that notices of intention are legislative instruments.

1.10 Proposed subsection 273EA(3) to the bill seeks to amend the Act to provide that a legislative instrument made under subsection 273EA(1) is not subject to disallowance.

1.11 The committee expects that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum.

1.12 In this instance the explanatory memorandum states that:

> Application of the disallowance regime in the *Legislation Act 2003* to a notice under subsection 273EA(1) is not appropriate in the context of the broader scheme for Customs Tariff or Customs Tariff alteration proposals.
>
> By the seventh sitting day after notice is given under subsection 273EA(1) of the Customs Act, the notice will no longer have substantive effect under subsection 226(2) of that Act. By that date, either an equivalent Customs Tariff or Customs Tariff alteration will have been proposed in the House of Representatives (being covered by paragraph 226(2)(b)), or the period of the instrument's effect under paragraph 226(2)(a) of the Customs Act will otherwise have lapsed.
>
> Further, a Customs Tariff or Customs Tariff alteration proposed in the House of Representatives is not a legislative instrument, as it is not an instrument

4 Schedule 2, item 10, proposed subsection 273EA(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

> made under the Customs Act but is instead a motion moved in that House. Accordingly, none of the provisions of the *Legislation Act 2003* relating to instruments (including any of those related to disallowance) apply to the proposal of a Customs Tariff or Customs Tariff alteration. Customs Tariff and Customs Tariff alteration proposals are instead subject to the orders, procedures and oversight of the House of Representatives.
>
> Following the proposal of a Customs Tariff or Customs Tariff alteration in the House of Representatives, legislation must then be enacted by the Parliament to incorporate the proposed tariff changes into law and enable concessional treatment or the collection of customs duties on an ongoing basis. Further oversight of the proposal therefore takes place by both Houses of the Parliament when a Bill to make these proposed amendments is introduced into the Parliament.[5]

1.13 Further, the explanatory memorandum states that the disallowance of customs tariff changes implemented through a notice given under subsection 273EA(1) would affect business' certainty in relation to the cost of importing goods. The explanatory materials note that, for example, an importer who relies on a tariff concession implemented through a tariff proposal notice and, accordingly, pays a reduced amount of customs duty, could potentially face the prospect of being required to pay the relevant additional amount of duty if the notice were to be disallowed.[6]

1.14 The committee notes this explanation and welcomes amendments which clarify that a notice of intention is a legislative instrument.

1.15 However, the committee also notes that its default position is that any instrument of a legislative character should be subject to disallowance unless exceptional circumstances can be demonstrated.

1.16 The committee does not consider that a desire to provide certainty is a sufficient justification for limiting the usual disallowance process in relation to an instrument. While the committee acknowledges that the possibility of disallowance presents some degree of uncertainty, the committee notes that this level of uncertainty is in many ways inherent to lawmaking within Australia's system of representative government and applies equally to primary legislation which is subject at any time to amendment or repeal by the Parliament.

1.17 A balance must be struck between protecting against uncertainty and allowing parliamentary scrutiny over executive made law. As a general principle, the committee does not consider that the difficulties associated with the small degree of uncertainty inherent in the disallowance process outweigh the significance of abrogating or limiting parliamentary oversight of executive made law by exempting an instrument from disallowance. In this context the committee notes that the number of

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5 Explanatory memorandum, p. 17.

6 Explanatory memorandum, p. 17.

instruments to which a disallowance notice is attached is low and instances of disallowance themselves are rare.

1.18 In addition, while the committee acknowledges that the context of the broader Customs Tariff and Customs Tariff alteration proposal scheme means that, in many cases, disallowance will be of less practical import than in relation to other legislative instruments, the committee does not consider that this is a valid reason for removing disallowance. In this context the committee notes that the disallowance process has a number of extrinsic benefits which apply in addition to the effect of disallowance itself, including increasing opportunities for parliamentary debate and increasing the levels of scrutiny applied to an instrument. The committee reiterates the view of the Delegated Legislation Committee that:

> In practice, the disallowance procedure serves to focus the Parliament's attention on a small number of legislative instruments by providing opportunities for parliamentary debate, and promoting dialogue between the executive and legislative branches of government about the manner in which legislative powers delegated to the executive have been exercised.[7]

1.19 While proposed tariff changes must eventually be enacted through primary legislation, it is unclear to the committee why it is appropriate to remove the potential for parliamentary disallowance of these proposals before enactment occurs.

1.20 In light of the above, the committee requests the minister's detailed advice as to whether the bill could be amended to provide that legislative instruments made under subsection 273EA(1) of the *Customs Act 1901* are subject to disallowance to ensure that they are subject to appropriate parliamentary oversight.

7 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Interim report: Exemption of delegated legislation from parliamentary oversight*, December 2020, p. 62.

Export Control Amendment (Streamlining Administrative Processes) Bill 2022

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

Privacy

Significant matters in delegated legislation[8]

1.21 Schedule 1 to the bill seeks to set out new information disclosure requirements for the Export Control Framework. The explanatory memorandum states that the intention of Schedule 1 is to provide for specific authorisations for the use and disclosure of relevant information, while ensuring that protected information is afforded appropriate safeguards.[9] Item 12 of Schedule 1 introduces several new provisions to this effect.

1.22 Proposed subsection 388(1) provides that an entrusted person, or a person covered by proposed subsection 388(2), may use or disclose relevant information for the purposes of performing functions or duties or assisting persons. 'Entrusted person' is defined under a proposed amendment to section 12 to include the Minister, the Secretary, an APS employee in the department, any other person employed by the Commonwealth in connection with the department, and any other person who is employed or engaged by the Commonwealth or a body corporate and is prescribed by the rules. Proposed subsection 388(2) provides that the following persons may also use or disclose relevant information under subsection 388(1): any person employed by the Commonwealth or a Commonwealth corporation, authorised officers, approved auditors, approved assessors, accredited veterinarians, nominated export permit issuers and issuing officers. Many of the classes of persons listed under proposed subsection 388(2) could potentially include non-commonwealth employees. For example, under subsection 291(3) of the *Export Control Act 2020* (the Export Act) an authorised officer includes a 'third-party authorised officer'. Third-party authorised officers are not required to be Commonwealth, state or territory employees. Similarly, nominated export permit issuers are persons nominated within an approved

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

9 Explanatory memorandum, p. 5.

arrangement, with no requirement that these persons are Commonwealth employees.[10]

1.23 'Relevant information' means information obtained or generated in the course of performing functions or duties or exercising powers or assisting persons.[11] The bill would allow for the use or disclosure of relevant information in a wide variety of circumstances, including:

- **to foreign governments**,[12] for the purposes of export, managing Australia's international relations in respect of trade, or giving effect to Australia's international obligations;
- **to Commonwealth entities**,[13] for the purposes of assisting the entity to perform its functions or duties or exercise its powers;
- **to a court or tribunal exercising federal jurisdiction**,[14] for the purposes of the enforcement of a law of the Commonwealth or to assist the court, tribunal, authority or person to make or review an administrative decision;
- **to law enforcement agencies**,[15] where the entrusted person reasonably believes that disclosure is necessary for the enforcement of certain laws;
- **to state or territory bodies**,[16] if the Secretary reasonably believes that disclosing the information is necessary for the purposes of administering state or territory law;
- **to undertake research, policy development or data analysis**,[17] for the purposes of administering the department or achieving one of the objectives of the Export Act;
- **to manage severe or immediate threats**,[18] if the Secretary reasonably believes using or disclosing the information is necessary to manage the threat and the threat is export related and of a nationally significant scale; and
- **when authorised by the rules**.[19]

10 See definition of 'nominated export permit issuer' at section 12 of the *Export Control Act 2020.*

11 See definition of 'relevant information' at proposed section 12 of the bill.

12 Schedule 1, item 12, proposed section 389.

13 Schedule 1, item 12, proposed section 391.

14 Schedule 1, item 12, proposed section 392.

15 Schedule 1, item 12, proposed section 393.

16 Schedule 1, item 12, proposed section 397C.

17 Schedule 1, item 12, proposed section 394.

18 Schedule 1, item 12, proposed section 397D.

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

1.24 Under proposed section 397G, the use or disclosure of protected information[20] would constitute an offence, providing some safeguards against the inappropriate disclosure of private information. Proposed section 397F sets out what kinds of information may constitute protected information, including the fact that the rules may set out exceptions to the definition of protected information.

1.25 The committee's consistent scrutiny view is that significant matters should be included in the primary legislation unless a sound justification is provided for the use of delegated legislation. The prescription of the circumstances in which the use and disclosure of information is authorised is one such matter. This is particularly so when the use or disclosure of the information has the potential to impact on a person's right to privacy, as in this case. The committee is therefore concerned about the proposed amendment to section 12 which allows for rules to additionally define who is an 'entrusted person' and the rule-making powers set out at proposed sections 397E and 397F. In this instance, the statement of compatibility states in relation to proposed section 397E:

> The authorisation in new section 397E would allow the rules to prescribe the use or disclosure of relevant information in other circumstances. This is necessary as circumstances may arise in the future, which may require expedient authorisation to effectively manage the export control framework, and where reliance on another authorisation is not available or appropriate. It is also needed because there are classes of person who only have functions and powers under the various export control rules that are made under the Act. The rules under new section 397E would be able to be tailored to particular circumstances, by prescribing the kinds of information that may be used or disclosed, the classes of persons who may use or disclose the information, and the purposes for the use or disclosure. In addition, the rules would be able to impose appropriate limitations on the use or disclosure of the information, by requiring certain conditions to be complied with. For example, this may include requiring the person who is using or disclosing the information to ensure appropriate protections are in place for any personal information.[21]

1.26 In relation to the rule-making power at proposed section 397F, the explanatory memorandum states:

> It is necessary to allow the rules to be able to prescribe additional kinds of protected information, in order to be able to quickly adapt to changing circumstances, technology and, potentially Australia's international obligations, in the future. However, any additional kinds of protected

20 See Schedule 1, item 12, proposed section 397F for the kinds of information that constitute protected information.

21 Statement of compatibility, p. 62.

information to be prescribed by the rules would need to meet the requirements set out in new subsection 397F(2) of the Act.[22]

1.27 While acknowledging these explanations, and welcoming the safeguards set out in proposed subsection 397F(2), the committee remains concerned about the new rule-making powers introduced by the bill given the breadth of the class of persons who may exercise the new information disclosure powers. This is particularly so given that non-Commonwealth officers may exercise information disclosure powers. The committee acknowledges the need for flexibility in relation to the prospect of rapidly changing technology. However, the committee considers that the justification provided in the explanatory memorandum that new delegated legislation making powers are necessary due to a general uncertainty in relation to future regulatory needs is overbroad in the context of the Export Act. The committee is also concerned at the lack of enforceable consultation requirements given that these rule-making powers have the potential to impact on a person's right to privacy.

1.28 In light of the above, the committee requests the minister's more detailed advice in relation to why it is both necessary and appropriate to include new rule-making powers in proposed section 397E, proposed paragraph 397F(1)(e), and in the definition of 'entrusted person' in the proposed amendment to section 12. The committee's consideration of this issue will be assisted if the minister provides examples demonstrating why new rule-making powers are necessary.

1.29 The committee also requests the minister's advice in relation to the appropriateness of amending the bill to provide enforceable consultation requirements in relation to these rule-making powers.

Reversal of the evidential burden of proof[23]

1.30 As noted above, item 12 of Schedule 1 to the bill seeks to insert proposed section 397G into the Export Act to provide that it is an offence to use or disclose protected information.

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

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22 Explanatory memorandum, pp. 20-21.

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

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

1.33 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[24] 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.

1.34 The committee expects any such reversal of the evidential burden of proof to be justified and for the explanatory memorandum to address whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*,[25] which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[26]

1.35 In this instance the explanatory memorandum states:

> The reversal of the burden of proof is justified in this instance as the matter to be proved (that is, that the use or disclosure of protected information was required or authorised by a Commonwealth law or a prescribed State or Territory law) is a matter that would be peculiarly in the knowledge of the defendant. Further, there would be a number of authorised uses and disclosures set out in new Division 2 of Part 3 of Chapter 11 of the Act (as inserted by this item), across the laws of the Commonwealth, and where relevant, across the laws of a State or Territory. In the event of criminal or civil proceedings, it would be significantly more difficult and costly for the prosecution to disprove all possible circumstances than it would be for a defendant to establish the existence of one potential circumstance. Consequently, in order to effectively protect information under new section 397G, it is reasonable, necessary and proportionate to reverse the evidential burden of proof in this limited situation.[27]

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24 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.

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

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

27 Explanatory memorandum, p. 22.

1.36 The explanatory statement provides a similar justification in relation to the defence set out at proposed subsection 397G(4).

1.37 It is not clear to the committee from the explanations provided in the explanatory memorandum how the relevant matters can be said to be *peculiarly* within the defendant's knowledge when several of the matters appear to be questions of law. For example, whether disclosure is in accordance with the Export Act appears to be a matter which the prosecution could readily ascertain.

1.38 The committee considers it is not appropriate to reverse the evidential burden of proof in relation to matters that are not peculiarly within the knowledge of the defendant. The committee therefore requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[28]

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

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

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

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

Portfolio	Education
Introduced	House of Representatives on 1 December 2022

Tabling of documents in Parliament[29]

1.40 The Higher Education Support Amendment (Australia's Economic Accelerator) Bill 2022 was introduced in the House of Representatives on 17 February 2022 and lapsed at the dissolution of the previous Parliament. An identical bill has now been introduced in the House of Representatives under the same name. The committee raised scrutiny concerns in relation to the earlier bill in *Scrutiny Digest 2 of 2022*.[30]

1.41 Item 3 of Schedule 1 to the bill seeks to insert proposed section 42-1 into the *Higher Education Support Act 2003* (Higher Education Support Act). Proposed section 42-1 provides that the Australia's Economic Accelerator (AEA) Advisory Board must make a research commercialisation strategy to:

- outline the vision, aims and objectives for translation and commercialisation of university research in areas of national priority; and
- identify new and emerging technologies in areas of national priority; and
- identify and propose ways of addressing barriers to translating and commercialising university research.

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

30 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 2 of 2022* (18 March 2022) pp. 38–41.

1.42 Proposed subsection 42-1(3) provides that the strategy will be in force for 5 years. Proposed subsection 42-1(5) provides that the minister must table the strategy in both Houses of the Parliament, although no timeframe is specified setting out how quickly the minister must table the report after it is given to them. Proposed subsection 42-1(6) provides that the research strategy is not a legislative instrument.

1.43 Proposed section 42-5 provides that the AEA Advisory Board must also formulate an annual investment plan. This investment plan must set out the following matters in relation to the Australia's Economic Accelerator program:

- areas of national priority;
- the total amount of funding available;
- any other matters that the AEA Advisory Board considers appropriate to deal with to ensure that the program meets its objectives.

1.44 It appears that investment plans made under proposed section 42-5 are not intended to be legislative instruments. However, there is nothing on the face of the bill clarifying this matter. It is also unclear to the committee whether investment plans are intended to be formulated as a standalone document in relation to each year or whether the plan for a year will consist of numerous written policies.

1.45 Furthermore, the committee notes that there is no requirement to table investment plans in both Houses of the Parliament, as is required for the research commercialisation strategy made under proposed subsection 42-1(5). In this regard, the committee notes that the process of tabling documents alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online.

1.46 The committee therefore requests the minister's advice as to whether the bill could be amended to provide that:

- **the research commercialisation strategy must be tabled in both Houses of the Parliament within 15 sitting days of the minister receiving a strategy; and**
- **the investment plan formulated by the Australia's Economic Accelerator Advisory Board is required to be tabled in each House of the Parliament.**

Reversal of the evidential burden of proof[31]

1.47 Item 7 of Schedule 1 to the bill seeks to insert proposed section 181-15 into the Higher Education Support Act. Proposed section 181-15 would provide that it will

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

be an offence for an officer to disclose or make a copy of certain information relating to Australia's Economic Accelerator program where:

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

1.48 Proposed subsections 181-15(3) and (4) provide exceptions (offence-specific defences) to this offence, stating that the offence will not apply if:

- the disclosure, or the making of the copy or record, is authorised by proposed Division 181; or
- the disclosure, or the making of the copy or record, is required by a law of the Commonwealth.

1.49 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[32] This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.50 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 reversals of the evidential burden of proof in proposed subsections 181-15(3) and (4) have not been addressed in the explanatory materials.

1.51 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.[33]

1.52 In this case, it is not apparent that the relevant matters would be *peculiarly* within the defendant's knowledge, or that it would be more difficult or costly for the prosecution to establish the matters than for the defendant to establish them. For

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

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

example, it appears that whether a disclosure is authorised by Division 181 would be a matter that the prosecution could readily ascertain. These matters therefore appear to be matters more appropriate to be included as an element of the offence.

1.53 As the explanatory materials do not address this issue, the committee requests the minister's detailed justification as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[34]

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

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

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

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

Abrogation of privilege against self-incrimination[35]

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

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

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

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

1.57 These amendments expand the offences a person could be prosecuted for after being compelled to provide information under subsection 18(1). This undermines the common law privilege against self-incrimination which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.[36]

1.58 The committee recognises that there may be certain circumstances in which the privilege against self-incrimination can be overridden. However, abrogating the privilege represents a serious loss of personal liberty. In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty.

1.59 The statement of compatibility explains that:

> As with the existing exemptions, these amendments remove the use immunity for conduct related to the provision of information to IGIS under section 18, rather than the content of the information itself. Consequently, any self-incriminating information provided to IGIS under subsections 18(1) and (3) is subject to a use immunity and cannot be used against the individual. The information will only be exempted from the use immunity where it is required to prove unlawful conduct committed in the course of providing the requested information or documents.[37]

1.60 While acknowledging this explanation, the committee considers that any justification for abrogating the privilege against self-incrimination will be more likely to be considered appropriate if accompanied by both a 'use immunity' and a 'derivative use immunity'. A use immunity provides that information or documents produced are not admissible in evidence in most proceedings. By contrast, a derivative use immunity provides that anything obtained as a direct, or indirect, consequence of the information or documents is not admissible in most proceedings.

