



Senate Standing

Committee for the Scrutiny of Bills

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Committee information

Terms of reference

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

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

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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.

Australian Naval Nuclear Power Safety Bill 2023¹

Purpose	This bill seeks to establish a framework to regulate the nuclear safety aspects of Australia's nuclear-powered submarine enterprise.
Portfolio	Defence
Introduced	House of Representatives on 16 November 2023
Bill status	Before the House of Representatives

Significant penalties

Reversal of the evidential burden of proof²

1.2 Part 2 of the bill provides for numerous civil penalties and offences relating to nuclear safety and licences. Subclause 18(1) provides that a person who conducts a regulated activity must,³ so far as is reasonably practicable,⁴ ensure nuclear safety when conducting the activity. Subclause 18(4) provides that it is an offence for a person to engage in conduct that is a regulated activity and the conduct results in a contravention of subsection 18(1). The penalty for an individual is 12 years imprisonment or 700 penalty units, or both.

1.3 Further, subclause 18(5) provides that it is an offence for a person to engage in conduct that is a regulated activity, results in a contravention of subsection 18(1), a nuclear safety incident occurs and the person is reckless, or negligent, as to whether the conduct would cause or contribute to the nuclear safety incident. The penalty for an individual is 25 years imprisonment or 1,400 penalty units, or both.

1.4 Subclause 19(1) provides that a person must not conduct a regulated activity if the person does not hold a licence authorising the person to conduct the regulated

¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Australian Naval Nuclear Power Safety Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 2.

² Part 2, subclauses 18(4), 18(5), 19(3), 20(3), 21(5), 22(3), 24(3) and 25(3). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

³ Clause 9 defines 'regulated activity' to mean a facility activity, a submarine activity and a material activity, which are further defined in clauses 11, 13 and 14 respectively.

⁴ Subclause 5(2) further defines 'reasonably practicable'.

activity. Subclause 19(3) provides that it is an offence if the person conducts a regulated activity and the person does not hold a licence authorising the person to conduct the regulated activity. The penalty for an individual is 6 years imprisonment or 350 penalty units, or both. The bill also provides for numerous other offences with significant terms of imprisonment (3 or 6 years).⁵

1.5 The committee considers that, where significant penalties are imposed, the rationale should be fully outlined in the explanatory memorandum, and should be justified by reference to similar offences in Commonwealth legislation and if not, why not. This promotes consistency and guards against the risk that a person's liberty is unduly limited through the application of disproportionate penalties.

1.6 The explanatory memorandum explains:

There are varying levels of civil and criminal penalties depending on the duty involved and the person to whom the duty applies. The penalties have been chosen based on the possible severe outcomes if a duty is breached, such as death, serious injury or serious harm to the environment. They have also been chosen to act as a deterrent to ensure compliance and to promote public confidence and trust in the nuclear-powered submarine enterprise. This is consistent with the objects of the Act.⁶

1.7 In relation to subclause 19(3), the explanatory memorandum further explains that 'the offence and the penalties in subsection 19(3) are intended to provide an effective deterrent to conduct that contravenes the section'.⁷ This same explanation is provided for subsections 20(3) and 21(5),⁸ and no explanation is provided for the other offences in Part 2 of the bill.

1.8 The committee considers that in the context of nuclear safety, significant penalties may be appropriate to ensure compliance with the regulatory scheme. Nevertheless, it is unclear to the committee why particular penalty amounts have been chosen in relation to the various offences. The committee considers that the explanatory memorandum has not justified why the various penalties have been considered necessary to achieve deterrence. In addition, no reference to other Commonwealth laws has been provided or explanation as to why these penalties may differ from other Commonwealth laws. The committee's concerns are heightened given that strict liability is attached to elements of some of these offences and the evidential burden of proof has also been reversed in relation to some of these offences, as discussed further below.

⁵ See subclauses 20(3), 21(5), 22(3), 24(3) and 25(3).

⁶ Explanatory memorandum, p. 16.

⁷ Explanatory memorandum, p. 18.

⁸ Explanatory memorandum, pp. 19 and 21.

- 1.9 In light of this, the committee requests the minister's detailed advice as to:**
- **the appropriateness of the penalties proposed in subclauses 18(4), 18(5), 19(3), 20(3), 21(5), 22(3), 24(3) and 25(3); and**
 - **whether these penalties are broadly equivalent to similar offences in Commonwealth legislation and if not, why not.**

1.10 The committee's consideration of the appropriateness of these provisions would be assisted if the minister's response explicitly addresses relevant principles as set out in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide to Framing Commonwealth Offences)*.