1.61 In this case, the committee notes that subsection 18(6) includes a limited use immunity but no derivative use immunity. The committee considers it would be more appropriate if a derivative use immunity were included to ensure information or evidence indirectly obtained from a person could not be used in evidence against them. The lack of a derivative use immunity has not been addressed in the explanatory memorandum.

1.62 The committee also considers that it would be more appropriate if the Inspector-General considered other less coercive avenues to obtain information prior

36 *Sorby v Commonwealth* (1983) 152 CLR 281; *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328.

37 Statement of compatibility, p. 9.

to compelling a person to give evidence in circumstances where the privilege against self-incrimination is abrogated.

1.63 The committee requests the Attorney-General's more detailed advice regarding:

- **whether the bill could be amended to provide derivate use immunity; or**
- **at a minimum, provide that the Inspector-General must consider whether less coercive avenues are available to obtain the information prior to compelling a person to give information in circumstances which would abrogate the privilege against self-incrimination.**

Broad delegation of administrative powers or functions[38]

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

1.65 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 of why these are considered necessary should be included in the explanatory memorandum.

1.66 The explanatory memorandum states that:

> This amendment is intended to reflect the modern realities and the breadth of work of the office of the IGIS. Without the ability for the Inspector-General to delegate function, in some circumstances, it would be difficult to fulfil their statutory functions in a timely manner.[39]

1.67 The explanatory memorandum further notes some safeguards to this power, including that the Inspector-General can only delegate a power or function to

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

39 Explanatory memorandum, p. 43.

someone they consider has appropriate expertise to perform the functions or powers, and subsection 32AA(2) which requires that any delegated powers be exercised in a way that is compliant with the Inspector-General's written directions (if any).[40]

1.68 While noting this explanation, the committee is concerned with the breadth of powers or functions that can be delegated and to whom they can be delegated. It is not clear to the committee what the Inspector-General must consider before they believe someone has the appropriate expertise. Further, the committee generally does not consider the requirement to comply with any written directions as a sufficient safeguard.

1.69 The committee notes that it is sometimes appropriate to delegate powers to a wide range of staff in order to allow for administrative efficiency. However, the committee considers that it would be possible to achieve this administrative efficiency while still providing appropriate limits on the delegation power. The committee considers that it would be appropriate to amend the bill to limit the class of persons to whom powers or functions may be delegated or to set out with more specificity the powers or functions that may be delegated.

1.70 The committee requests the Attorney-General's advice as to whether subsection 32AA(1A) of the bill could be amended to limit the class of persons to whom powers or functions may be delegated or to set out with more specificity the powers or functions that may be delegated.

Reversal of the evidential burden of proof[41]

1.71 Schedule 1, part 2 of the bill makes a number of consequential amendments to various Acts to expand the scope of several offences. Many of these offences reverse the evidential burden of proof. Amongst other things, the amendments would update references to the 'Inspector-General of Intelligence and Security' to instead refer to an 'IGIS official', to reflect the expanded persons considered as staff assisting the Inspector-General in Schedule 1, part 1, item 126, proposed paragraphs 32(1)(c) and (d). Reverse evidential burdens already exist in exceptions to various offences in these Acts, but these proposed amendments would mean the exceptions to the offences may cover a broader group of people and/or cover broader functions. For

40 Explanatory memorandum, p. 43.

41 Schedule 1, part 2. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

instance, IGIS officials performing functions delegated by the Inspector-General would now be covered by these existing offences.[42]

1.72 For example, items 170-173 of Schedule 1 to the bill amend the *Australian Security Intelligence Organisation Act 1979* to substitute subsections 18(2B), 18A(2A), 18B(2A) and paragraph 35P(3)(f). These provisions currently provide for exceptions to secrecy offences. The amendments clarify the operation of these provisions as they relate to the exercise of powers by IGIS officials, such that it applies where an IGIS official is performing functions delegated by the Inspector-General of Intelligence and Security. In this instance, the amendments would provide that the existing secrecy offences would no longer apply where a person communicates information to an IGIS official. A defendant would bear an evidential burden in relation to this matter.

1.73 A further example is item 191 of Schedule 1 which introduces an exception to the offence in section 41 of the *Intelligence Services Act 2001*. Section 41 of the *Intelligence Services Act 2001* provides that a person commits an offence if they publish the identity of an Australian Secret Intelligence Service staff member. Proposed 41(2) introduces an exception if the person identifies the person to an IGIS official, for the purpose of the IGIS official exercising a power, or performing a function or duty, as an IGIS official. A note to proposed subsection 41(2) clarifies that a defendant bears an evidential burden in relation to the matter, introducing a reverse evidentiary burden.

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

1.75 While in these provisions 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.

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42 Items 170-173 substituting subsections 18(2B), 18A(2A), 18B(2A) and paragraph 35P(3)(f) to the *Australian Security Intelligence Organisation Act 1979*; item 177 inserting paragraph 15LC(4)(db) to the *Crimes Act 1914*; item 178 amending subparagraph 122.5(3)(a)(i) in the *Criminal Code 1995*; items 181-189 substituting subsections 39(3), 39A(3), 40(3), 40B(3), 40C(2A), 40D(2A), 40E(2A), 40F(2A), 40G(2A), 40H(2A), 40L(2A) and 40M(2A) in the *Intelligence Services Act 2001*; item 200 substituting section 355-185 in the *Taxation Administration Act 1953*; items 217-222 substituting paragraphs 181A(6)(c), 182(2)(b), 182(3)(b), 182B(c) and (d) and inserting paragraphs 181B(3)(c) and 181B(6)(c) into the *Telecommunications (Interception and Access) Act 1979*.

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

1.76 The explanatory memorandum explains that the notes at the end of the new subsections (which contain the reversed evidential burden) is not a substantive change.[44] While most of these amendments do not introduce a reversed evidential burden, the committee is concerned that the provisions expand the number of people or the circumstances in which they may seek to rely on the exceptions to the offences in relation to matters which do not appear to be peculiarly within the knowledge of the defendant.

1.77 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 provisions across various Acts rather than including these matters as elements of the offence.

44 Explanatory memorandum, p. 58.

National Reconstruction Fund Corporation Bill 2022

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

Section 96 Commonwealth grants to the states[45]

1.78 This bill seeks to establish a National Reconstruction Fund Corporation (the Corporation). The Corporation would be a corporate Commonwealth entity,[46] whose functions would include investment functions, and liaising with relevant persons and bodies to support those investment functions.[47] Clause 63 of the bill sets out the Corporation's investment functions in greater detail, including by providing that the Corporation may provide financial accommodation to the states and territories where financial accommodation relates to an economic priority area and is provided by way of a grant of financial assistance.[48] Clause 66 provides that the terms and conditions on which financial accommodation to a state or territory is provided must be set out in a written agreement between the Corporation and the state or territory.

1.79 The committee notes that section 96 of the Constitution confers on the Parliament the power to make grants of financial assistance to the states and to determine the terms and conditions attaching to them. Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory. More generally, the committee's view is that, where it is proposed to allow the expenditure of a potentially significant amount of public money, the expenditure should be subject to appropriate parliamentary scrutiny and oversight.

1.80 In this regard, the committee is concerned that the bill contains no guidance on its face as to how the broad power to make grants is to be exercised, nor any

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

46 Clause 11.

47 Clause 12.

48 Paragraph 63(1)(d).

information as to the terms and condition of the grants, other than that they must be set out in a written agreement.

1.81 The committee is also concerned that there is no requirement to table in the Senate written agreements between the Commonwealth and the states and territories. Such a requirement would ensure that senators are at least made aware of, and have an opportunity to debate, any agreements made under clause 66 of the bill. In this context, the committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are made available through other means, for example, by being published online.

1.82 Where a bill provides for a broad discretionary power to make an arrangement for granting financial assistance, including to the states and territories, the committee expects the explanatory memorandum to: justify why a broad discretionary power is necessary; to address what limits or terms and conditions will apply to the making of the grants; and to explain how an appropriate level of parliamentary scrutiny will be maintained. In this instance, the explanatory memorandum provides no explanation, merely re-stating the effect of the provision.

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

- **why it is considered necessary and appropriate to confer a broad power to make grants of financial assistance in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised;**
- **whether the bill can be amended to include at least high-level guidance as to the terms and conditions on which financial assistance may be granted; and**
- **whether the bill can be amended to include a requirement that written agreements with the states and territories for grants of financial assistance made under clause 66 are:**
  - **tabled in the Parliament within 15 sitting days after being made; and**
  - **published on the internet within 30 days after being made.**

Exemption from disallowance
Broad discretionary power[49]

1.84 Clause 51 provides for the establishment of the National Reconstruction Fund Corporation Special Account (the Special Account). The explanatory memorandum states that it is intended that returns on investments made by the Corporation will be

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

credited into the Special Account and subsequently made available for future investments.[50] Subclause 52(1) provides that $5 billion must be credited into the Special Account upon commencement of the Act. In addition, subclause 52(2) empowers the Ministers[51] to determine a specified amount to be credited to the Special Account. The amount that may be credited under subclause 52(2) is substantial, noting that, in addition to the $5 billion credited upon commencement of the Act, subclause 52(4) provides that the Ministers must ensure the total of the amounts credited to the account before 2 July 2029 is equal to $10 billion. Subclause 52(5) provides that while such a determination is a legislative instrument, it is not subject to disallowance.

1.85 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.[52]

1.86 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*,[53] and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[54]

1.87 In light of these comments and the resolution of the Senate, the committee expects the explanatory materials for a bill exempting delegated legislation from disallowance to set out the exceptional circumstances which justify the exemption and how they apply to the provision in question. The committee's already significant scrutiny concerns in relation to an unjustified exemption from disallowance are

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50 Explanatory memorandum, p. 27.

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

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

53 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.

54 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).

heightened when the instrument in question would allow the crediting of a potentially significant amount of public money, as in this case. In this instance the explanatory memorandum states:

> A determination made under subclause 52(4) [sic] will not be disallowable. Given that Parliamentary approval of this Bill will constitute approval of the total $15 billion appropriation provided for by subclauses 52(1) and (2), it is not necessary to provide for further parliamentary scrutiny of the timing of particular transfers to the Special Account.[55]

1.88 The committee does not consider that this is an adequate justification for removing democratic oversight over a law of the Commonwealth.

1.89 Section 1 of the Constitution vests legislative power in the Federal Parliament. Legislative scrutiny, including scrutiny of delegated legislation made by the executive, is a core component of this central law-making role of Parliament. Moreover, the system of responsible and representative government established by the Constitution requires the Parliament, as the representative branch of government, to hold the executive to account. Exemptions from disallowance undermine the ability of Parliament to properly undertake its scrutiny functions and, therefore, have significant implications for both the system of responsible and representative government established by the Constitution and for the maintenance of Parliament's constitutionally conferred law-making functions. Any exemption from disallowance should be considered in the context of its interaction with these twin considerations.

1.90 In addition, the committee is concerned that the Ministers' discretionary power to credit an amount to the Special Account is overbroad. The committee generally expects that guidance in relation to the exercise of a discretionary power will be included within the primary legislation. The committee considers that it may be appropriate to provide further guidance on the face of the bill as to the amount that may be credited to the Special Account. In particular, the absence of an express cap on the amount that may be credited by delegated legislation heightens the committee's concerns. The committee therefore considers that it would be appropriate to, at a minimum, set out clear limits on the amount that may be credited under a determination. Further, the committee considers that it would be possible to provide an inclusive list of matters which the Ministers may take into account prior to making a determination, without limiting the flexibility available to the Ministers under subclauses 52(2).

1.91 The committee also expects that the inclusion of broad discretionary powers will be justified in the explanatory memorandum. In this instance, the explanatory memorandum does not appear to justify the broad discretionary power or the use of delegated legislation. Given this lack of justification it is difficult to assess what further limits or guidance may be appropriate for inclusion within the bill.

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55 Explanatory memorandum, p. 28.

1.92 In light of the above, the committee requests the minister's detailed advice as to whether the bill could be amended to:

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

Significant matters in delegated legislation
Exemption from disallowance[56]

1.93 Clause 71 provides that the Ministers may, by legislative instrument, give the Board directions about the performance of the Corporation's investment functions or powers by way of an investment mandate. A direction issued under clause 71 could cover a broad range of significant matters, including for example, the policies to be pursued by the Corporation in relation to:

- matters of risk and return;
- the allocation of investments of the Corporation between the various priority areas of the Australian economy;
- the types of derivatives which the Corporation may acquire;
- national security;
- broad operational matters; and
- the types of financial accommodation that may be provided to constitutional corporations, the states and territories and other entities by a Corporation body and the circumstances in which they may be provided.

1.94 The committee's consistent scrutiny view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Given the importance of parliamentary oversight and control of the expenditure of public money, the committee considers that the authorisation of expenditure should, generally, be enacted via primary legislation, rather than delegated to the executive. The committee expects there to be appropriate safeguards within the primary legislation that guide and constrain the exercise of these powers.

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

In this regard, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.95 In addition, as ministerial directions, such mandates are not subject to disallowance. As noted above, the committee's expectation is that any exemption from disallowance will be extensively justified within the explanatory materials to the bill. Such a justification should include a discussion of the exceptional circumstances that are said to justify the exemption. In this instance, the explanatory memorandum states:

> This clause establishes a framework for the Government to give guidance to the Board while preserving the Board's role in making investment decisions independently from Government. It is appropriate that the Government, as manager of the economy, have a mechanism for articulating its broad expectations for how the Corporation's funds are invested and managed by the Board.
>
> …
>
> It is appropriate for the Investment Mandate to not be subject to disallowance. Making the instrument subject to disallowance would introduce significant operational uncertainty for the Corporation and would be inconsistent with like instruments for other entities, including the Clean Energy Finance Corporation and the Northern Australia Infrastructure Facility.[57]

1.96 The committee acknowledges that it may be appropriate for the bill to establish a mechanism within delegated legislation for the government to set out its expectations in relation to the Corporation's investment functions. However, the committee remains concerned in relation to the lack of legislated limits in the bill mandating what may or may not be included within such a determination.

1.97 In relation to the exemption from disallowance, the committee does not consider that consistency with existing legislation is a sufficient justification. Further, the committee does not consider that a desire to provide certainty is a sufficient justification for limiting the usual disallowance process in relation to an instrument. While the committee acknowledges that the possibility of disallowance presents some degree of uncertainty, the committee notes that this level of uncertainty is in many ways inherent to lawmaking within Australia's system of representative government and applies equally to primary legislation which is subject at any time to amendment or repeal by the Parliament.

1.98 In light of the above, the committee requests the minister's detailed advice as to whether the bill could be amended to provide that investment mandates are

57 Explanatory memorandum, pp. 37-38.

subject to disallowance to ensure that they receive an appropriate level of parliamentary oversight.

Broad delegation of administrative powers or functions[58]

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

1.100 The committee has consistently drawn attention to legislation that allows the delegation of a broad range of administrative powers or functions 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 (SES). Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. In this instance, the explanatory memorandum states:

> Allowing the CEO to delegate or subdelegate their powers or functions to staff, who would undertake the tasks concerned is a normal administrative arrangement. While some powers (for example, large spending decisions, recruitment decisions etc.) would be limited to executive level staff, it is important to make the power unfettered to ensure administrative efficiency so that, for example, executive staff are not required to authorise every grant of leave to staff members or the expenditure of small sums of money on routine tasks.
>
> The CEO remains accountable to the Board for the performance of their duties which includes managing and monitoring the activities of those officials who perform the tasks under delegation.
>
> Delegates must comply with any directions given by the CEO when exercising powers under a delegation or subdelegation. Subdelegates will also be required to comply with the directions of the Corporation or the Board to the CEO. This ensures that appropriate oversight and limits can be placed on any delegated or subdelegated powers.[59]

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

59 Explanatory memorandum, p. 47.

1.101 While noting this explanation, the committee considers that a desire for administrative efficiency is not, of itself, sufficient justification for allowing a broad delegation of administrative powers. The committee notes that it is sometimes appropriate to delegate powers to a wide range of staff in order to allow for administrative efficiency. However, the committee considers that it would be possible to achieve this without allowing delegation to any staff member. It is not clear to the committee why it would not be possible to provide at least high-level restrictions on either the powers and functions that may be delegated or the persons who may receive delegations. For example, the bill could be amended to include a requirement that the CEO must be satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated power or function.

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

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

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

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

Broad discretionary power[60]

1.103 Item 4 of Schedule 2 to the bill seeks to insert an amended form of section 72-20 into the *Private Health Insurance Act 2007* (the PHI Act). Proposed section 72-20 would provide the minister with a discretionary power to remove a kind of medical device or human tissue product from the list in the Private Health Insurance (Medical Devices and Human Tissue Products) Rules. This discretionary power is exercisable where a person who is liable to pay a cost-recovery fee or a levy has failed to do so.[61] Similarly, proposed section 72-25 would provide the minister with a discretionary power to direct that activities not be carried out where a person has failed to pay a cost-recovery fee or a levy.

1.104 Other than the fact that these powers are only exercisable upon non-receipt of a fee or levy payment, there is nothing on the face of the bill limiting or guiding the exercise of these discretions. The committee is therefore concerned about the breadth of each discretion, particularly given that the exercise of the power under either proposed section 72-20 or 72-25 appear to have the potential to affect an individual's rights or interests. The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum and that guidance in relation to the exercise of the power should be included within the primary legislation.

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

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

In this instance, the explanatory memorandum states in relation to proposed section 72-20 that:

> New section 72-20 provides discretion because it would be inappropriate, for example, to require removal of a listing for non-payment of cost recovery fees or levies if this would adversely affect patient health. The provision therefore allows the Minister to retain a listing where, for example, that is in the best interests of patients and clinicians, even though the sponsor has not paid cost-recovery fees or levies.
>
> The decision to retain or remove the listing for unpaid cost-recovery fees or levies is an objective decision (as fees are either paid or not paid). However, the decision may involve consideration of a significant public interest element for patients that require treatment with the relevant medical device or human tissue products. The decision to retain a listing would also require an evaluation of complex technical information (scientific and economic) about the value of a medical device or human tissue product in Australia's health system; for example, whether retaining a listing would be in the best interests of patients and clinicians (rather than sponsors).[62]

1.105 The explanatory memorandum provides a similar explanation in relation to the minister's discretionary power under proposed section 72-25.[63]

1.106 While acknowledging these explanations, the committee considers that it would have been possible to provide the necessary breadth to ensure that the minister is not unduly limited in exercising the power given the complex scientific and economic considerations the minister may be required to take into account, while still providing appropriate safeguards in relation to the exercise of the power. The committee considers that it would have been more appropriate to include the considerations outlined in the explanatory memorandum as considerations within the bill. For example, by providing that the minister may, or must, consider whether removing a listing would adversely affect patient health, whether retaining a listing would be in the best interests of patients and clinicians and whether retaining or removing a listing would be in the public interest.

1.107 In light of the above, the committee requests the minister's advice as to whether the bill could be amended to provide a list of considerations, or limitations, in relation to the broad discretionary powers set out at proposed section 72-20 and proposed section 72-25 of the bill.

62 Explanatory memorandum, p. 18.

63 Explanatory memorandum, pp. 18-19.

Public Interest Disclosure Amendment (Review) Bill 2022

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

Reversal of the evidential burden of proof[64]

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

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

1.110 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[65] 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

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

65 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.

defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.111 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.

1.112 The explanatory memorandum states that requiring the prosecutor to prove that the relevant conduct was not reasonable administrative action is 'a significantly higher onus for the prosecution to discharge' and 'is also more costly for the prosecution to disprove than for the defendant to establish these matters'. It further states that 'the question of whether something is reasonable administrative action will be peculiarly within the knowledge of the defendant, and will not be known to the prosecution'.[66]

1.113 The committee considers that whether an administrative action is 'reasonable' is not a matter *peculiarly* within the knowledge of the defendant but is an objective test. Determining whether something is a reasonable administrative action is therefore something knowable to the prosecution and is a question of law.

1.114 The committee further notes that subsection 13(3) of the principal Act provides that reasonable administrative action is not an element of the definition of taking a reprisal. The committee considers this approach could be carried over to the proposed section 19 offence, such that engaging in reasonable administrative action could be considered not an element of the offence of taking a reprisal, rather than as an exception (offence-specific defence).

1.115 The committee requests the minister's advice as to why determining whether conduct is reasonable administrative action is considered *peculiarly* within the knowledge of the defendant.

1.116 The committee suggests that it may be appropriate for the bill to be amended to provide that a reasonable administrative action is specified as not an element of the offence, rather than as an exception to the offence. The committee also requests the minister's advice in relation to this matter.

Broad delegation of administrative powers or functions[67]

1.117 Item 18 of Schedule 2 to the bill substitutes section 77 to expand the delegation powers of the Ombudsman and the Inspector-General of Intelligence and Security (IGIS). This provision allows the Ombudsman and the IGIS to delegate any or

66 Explanatory memorandum, p. 40.

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

all of their functions or powers under the PID Act to a public official belonging to the agency, which includes contracted service providers and employees of contracted service providers, and aligns the delegation powers of the Ombudsman and IGIS with the principal officers of other agencies.

1.118 Proposed subsection 77(2) provides that a person exercising functions or powers under a delegation must comply with any directions of the principal officer who delegated the function or powers.

1.119 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.

1.120 The explanatory memorandum explains that under the current Act, unlike other Commonwealth agencies, the Ombudsman 'cannot delegate functions to external contractors who may be engaged to undertake PID investigations' and 'the engagement of contractors to undertake specified work is a common practice in Commonwealth agencies, as contractors can have unique expertise or experience which make them best placed to consider a particular matter'.[68]

1.121 While it may be appropriate for some officers with appropriate skills and experience to exercise particular delegated powers or functions, the explanatory memorandum does not explain why it is appropriate to include such a broad delegation power to officials at *any* level. The committee does not consider a requirement of compliance with any directions of the principal officer who delegated the function or power to be a sufficient safeguard in and of itself.

1.122 The committee's concerns are heightened by the power to delegate 'any or all' functions or powers under this Act, as the Act contains significant powers relating to the sharing and reporting of personal information.

1.123 The committee requests the minister's advice as to why it is necessary and appropriate to allow any or all of the powers or functions of a principal officer to be delegated to a public official who belongs to the agency (which includes any APS employee at any level and contractors).

1.124 The committee requests the minister's advice as to whether the bill could be amended to:

68 Explanatory memorandum, p. 69.

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

Immunity from civil and criminal liability[69]

1.125 Item 40 of Schedule 1, part 3 of the bill seeks to insert subsections 12A(3)-(5) into the PID Act. These proposed subsections provide immunity from civil, criminal or administrative action (including disciplinary action) and immunity from enforcement of remedies or rights to witnesses. Proposed subsection 12A(1) defines a witness as any person providing assistance in relation to a public interest disclosure other than the discloser. Proposed subsection 12A(5) also provides that a witness has absolute privilege in proceedings for defamation in respect of the assistance provided, and a contract to which the witness is a party must not be terminated on the basis that the assistance provided constitutes a breach of the contract.

1.126 Item 19 of Schedule 2 to the bill seeks to insert proposed paragraph 78(1)(c) into the PID Act to extend immunity from any disciplinary action, or criminal or civil liability. Currently, the Act provides immunity for a principal officer or their delegate, an authorised officer or a supervisor of a person who makes a disclosure for, or in relation to, an act or matter done, or omitted to be done, in good faith in the performance or purported performance of any function conferred on the person by the Act, or in the exercise or purported exercise of any power conferred on the person by the Act. This provision extends the immunity to include a person assisting a principal officer of an agency or a delegate of the principal officer in doing anything in relation to the above.

1.127 Providing immunity from civil liability would remove any common law right for an individual to bring an action to enforce legal rights (for example, a claim of defamation), unless it can be demonstrated that a lack of good faith is shown.[70] The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve a personal attack on the honesty of a

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

70 Where a provision does not specifically provide that good faith is required, there is some judicial support for the position that good faith may be implied in relation to acts undertaken by public officers, see *Little v Commonwealth* (1947) 75 CLR 94 [103].

decision-maker. As such, the courts have taken the position that bad faith can only be shown in very limited circumstances. The committee expects that if a bill seeks to provide immunity from civil or criminal liability, particularly where such immunity could affect individual rights, this should be soundly justified. This is particularly the case when a broad immunity is provided.

1.128 In this case, providing witnesses with these protections (a witness being anyone providing assistance in relation to a public interest disclosure other than the discloser) in section 12A and persons providing assistance to a principal officer or delegate in paragraph 78(1)(c) will extend the existing immunity to a much broader class of people, and therefore the committee expects the proposed immunity from liability to be soundly justified given this limitation on personal rights.

1.129 In relation to proposed section 12A, the explanatory memorandum states that it 'would enable witnesses to contribute to PID [public interest disclosure] investigations without the threat of reprisal and assist agencies to investigate disclosures more effectively' and aligns the protections for witnesses with protections for disclosers.[71] In relation to paragraph 78(1)(c), the explanatory memorandum states that this provision would 'reassure public officials providing assistance to the principal officer in relation to a disclosure by reducing their civil liability for actions done in good faith in providing such assistance. This would, in turn, support better investigations of disclosures and facilitate a pro-disclosure culture within government.'[72]

1.130 The committee considers that providing reassurance to public officials, who already hold existing obligations to use their best endeavours to assist the principal officer to perform their functions under the Act,[73] is not a sufficient reason in itself to provide extensive immunities to such a broad class of individuals. Supporting better investigations and cultural change can be sought through other means, including amendments already proposed in the bill, for example proposed sections 59 and 60A which provide additional obligations on principal officers and supervisors to, amongst other things, facilitate public interest disclosures, provide training and education about the PID Act and to protect public officials from reprisals. The committee considers that while it is important to include measures to support the functioning of the scheme, consideration should also be given to whether all of the immunities are reasonable in this context and whether there are other measures that could support the public interest disclosure scheme while also reducing the limitation on the personal rights of individuals to bring a civil action. While the committee acknowledges the importance of the public interest disclosure scheme set out in the PID Act and that it may be appropriate to provide immunity from civil liability in some

71 Explanatory memorandum, p. 34.

72 Explanatory memorandum, p. 70.

73 *Public Interest Disclosure Act 2013*, section 61.

circumstances, it considers that more justification for the immunity would be appropriate in this case.

1.131 The committee requests the minister's more detailed advice as to why it is considered necessary and appropriate to give an individual providing assistance in relation to a public interest disclosure under proposed section 12A, and a person assisting a principal officer of an agency or a delegate of the principal officer under proposed paragraph 78(1)(c), with immunity from civil liability, such that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown.

1.132 The committee's consideration of this issue will be assisted if the minister's advice addresses what, if any, alternative protections are afforded to an affected individual given that the normal rules of civil liability have been limited by the bill.

Referendum (Machinery Provisions) Amendment Bill 2022

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

Reversal of the evidential burden of proof[74]

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

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

1.135 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[75] 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.

1.136 The committee expects any such reversal of the evidential burden of proof to be justified. In this instance the explanatory memorandum states:

> It is appropriate to place the burden of proof on the defendant in this context because it will be peculiarly within the knowledge of the defendant whether the communication or intended communication of the matter meets an exception as provided by new subsection 3AA(6). That is, the defendant has full knowledge as to whether they have completely met the

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

75 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.

criteria for the offence-specific defence, and may be able to provide evidence to this.[76]

1.137 As alluded to in this explanation, the *Guide to Framing Commonwealth Offences*[77] states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[78]

1.138 In this case, it is not apparent that several of the matters relevant to a proposed subsection 3AA(6) defence would be *peculiarly* within the defendant's knowledge. For example, it appears that whether the communication or intended communication of a referendum matter occurred in the House of Representatives or the Senate or whether the referendum matter forms part of the reporting of news are matters that the prosecution could readily ascertain. These matters therefore appear to be more appropriate to be included as elements of the offence.

1.139 The committee considers it is not appropriate to reverse the evidential burden of proof in relation to matters that are not peculiarly within the knowledge of the defendant. The committee therefore requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[79]

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

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76 Explanatory memorandum, p. 20.

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

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

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

Henry VIII clause – modification of primary legislation by delegated legislation[80]

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

1.142 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the executive. As such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum. In this instance, the explanatory memorandum provides no explanation, merely restating the effect of the provision.

1.143 The committee notes the safeguards in place in relation to the making of a legislative instrument under proposed section 144A, including a requirement that the Electoral Commissioner notify the Prime Minister and the Leader of the Opposition and publish the instrument on the Electoral Commission's website. The committee further notes that the instrument will be time limited so that it sunsets at the earlier of the time the relevant emergency declaration is revoked or when the writs for the election to which the instrument relates are returned.

1.144 The committee previously raised scrutiny concerns in relation to a similar provision in the Electoral Legislation Amendment (Contingency Measures) Bill 2021 in *Scrutiny Digest 17 of 2021*.[81] In that instance, the explanatory memorandum stated:

> Voting, as both a constitutional right and a legislated duty, is fundamental to the concept of Australian citizenship. Subsection 396(3) is designed to ensure core activities that occur as part of in-person voting, such as

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

81 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021* (24 November 2021) pp. 9–10.

> canvassing for votes are protected, and allow elections to occur as closely as possible to their ordinary conduct, as they should.
>
> This will enable the AEC to conduct an election safely by minimising the risk of harm to electors, employees and contractors when a Commonwealth emergency law is in force, whilst maintaining transparency of the electoral process. If the Commissioner permits such activity under the Act, travel for purposes of that activity is to be permitted by the Commissioner.[82]

1.145 It is unclear to the committee why this explanation has not been included in the explanatory memorandum for the bill.

1.146 In light of the above, the committee requests the minister's advice as to why it is considered necessary and appropriate to allow delegated legislation to modify the operation of the *Referendum (Machinery Provisions) Act 1984*.

Broad discretionary power
Significant matters in delegated legislation[83]

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

1.148 The committee's consistent scrutiny view is that significant matters should be included in the primary legislation unless a sound justification is provided for the use of delegated legislation. The prescription of matters which fundamentally impact on a person's right to vote are one such matter. In this instance, the explanatory memorandum contains no justification as to why the list of relevant legislation in proposed subsection 144A(8) can be expanded by delegated legislation.

1.149 The committee also considers that the provision gives the minister a broad discretionary power in circumstances where there is no guidance on the face of the primary legislation in relation to the circumstances where the power can be exercised. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed

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82 Explanatory memorandum, p. 9.

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

changes in the form of an amending bill. Noting the significant nature of the power to modify electoral law in proposed section 144A, the committee considers that any additions to the definition of Commonwealth emergency law should be contained in primary legislation or, at a minimum, that high-level guidance should be included as to when additional legislation can be specified by legislative instrument.

1.150 The committee previously raised scrutiny concerns in relation to a similar provision in the Electoral Legislation Amendment (Contingency Measures) Bill 2021 in *Scrutiny Digest 17 of 2021*.[84] The then minister advised that there is often significant uncertainty during emergency situations, and that this uncertainty combined with the dissolution of Parliament shortly before an election, means it is necessary and appropriate to allow for the use of delegated legislation. The then minister also advised that further guidance is not required as to when the instrument-making power should be exercised, because such legislative instruments will be subject to parliamentary scrutiny.[85]

1.151 It is unclear to the committee why this explanation has not been included in the explanatory memorandum for the bill. In addition, while acknowledging this explanation, it is unclear to the committee why at least high-level guidance as to when additional legislation can be specified by legislative instrument cannot be included in the primary legislation.

1.152 Nothing the above, the committee requests the minister's more detailed advice as to:

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

Broad discretionary power[86]

1.153 Item 2 of Schedule 5 to the bill seeks to insert proposed subsection 202AH(1) into the *Commonwealth Electoral Act 1918* (the Electoral Act) to provide that the Electoral Commissioner may declare that an elector is a 'designated elector' if the

84 Senate Scrutiny of Bills Committee, *Scrutiny Digest 17 of 2021* (24 November 2021) pp. 10–11.

85 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2022* (4 February 2022) pp. 37–39.

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

Electoral Commissioner reasonably suspects that the elector has voted more than once in a referendum. Proposed section 46AA provides that a designated elector may only vote by declaration vote, which includes a postal vote, a pre-poll declaration vote, an absent vote, or a provisional vote but does not include an ordinary vote or an ordinary pre-poll vote.

1.154 The committee notes that the bill provides no guidance on its face as to what considerations the Electoral Commissioner may take into account in forming a reasonable suspicion that an elector has voted more than once in a referendum and then making a decision to declare a person as a designated elector. As such, the committee considers that the bill provides the Electoral Commissioner with a broad discretionary power to declare an elector a designated elector. The committee expects that the inclusion of broad discretionary powers should be justified in the explanatory memorandum. In this instance, the explanatory memorandum explains that:

> A reasonable suspicion can be determined by any means available to the Electoral Commissioner. For example, this may include consideration of records of certified-lists, which contain multiple-marks recorded against an elector's name as having voted more than once in a single election.[87]

1.155 While noting this explanation, it is unclear to the committee why additional guidance, including the example set out in the explanatory memorandum, cannot be included on the face of the primary legislation. The committee considers that this would provide legislative guidance as to the appropriate exercise of the power to declare a person a designated elector. As a result, the committee considers that it may be appropriate to, at a minimum, amend the bill to include an inclusive list of considerations that the Electoral Commissioner may take into account when exercising the power set out at proposed section 202AH. The committee's scrutiny concerns in this instance are heightened noting that the power to declare that a person is a designated elector would restrict a person's voting options at an election.

1.156 The committee previously commented on section 202AH in relation to the Electoral Legislation Amendment (Electoral Offences and Preventing Multiple Voting) Bill 2021 (the 2021 bill) in its *Scrutiny Digest 13 of 2021*.[88] In response to the committee's concerns in relation to the 2021 bill, the then assistant minister advised that sufficient guidance as to the appropriate exercise of the power to declare a person a 'designated elector' was set out in the explanatory memorandum. The then assistant minister further advised that review of a decision to declare a person a 'designated

87 Explanatory memorandum, p. 42.

88 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2021* (25 August 2021) pp. 8–9.

elector' is provided in proposed sections 202AJ and 202AK of the *Commonwealth Electoral Act 1918*.[89]

1.157 The committee does not consider that sufficient guidance has been provided, noting the importance of section 202AH to a person's right to vote, and the fact that the bill provides no guidance on its face as to what considerations the Electoral Commissioner may take into account in forming a reasonable suspicion that an elector has voted more than once in a referendum.

1.158 The committee remains of the view that section 202AH of the *Commonwealth Electoral Act 1918* provides the Electoral Commissioner with a broad discretionary power to declare an elector a 'designated elector'. Therefore, the committee requests the minister's advice as to whether the bill can be amended to include at least high-level guidance as to the factors the Electoral Commissioner may take into account when determining that an elector should be declared a 'designated elector'.

89 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2021* (1 September 2021) pp. 16–17.

Safeguard Mechanism (Crediting) Amendment Bill 2022

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

Significant matters in delegated legislation[90]

1.159 The Safeguard Mechanism is a framework set up under the *National Greenhouse and Energy Reporting Act 2007* (NGER Act) which requires certain large greenhouse gas emitters to maintain emissions below a legislated baseline emissions limit. Regulated entities are required to purchase and surrender Australian Carbon Credit Units (ACCUs) if they exceed this emissions limit. ACCUs are intended to represent an amount of greenhouse gas emissions that have been reduced or avoided by a regulated entity. A regulated entity that has exceeded the emissions limit is therefore said to have offset any additional emissions by purchasing and surrendering ACCUs.