Reversal of the evidential burden of proof⁹

1.11 As noted above, subclause 19(1) provides that a person must not conduct a regulated activity if the person does not hold a licence authorising the person to conduct the regulated activity. Subclause 19(3) provides that it is an offence if the person conducts a regulated activity and the person does not hold a licence authorising the person to conduct the regulated activity. Subclause 19(5) provides for exceptions to the offence if the person is not the holder of a licence but is authorised by a licence to conduct the regulated activity, or an exemption granted under section 144 applies to the person in relation to the activity.¹⁰ A defendant bears an evidential burden of proof in relation to these matters.

1.12 Similarly, the evidential burden of proof is reversed for exceptions in subclause 23(5), in relation to an offence for licence holders not complying with licence conditions; and subclause 25(5), in relation to an offence for authorised persons not complying with licence conditions.

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

⁹ Subclauses 19(5), 23(5) and 25(5)The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

¹⁰ Clause 144 provides that the Regulator may exempt specified persons from the application of subsection 19(1) or another provision of the Act prescribed by the regulations, in relation to a regulated activity, or the application of a specified licence condition.

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

1.14 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.¹²

1.15 While in these instances 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.

1.16 In relation to subclauses 19(5), 23(5) and 25(5), the explanatory memorandum explains that 'it is appropriate for the defendant to bear the evidential burden because the facts in relation to the defence are within the defendant's knowledge'.¹³

1.17 In this instance, the committee considers that whether the facts are within the defendant's knowledge is not the appropriate test as to whether the evidential burden of proof should be reversed. In relation to subclause 19(5), for example, whether a person is authorised by a licence to conduct a regulated activity, or whether an exemption under section 144 has been granted, are both facts that would be readily ascertainable by the prosecution and is not peculiarly within the defendant's knowledge. As noted above, the committee's concerns are heightened in these instances given the significant penalties attached to these offences. The committee considers it is likely more appropriate to include these exceptions as elements of the offence, or to disallow the application of subsection 13.3(3) of the *Criminal Code Act 1995* (Criminal Code), so that the defendant does not bear the evidential burden of proof.

1.18 The committee requests the minister's detailed advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in subclauses 19(5), 23(5) and 25(5).

1.19 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*.

¹² Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (September 2011) p. 50.

¹³ Explanatory memorandum, pp. 19, 22 and 24.

Coercive powers—entry and search powers¹⁴

1.20 Part 4, division 2 of the bill provides for powers relating to ‘monitoring areas’.¹⁵ Clause 40 provides that an inspector may, at any time, enter a monitoring area and exercise monitoring powers to:

- determine whether the Act has been or is being complied with;
- determine whether information provided under or for the purposes of the Act is correct; or
- investigate a nuclear safety incident if, at the time the inspector enters, they do not reasonably suspect that the incident involves a contravention of an offence or civil penalty provision of the Act.

1.21 Monitoring powers include the power to search the monitoring area; examine or observe any activity conducted; inspect, examine, take measurements of or conduct tests on any thing; make any still or moving image or any recording; inspect any document; take extracts from, or make copies of, any such document; and powers relating to operating equipment.¹⁶ Additionally, it includes the power to secure evidential material for up to 72 hours under particular conditions.¹⁷ These powers can be exercised without the consent of any relevant person in relation to the monitoring area,¹⁸ and without a warrant.¹⁹

1.22 Under common law, government officials cannot enter and search the premises of a person without consent. Although this common law position may be appropriately modified by legislation, the committee will closely scrutinise any conferral of coercive powers. As noted in the *Guide to Framing Commonwealth Offences*, the default position is that entry into a premises without consent should generally be authorised by a warrant issued by a judicial officer, such as a magistrate.²⁰

1.23 Officials entering premises without consent should also generally be either police officers, or officers of another kind of investigatory body which has established

¹⁴ Part 4, division 2. The committee draws senators’ attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

¹⁵ Part 4, division 3 of the bill separately deals with powers relating to ‘investigation areas’ and, where an inspector reasonably believes that there may be evidential material in an investigation area, the inspector may enter and exercise investigation powers by consent or under warrant.

¹⁶ Clause 41.

¹⁷ Clauses 42 and 44.

¹⁸ Subclause 40(2).

¹⁹ Subclause 40(3).