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

1.161 Much of the detail as to how the new Safeguard Mechanism framework will operate is not set out within the bill but is instead left to delegated legislation. Details that are left to delegated legislation include several matters which appear to relate directly to the scope and operation of the scheme. For example, proposed section 22XNA provides that the Clean Energy Regulator may, on behalf of the Commonwealth, issue SMCs to one or more persons in relation to certain activities involving greenhouse gas emissions, the production of energy or the consumption of

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

energy.[91] However, the detail as to how this would occur is not set out within the primary legislation. Other rule-making powers found within Schedule 1 include rules on the process for the surrender of SMCS,[92] and rules outlining how audit processes are intended to operate.[93]

1.162 The committee is concerned that Schedule 1 is characterised by the inclusion of 'framework provisions' which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scheme's scope and operation. The committee has longstanding concerns with framework provisions because they considerably limit the ability of Parliament to have an appropriate oversight over new legislative schemes.

1.163 In relation to the framework nature of the bill, the explanatory memorandum explains:

> The NGER Act provides for safeguard rules on the detailed elements of the framework for issuing SMCs such as application processes, the number of units issued, how that number is worked out, conditions that may be imposed, and any rights of review or reconsideration. This structure is necessary because the crediting framework is inextricably linked to the technical details of how Safeguard baselines are determined. As baseline determinations are set out in the safeguard rules, it is appropriate for the details of the crediting framework to also be set out in the safeguard rules. In addition, item 37 of Schedule 1 of the Bill requires the Minister to only make safeguard rules that are consistent with the objects of the NGER Act.
>
> The provisions in the ANREU Act for delegated legislation related to SMCs essentially ensure consistent treatment with ACCUs.[94]

1.164 The committee acknowledges that it is sometimes appropriate to include certain administrative and technical matters within delegated legislation, particularly when establishing new, or substantially altered, legislative schemes. For example, highly technical scientific information may be included within delegated legislation on the basis that the law-making process should involve considerable input from experts within the executive. The committee acknowledges that the Safeguard Mechanism framework will rely to a large degree on such technical information. However, it appears that much of the detail that is left to delegated legislation cannot be characterised as technical or administrative in nature. For example, it is unclear to the

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91 That is, the Clean Energy Regulator may issue credits in relation to facilities. See the definition of 'facilities' at section 9 of the *National Greenhouse and Energy Reporting Act 2007.*

92 Schedule 1, item 27, proposed subsection 22XK(2); item 28, proposed subsection 22XK(2A); item 31, proposed 22XK(2A).

93 Schedule 1, item 55, proposed subsection 74AA(3).

94 Explanatory memorandum, p. 2.

committee why an individual's right to review of a decision under proposed section 22XNA could not be set out within the bill.

1.165 The committee does not disagree with the view expressed in the explanatory memorandum that it may be appropriate to include details of the crediting framework within delegated legislation. However, the committee is concerned that much of the crediting framework itself is being left to the rules. Requirements relating to review rights, the basic elements of application processes, the value of an SMC, limits or guidance on the issuing of SMCs, guidance in relation to surrendering SMCs and other fundamental aspects of the scheme are more appropriately characterised as part of the crediting framework and, as such, the committee is of the view that it may be more appropriate to include these details within the bill.

1.166 The committee also takes this opportunity to note that consistency with existing legislation is not a sufficient justification for including significant matters within delegated legislation.

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

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

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

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

Reversal of the evidential burden of proof[95]

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

1.169 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[96] 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.

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

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

1.170 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.

1.171 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.[97]

1.172 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that:

> An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.[98]

1.173 The committee therefore expects the explanatory materials for a bill which includes the defence of 'reasonable excuse' to include a justification as to why the defence is appropriate and an explanation as to why it is not possible to include more specific defences within the bill.

1.174 The explanatory memorandum states that:

> As well as being consistent with defences to similar existing offences…the inclusion of this defence is appropriate as the matters that might comprise a reasonable excuse would, in most cases, be peculiarly within the knowledge of the defendant and it would, therefore, not be possible for the prosecution to establish the absence of a reasonable excuse.[99]

1.175 In this case, the committee notes that the explanatory memorandum does not justify why a defence of reasonable excuse is appropriate in this context. Consistency with similar offences is not, in itself, a persuasive justification for including reasonable excuse as a defence to a proposed new offence. It is also not clear to the committee from this explanation how it can be said that a reasonable excuse would be peculiarly within the knowledge of the defendant.

1.176 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use a defence of reasonable

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

98 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 52.

99 Explanatory memorandum, p. 34.

excuse (which reverses the evidential burden of proof) for proposed subsection 45AC(3). The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[100]

Strict liability[101]

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

1.178 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 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.

1.179 The committee notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual or 300 penalty units for a body corporate.[102] When a penalty is higher, the committee expects this to be thoroughly justified in the explanatory memorandum, including by outlining the exceptional circumstances that justify the penalty and whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.

1.180 In relation to subsection 45AC(2), the explanatory memorandum states that:

> …the strict liability offence…is necessary because of the significance of non-compliance even where fault is not established. The inclusion of the strict liability offence reflects the importance of the Secretary being able to gather accurate information regarding potential contraventions of the Act so appropriate regulatory action may be taken if necessary, to protect

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

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

102 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 23.

> consumers from the supply, and advertising for supply, of therapeutic goods that are non-compliant with requisite regulatory obligations.
>
> The 100-penalty unit maximum for the strict liability offence is consistent with existing strict liability offence provisions in the Act for failure to comply with a notice (see for example, subsection 41JB(3B) of the Act) and is justified because of the potential risk to public health arising from the use or supply of non-compliant therapeutic goods and the importance of the Secretary being able to gather accurate information regarding potential contraventions of the Act so appropriate regulatory action may be taken if necessary.[103]

1.181 The explanatory memorandum provides a similar justification in relation to subsection 45AD(2).[104]

1.182 While this penalty may align with other penalties in the Act, the committee notes that proposed Schedule 5 introduces much broader information gathering powers for the Secretary. Currently, the Act limits who the Secretary can require the production of information or documents from to specified persons, for example sponsors or manufacturers of therapeutic goods. These proposed amendments broaden this power to allow the Secretary to require information or documents from anyone that may be relevant to an alleged contravention of the Act, therefore extending the potential application of the strict liability offences. Further, the committee generally expects that penalties distinguish between individuals and corporations so it is appropriately specific. The penalties in subsections 45AC(2) and 45AD(2) are drafted broadly and do not distinguish between individuals and corporations. The committee also does not consider that consistency with existing provisions is a sufficient justification for the imposition of penalties that are above those recommended in the *Guide to Framing Commonwealth Offences.* Rather, each provision must be justified on its own merits.

1.183 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of imposing a strict liability offence under proposed subsection 45AD(2), noting that the penalties imposed under that offence are above what is recommended in the *Guide to Framing Commonwealth Offences*.

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103 Explanatory memorandum, p. 34.

104 Explanatory memorandum, p. 35.

Procedural fairness[105]

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

1.185 Procedural fairness is a fundamental common law right that ensures fair decision-making. Amongst other matters, it includes requiring that people who are adversely affected by a decision are given an adequate opportunity to put their case before the decision is made (known as the 'fair hearing rule'). The fair hearing rule includes not only the right of a person to contest any charges against them but also to test any evidence upon which any allegations are based. Where a bill limits or excludes the right to procedural fairness the committee expects the explanatory memorandum to the bill to address the following matters:

- the nature and scope of the exclusion or limitation; and
- why it is considered necessary and appropriate to restrict a person's right to procedural fairness.

1.186 The explanatory memorandum clarifies that this amendment seeks to codify the Therapeutic Goods Administration's current practice. It further states that:

> …observing the requirements of the natural justice hearing rule would compromise the TGA's ability to provide health and safety information to stakeholders in a timely manner and is, therefore, contrary to the public interest. Any delay in the ability to release critically important safety information may have grave consequences for patients and public health, if critical safety information is not able to be disclosed urgently. This could even include the risk of death - for instance, if the public were not able to be informed about the risks posed by a particular product and continued to use the product, or if State or Territory health departments were not able to be alerted to particular adverse events associated with a product and were not able to work with practitioners or providers to limit (or cease) the use of the product.[106]

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

106 Explanatory memorandum, p. 48.

1.187 While acknowledging this explanation and the importance of conveying information relevant to public health and safety in a timely way, the committee considers that this does not, of itself, justify such a broad exclusion of the natural justice hearing rule. The committee notes that some of the information that can be released under section 61 may not, in all circumstances, be of such an urgent nature as to justify this exclusion. For example, in cases of potential tampering with therapeutic goods, it may sometimes be more appropriate to seek further information from the manufacturer before release.

1.188 The committee's concerns are heightened in this instance given the breadth of the information that may be released, and the potential effects of such a release on individuals. For example, subsection 61(5C) provides that the Secretary may release to the public therapeutic goods information of a kind specified under subsection 61(5D). Subsection 61(5D) provides that the minister may, by legislative instrument, specify kinds of therapeutic goods information. The kind of information that may be released to the public is therefore potentially very broad and may adversely affect a manufacturer or sponsor, for example, in circumstances where it may be more appropriate to seek further comment. While the committee notes that the Therapeutic Goods Administration *may* still observe the requirements of the natural justice hearing rule before releasing information, the committee considers that it would be preferable to narrow the exclusion of procedural fairness to circumstances where it is required for urgent public safety reasons.

1.189 In addition, the committee notes that the courts have consistently interpreted procedural fairness obligations flexibly based on specific circumstances and the statutory context. Consideration by the courts of the procedural fairness obligations that may arise in relation to an information disclosure power such as section 61 would include consideration of the urgency of the particular circumstances necessitating disclosure. Given the high degree of flexibility already applied by the courts to matters of procedural fairness, it is not clear to the committee why it is necessary to set out a broad exclusion from procedural fairness within the bill.

1.190 In light of this, the committee requests the minister's advice as to:

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

Incorporation of external material as existing from time to time[107]

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

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

1.193 The explanatory memorandum explains that this is important for flexibility and to maintain currency with international best practice, and any document incorporated from time to time would only occur after appropriate consultation with stakeholders affected by such instruments.[108]

1.194 While noting this explanation, the explanatory memorandum does not comment on whether the incorporated material will be made freely and readily available to all persons interested in the terms of the law.

1.195 The committee requests the minister's advice as to whether material incorporated from time to time will be made freely and readily available to all persons interested in the law.

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

108 Explanatory memorandum, p. 55.

Treasury Laws Amendment (Consumer Data Right) Bill 2022

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

Reversal of the evidential burden of proof[109]

1.196 Item 78 of Schedule 1 to the bill seeks to introduce new subparagraphs 56BN(1)(c)(iii) and (iv) into the section 56BN offence currently set out in the *Competition and Consumer Act 2010* (the Act). Section 56BN provides for an offence where a person engages in conduct that the person knows is misleading or deceptive and the conduct has the effect of making another person believe a person is a Consumer Data Right (CDR) consumer for CDR data, or is acting in accordance with a valid request or consent for the disclosure of CDR data. This amendment adds that it is also an offence if the effect of the conduct is making another person believe a person is a CDR consumer for CDR action, or believe a person has satisfied any criteria under the consumer data rules for the making of a request, the giving of a valid instruction or the processing of a valid instruction, for the performance of a CDR action. Subsection 56BN(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the conduct is not misleading or deceptive in a material particular. A defendant bears the evidential burden of proof in relation to this defence.[110]

1.197 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

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

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

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[111]

1.198 The committee expects that any reversal of the evidential burden of proof will be comprehensively justified in the explanatory materials for a bill. In this case, the statement of compatibility states that it would be unduly onerous to require the prosecution to prove the materiality of a matter, and that, by contrast, being able to produce this material should place no additional burden on the defendant.[112]

1.199 The committee commented on the inclusion of the reversed evidential burden in section 56BN when the section was initially introduced in the Treasury Laws Amendment (Consumer Data Right) Bill 2019 in *Scrutiny Digest 4 of 2019* and *Scrutiny Digest 5 of 2019*.[113] As this amendment expands the offence provision, the committee reiterates its comment that subsection 56B(2) be amended to be included as an element of the offence, rather than as a defence, as it is not clear that it relies on information *peculiarly* within the knowledge of the defendant.

1.200 The committee considers that the justification made in the statement of compatibility is overbroad, given the numerous matters which could conceivably be included within an assessment of whether a matter is significant enough to be considered a material particular. If it is intended that the matters that would, in practice, be required to be adduced under subsection 56B(2) are more specific, such as the example provided in the statement of compatibility in relation to consent documents, the committee considers that it would be appropriate to amend the bill so that the offence-specific defence includes those matters.

1.201 The committee requests the Treasurer's advice in relation to the inclusion of subsection 56B(2) as an offence-specific defence, rather than as an element of the offence.

Incorporation of external material as in force from time to time[114]

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

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

112 Statement of compatibility, p. 53.

113 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2019* (31 July 2019) pp. 31–33; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2019* (11 September 2019) pp. 83–85.

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

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

1.204 The committee previously commented on the accessibility of materials incorporated from time to time in section 56GB when the section was initially introduced in the Treasury Laws Amendment (Consumer Data Right) Bill 2019 in *Scrutiny Digest 4 of 2019* and *Scrutiny Digest 5 of 2019*.[115]

1.205 The explanatory memorandum provides a justification as to why materials need to be incorporated from time to time as it 'is important to have flexibility for delegated legislation in the CDR because of the broad range of sectors the CDR could apply to and the corresponding range of standards, codes and other regulatory instruments that may have relevant material'.[116] The explanatory memorandum does not comment on whether the incorporated material will be made freely and readily available to all persons interested in the terms of the law.

1.206 The committee requests the Treasurer's advice as to whether material incorporated from time to time will be made freely and readily available to all persons interested in the law.

Immunity from civil and criminal liability
Reversal of the evidential burden of proof[117]

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

1.208 The immunities provided for in proposed subsection 56GC(1) would remove any common law right to bring an action to enforce legal rights (for example, a claim of defamation), unless a lack of good faith can be shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will

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115 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2019* (31 July 2019) pp. 33–34; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2019* (11 September 2019) pp. 85–86.

116 Explanatory memorandum, p. 44.

117 Schedule 1, items 180 and 181, proposed subsection 56GC(1). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

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

1.209 The committee expects that if a bill seeks to provide immunity from civil and criminal liability, particularly where such immunity could affect individual rights, this should be soundly justified within the explanatory materials for the bill. In this instance, the explanatory memorandum has not provided an explanation for the inclusion of the immunity.

1.210 The committee also has concerns in relation to the reversal of the evidential burden of proof. As noted above, provisions that reverse the burden of proof and require the defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with the common law right to be presumed innocent until proven guilty. Generally, 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.[118]

1.211 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 explains that this is appropriate as the person will know whether or not they received evidence of a valid consent or request and otherwise met their CDR obligations. As this material will be within a person's knowledge, it should place no additional burden on the person.[119]

1.212 In this instance, it is not clear that the information would be *peculiarly* within the knowledge of the defendant, or that it would be difficult or costly for the prosecution to establish the matters. For example, it would appear that the prosecution could readily ascertain whether the person met their CDR obligations or otherwise complied with any laws specified in regulations.

1.213 The committee requests the Treasurer's advice as to:

- **why it is necessary and appropriate to confer immunity from civil and criminal proceedings on a potentially broad range of persons, so that affected persons have their right to bring an action to enforce their legal rights limited to situations where a lack of good faith is shown;**

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

119 Explanatory memorandum, p. 44.

- **where there is not a sufficient justification, consideration be given to amending the bill so that a more limited immunity is conferred; and**
- **why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[120]**

Broad discretionary power
Significant matters in delegated legislation[121]

1.214 Item 182 to Schedule 1 to the bill seeks to amend subsection 56GD(2) to allow the Australian Competition and Consumer Commission (ACCC) to exempt a person, by written notice, from all or specified provisions covered by existing 56GD, in relation to a particular CDR action or one or more types of CDR action. A subsection 56GD(2) exemption would apply in addition to the exemptions currently provided for in the Act in relation to particular CDR data or one or more classes of CDR data.

1.215 Item 184 to Schedule 1 to the bill similarly seeks to amend subsection 56GE(2) to allow for regulations to be made that would exempt a person or a class of persons from the same provisions, or declare that those provisions apply as if specified provisions were omitted, modified or varied.

1.216 Proposed subsection 56GD(2) therefore provides for a broad discretionary power for the ACCC to exempt persons from the operation of primary and delegated legislation, and proposed subsection 56GE(2) provides a broad power for the regulations to exempt persons or classes of persons from the operation of primary and delegated legislation and to modify how that legislation would operate.

1.217 A written notice by the ACCC or a regulation made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill. The committee considers that leaving significant elements of a legislative scheme to delegated legislation may considerably limit the ability of Parliament to exercise appropriate oversight of legislative schemes. Certain matters should therefore generally be included in primary legislation. The committee therefore expects that the inclusion of broad discretionary powers and the inclusion of significant matters in delegated legislation should be justified in the

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

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

explanatory memorandum, and that guidance or criteria in relation to the exercise of such powers should be included within the primary legislation. In this case, the explanatory memorandum explains the operation of the provisions but does not justify their inclusion or provide any information on any safeguards that may exist.

1.218 The committee commented on the broad discretionary powers and inclusion of significant matters in delegated legislation in relation to these provisions when they were initially introduced in the Treasury Laws Amendment (Consumer Data Right) Bill 2019 in *Scrutiny Digest 4 of 2019* and *Scrutiny Digest 5 of 2019*.[122] As this amendment expands the scope of the exemption provisions, the committee reiterates its concerns.

1.219 The committee considers that safeguards to the exercise of these exemptions could readily be provided for in the bill, for example by providing a requirement for review of exemptions made after a period of time or a requirement for a person to notify the ACCC if the circumstances under which they were granted an exemption change. The committee is particularly concerned about the lack of detail on the face of the primary legislation in relation to the circumstances in which an exemption may be granted and the lack of any general guidance in relation to the conditions which may apply to an exemption.

1.220 In light of the above, the committee requests the Treasurer's advice as to:

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

122 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 4 of 2019* (31 July 2019) pp. 34–36; Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2019* (11 September 2019) pp. 86–88.