²⁰ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 80–81.

clear guidelines on the appropriate conduct of an investigation.²¹ A framework allowing Commonwealth officials to enter premises either with consent or with a warrant is set out in the *Regulatory Powers (Standard Provisions) Act 2014*.²² However, that framework has not been applied in this case.

1.24 The explanatory memorandum explains:

The Regulatory Powers Act is an Act of general application and there is no express requirement to trigger its provisions. In this instance, it was considered not suitable to trigger certain parts of the Regulatory Powers Act because of the unique operating circumstances of the conventionally armed, nuclear-powered submarine enterprise. In particular, the compliance and enforcement powers need to be appropriate for the military context in which they will be exercised.²³

1.25 The committee considers that there may be sound reasons to depart from the standard Commonwealth law position in relation to monitoring and investigating an industry which potentially poses serious dangers to public health, however it is unclear to the committee why the approach proposed in the bill has been taken. The committee notes that the *Guide to Framing Commonwealth Offences* considers that a monitoring warrant regime may be appropriate 'where there is a need to monitor compliance with legislation in circumstances where no offence is suspected'.²⁴ It appears to the committee that such a regime may be appropriate to regulate Part 4, division 2 of the bill in relation to monitoring powers.

1.26 The committee requests the minister's detailed advice as to whether consideration has been given to including a monitoring warrant regime in Part 4, division 2 of the bill and, if it was considered not appropriate, why that is the case.

Coercive powers—seizure

Use and derivate use of seized material²⁵

1.27 Clause 43 provides for additional powers for an inspector to seize a thing without a warrant where:

- the thing is found during the exercise of a monitoring power under section 41; and

²¹ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Chapter 8.

²² *Regulatory Powers (Standard Provisions) Act 2014*, Part 3.

²³ Explanatory memorandum, p. 34.

²⁴ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 87–88.

²⁵ Part 4, div 2, clause 43 and part 4, div 2, clause 52. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

- an inspector reasonably believes that the thing is evidential material; and
- the powers relating to securing evidence need to be exercised without a warrant because it is not practicable to obtain a warrant or the circumstances are serious and urgent.

1.28 In general, the committee prefers seizure to only be allowed under a warrant, even if search and entry has been authorised in the absence of a warrant. The committee considers that where a bill seeks to confer coercive powers, which includes the seizing of evidential material, the explanatory memorandum should address why it is appropriate, what safeguards exist, and whether the approach taken is consistent with the *Guide to Framing Commonwealth Offences*.

1.29 The *Guide to Framing Commonwealth Offences* outlines the expectation that seizures should only be allowed under warrant, with an interim power to secure the item if necessary.²⁶ While under subparagraph 43(1)(b)(ii) seizure of items is limited to where it is not practicable to obtain a warrant or the circumstances are serious and urgent, the committee is unclear what the term ‘not practicable to obtain a warrant’ means.

1.30 In this case, the explanatory memorandum provides only a short justification:

This provision applies where it is impractical to obtain a warrant such as in remote locations. Other comparable examples include subsection 70A(6) of the *National Health Security Act 2007* and subsection 68(6) of the *National Vocational Education Training Regulator Act 2010*.²⁷

1.31 The committee considers that this justification does not adequately provide guidance on what may be considered ‘not practicable’. It therefore retains concerns regarding the potential breadth of this term. While remote locations may make it more difficult to obtain a warrant, the *Guide to Framing Commonwealth Offences* outlines that in circumstances where it is not practical to obtain a warrant in person, it is usually desirable to allow for the issue of a warrant by telephone or other electronic means and should contain the safeguards and requirements in section 3R of the *Crimes Act 1914* (Crimes Act).²⁸ It is unclear to the committee why remote warrant provisions would not be appropriate in this context.

1.32 Additionally, it appears to the committee that evidential material seized under clause 43 can be used to prosecute offences outside of the bill. The committee notes that the power to secure evidence under clause 42 is limited to where an inspector reasonably believes that a provision of the bill has been contravened with respect to

²⁶ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 82–83.

²⁷ Explanatory memorandum, p. 38.

²⁸ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 81–82.

the thing, or the thing affords evidence of, or is intended to be used, for the purpose of contravening a provision of the bill.

1.33 However, clause 43 is not so limited and requires just that an inspector reasonably believes that the thing is evidential material (and it is not practicable to obtain a warrant or the circumstances are serious and urgent, as noted above). Further, paragraph 43(3)(b) provides that if the thing is equipment or a device that has been operated under the monitoring powers in clause 41, the inspector may seize the thing only if possession of the equipment or device by a relevant person in relation to the monitoring area could constitute an offence against a law of the Commonwealth, a state or a territory.

1.34 Further, even where a warrant is issued in relation to investigation powers under Part 4, division 3 of the bill, evidential material not specified in the warrant may be seized. Clause 52 of the bill provides that if an inspector enters an investigation area under an investigation warrant to search for evidential material, they can seize a thing that is not evidential material of the kind specified in the warrant. This can occur if, in the course of searching for the kind of evidential material specified in the warrant, the inspector finds a thing, and reasonably believes that it is evidential material of another kind and it is necessary to seize it in order to prevent its concealment, loss or destruction.

1.35 The *Guide to Framing Commonwealth Offences* outlines the principle that where legislation confers seizure powers, consideration should be given to including limits on the use and derivative use of incidentally seized material.²⁹ It further outlines the principle that legislation should be explicit where it confers the power to seize material related to an offence other than that for which a warrant was issued. It explains that:

In such instances, the legislation should also require that warrants include clear information on the extent of the seizure powers authorised under a warrant and whether these powers extend to material related to a different offence to that specified in the warrant (for example, see subsection 3E(6) of the Crimes Act). Provision may also be made for how material seized in relation to an offence under another Act is to be dealt with (for example, if material seized by a regulatory agency is relevant to a Commonwealth offence, that it be provided to the AFP [Australian Federal Police] as soon as practicable or within a specified timeframe).³⁰

1.36 In this case, the explanatory memorandum has not provided any additional information as to whether any limitations on the use and derivative use of seized

²⁹ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 84.

³⁰ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 84.

material have been considered. In relation to the power under clause 53, the explanatory memorandum explains:

This is intended to cover limited circumstances where it may be impractical to obtain a warrant, including those involving operations in remote locations and other cases where an issuing officer may not be available.³¹

1.37 Again, the committee considers that there may be sound reasons to depart from the standard Commonwealth law position in relation to the seizure of material in this context, but the committee does not consider that the departure from the principles in the *Guide to Framing Commonwealth Offences* has been suitably justified. As such, the committee considers it may be appropriate to include further provisions to clarify the power to seize material related to a different offence.

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

- **what is meant by the term 'not practicable to obtain a warrant' in subparagraph 43(1)(b)(ii) and what guidance exists for inspectors;**
- **whether consideration has been given to including remote warrant provisions in relation to clause 43, and if it is not considered appropriate, why not;**
- **whether consideration has been given to including limits on the use and derivative use of seized material in relation to clauses 43 and 52; and**
- **whether the bill can be amended to more clearly define the extent of the seizure powers under clauses 43 and 52.**

1.39 The committee's consideration of the appropriateness of these provisions is assisted if the minister's response explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.

³¹ Explanatory memorandum, p. 46.

Australian Research Council Amendment (Review Response) Bill 2023³²

Purpose	The Australian Research Council Amendment (Review Response) Bill 2023 (the bill) amends the <i>Australian Research Council Act 2001</i> (ARC Act) to enhance the Australian Research Council's (ARC) role to better support Australia's dynamic research landscape. The amendments in the bill are in response to the Final Report of the Trusting Australia's Ability: Review of the <i>Australian Research Council Act 2001</i> (Review).
Portfolio	Education
Introduced	House of Representatives on 29 November 2023
Bill status	Before the House of Representatives.

Broad discretionary powers

Availability of merits review³³

1.40 Item 6 of Schedule 3 introduces proposed subsection 50(1) into the *Australian Research Council Act 2001*, which provides that the Chief Executive Officer (CEO) of the Australian Research Council may terminate or vary a funding agreement if the CEO is satisfied that the organisation that is a party to the agreement has breached a term or condition of the agreement.³⁴ Proposed subsection 50(2) provides that the CEO may vary the funding agreement in any other circumstances.³⁵

1.41 Similarly, proposed subsections 50(4) and 50(5) provide that the Australian Research Council Board (the board) or the minister may terminate or vary a funding approval in relation to an organisation if: the CEO gives the board or the minister notice of a term or condition of the funding agreement that relates to the funding approval; and if the board or the minister is satisfied that the organisation has breached the term or condition. Under proposed subsections 47(5) and 48(4), the board and CEO respectively have general powers to vary a funding approval.³⁶

³² This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Australian Research Council Amendment (Review Response) Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 3.