Treasury Laws Amendment (Energy Price Relief Plan) Bill 2022

Purpose	Schedule 1 to the bill seeks to establish a new legislative framework to enhance the welfare of Australians through the regulation of the Australian gas market, and in particular, limitation of increases in gas prices. Schedule 2 to the bill seeks to amend the *Federal Financial Relations Act 2009* to introduce a new type of payment to the States and Territories to support temporary and targeted relief on energy bills for eligible households and small businesses.
Portfolio	Treasury
Introduced	House of Representatives on 15 December 2022

Significant matters in delegated legislation[123]

1.221 Schedule 1 to the bill seeks to introduce new Part IVBB into the *Competition and Consumer Act 2010* to establish a new legislative framework to regulate the Australian gas market. It seeks to do this by limiting increases in gas prices and introducing a mandatory gas market code of conduct on wholesale gas suppliers and purchasers. The mandatory code of conduct will be a legislative instrument.

1.222 The committee is concerned that Schedule 1 to the bill is characterised by 'framework provisions' which contain only the broad principles of a legislative scheme while relying heavily on delegated legislation to determine the scheme's scope and operation. The committee has longstanding concerns with framework provisions because they considerably limit the ability of Parliament to have appropriate oversight over new legislative schemes.

1.223 Many of the provisions set out in Schedule 1 leave significant elements of the new framework to the regulations. For example, proposed subsections 53D(2) and (3) and paragraph 53D(1)(e) provide that regulations may prescribe who is or is not a 'gas market participant'. This is an operative part of who is subject to the proposed framework and yet is entirely subject to executive decision-making. The committee's concerns about the use of delegated legislation are heightened in this case by the inclusion of penalties for failure to comply with matters set out in instruments in proposed section 53ZJ, and the coercive search and seizure powers that may be exercised by the Australian Competition and Consumer Commission (ACCC) for

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

contraventions of gas market instruments as set out in proposed section 154, section 154A and paragraph 154V(2)(a).

1.224 The committee's position is that significant matters should be included within primary legislation unless a sound justification for the use of delegated legislation is provided. Where substantial elements of the scope and operation of a legislative scheme are proposed to be left to delegated legislation, the committee's already significant concerns will be further heightened.

1.225 In this instance, the explanatory memorandum outlines a number of safeguards on the making of gas market instruments, including that:

- they are subject to tabling, disallowance and sunsetting;
- there are some limits on the content of the instruments, for example they cannot create offences, provide for coercive powers, impose taxes, set amounts to be appropriated from the Consolidated Revenue Fund or direct amendments of the *Competition and Consumer Act* 2010*;*
- a gas market emergency price order must be repealed 12 months after the earliest time any provision of any gas market emergency price order commences; and
- the minister must consult with the ACCC before making a gas market emergency price order.[124]

1.226 The committee welcomes the inclusion of these safeguards. The committee also acknowledges that it is sometimes appropriate to include certain administrative and technical matters within delegated legislation. For example, highly technical scientific information may be appropriate for inclusion within delegated legislation on the basis that the law-making process in relation to those matters should include considerable input from experts within the executive. However, in this instance, while acknowledging some of the safeguards that exist in the making of delegated legislation, it appears that substantial elements of the scope and operation of the legislative scheme proposed to be introduced by Schedule 1 to the bill will be left to delegated legislation, including key definitions and the introduction of civil penalties and coercive measures.

1.227 The committee is further concerned about the inclusion of fees in delegated legislation. Proposed section 53ZC provides that gas market instruments can provide for the charging of a fee for anything done by or in relation to the Commonwealth, ACCC or any other person or body in relation to a gas market instrument, and this can include setting the amount of the fee, including a method for working out the amount of the fee, fee waivers, who is liable to pay the fee and consequences for not paying the fee.

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124 Explanatory memorandum, pp. 22–23.

1.228 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 leave the setting of the rate of a fee to delegated legislation and if there is no limit on the amount of the fee that may be imposed, why it would not be appropriate to include such a limitation on the face of the bill.

1.229 The explanatory memorandum explains the operation of section 53ZC and also clarifies that, as outlined in section 53ZH, such a fee must not be such as to amount to taxation.[125] However, the explanatory memorandum does not justify why it is considered appropriate to leave the setting of the rate of a fee to delegated legislation and why there is no limit on the amount of the fee that may be imposed on the face of the bill.

1.230 The committee considers that, given the substantial elements of the scope and operation of the legislative scheme proposed to be introduced by Schedule 1 to the bill, it would be more appropriate to include this information within the primary legislation to allow an appropriate level of parliamentary oversight.

1.231 The committee considers that substantial elements of the scope and operation of the legislative scheme, including the imposition of fees, have been left to delegated legislation without sufficient justification in the explanatory memorandum.

1.232 However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Broad discretionary power
Section 96 Commonwealth grants to the states[126]

1.233 Item 4 of Schedule 2 to the bill seeks to insert proposed section 15E into the *Federal Financial Relations Act 2009* (FFR Act). Under proposed subsection 15E(2) the minister must determine that an amount is to be paid to a state for the purpose of making a grant of financial assistance. A grant of financial assistance is to be done in accordance with the temporary energy bill relief agreement.

1.234 The temporary energy bill relief agreement is an agreement that:

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125 Explanatory memorandum, p. 20.

126 Schedule 2, item 4, proposed subsection 15E(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (v).

- is entered into between the Commonwealth and one or more of the states; and
- relates to the delivery by the state or states of temporary relief from high energy bills for households and small businesses; and
- provides that the state or states must not deliver that relief to a household or small business unless criteria specified in the agreement in relation to the household or small business are met;
- is expressed to be a temporary energy bill relief agreement for the purposes of the FFR Act; and
- is entered into on or after 9 December 2022.[127]

1.235 The committee notes that section 96 of the Constitution confers on the Parliament the power to make grants of financial assistance to the states and to determine the terms and conditions attaching to them. Where the Parliament delegates this power to the executive, the committee considers it appropriate for the exercise of the power to be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 and the role of senators in representing the people of their state or territory. More generally, the committee's view is that, where it is proposed to allow the expenditure of a potentially significant amount of public money, the expenditure should be subject to appropriate parliamentary scrutiny and oversight.

1.236 In this regard, the committee is concerned that the bill contains only limited guidance on its face as to how the broad power to make grants of financial assistance is to be exercised, and does not contain any information as to the terms and conditions of the grants, other than that they must be set out in the temporary energy bill relief agreement. Where a bill provides for a broad discretionary power to make an arrangement for granting financial assistance to the states, the committee expects that the inclusion of these powers will be justified in the explanatory memorandum. In this instance, the explanatory memorandum contains no justification for the breadth of the discretion afforded to the minister.

1.237 The committee is also concerned that there appears to be no requirement to table temporary energy bill relief agreements in the Senate to ensure that senators are at least made aware of, and have an opportunity to debate, such an agreement. In this context, the committee notes that the process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not made available through other means, for example, by being published online.

1.238 The committee is of the view that it would have been more appropriate to include at least high-level guidance on the face of the bill as to the terms and

127 Schedule 2, item 3, proposed section 4.

conditions on which financial assistance may be granted and in relation to the circumstances in a which financial assistance may be granted.

1.239 The committee also considers that it would have been more appropriate to include a more detailed justification within the explanatory memorandum for the bill setting out why it is considered necessary and appropriate to confer a broad power to make grants of financial assistance in circumstances where there is limited guidance on the face of the bill as to how that power is to be exercised.

1.240 However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Exemption from disallowance[128]

1.241 As outlined above, proposed subsection 15E(2) provides that the minister must determine an amount to be paid to a state for the purpose of making a grant of financial assistance. Proposed subsection 15E(3) provides that a determination made under subsection (2) is not subject to disallowance.

1.242 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.[129]

1.243 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*,[130] and by the Senate Standing Committee

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128 Schedule 2, item 4, proposed subsection 15E(3). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

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

130 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.

for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.[131]

1.244 In light of these comments and the resolution of the Senate, the committee expects that any exemption of delegated legislation from the usual disallowance 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. In this instance the explanatory memorandum states that:

> The determination is a legislative instrument but is not subject to disallowance. This is because the determinations facilitate the operation of an intergovernmental scheme involving the Commonwealth and States and Territories and are made for the purpose of that scheme. In this instance, the scheme is the temporary energy bill relief agreement and payments made by the Commonwealth are for the purpose of that agreement.[132]

1.245 The committee does not consider that the fact that a particular scheme is an intergovernmental scheme is a sufficient justification, of itself, for exempting an instrument from the usual parliamentary disallowance process. Although negotiations between governments may be frustrated by the possibility of disallowance of an intergovernmental agreement, the committee does not consider that this concern is enough to justify removing democratic oversight over intergovernmental agreements.

1.246 The committee considers that it would have been more appropriate to provide that determinations made under proposed subsection 15E(2) are subject to the usual parliamentary disallowance process.

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

1.248 However, in light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

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131 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).

132 Explanatory memorandum, p. 48.

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

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

Retrospective application[133]

1.249 Schedule 1 to the *National Consumer Credit Protection Act 2009* currently sets out a National Credit Code (the NCC). The NCC operates in respect of all credit contracts and is intended to govern the manner in which credit providers operate, particularly in relation to licensing requirements and responsible lending practices.

1.250 Subsection 6(5) of the NCC currently provides that the Code does not apply to the provision of credit under a continuing credit contract if the only charge that is made, or may be made, under that contract is a fixed charge. Regulation 51 of the *National Consumer Credit Protection Regulations 2010* provides an exception to this general rule, such that the NCC will still apply to fixed charge contracts if the proposed charge is over a specified amount.

1.251 This bill would amend regulation 51 to ensure that the specified charge is only calculated by reference to contracts for which the exception already applies. The explanatory memorandum to the bill states that the intention of this amendment is to ensure that the process for determining whether a continuing credit contract is exempt from the NCC operates as originally intended when the regulations were made.[134]

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

134 Explanatory memorandum, p. 84.

1.252 Item 104 of Schedule 4 to the bill provides that the amendment applies retrospectively, capturing all contracts entered into on or after 13 June 2014.

1.253 Retrospective application challenges a basic principle of the rule of law that laws should only operate prospectively. The committee therefore has long-standing scrutiny concerns in relation to provisions which have the effect of applying retrospectively. These concerns are particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

1.254 Generally, where proposed legislation will have a retrospective effect, the committee expects that the explanatory materials will set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum states that 'the retrospective application is appropriate because it clarifies the operation of the law and ensures the law aligns with the policy intention, and past industry and administrative practice'.[135]

1.255 The committee notes that while the intention of the bill may be to restore the position that was intended when the original anti-discrimination Acts were made, from a rule of law perspective, individuals and entities should not be required to comply with laws that were invalidly made. The committee considers that any departure from this position must be comprehensively justified. In this instance, the committee does not consider that the explanatory materials provide an adequate justification for the retrospective application of the bill. In particular, it is unclear to the committee whether the retrospective application of this bill will, or might, have an adverse effect on individuals.

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

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

135 Explanatory memorandum, p. 85.

Work Health and Safety Amendment Bill 2022

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

Broad scope of offence provisions
Significant penalties[136]

1.257 Item 4 of Schedule 1 amends paragraph 31(1)(c) of the *Work Health and Safety Act 2011* to broaden the concept of a 'Category 1 offence'. Currently a Category 1 offence is established where a person has a health and safety duty and the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness, and the person is reckless as to the risk to an individual of death or serious injury or illness. This amendment expands the offence to include negligence as an additional fault element.

1.258 The penalty for an individual committing a Category 1 offence is $300,000 or 5 years imprisonment or both. The penalty for an individual committing a Category 1 offence as a person, or an officer of a person, conducting a business or undertaking is $600,000 or 5 years imprisonment or both.[137]

1.259 Establishing negligence requires an objective assessment of the standard of care and risk and, as the explanatory statement notes, it is 'intended to lower the threshold for conviction of the Category 1 offence'.[138] In the context of the significant penalties for committing a Category 1 offence, the committee expects the explanatory memorandum to explain why it is considered necessary and appropriate to include negligence as an additional fault element, and whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*.[139]

1.260 In this instance, the explanatory memorandum does not provide any further context in relation to, or justification of, the inclusion of negligence as a fault element,

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

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

138 Explanatory memorandum, p. 12.

139 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 21–22.

other than to state that it would implement recommendation 23a of the Boland Review.[140]

1.261 The committee requests the minister's advice as to why it is considered necessary and appropriate to include negligence as an additional fault element in paragraph 31(1)(c) of the *Work Health and Safety Act 2011*, including by reference to the considerations in the *Guide to Framing Commonwealth Offences.*

Reversal of the evidential burden of proof[141]

1.262 Item 25 of Schedule 1 introduces proposed section 272A into the *Work Health and Safety Act 2011* to prohibit, without reasonable excuse, insurance and other arrangements that cover the costs of a monetary penalty imposed on a person under the Act. Subsection 272A(2) places an evidential burden on the defendant to show a reasonable excuse.

1.263 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.[142] 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.

1.264 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 reversal of the evidential burden of proof in relation to proposed subsection 272A(2) has not been addressed in the explanatory materials.

1.265 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

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140 Explanatory statement, p. 12.

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

142 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.

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[143]

1.266 Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that:

> An offence-specific defence of 'reasonable excuse' should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.[144]

1.267 The committee therefore expects the explanatory materials for a bill which includes the defence of 'reasonable excuse' to include a justification as to why the defence is appropriate and an explanation as to why it is not possible to include more specific defences within the bill.

1.268 The committee notes that the explanatory memorandum includes an example of a circumstance that may constitute a reasonable excuse but does not justify why the use of a reasonable excuse defence is appropriate in this context. Rather than relying on such a broad defence, the bill could include the examples set out in the explanatory memorandum that 'a reasonable excuse may be that the person granted the indemnity under duress, or entered the insurance contracted based on negligent legal advice',[145] as more specific defences. The committee considers that this would be a more appropriate approach, given the lack of justification for the use of a reasonable excuse defence.

1.269 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use a reasonable excuse defence (which reverse the evidential burden of proof) for proposed section 272A, rather than including the examples in the explanatory memorandum as more specific defences. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if the provision explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[146]

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

144 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 52.

145 Explanatory memorandum, p. 18.

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

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

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

Bill	Relevant provisions	Potential scrutiny concerns
Commonwealth Electoral Amendment (Stop the Lies) Bill 2022	Schedule 1, item 1, proposed paragraph 321Q(2)(b)	The provision may raise scrutiny concerns under principle (i) in relation to the reversal of the evidential burden of proof.
COVID-19 Vaccination Status (Prevention of Discrimination) Bill 2022	Subclause 10(2)	The provision may raise scrutiny concerns under principle (i) in relation to the reversal of the evidential burden of proof.
Fuel and Vehicle Standards Legislation Amendment (Reducing Vehicle Pollution) Bill 2022	Schedule 1, item 3, proposed subsection 21A(3); item 5 proposed subsection 12A(4)	The provisions may raise scrutiny concerns under principle (v) in relation to the incorporation of external material as in force from time to time.

Bills with no committee comment

1.271 The committee has no comment in relation to the following bills which were introduced into the Parliament between 28 November – 1 December 2022 and on 15 December 2022:

- Classification (Publications, Films and Computer Games) Amendment (Loot Boxes) Bill 2022
- Education and Other Legislation Amendment (Abolishing Indexation and Raising the Minimum Repayment Income for Education and Training Loans) Bill 2022
- Human Rights (Children Born Alive Protection) Bill 2022
- Ministers of State Amendment Bill 2022
- Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022
- Private Health Insurance (National Joint Replacement Register Levy) Amendment (Consequential Amendments) Bill 2022
- Private Health Insurance (Prostheses Application and Listing Fees) Amendment (Cost Recovery) Bill 2022
- Treasury Laws Amendment (2022 Measures No. 4) Bill 2022
- Treasury Laws Amendment (2022 Measures No. 5) Bill 2022
- Treasury Laws Amendment (Modernising Business Communications and other Measures) Bill 2022

Commentary on amendments and explanatory materials

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

- Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022
- Financial Sector Reform Bill 2022
- Higher Education Support Amendment (2022 Measures No. 1) Bill 2022
- Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022
- Treasury Laws Amendment (Electric Car Discount) Bill 2022

Chapter 2

Commentary on ministerial responses

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

Aboriginal Land Grant (Jervis Bay Territory) Amendment (Strengthening Land and Governance Provisions) Bill 2022

Purpose	This bill seeks to amend the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* to facilitate home ownership style leases, strengthen local decision-making, improve the Wreck Bay Aboriginal Community Council's governance and corporate operations, and amend or remove outdated or unclear provisions.
Portfolio	Indigenous Australians
Introduced	House of Representatives on 26 October 2022
Bill status	Before the Senate

No-invalidity clause[1]

2.2 This bill seeks to amend the Wreck Bay Aboriginal Community Council's governance and corporate operations in several ways, including by prescribing new eligibility criteria for executive members. The bill seeks to insert proposed subsection 29(1) into the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (the Act) to provide that a person is not eligible to be an executive member unless the person is a registered member and a fit and proper person. Proposed section 34F sets out the meaning of fit and person for the purposes of the Act, including that a person has not been convicted of certain kinds of offences or is not an undischarged bankrupt.[2] However, proposed subsection 29(1A) provides that anything done by or in relation to a person purporting to hold the office of an executive member is not invalid merely because the person is not a fit and proper person.

1 Schedule 1, item 20, proposed subsection 29(1A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

2 See Schedule 1, item 29, proposed section 34F.

2.3 In *Scrutiny Digest 7 of 2022* the committee requested the minister's advice as to why it is considered necessary and appropriate to include a no-invalidity clause in proposed subsection 29(1A) of the bill.[3]

Minister's response[4]

2.4 The minister advised that the Wreck Bay Aboriginal Community Council's (the Council's) functions include holding title to Aboriginal land, exercising powers as a land owner and conducting business enterprises for the economic and social benefit of the community. The minister advised that it is important that parties dealing with the Council have certainty when transacting in good faith with the Council.

2.5 The minister also advised that the no-invalidity clause is necessary to ensure the proper operation of the Council's executive committee. The minister advised that the committee is comprised of nine members and decisions are made by a majority of votes. The minister advised that the no-invalidity clause ensures that if an individual member of the committee was found not to be fit and proper, then the decisions of the committee as a whole would not be undermined.