³³ Schedule 3, item 6, proposed subsections 50(1), 50(2), 50(4) and 50(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and 24(1)(a)(iii).

³⁴ Proposed subsection 50(1).

³⁵ Proposed subsection 50(2).

³⁶ Proposed subsections 47(5) and 48(4).

1.42 The committee expects that the inclusion of broad discretionary powers be justified in the explanatory memorandum and that guidance be provided as to the exercise of such powers. In this instance, the explanatory memorandum only provides a description of the provisions in relation to the board and the minister, such as:

New subsection 47(5) provides that the Board may, in writing, vary an approval under subsection 47(1).

[...]

New subsection 48(4) provides that the Minister may, in writing, vary an approval under subsection 48(1).

[...]

New subsection 50(1) provides that, if the CEO is satisfied that the organisation that is a party to a funding agreement has breached a term or condition of the funding agreement, the CEO may, on behalf of the Commonwealth:

- at paragraph (a), terminate the funding agreement; or
- at paragraph (b), vary the funding agreement. For example, the CEO may vary the terms and conditions relating to the periods in which payments of financial assistance are made to an organisation.³⁷

1.43 It is unclear when the board or minister are able to vary funding approvals and in what ways they are able to vary funding approvals. It appears that only the CEO is constrained by the requirement to be satisfied of a breach of a condition of the funding agreement, but may vary a funding agreement even in other circumstances. Further, there is no guidance provided as to what would satisfy the CEO that a breach of a condition of a funding agreement has occurred. The committee considers that some guidance as to the CEO, board and the minister's powers to terminate and vary funding agreements and approvals would be of assistance in constraining how their discretionary powers may be exercised.

1.44 The committee's concerns are heightened in this instance in the absence of a provision that allows for merits review of a decision to vary a condition of or terminate a funding agreement. The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided by reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*³⁸

³⁷ Explanatory memorandum, pp. 29, 32, 34.

³⁸ Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999) [What decisions should be subject to merit review? 1999 | Attorney-General's Department \(ag.gov.au\)](#).

1.45 The committee understands that in this instance, a variation or a termination of a funding agreement is likely to affect funding that is provided to an organisation for the purpose of research, which may have detrimental consequences for the organisation. The committee queries the exclusion of a right to independent merits review in this instance and whether affected parties will be provided an opportunity to present their case prior to contract variation or termination.

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

- **why it is necessary and appropriate to provide the minister and the board with a broad power to vary funding approvals under proposed subsections 47(5) and 48(4);**
 - **why it is necessary and appropriate to provide the CEO with a broad power to vary funding agreements under proposed subsection 50(2);**
 - **whether guidance can be provided as to how the CEO must be satisfied that a breach of a condition of the funding agreement has occurred under proposed subsections 50(1);**
 - **whether independent merits review will be available in relation to a decision made under proposed subsection 50(1), 50(4) or 50(5) of the bill or if not, why not; and**
 - **why it is necessary and appropriate to exclude independent merits review of a decision made under proposed subsection 50(1), 50(4) or 50(5) of the bill, with reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?***
-

Defence Trade Controls Amendment Bill 2023³⁹

Purpose	This bill seeks to amend the <i>Defence Trade Controls Act 2012</i> to regulate the supply of certain Defence and Strategic Goods List military or dual-use goods and technology.
Portfolio	Defence
Introduced	House of Representatives on 30 November 2023
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof

Significant penalties⁴⁰

1.47 Subsection 10(1) of the *Defence Trade Controls Act 2012* (the DTC Act) provides an offence for supplying DSGL (Defence and Strategic Goods List) technology under particular circumstances. The penalty for the offence is ten years imprisonment or 2,500 penalty units, or both. Proposed substituted subsections 10(3) and 10(3A) and proposed new subsection 10(3B) of the bill provide exceptions to this offence.

1.48 Proposed subsection 10(3) provides that subsection 10(1) does not apply if the DSGL technology is supplied by, or on behalf of, a person or body to an officer or employee of the person or body; and the officer or employee is a citizen or permanent resident of Australia, or of a foreign country that is specified in an instrument, and the supply occurs in the course of the officer or employee's duties as an officer or employee.

1.49 Proposed subsection (3A) provides subsection 10(1) does not apply if the DSGL technology is supplied by, or to, a person who is a member or employee of particular defence, police or government forces,⁴¹ and the supply occurs in the course of the person's duties as such a person and the supply is made solely or primarily for a purpose prescribed by the regulations.

1.50 Proposed subsection 10(3B) provides that subsection 10(1) does not apply if the DSGL technology is supplied to a person who holds a covered security clearance, and the supply is made solely or primarily for a purpose prescribed by the regulations.

³⁹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Defence Trade Controls Amendment Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 4.

⁴⁰ Proposed sections 10, 10A, 10B and 10C. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

⁴¹ Specifically the Australian Defence Force, Australian Public Service, Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Australian Signals Directorate, Australian Federal Police or a state or territory police force.

1.51 For all three exceptions, the defendant bears an evidential burden of proof in relation to the matters. At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence.⁴² This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.52 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 Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*,⁴³ (*Guide to Framing Commonwealth Offences*) which states that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence) where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁴⁴

1.53 In this instance, the explanatory memorandum provides little explanation as to why they are exceptions rather than elements of the offence. Instead, the explanatory memorandum restates the effect of subsection 13.3(3) of the *Criminal Code Act 1995* (Criminal Code), provides no justification for the exceptions in proposed subsections 10(3A) and 10(3B), and in relation to proposed subsection 10(3) explains:

It is appropriate for a defendant to bear the evidential burden when seeking to rely on this exception because information such as citizenship status and employee duties would typically be peculiarly within a defendant's knowledge.⁴⁵

1.54 It does not appear to the committee that the explanation provided is consistent with the approach in the *Guide to Framing Commonwealth Offences*. In particular, it is not clear how the relevant matters can be said to be *peculiarly* within the defendant's knowledge. For example, whether someone is an Australian citizen or permanent resident appears to be a matter which the prosecution could readily ascertain. Similarly, in relation to the other exceptions, whether someone is acting in accordance with regulations and whether someone holds a security clearance all appear to be matters that are not peculiarly within the defendant's knowledge.

⁴² 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.

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

⁴⁴ Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, p. 50.

⁴⁵ Explanatory memorandum, pp. 14–16.

1.55 Additionally, the bill proposes three new offences under proposed subsections 10A (supplying DSGL technology in Australia to a foreign person), 10B (supplying of DSGL goods or DSGL technology from outside Australia) and 10C (provision of DSGL services). All three proposed new offences have penalties of 10 years imprisonment or 2,500 penalty units, or both, and have numerous exceptions attached. The defendant similarly bears the evidential burden of proof. As with the exceptions under section 10(1) discussed above, the explanatory memorandum does not provide a justification as to why it is appropriate to reverse the evidential burden of proof in relation to the exceptions listed for these offences, and it similarly appears to the committee to relate to matters that are not peculiarly within the knowledge of the defendant.

1.56 The committee's concerns are heightened in relation to the reversed burden of proof by the significant penalties attached to these offences.

1.57 The committee requests the minister's detailed advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in relation to proposed sections 10, 10A, 10B and 10C.

1.58 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 Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Broad delegation of administrative powers or functions⁴⁶

1.59 Proposed subsection 73(2A) provides for the delegation of functions or powers under sections 11 and 12 of the DTC Act to the Secretary, a Senior Executive Service (SES) or acting SES employee in the Department of Defence, or an Australian Public Service employee who holds, or is acting in, an Executive Level 1 or 2, or equivalent position, in the Department of Defence.

1.60 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 SES. Where broad delegations are provided for, the committee expects the explanatory memorandum to include an explanation as to the purpose and scope of the delegated power, including why these are considered necessary, and, where a delegation extends beyond members of the SES, an explanation as to why this is appropriate. In addition, the committee expects the explanatory memorandum to explain what safeguards are in place to ensure that

⁴⁶ Proposed subsection 73(2A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

any powers are appropriately delegated, and whether these safeguards are contained in law or policy.

1.61 In this case, the committee acknowledges and welcomes that consideration has been given to which functions or powers are considered appropriate to be delegated and to which position levels. The explanatory memorandum further explains:

Subsection (2A) sets out a specific provision to enable the delegation of functions or powers of the Minister under section 11 or 12 of the DTC Act. The purpose of this provision is to enable a suitably senior and qualified departmental official to exercise the Minister's powers on their behalf and to create an avenue of review to the Minister, where the decision is reviewable.⁴⁷

1.62 Nevertheless, the committee considers that the explanatory memorandum could provide a greater justification as to why a delegation to officials at the Executive Level 1 or 2 is necessary and appropriate rather than limiting the delegation to the SES and above. It could also provide greater justification regarding whether those who will be exercising the delegated powers and functions will possess appropriate training, qualifications, skills or experience.