2.6 The minister further advised that the executive committee is the accountable authority of the Council and its members must comply with the duties set out in the *Public Governance, Performance and Accountability Act 2013* including the duty to act honestly, in good faith and for proper purpose.

2.7 Finally, the minister advised that an additional explanatory memorandum with the above information will be prepared and tabled in the Parliament as soon as practicable.

Committee comment

2.8 The committee thanks the minister for this response.

2.9 The committee welcomes the minister's undertaking to table an addendum to the explanatory memorandum in relation to scrutiny issues raised in *Scrutiny Digest 7 of 2022*.

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

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3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 1–2.

4 The minister responded to the committee's comments in a letter dated 7 December 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Broad delegation of administrative powers[5]

2.11 Item 29 of Schedule 1 to the bill seeks to insert proposed Division 4A into the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* in order to regulate the appointment, functions and powers of the Chief Executive Officer. Proposed subsection 34E(1) provides that the Chief Executive Officer may, in writing, delegate all or any of its functions or powers to an employee of the Council.

2.12 In *Scrutiny Digest 7 of 2022* the committee requested the minister's advice as to whether the bill could be amended to require that the Chief Executive Officer and the executive committee, when exercising the delegation power under proposed subsections 34E(1) and 36(1), must be satisfied that the relevant person has the appropriate training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions.[6]

Minister's response[7]

2.13 The minister agreed with the committee that factors such as the training, qualifications, skills or experience to exercise decision-making powers or carry out administrative functions are relevant to the ability to exercise a delegated power.

2.14 The minister advised that a request to draft an amendment to the bill requested by the committee will be made to the Office of Parliamentary Counsel and a supplementary explanatory memorandum will also be prepared. The minister further advised that the appropriate policy authority will be sought and consultation will be undertaken to progress the amendment to the bill.

Committee comment

2.15 The committee thanks the minister for this response.

2.16 The committee welcomes the minister's undertaking to amend the bill to address the committee's scrutiny concerns relating to the broad delegation of administrative powers.

2.17 In light of the information provided and the minister's undertaking, the committee makes no further comment in relation to this matter.

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5 Schedule 1, item 29, proposed subsection 34E(1); Schedule 1, item 33, proposed subsection 36(1). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii).

6 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 2–3.

7 The minister responded to the committee's comments in a letter dated 7 December 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

Appropriation Bill (No. 1) 2022-2023

Appropriation Bill (No. 2) 2022-2023

Purpose	Appropriation Bill (No. 1) 2022-2023 seeks to appropriate money out of the Consolidated Revenue Fund for the ordinary annual services of the government. Appropriation Bill (No. 2) 2022-2023 seeks to appropriate money out of the Consolidated Revenue Fund for certain expenditure.
Portfolio	Finance
Introduced	House of Representatives on 25 October 2022
Bill status	Received the Royal Assent on 30 November 2022

Parliamentary scrutiny—appropriations determined by the Finance Minister[8]

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

2.19 Subclause 10(3) of Appropriation Bill No. 1 provides that $2,000 million of the amount that may be included within an AFM determination must relate to expenditure for the purposes of responding to circumstances relating to COVID-19,[9] an event that the Finance Minister is satisfied is a natural disaster,[10] or circumstances that the Finance Minister is satisfied constitute a national emergency.[11] Subclause 12(4) of Appropriation Bill No. 2 provides that the total of the amounts included within an AFM determination under that bill for the purposes of responding to circumstances relating to COVID-19 cannot be more than $600 million.

2.20 In *Scrutiny Digest 7 of 2022* the committee requested the minister's advice as to whether the bill can be amended so that inclusive definitions of 'national

8 Clause 10 of Appropriation Bill (No. 1) 2022-2023; Clause 12 of Appropriation Bill (No. 2) 2022-2023. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv) and (v).

9 Subparagraph 10(3)(b)(i) of Appropriation Bill (No. 1) 2022-2023.

10 Subparagraph 10(3)(b)(ii) of Appropriation Bill (No. 1) 2022-2023.

11 Subparagraph 10(3)(b)(iii) of Appropriation Bill (No. 1) 2022-2023.

emergency' and 'natural disaster' are set out on the face of the bill, or, at minimum, whether guidance on the exercise of the power in relation to those concepts may be provided on the face of the primary legislation.[12]

Minister's response[13]

2.21 The minister advised that as the Appropriation Bill (No. 1) 2022-2023 received the Royal Assent on 30 November 2022, the bill can no longer be amended.

2.22 The minister also advised that the terms 'national emergency' and 'natural disaster' rely on their natural and ordinary meaning.

Committee comment

2.23 The committee thanks the minister for this response.

2.24 However, the committee does not consider that the minister has addressed the committee's concerns.

2.25 The committee notes that 'national emergency' and 'natural disaster' are imprecise terms. An extremely broad set of circumstances could conceivably be included within the spectrum encompassed by the words 'national emergency' and 'natural disaster'. Relying solely on the ordinary meaning of those terms means that the scope of the power to allocate additional funds to entities under an AFM determination is not defined with sufficient precision. Insufficiently defined administrative powers may be exercised arbitrarily or inconsistently and may impact on the predictability and guidance capacity of the law, undermining fundamental rule of law principles.

2.26 The committee's concerns in relation to this broad discretionary power are heightened, given that the power to make AFM determinations represents a significant delegation of legislative power to the executive and because an AFM determination is not subject to the usual parliamentary disallowance process.

2.27 The committee acknowledges that it may be appropriate to maintain a degree of flexibility in relation to terms such as 'national emergency' or 'natural disaster'. However, the committee considers that it would be possible to set out at least an inclusive definition of these terms, or, at a minimum, guidance in relation to the exercise of the Finance Minister's powers to make an AFM Determination, without compromising on the required flexibility to allocate funds during times of natural disaster or national emergency.

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12 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 13–17.

13 The minister responded to the committee's comments in a letter dated 12 December 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

2.28 As previously noted, the committee welcomes the inclusion of provisions which limit the purposes for which additional funds may be allocated under an AFM determination, such as those set out at subparagraphs 10(3)(b)(i), 10(3)(b)(ii), and 10(3)(b)(iii). However, given the importance of the AFM framework, the committee considers that limiting terms such as 'national emergency' and 'natural disaster' should be appropriately defined and the exercise of the power to make an AFM determination should be subject to clear and explicit guidance.

2.29 The committee remains of the view that it would be appropriate to further define the terms 'national emergency' and 'natural disaster' as set out in clause 10 of the bill and to provide additional guidance as to when the power to make an AFM determination during times of national emergency or natural disaster could be appropriately exercised.

2.30 The committee therefore suggests that when appropriation bills are being proposed in the future, consideration should be given to providing clear and explicit guidance on the face of the bill in relation to any key terms that are intended to limit the circumstances in which allocations may be made under an AFM determination.

2.31 If equivalent provisions are included within future appropriation bills, the committee considers that, at a minimum, consideration should be given to including:

- **examples of national emergencies and natural disasters on the face of the bill;**
- **an *inclusive* definition of the terms 'national emergency' and 'natural disaster'; and**
- **a list of matters that the Finance Minister may consider in determining whether a circumstance is a 'national emergency' or a 'natural disaster'.**

2.32 The committee will continue to consider this important matter in its scrutiny of future appropriation bills.

2.33 In light of the fact that this bill has already passed both Houses of the Parliament the committee makes no further comment on this matter.

Biosecurity Amendment (Strengthening Biosecurity) Bill 2022

Purpose	This bill seeks to amend the *Biosecurity Act 2015* to enhance Australia's ability to manage the risk of pests and diseases entering, emerging, establishing or spreading in Australian territory and causing harm to animal, plant and human health, the environment and the economy.
Portfolio	Agriculture, Fisheries and Forestry
Introduced	Senate on 28 September 2022
Bill status	Passed both Houses

Availability of merits review[14]

2.34 Part 5 of Schedule 7 to the bill seeks to amend sections 632 and 633 of the *Biosecurity Act 2015* (the Biosecurity Act). Under those sections the Director of Biosecurity has the discretion to approve the payment of compensation for damaged or destroyed goods, conveyances or other premises. This discretion is only available in certain circumstances. This bill would amend both provisions to provide that the Director of Biosecurity's discretion to provide compensation is exercisable in a more limited set of circumstances than previously available.

2.35 The committee initially scrutinised this bill in *Scrutiny Digest 6 of 2022* and requested the minister's advice as to why it is necessary and appropriate not to provide that independent merits review will be available in relation to a decision made under either section 632 or section 633 of the Biosecurity Act.[15] The committee considered the minister's response in *Scrutiny Digest 7 of 2022* and requested the minister's further advice as to whether the bill can be amended to provide independent merits review.[16]

14 Schedule 7, part 5. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

15 Senate Scrutiny of Bills Committee, *Scrutiny Digest 6 of 2022* (26 October 2022) pp. 10–11.

16 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 57–59.

Minister's response[17]

2.36 The minister advised that there is an alternative mechanism for relief in relation to a decision made under section 632 or section 633 and that merits review over such a decision is therefore not necessary. To this end, the minister noted section 27 of the Biosecurity Act, which prevents the Commonwealth from acquiring property from a person otherwise than on just terms. In such cases, the Commonwealth would be liable to pay reasonable compensation to an affected person. Section 27 also provides that, in the event of a disagreement between the parties as to the amount of compensation, an affected person may institute proceedings in a relevant court for the recovery from the Commonwealth of such reasonable amount of compensation as the court determines.

2.37 The minister advised that, in such a case, the court's remit would not be limited only to questions of law, but would also include making a determination as to the amount of compensation payable.

2.38 The minister therefore did not propose to amend the bill to provide that independent merits review is available for a decision made under either sections 632 or 633 of the Biosecurity Act.

Committee comment

2.39 The committee thanks the minister for this response.

2.40 However, as previously noted by the committee, section 27 of the Biosecurity Act relates generally to the acquisition of property, rather than specifically to a decision by the Director of Biosecurity under sections 632 and 633. Sections 632 and 633 relate to destroyed or damaged goods, not to goods that have been acquired by the Commonwealth. While a person detrimentally affected by a decision made under section 632 or 633 may have recourse to the courts under section 27, it is not clear to the committee that this would be the case in all circumstances.

2.41 Moreover, the committee does not consider that recourse to the court in the manner provided for under subsection 27(2) is a sufficient justification for not providing independent merits review over an administrative decision that may detrimentally affect individuals given that merits review is generally a cheaper and more convenient alternative review mechanism than litigation. The committee also reiterates the point that other decisions relating to the destruction of goods are subject to independent merits review under the Biosecurity Act. For example, a decision to give approval for destroying high-value goods,[18] a decision to give approval

17 The minister responded to the committee's comments in a letter dated 30 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 9 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

18 Subsection 574(1), table items 1 and 20.

for destroying high-value conveyances,[19] and a decision to give approval for destroying high-value premises,[20] are all subject to independent merits review. It is not clear why similar review rights cannot be provided in relation to a decision under sections 632 or 633 of the Act.

2.42 The committee continues to have concerns in relation to not providing for independent merits review over a decision made under either section 632 or section 633 of the *Biosecurity Act 2015*. However, as this bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

19 Subsection 574(1), table items 8 and 21.

20 Subsection 574(1), table item 22.

Broadcasting Services Amendment (Community Radio) Bill 2022

Purpose	This bill seeks to amend the *Broadcasting Services Act 1992* to provide greater regulatory clarity and flexibility for community radio broadcasters by simplifying aspects of community broadcasting licensing arrangements.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 27 October 2022
Bill status	Before the Senate

Availability of merits review[21]

2.43 Part 6 of the *Broadcasting Services Act 1992* (the Broadcasting Act) sets out requirements in relation to community broadcasting licences. A community broadcasting licence is a radio or television licence which provides a community broadcasting service.[22] Community broadcasting services are defined under section 15 of the Broadcasting Act to mean a not-for-profit service that is provided for a community purpose, is freely and readily available, and which complies with any additional criteria prescribed by the Australian Communications and Media Authority (ACMA) under section 19.

2.44 Item 7 of Schedule 1 to this bill seeks to amend existing subsection 91(2A) of the Broadcasting Act to alter the scope of the ACMA's discretionary power to refuse to renew a community broadcasting licence. A decision to refuse to renew a licence would not be subject to merits review.

2.45 In *Scrutiny Digest 7 of 2022* the committee requested the minister's advice as to whether the bill can be amended to provide that independent merits review will be available in relation to a decision made under proposed subsection 91(2A) of the bill.[23]

21 Schedule 1, item 7, proposed subsection 91(2A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

22 Section 6 of the *Broadcasting Services Act 1992*.

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 25–26.

Minister's response[24]

2.46 The minister advised that when considering whether to allocate or renew a licence, the ACMA must refer to the relevant Licence Area Plan, which sets out detailed technical specifications that licensees must follow, including the assigned frequency that stations can use to broadcast services in the particular area. The minister advised that in granting a community broadcasting licence, the ACMA is essentially allocating a finite resource because the use of the particular frequency for a long-term community broadcaster is exclusive to the licence holder within the particular licence area. In this context the minister advised that it is not always possible to grant a community broadcasting licence in a particular area to each and every aspirant. Further, the Administrative Review Council generally considers that decisions relating to the allocation of a finite resource, from which all potential claims for a share of the resource cannot be met, are inappropriate for merits review.

2.47 Additionally, the minister advised that the ACMA may have already allocated a new community broadcasting licence for the same spectrum band that was previously occupied by the community broadcaster whose licence renewal was refused. In such a case, the new licensee would be affected by overturning the ACMA's original decision to refuse the previous broadcaster's licence renewal application. Making the decision to refuse to renew a community broadcasting licence subject to merits review would adversely affect the allocation of that resource to another party.

2.48 On this basis, the minister considered that a decision under subsection 91(2A) to refuse to renew a community broadcasting licence should not be subject to independent merits review.

Committee comment

2.49 The committee thanks the minister for this response.

2.50 The committee notes that the mere fact that there is a limited pool of resources for distribution does not of itself mean that a decision in relation to those resources is unsuitable for review. The key question in relation to whether a decision to allocate a finite resource is inappropriate for merits review is whether an allocation decision would affect the interests of another competing applicant.[25] For example, this could occur where several applicants are competing for funds and a decision in relation to one applicant has the potential to affect the amount of funding received by another applicant. If one allocation is altered but an allocation to another party will not necessarily be directly affected, then it may not be appropriate to exclude review over

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24 The minister responded to the committee's comments in a letter dated 30 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 9 of 2022* available at: www.aph.gov.au/senate_scrutiny_digest.

25 See Chapter 4 of the Administrative Review Council, *What decisions should be subject to merit review?*, January 1999.

the relevant decision. In addition, where a decision in relation to finite resources does not involve competing applicants, it may not be appropriate to exclude review.

2.51 In this instance, it is unclear to the committee whether a decision under subsection 91(2A) relates to the allocation of a finite resource between competing applicants, given that such a decision does not relate to the initial allocation of an assigned frequency within the broadcasting service band of spectrum, but instead relates to the renewal of an existing licence to use that spectrum. In this context, the committee notes that similar decisions in relation to the use of an assigned frequency within the broadcasting service band of spectrum are subject to merits review under the Broadcasting Act. For example, a decision that a person is not a suitable applicant or licensee under subsection 83(2) of the Broadcasting Act is subject to review, despite the fact that the ACMA must refuse to renew a licence under subsection 91(2) if a subsection 83(2) decision is made.

2.52 The committee continues to have scrutiny concerns in relation to the lack of independent merits review over a decision made under proposed subsection 91(2A) of the bill.

2.53 However, in light of the fact that that this bill has already passed both Houses of the Parliament the committee makes no further comment on this matter.

Crimes Amendment (Penalty Unit) Bill 2022

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

Significant penalties[26]

2.54 Item 1 of Schedule 1 to the bill amends the definition of 'penalty unity' in subsection 4AA(1) of the *Crimes Act 1914* (Crimes Act) to increase the amount of a single unit from $222 to $275. Commonwealth pecuniary criminal and civil penalty provisions are generally expressed in terms of penalty units, with the penalty amount calculated by multiplying the value of a penalty unit as prescribed by the Crimes Act by the number of penalty units applicable.[27] The effect of this amendment is therefore to increase the maximum civil and criminal penalties that apply across the majority of Commonwealth legislation.

2.55 The amendment took effect on 1 January 2023.

2.56 In *Scrutiny Digest 8 of 2022* the committee requested the Attorney-General's advice as to why it is both necessary and appropriate to increase the amount of a Commonwealth penalty unit by almost 24 percent, noting the limited explanation provided in the explanatory materials for the increase and that the increase will apply in addition to the usual indexation process.

2.57 In light of the committee's significant scrutiny concerns, the committee considered that it would have been appropriate to afford the committee more time to review the bill before passage of the bill through the Parliament.[28]

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

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

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

Attorney-General's response[29]

2.58 The Attorney-General advised that the bill delivers on an election commitment and that the public expects that the courts have appropriate financial penalties available to them when sentencing. The Attorney-General further noted that the courts are still required to impose the most appropriate penalty in all the circumstances of a particular case.

2.59 The Attorney-General also noted that the bill had already passed both houses of the Parliament at the time of writing.

Committee comment

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

2.61 However, the committee notes that this response does not appear to address any of the committee's concerns as previously outlined in *Scrutiny Digest 8 of 2022*:

> The committee is concerned that the Parliament is being asked to approve a wholesale increase to all civil and criminal penalties contained within Commonwealth legislation that are expressed in penalty units with very limited justification as to why this significant increase is necessary or appropriate. For example, the committee notes that the explanatory materials to the bill do not explain how the amount of the increase was determined, or why it is considered necessary to introduce an increase to the Commonwealth penalty unit of approximately 24 per cent in addition to the usual indexation process. The explanatory memorandum also contains no evidence that the proposed increase better reflects community expectations or is necessary to ensure that penalties remain an effective deterrence measure.[30]

2.62 Simply stating that a measure reflects community expectations without any supporting evidence is not a sufficient justification.