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

- **why it is considered necessary and appropriate to provide the power to delegate the minister's functions or powers under proposed subsection 73(2A) to an Executive Level 1 or 2 employee in the Department of Defence; and**
- **whether those exercising the delegated powers or functions will possess the appropriate training, qualifications, skills or experience.**

⁴⁷ Explanatory memorandum, p. 45.

National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023⁴⁸

Purpose	The National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023 (the bill) seeks to amend the <i>Australian Security Intelligence Organisation Act 1979</i> (ASIO Act), the <i>Intelligence Services Act 2001</i> (IS Act), the <i>Telecommunications (Interception and Access) Act 1979</i> (TIA Act) and the <i>Archives Act 1983</i> (Archives Act) to support intelligence agencies.
Portfolio	Home Affairs
Introduced	House of Representatives on 30 November 2023
Bill status	Before the House of Representatives

Reversal of the evidential burden of proof⁴⁹

1.64 Item 39 of Schedule 2 to the bill seeks to amend existing section 92 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) by repealing and substituting it with an amended offence provision. The offence relates to making information public or causing or permitting information to be made public if the information identifies a person as being an Australian Security and Intelligence Organisation (ASIO) employee, a former ASIO employee or an ASIO affiliate, or could reasonably lead to establishing the identity of a person as such, or the identity of a person as being as such could reasonably be inferred from the information.⁵⁰

1.65 Proposed subsections 92(2) and 92(3) introduce defences to the offence that would be created by proposed subsection 92(1). Proposed subsection 92(2) provides the offence does not apply if the Minister or the Director-General has consented, in writing, to the information being made public.⁵¹

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

1.67 At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed

⁴⁸ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Security Legislation Amendment (Comprehensive Review and Other Measures No. 3) Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 5.

⁴⁹ Schedule 2, item 39, proposed subsection 92(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

⁵⁰ Proposed subsection 92(1).

⁵¹ Proposed subsection 92(2).

innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.68 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 Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (Guide to Framing Commonwealth Offences)*, which states that a matter should only be included in an offence-specific defence (rather than 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.⁵²

1.69 In relation to proposed subsection 92(2), the explanatory memorandum states:

Subsection 92(2) would provide an exception to the offence in subsection 92(1) where the ASIO Minister or Director-General of Security has consented in writing to the information being made public. This would be consistent with the existing subsection 92(1).

Subsection 92(2) would also include a note that a defendant bears an evidential burden in relation to the matters in the subsection, by reason of subsection 13.3(3) of the Criminal Code. This is appropriate because consent being given would be exceptional. The decision to give consent needs to be made with very careful consideration of the impact of the publication of the identity of current or former ASIO employees and affiliates on their colleagues in ASIO, and other agencies, and the impact on other people in the community or internationally they have engaged with while working for ASIO. It also has to give regard to the sensitive matters they have been involved in that relate to Australia's national security. It is reasonable to expect that any consent is clearly given and therefore can be demonstrated by the defendant. Clarity that the consent has been granted is a necessary consideration in ensuring the offence is operating effectively to protect the interests of the Commonwealth, of ASIO, and of the current or former ASIO employees or affiliates.⁵³

1.70 The committee notes that while written consent provided by the Minister or the Director-General, to making identifying information public, may only be made in exceptional circumstances, it is not clear to the committee why the evidential burden has been reversed in relation to this exception. It is not apparent to the committee

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

⁵³ Explanatory memorandum, p. 47.

that the Minister or the Director-General's written consent would be a matter peculiarly within the defendant's knowledge as the Minister or the Director-General would also have knowledge of such consent and would also be able to provide it as evidence if required. Further, it is not clear to the committee that obtaining or disproving such information would be significantly more costly or difficult for the prosecution.

1.71 The committee also notes that under existing subsection 92(1) of the ASIO Act, disproving the existence of written consent of the Minister or Director-General is an element of the offence of making information public that can identify an ASIO employee, former ASIO employee or ASIO affiliate.⁵⁴ It is unclear to the committee why, in modernising the wording of the offence, it was necessary to create an additional defence, when previously it was sufficient for the matter to exist as an element of the offence.