2.63 The committee's concerns in relation to this increase are heightened given the significant impact that this wholesale increase in the amount of the penalty unit could have on individuals. The committee is also concerned that this increase has occurred in addition to the usual indexation process.

2.64 The committee therefore requests the Attorney-General's advice as to why it is both necessary and appropriate to increase the amount of a Commonwealth penalty unit by almost 24 percent, noting the limited explanation provided in the

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29 The minister responded to the committee's comments in a letter dated 20 December 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

30 Senate Scrutiny of Bills Committee, *Scrutiny Digest 8 of 2022* (30 November 2022) p. 2.

explanatory materials for the increase and that the increase will apply in addition to the usual indexation process.

2.65 In particular, the committee's consideration of this issue will be assisted if the Attorney-General's response addresses:

- **how the amount of the increase was determined;**
- **why it was considered necessary to introduce an increase to the Commonwealth penalty unit of approximately 24 per cent in addition to the usual indexation process;**
- **evidence that the increase better reflects community expectations; and**
- **evidence that an increase was necessary to ensure that penalties remain an effective deterrence measure.**

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022

Purpose	This bill seeks to amend the *Fair Work Act 2009* and related legislation to improve the workplace relations framework.
Portfolio	Employment and Workplace Relations
Introduced	House of Representatives on 27 October 2022
Bill status	Passed both Houses

Broad delegation of administrative functions and powers[31]

2.66 Item 222 of Part 3 of Schedule 1 to the bill seeks to insert proposed paragraph 40(1)(ba) into existing section 40 of the *Building and Construction Industry (Improving Productivity) Act 2016* (BCIIP Act). Section 40 currently allows the Federal Safety Commissioner (FSC) to delegate all or any of their powers and functions to Federal Safety Officers, members of the Senior Executive Service (SES) or a person prescribed by the rules. Proposed paragraph 40(1)(ba) provides that the FSC may also delegate all or any of their powers and functions to an APS employee whose duties relate to the powers and functions of the FSC. The committee notes that the FSC's role has a number of regulatory and administrative functions, including administering the Accreditation Workplace Health and Safety Scheme.[32]

2.67 In *Scrutiny Digest 7 of 2022* the committee requested the minister's advice as to whether the bill can be amended to:

- provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated; or
- at a minimum, require that the Federal Safety Commissioner, when making a delegation under proposed paragraph 40(1)(ab), must be satisfied that the person has the appropriate training, qualifications or experience to appropriately exercise the delegated power or function.[33]

31 Schedule 1, Part 3, item 222, proposed paragraph 40(1)(ba). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

32 See *Building and Construction Industry (Improving Productivity) Act 2016*, section 38.

33 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 27–29.

Minister's response[34]

2.68 The minister advised that, in his view, proposed paragraph 40(1)(ba) would strike an appropriate balance that ensures the FSC can effectively and efficiently discharge its duties while providing appropriate safeguards and parliamentary oversight.

2.69 In relation to the categories of people to whom powers and functions might be delegated, the minister advised that the Office of the FSC is comprised of one Senior Executive Service employee (the FSC) and a small number of Federal Safety Officers, all of whom are contractors engaged from the private sector for their building industry safety experience. The minister also noted that, despite being empowered to delegate all or any of the FSC's powers and functions to an FSO under existing paragraph 40(1)(a), it would not be appropriate to delegate to FSOs in all circumstances. The minister advised that, as a result, proposed paragraph 40(1)(ba) is necessary for the FSC to enable appropriately trained and experienced executive level employees in the Office of the FSC to make routine or minor decisions.

2.70 In addition, the minister advised that proposed paragraph 40(1)(ba) would preserve the FSC's current delegation powers.

2.71 The minister also noted that safeguards on the delegations power include the requirement to publish details of delegations, the requirement for delegates to comply with any directions of the FSC and parliamentary accountability through the Senate estimates process. Further, any direction given by the FSC of general application would be a legislative instrument and thus subject to parliamentary disallowance.

Committee comment

2.72 The committee thanks the minister for this response.

2.73 In relation to the categories of people to whom powers and functions might be delegated, the committee notes the minister's advice that the Office of the FSC has a relatively small number of employees and that the existing power to delegate to FSOs may not be appropriate in all circumstances. The committee notes the minister's advice that proposed paragraph 40(1)(ba) is therefore necessary to allow the FSC to delegate routine or minor decisions to appropriately trained and experienced executive level employees. However, the committee notes that this is not provided for on the face of the primary legislation. The committee therefore remains concerned that proposed paragraph 40(1)(ba) allows the FSC to delegate *all or any* of their powers and functions to *any* APS employee whose duties relate to the powers or functions of the FSC. While thanking the minister for this advice, the committee

34 The minister responded to the committee's comments in a letter dated 30 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

emphasises that it would have been more appropriate to include this guidance as a requirement on the face of the bill.

2.74 The committee notes the minister's advice that the broad delegations power in proposed paragraph 40(1)(ab) would preserve the FSC's current delegation powers. However, the committee does not consider that consistency with existing provisions is, of itself, sufficient justification for allowing the broad delegation of administrative powers and functions.

2.75 The committee further notes that the minister considers that there are appropriate safeguards and parliamentary oversight in place. While noting the minister's advice, the committee's preference is that a limit be set in the primary legislation on either the scope of powers that might be delegated or on the categories of people to whom those powers might be delegated.

2.76 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

Immunity from civil liability[35]

2.77 The bill seeks to introduce several provisions which provide immunity from civil liability. These provisions are set out in item 303 and subitem 323(3) of Part 3 of Schedule 1 to the bill. Part 3 of Schedule 1 would amend the BCIIP Act to abolish the Australian Building and Construction Commission (ABCC) and provide transitional arrangements, including to transfer the responsibility for the ABCC's ongoing civil court proceedings to the Fair Work Ombudsman (FWO).

2.78 In *Scrutiny Digest 7 of 2022* the committee requested the minister's detailed advice as to why it is considered necessary and appropriate to confer immunity from liability on the Australian Building and Construction Commissioner, the Fair Work Ombudsman (FWO), a Fair Work Inspector, consultants and staff members of the Office of the FWO and any persons assisting the FWO.[36]

Minister's response[37]

2.79 The minister advised that it is appropriate and proportionate to confer immunity from civil liability on the FWO and officials working for the FWO to support

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35 Schedule 1, Part 3, item 303, proposed section 118 and subitem 323(3). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

36 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 29–30.

37 The minister responded to the committee's comments in a letter dated 30 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

the transfer of the responsibility for the ABCC's ongoing civil court proceedings to the Fair Work Ombudsman.

2.80 The minister advised that this immunity is appropriate to ensure that the FWO and officials working for the FWO are able to fully meet their responsibilities in relation to ongoing civil court proceedings without risk of personal liability. In addition, the minister advised that the immunity would provide appropriate protection for officials carrying out of transitional functions in circumstances where they did not initiate or respond to these proceedings. The minister noted that these proceedings may relate to the exercise of powers by the Australian Building and Construction (ABC) Commissioner and ABC Inspectors to carry out investigations under the BCIIP Act which might otherwise be unlawful.

2.81 In relation to proportionality, the minister advised that the immunity is limited in terms of its application. The minister noted that a limited class of individuals would be afforded protection from liability in their professional capacity in a limited number of cases. Additionally, the minister advised that the immunity would conclude with the finalisation of matters transferred to the FWO. Further, the minister advised that a person would still be able to bring a civil action against the Commonwealth.

Committee comment

2.82 The committee thanks the minister for this response.

2.83 The committee notes the minister's advice that the protection from civil liability afforded by subitem 323(3) would be transitional in nature to ensure that the FWO and officials working for the FWO can manage the ABCC's ongoing civil court proceedings and ensure they do not incur civil liability while doing so. The committee also notes the minister's advice that this immunity is appropriate in circumstances where these officials did not initiate these proceedings. While noting the minister's advice that civil immunity is needed for the FWO and officials working for the FWO, the committee also notes that the immunity conferred by item 323 is broader and includes the FWO, a Fair Work Inspector, consultants and staff members of the Office of the FWO and any persons assisting the FWO.[38]

2.84 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

38 Defined in section 698 of the *Fair Work Act 2009*.

Fees in delegated legislation[39]

2.85 Item 393 of Part 8 of Schedule 1 to the bill seeks to insert proposed section 527F into the BCIIP Act to provide that an 'aggrieved person' may make an application for the FWC to deal with a sexual harassment dispute. Proposed subsection 527H(1) provides that an application must be accompanied by the fee, if any, that is prescribed in the regulations. Proposed paragraphs 527H(2)(a) and (b) provide that the regulations may prescribe the application fee, or the method for indexing the fee.

2.86 In *Scrutiny Digest 7 of 2022* the committee requested the minister's advice as to whether the bill can be amended to provide high-level guidance regarding how the application fee in proposed subsection 527H(1) will be calculated, including, at a minimum, a provision stating that the fee must not be such as to amount to taxation.[40]

Minister's response[41]

2.87 The minister advised that a provision stating that the fee must not amount to a tax is unnecessary, as fees imposed under proposed section 527H cannot be read as authorising the imposition of a tax by virtue of section 15A of the *Acts Interpretation Act 1901*. The minister further advised that the provision is consistent with similar regulation making powers in the *Fair Work Act 2009* (Fair Work Act) and, as a result, the inclusion of such a provision may cause confusion about the intended operation of existing provisions in the Fair Work Act.

Committee comment

2.88 The committee thanks the minister for this response.

2.89 While noting the minister's advice, the committee reiterates its view that this kind of guidance should be included on the face of the bill and that, at a minimum, the bill should include a provision stating that the fee must not be such as to amount to taxation. While there is no legal need to include such a provision, the committee considers that it is nonetheless importance to include it to avoid confusion and to emphasise the point that the amount calculated under the regulations will be a fee and not a tax. In addition, as set out in the Office of Parliamentary Counsel Drafting Direction 3.6, 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.[42]

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39 Schedule 1, Part 8, item 393, proposed section 527H. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

40 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 30–31.

41 The minister responded to the committee's comments in a letter dated 30 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

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

2.90 **As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.**

Broad discretionary power

Significant matters in delegated legislation[43]

2.91 Item 393 of Part 8 of Schedule 1 to the bill inserts proposed Part 3-5A into the Fair Work Act. The effect of this is to merge the stop sexual harassment order jurisdiction in existing Part 6-4B with a new prohibition on sexual harassment. Proposed Part 3-5A would allow a worker who has been bullied or sexually harassed at work to apply to the FWC for an order to stop the bullying or sexual harassment. Proposed sections 527N, 527P and 527Q would, respectively, permit the Chief of the Defence Force, the Director-General of Security and the Director-General of the Australian Secret Intelligence Service (ASIS) to declare by legislative instrument, with the approval of the Minister, that some or all of the stop sexual harassment order provisions do not apply in relation to specified activities, or persons who carry out work for the Director-General of Security or the Director-General of ASIS.

2.92 In *Scrutiny Digest 7 of 2022* the committee requested the minister's detailed advice regarding:

- why it is considered necessary and appropriate for the Chief of the Defence Force, the Director-General of Security and the Director-General of the Australian Secret Intelligence Service to be provided with broad powers under proposed sections 527N, 527P and 527Q to declare by legislative instrument that some or all of the stop sexual harassment order provisions do not apply; and
- whether the bill can be amended to provide at least high-level guidance regarding the exercise of these powers on the face of the primary legislation.[44]

Minister's response[45]

2.93 The minister advised that it would not be appropriate to amend the bill to provide high-level guidance regarding the exercise of these powers as the purpose of the powers is to provide flexibility to adapt the legislative framework in a timely

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43 Schedule 1, Part 8, item 393, proposed sections 527N, 527P and 527Q. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(ii) and (iv).

44 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 31–33.

45 The minister responded to the committee's comments in a letter dated 30 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

manner in response to future unforeseen changes in the national security landscape. The minister advised that these powers are needed to ensure that the stop sexual harassment order provisions do not interfere with Australia's defence, national security or international law enforcement activities.

2.94 The minister noted that declarations issued by the Chief of the Defence Force, the Director-General of Security and the Director-General of ASIS would be in the form of legislative instruments and therefore subject to consultation requirements and the usual parliamentary disallowance process. In addition, such declarations may only be made with the approval of the Minister for Employment and Workplace Relations.

2.95 The minister also advised that proposed sections 527N, 527P and 527Q are consistent with the existing stop sexual harassment order jurisdiction in the Fair Work Act and align with the existing framework for exemptions under the *Work Health and Safety Act 2011.*

2.96 The minister further advised that these limitations apply only in relation to the stop sexual harassment orders, that other military sanctions that could have a similar effect as a stop sexual harassment order may apply, and that other remedies for sexual harassment in connection with work would be available under the Fair Work Act.

2.97 Finally, the minister also advised that a new regulation-making power in proposed subsection 527F(3) would enable the regulations to specify the circumstances in which defence members may make stop sexual harassment order applications.[46] A regulation made under this new power could only be used to narrow the limitation on defence members making applications.

Committee comment

2.98 The committee thanks the minister for this response.

2.99 The committee notes the minister's advice that exemptions to the stop sexual harassment order provisions are needed to ensure these provisions do not interfere with Australia's defence, national security or international law enforcement activities. However, the committee remains concerned about the use of delegated legislation to provide for such exemptions, particularly in circumstances where there is no guidance or limits on the face of the bill as to how or when these powers should be exercised. The committee also notes that the minister did not provide any evidence as to how these provisions protect Australia's defence, national security or international law enforcement activities. Further, the committee notes that there is nothing on the face of the primary legislation requiring that the Chief of the Defence Force, the Director-General of Security and the Director-General of ASIS must consider whether the exemption would protect these matters before making an exemption instrument.

46 Proposed subsection 527F(3) would prevent a defence member from applying for a stop sexual harassment order in relation to sexual harassment that occurred while they were a defence member, except as provided by the regulations.

It therefore remains unclear to the committee why it is not possible to provide even high-level guidance within the bill in relation to the exercise of the broad discretionary powers under proposed sections 527N, 527P and 527Q.

2.100 The committee also notes the minister's advice that the granting of exemptions via delegated legislation is necessary to respond to unforeseen changes in the national security landscape in a timely manner. While acknowledging this advice, the committee has generally not accepted a desire for administrative flexibility to be a sufficient justification for leaving significant matters to delegated legislation.

2.101 The committee acknowledges that proposed sections 527N, 527P and 527Q would relocate existing powers in the Fair Work Act, rather than creating any new powers. However, the mere fact that these provisions align with the existing framework is not sufficient justification for the inclusion of broad discretionary powers.

2.102 The committee considers that it would be possible to provide powers which allow the necessary flexibility for the Chief of the Defence Force, the Director-General of Security and the Director-General of ASIS to declare that some or all of the stop sexual harassment order provisions do not apply, while still providing appropriate limits on the exercise of the power. For example, it may be appropriate to include criteria which the Chief of the Defence Force, the Director-General of Security and the Director-General of ASIS must have regard to before making a declaration that some or all of the stop sexual harassment order provisions do not apply. In this regard, the committee notes that the bill does not even include a requirement that the effect of the instrument on Australia's defence, national security or international law enforcement activities must be considered before an instrument is made. If it is not possible to include this guidance within the bill it would have been appropriate to provide more justification for the breadth of discretion afforded to the Chief of the Defence Force, the Director-General of Security and the Director-General of ASIS under proposed sections 527N, 527P and 527Q. This is particularly so given the importance of the protections afforded to individuals under the stop sexual harassment order framework.

2.103 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

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

Legislative instrument not subject to disallowance[47]

2.105 Item 509 of Part 14 of Schedule 1 to the bill seeks to repeal section 188 of the Fair Work Act and insert a new section 188 dealing with requirements for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by employees. Proposed subsection 188B(1) provides that the FWC must make a statement of principles containing guidance for employers on how to ensure their employees have genuinely agreed to an enterprise agreement. Proposed subsection 188B(4) provides that the statement of principles is a non-disallowable legislative instrument.

2.106 In *Scrutiny Digest 7 of 2022* the committee requested the minister's detailed advice as to:

- the exceptional circumstances that are said to justify exempting the statement of principles made under proposed subsection 188B(1) from the usual parliamentary disallowance process; and
- whether the bill could be amended to provide that the statement of principles is subject to disallowance to ensure that they receive appropriate parliamentary oversight.[48]

Minister's response[49]

2.107 The minister advised that the making of the statement of principles is divorced from the political process and should therefore be independent of the Parliament and not subject to disallowance. The minister advised that the need for rule-making to be separated from the political process has been accepted as a rationale for exempting other legislative instruments from disallowance.[50]

2.108 The minister advised that the FWC will rely on the statement of principles in a technical manner when approving enterprise agreements. For this reason, the minister considered that allowing the Parliament to scrutinise the statement through disallowance may undermine the FWC's decision-making and independence, could potentially create uncertainty for employers and could bring into question the integrity of any enterprise agreements approved by the FWC in reliance on the statement.

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47 Schedule 1, Part 14, item 509, proposed subsection 188B(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

48 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 34–35.

49 The minister responded to the committee's comments in a letter dated 30 November 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

50 The minister cited the following report to support this claim: Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (March 2021) [4.28]-[4.39].

2.109 Finally, the minister advised that the statement of principles would not create any new rights or obligations for employers or their employees. The minister also noted that the minimum requirements for the statement of principles—which are set out in proposed subsection 188B(3)—have already been scrutinised by the Parliament and therefore that further parliamentary oversight would be redundant.

Committee comment

2.110 The committee thanks the minister for this response.

2.111 The committee notes that the minister considers the making of the statement of principles to be divorced from the political process and that the statement should not be subject to disallowance on this basis. The minister noted in his response that this rationale has been previously accepted and cited the final report of the Standing Committee for the Scrutiny of Delegated Legislation's (Delegated Legislation Committee) inquiry into the exemption of delegated legislation from parliamentary oversight to support this view. However, the committee notes that the Delegated Legislation Committee was critical of a blanket claim that technical instruments should be divorced from the political process and emphasised that the Parliament is capable of understanding scientific or technical issues.[51] The Delegated Legislation Committee questioned the legitimacy of this rationale and found that, while there may be limited circumstances in which there may be appropriate grounds for exemptions, exemptions from disallowance on the basis of a need for rule-making to be separated from the political process are highly unlikely to be accepted.[52]

2.112 This committee shares the long-standing scrutiny concerns of the Delegated Legislation Committee regarding the inappropriate exemption of delegated legislation from disallowance on this basis of this rationale. While it is often appropriate to delegate law-making power to the executive in relation to technically complex matters, it does not follow that such instruments should subsequently be exempt from disallowance on that basis alone. It is not clear why parliamentarians would be incapable of taking into account technical evidence, or any resulting outcomes that could flow from disallowance, when considering the appropriateness of an instrument. Moreover, the committee considers that decisions which can be classified as completely apolitical are rare. Even when relevant considerations are technical the potential implications of those considerations will often have more expansive implications. Finally, the committee notes that in this instance the minister has

51 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (March 2021) pp. 43–45.

52 Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report* (March 2021) pp. 106 and 116.

provided very little explanation as to why the statement of principles is uniquely apolitical, such as might make an exemption from disallowance appropriate.

2.113 The committee also notes the minister's advice regarding the intended use of the statement of principles. While noting this advice, the committee does not consider the fact that an instrument is intended to be explanatory and facilitative to be a sufficient justification for excluding parliamentary disallowance in circumstances where the instrument is proposed to be a legislative instrument.

2.114 The committee also notes the minister's advice that the Parliament has had the opportunity to scrutinise the minimum requirements for the statement of principles, and therefore that further parliamentary oversight would be redundant. However, the committee notes that proposed paragraphs 188B(3)(f) and (g) provide considerable scope for the statement of principles to deal with any matters prescribed by the regulations and any other matters the FWC considers relevant.

2.115 As to the minister's advice regarding the potential for disallowance to create uncertainty, the committee notes that need for certainty could be met by having the delegated legislation come into effect after the disallowance period has expired. Further, it is well established that the instances of the disallowance procedure resulting in disallowance by the Parliament is very low. Senators, as elected representatives, would be well aware of any impact that disallowance would have and would consider such matters as part of their deliberations. The committee also emphasises that in many ways uncertainty is inherent to lawmaking within Australia's system of representative government. While some degree of uncertainty exists in relation to the disallowance process, it is important not to overstate its significance. As a general principle, the committee does not consider that the difficulties associated with the small degree of uncertainty inherent in the disallowance process outweigh the significance of abrogating or limiting parliamentary oversight of executive made law by exempting an instrument from disallowance.

2.116 It remains unclear what genuinely exceptional circumstances are said to justify exempting the statement of principles from disallowance.

2.117 As the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

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

Privacy Legislation Amendment (Enforcement and Other Measures) Bill 2022

Purpose	This bill seeks to amend *Privacy Act 1988*, the *Australian Information Commissioner Act 2010* and the *Australian Communications and Media Authority Act 2005* to increase penalties under the *Privacy Act 1988*, provide the Australian Information Commissioner with greater enforcement powers, and provide the Commissioner and the Australian Communications and Media Authority with greater information sharing powers.
Portfolio	Attorney-General
Introduced	House of Representatives on 26 October 2022
Bill status	Passed both Houses

Broad discretionary power

Availability of merits review[53]

2.119 Item 32 of Schedule 1 of the bill seeks to insert proposed subsection 52(5A) into section 52 of the *Privacy Act 1988* (the Privacy Act). Section 52 currently provides that, after investigating a complaint about acts or practices that may be an interference with the privacy of an individual, the Commissioner may make a determination in relation to the investigation. A determination may include, for example, a declaration that the respondent has engaged in conduct constituting an interference with the privacy of an individual, or that an individual is entitled to compensation. An entity to which a determination relates must comply with certain declarations in the determination.[54] Proposed subsection 52(5A) provides that the Commissioner may publish a determination made under section 52 before or after commencement of the bill on the Commissioner's website.[55]

2.120 In *Scrutiny Digest 7 of 2022* the committee requested the Attorney-General's advice as to:

53 Schedule 1, item 32, proposed subsection 52(5A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (iii).

54 See *Privacy Act 1988*, sections 36A and 52.

55 Item 45 provides that proposed subsection 52(5A) applies in relation to determinations made by the Commissioner before or after commencement of the bill.

- why it is necessary and appropriate to provide the Commissioner with a broad discretion to publish determinations made before or after the commencement of the bill;
- whether the bill can be amended to include additional guidance on the exercise of the power on the face of the primary legislation or, at a minimum, whether this information can be included within the explanatory memorandum; and
- whether the bill can be amended to provide that independent merits review will be available in relation to a decision made under proposed subsection 52(5A).[56]

Attorney-General's response[57]

2.121 The Attorney-General advised that it is appropriate to provide the Commissioner with an express power in proposed subsection 52(5A) to publish determinations as this would formalise existing practices. In this regard, the Attorney-General noted that determinations are currently published on the Commissioner's website after being finalised and sent to the parties in reliance on the Commissioner's powers under section 12 of the *Australian Information Commissioner Act 2010*.[58] The Attorney-General further advised that it would be within the reasonable expectations of all parties and the community that such information would be disclosed and published.

2.122 In addition, the Attorney-General explained that the Commissioner publishes determinations to ensure transparency and accountability around the use of its privacy regulatory powers, to encourage compliance by increasing awareness and knowledge of personal rights and obligations, and to deter contravening conduct. The Attorney-General also advised that the Commissioner provides parties the opportunity to examine and comment on the information the Commissioner relies on in making the determination, including by providing access to submissions and information made by other parties.

2.123 The Attorney-General noted that the Commissioner will generally publish the name of the respondent but will generally not publish the names of complainants, respondent individuals or any third-party individuals. Further, the Attorney-General noted that the Office of the Australian Information Commissioner will update its policies and procedures, including the publicly-available *Guide to regulatory action*

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56 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 36–38.

57 The minister responded to the committee's comments in a letter dated 5 December 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

58 The Commissioner relies on her powers under section 12 of the *Australian Information Commissioner Act 2010*.

and *Guide to privacy regulatory action*, to reflect the Commissioner's express power to publish determinations in proposed subsection 52(5A).

2.124 The minister advised that the decision to publish a determination will not be subject to independent merits review.

Committee comment

2.125 The committee thanks the minister for this response.

2.126 While noting the Attorney-General's advice that proposed subsection 52(5A) would formalise existing practices, the committee has generally not considered consistency with existing provisions to be sufficient justification for the inclusion of a broad discretionary power. In addition, it is apparent to the committee from the Attorney-General's explanation why the bill could not be amended to provide additional guidance on the exercise of this power. However, the committee also notes the Attorney-General's advice regarding the intention of this measure and that the Commissioner will adhere to principles of natural justice and procedural fairness in making a determination. The committee considers that it would have been helpful had this information been included in the explanatory memorandum to the bill, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.

2.127 In relation to the Attorney-General's advice that the decision to publish a determination will not be subject to independent merits review, the committee notes that no justification was provided for excluding merits review. As a decision to publish a determination could have adverse impacts, such as damage to a person's reputation, the committee expects the limitation on merits review to be soundly justified with reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*.

2.128 In light of the fact that the bill has already passed both Houses of Parliament, the committee makes no further comment on this matter.

Reversal of the evidential burden of proof[59]

2.129 Item 39 of Schedule 1 to the bill seeks to amend existing section 66 of the Privacy Act to insert proposed subsection 66(1AA) into that section. Proposed subsection 66(1AA) makes it an offence for a body corporate to engage in conduct that constitutes a system of conduct or a pattern of behaviour which results in multiple instances of non-compliance with subsection 66(1). Proposed subsection 66(1) provides that a person who fails to answer a question or give information when

59 Schedule 1, item 40, proposed subsection 66(1B). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

required under the Privacy Act may be liable to a civil penalty. The new offence carries a maximum penalty of 300 penalty units. It is a defence under subsection 66(1B) if the person has a reasonable excuse.[60] A defendant bears an evidential burden in relation to this defence.

2.130 In *Scrutiny Digest 7 of 2022* the committee requested the minister's advice as to why it is appropriate to use a defence of reasonable excuse (which reverses the evidential burden of proof) for proposed subsection 66(1AA). The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[61]

Attorney-General's response[62]

2.131 The Attorney-General advised that it is not possible to rely on the general defences in the *Criminal Code Act 1995* (Criminal Code) and therefore it is appropriate to use a defence of reasonable excuse.[63]

2.132 The Attorney-General further advised that existing section 66 sets out guidance on when a defendant may have a reasonable excuse. The Attorney-General gave the example of existing subsection 66(1B), which provides that a journalist has a reasonable excuse if giving the information, answering the question or producing the document or record would tend to reveal the identity of a person who gave information or a document or record to the journalist in confidence. The Attorney-General advised that such conduct would not be covered by the defences of general application in Part 2.3 of the Criminal Code and therefore a more specific defence of reasonable excuse is necessary.

2.133 The Attorney-General also noted that the use of a defence, which reverses the burden of proof that would usually apply in an offence, is more readily justified as the offence in proposed subsection 66(1B) carries a relatively low penalty of 300 penalty units.

Committee comment

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

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60 Item 40 seeks to amend subsection 66(1B) to extend the existing defence of reasonable excuse to the new criminal offence in proposed subsection 66(1AA).

61 Senate Scrutiny of Bills Committee, *Scrutiny Digest 7 of 2022* (23 November 2022) pp. 38–39.

62 The minister responded to the committee's comments in a letter dated 5 December 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

63 The Criminal Code defences of general application include duress, mistake or ignorance of fact, intervening conduct or event and lawful authority.

2.135 While noting the Attorney-General's advice that existing section 66 contains guidance on when a defendant may have a reasonable excuse, the committee notes that the guidance in existing subsection 66(1B) is limited to journalists. It is unclear to the committee that this guidance would apply in relation to proposed subsection 66(1AA), which provides that it is an offence for a body corporate to engage in conduct that constitutes a system of conduct or a pattern of behaviour which results in multiple instances of non-compliance with subsection 66(1). However, the committee also notes that existing subsection 66(10) sets out guidance on when a body corporate may not have a reasonable excuse.

2.136 The committee also notes that the Attorney-General's response does not address why it is appropriate that the defendant bears the evidential burden for providing a reasonable excuse defence. The relevant test, as set out in the *Guide to Framing Commonwealth Offences*, is that a matter should only be included in an offence-specific defence where it is peculiarly within the knowledge of the defendant and is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish. The committee notes that the Attorney-General's advice does not address this test. The committee does not consider that a reversal of the burden of proof is justified, merely because the offence does not carry custodial penalties. The committee also notes that the Attorney-General's advice does not contain any information regarding why it is not possible to include more specific defences within the bill.

2.137 In light of the fact that the bill has already passed both Houses of the Parliament, the committee makes no further comment on this matter.

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

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

Privacy[64]

2.138 Under Part 13 of the *Telecommunications Act 1997* (Telecommunications Act), carriers, carriage service providers and others are prohibited from disclosing certain information, including personal information, except in limited circumstances.[65] This includes where the use and disclosure of information is:

- made to deal with calls to emergency service numbers;[66] or
- reasonably necessary to prevent or reduce a serious and imminent threat to the life or health of a person.[67]

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

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

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

66 Section 285.

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

2.140 In *Scrutiny Digest 8 of 2022* the committee requested the minister's advice as to the safeguards in place to protect information that may be used or disclosed under proposed subsection 285(1B) and proposed sections 287 and 300, including:

- to whom information may be disclosed;
- what kinds of information may be disclosed;
- the process by which information may be requested and disclosed; and
- what safeguards would operate in respect of information disclosed under these provisions and why the minister considers that these safeguards are sufficient.[68]

Minister's response[69]

2.141 The minister advised that the bill seeks to balance the right to privacy with the need to assist emergency services in finding and protecting people. In relation to proposed subsection 285(1B), the minister advised that information may be disclosed about unlisted numbers to an Emergency Call Person (ECP). The kinds of information that may be disclosed is limited to matters raised by a call to an emergency service number, including the name and service address associated with the number calling the emergency service, as contained in the Integrated Public Number Database (IPND).

2.142 The minister provided further information on the process by which information may be requested and disclosed. The minister clarified that when a caller dials an emergency service number the call is transferred to the requested emergency service, and that the customer name and residential address of the caller is automatically transmitted from the IPND and displayed on the control screen of the emergency service operator handing the call. The operator will attempt to confirm with the caller the location, but where this is not possible, assistance is dispatched to the address associated with the phone number of the caller as listed on the IPND. This amendment provides that disclosure about unlisted numbers from the IPND Manager (Telstra) to the ECP will be lawful.

2.143 The minister advised that the safeguards that exist in respect to information disclosed under these provisions include: a requirement that it must be unreasonable or impracticable to seek the consent of the person to whom the disclosure relates; the use and disclosure of data is restricted only to those necessary in providing an emergency service response; the use or disclosure of information received under these exceptions must be for the authorised purpose, contravention of which is an offence punishable on conviction by 2 years imprisonment; and there are publicly

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

69 The minister responded to the committee's comments in a letter dated 16 December 2022. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2023* available at: www.aph.gov.au/senate_scrutiny_digest.

available procedures in place to ensure that information disclosed between the IPND Manager (Telstra) and the ECP is handled appropriately, as well as obligations on IPND access seekers which are specified in an enforceable industry code and data access agreements with Telstra. The minister further advised that the explanatory memorandum will be updated to outline the process by which disclosures would occur under proposed subsection 285(1B) and the safeguards which are in place.

2.144 In relation to sections 287 and 300, the minister advised that in practice, the provisions generally only apply when a carrier or service provider is contacted by the police. The kinds of information that may be disclosed relate to the 'affairs or personal particulars of a person', for example location information as outlined in section 275A of the Telecommunications Act, but do not include the content of a communication.

2.145 In relation to the process by which information may be requested and disclosed, information may be requested by anyone, but a formal request from law enforcement agencies to providers is required in relation to missing persons. Further, internal procedural requirements apply for law enforcement agencies to help establish that the thresholds for reasonable belief and reasonably necessary in proposed section 300 are met. If a member of the general public made a claim, they would need the support or confirmation from emergency service organisations or law enforcement agencies in order to meet the threshold for the exception to apply.

2.146 The safeguards that operate in respect of information disclosed are that information may only be disclosed where: the carrier or carriage service provider must believe on reasonable grounds that the disclosure is reasonably necessary to prevent or lessen a serious threat to the life or health of a person; it must be unreasonable or impracticable to obtain the consent of the person the disclosure relates to before information can be disclosed; and any secondary use or disclosure of information received must be for the authorised purpose, contravention of which is an offence punishable on conviction by 2 years imprisonment. The minister further advised that additional safeguards exist in procedures and protocols that are not in the Telecommunications Act or made public, so as not to disclose operational police practices.

Committee comment

2.147 The committee thanks the minister for this detailed response and welcomes the minister's undertaking to update the explanatory memorandum and statement of compatibility to include the additional information provided.

2.148 The committee notes the minister's advice that proposed subsection 285(1B) facilitates the disclosure of information about unlisted numbers, including the name and service address associated with the number, to emergency services. Given the minister has advised that information, in practice, is only shared with emergency services, the committee considers that it would be appropriate for the bill to explicitly limit who the information can be shared with or, at a minimum, for the explanatory memorandum to be updated to specify this information. This would assist in limiting

the scope of the power to share personal information in subsection 285(1B) and therefore reduce the potential for a decision to unduly impact on an individual's right to privacy.

2.149 Further, information or the contents of a document that may be shared under subsection 300(1) must relate to the 'affairs or personal particulars (including any unlisted telephone number or any address) of another person'. The committee notes the minister's advice that this may include location triangulation information but will never include the substance of a communication. The committee considers that not disclosing the substance of a communication is an important safeguard to an individual's privacy. However, the committee notes that the term 'affairs or personal particulars' is not defined in the Telecommunications Act and that it is not explicit on the face of the bill what this may include or that the substance of a communication cannot be disclosed. Given the importance of the phrase 'affairs or personal particulars' to the use of the power under subsection 300(1), the committee considers that it would be appropriate to provide guidance as to its meaning, either within the bill, or at a minimum, within the explanatory memorandum. The committee also considers that it would be more appropriate to include a requirement that the substance of a communication cannot be disclosed.

2.150 The committee requests the minister's further advice as to:

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

Chapter 3

Scrutiny of standing appropriations

3.1 Standing appropriations enable entities to spend money from the Consolidated Revenue Fund on an ongoing basis. Their significance from an accountability perspective is that, once they have been enacted, the expenditure they involve does not require regular parliamentary approval and therefore escapes parliamentary control. They are not subject to approval through the standard annual appropriations process.

3.2 By allowing the executive government to spend unspecified amounts of money for an indefinite time into the future, provisions which establish standing appropriations may, depending on the circumstances of the legislation, infringe on the committee's terms of reference relating to the delegation and exercise of legislative power.

3.3 Therefore, the committee has determined that, as part of its standard procedures for reporting on bills, it should draw Senators' attention to bills that establish or amend standing appropriations or establish, amend or continue in existence special accounts.[1] It will do so under provisions 1(a)(iv) and (v) of its terms of reference, which require the committee to report on whether bills:

> (iv) inappropriately delegate legislative powers; or
>
> (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.[2]

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

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

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

- National Reconstruction Fund Corporation Bill 2022 – clause 51;[3] and
- Safeguard Mechanism (Crediting) Amendment Bill 2022 – Schedule 1, item 34, proposed subsection 22XNM(4).[4]

Senator Dean Smith
Chair

3 Clause 51 provides a power to allow the Consolidated Revenue Fund to be appropriated for the purposes of the National Reconstruction Fund Corporation Special Account.

4 Proposed subsection 22XNM(4) provides a power to allow the Consolidated Revenue Fund to be appropriated so that the Commonwealth can make interest payments on overpayments for administrative penalties that may be imposed under the bill.