1.72 As the explanatory materials do not adequately address this issue, the committee requests the minister's explanation as to:

- **why it is proposed to use an offence-specific defence in proposed subsection 92(2) (which reverses the evidential burden of proof) in relation to the offence under proposed subsection 92(1);**
- **why the matters in proposed subsection 92(2) cannot remain as an element of the offence under proposed subsection 92(1); and**
- **whether further guidance can be provided as to the operation of the defence.**

1.73 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*.

⁵⁴ *Australian Security and Intelligence Act 1979*, subsection 92(1).

Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023⁵⁵

Purpose	The Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023 (the bill) seeks to amend the <i>Telecommunications Act 1997</i> , the <i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i> and the <i>Competition and Consumer Act 2010</i> to refine the operation of the statutory infrastructure provider (SIP) regime. It also seeks to make technical and other amendments to legislation to improve the operation of telecommunications regulation outside the SIP regime, including changes that would enhance the enforcement and reporting powers of the Australian Communications and Media Authority and the Australian Competition and Consumer Commission.
Portfolio	Infrastructure, Transport, Regional Development, Communications and the Arts
Introduced	House of Representatives on 7 December 2023
Bill status	Before the House of Representatives

Modification of the operation of primary legislation by delegated legislation (akin to Henry VIII clause)⁵⁶

1.74 The bill proposes amendments to the *Telecommunications Act 1997* (the Tel Act), which would enable delegated legislation to modify the operation of primary legislation.

1.75 Proposed subsection 360HB(2) requires that where a facility is installed in, or in proximity to, the project area of a real estate development or building redevelopment project that is not part of an existing nominated service area, a carrier service provider (CSP) must declare that area as a provisional nominated service area where the specified conditions are met. However, proposed subsections 360HB(4) and 360HB(5) would also respectively enable the minister, by legislative instrument, to

⁵⁵ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Telecommunications Legislation Amendment (Enhancing Consumer Safeguards and Other Measures) Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 6.

⁵⁶ Schedule 1, Part 1, item 74, proposed subsections 360HB(4) and 360HB(5); Schedule 1, Part 1, item 76, proposed subsections 360J(3) and 360J(4); Schedule 1, Part 1, item 78, proposed subsection 360K(1B); Schedule 1, Part 1, item 82, proposed subsections 360KB(2) and 360KB(4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

exempt a project from subsection 360HB(2) and to specify circumstances where the obligations do not apply.

1.76 Currently, section 360J of the Tel Act provides that 33 'development areas' described in three carrier licence condition declarations, are nominated service areas under the Act. However, proposed subsections 360J(3) and 360J(4) would enable the minister, by legislative instrument, to make a declaration which would have the effect of revoking or varying the 'nominated service area'.

1.77 Proposed subsection 360K(1A) provides that if an area is a provisional nominated service area because of a declaration made by a CSP under section 360HB, the carriage provider is the statutory infrastructure provider (SIP) for the service area. However, proposed subsection 360K(1B) would enable the minister, by legislative instrument, to declare that subsection 360K(1A) does not apply to a specified nominated service area and that another specified CSP is the SIP for the nominated area.

1.78 Proposed section 360KB establishes how the SIP for an anticipated service area is determined. It provides that a carrier who gives a notice under subsections 360HA(1) or 360HC(1) of the Act, in relation to an anticipated service area, will be the SIP for the area. However, proposed subsections 360KB(2) and 360KB(4) would enable the minister, by legislative instrument, to declare that these provisions do not apply and that a specified carrier is the SIP for the area.

1.79 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the relevant parent statute). The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.80 Regarding proposed subsection 360K(1B), the explanatory memorandum states:

The Minister would be able to declare, by legislative instrument, that an alternative carrier or CSP is the SIP for the area. This would provide flexibility to adjust to circumstances, such as, for example, when an entity exits the market or sells infrastructure or facilities.

1.81 While the committee has not generally accepted a desire for flexibility alone to be a sufficient justification for allowing delegated legislation to modify the operation of primary legislation, it acknowledges that in this instance this would enable flexibility where an entity exited the market or sold infrastructure or facilities.

1.82 However, the explanatory memorandum provides no explanation for why it is necessary or appropriate to allow delegated legislation made under the other provisions noted above to modify the operation of the Tel Act. In this regard, the committee notes that delegated legislation, made by the Executive, is not subject to the same level of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.83 The committee therefore requests the minister's detailed advice as to why it is necessary and appropriate to allow delegated legislation made under proposed subsections 360HB(4), 360HB(5), 360J(3), 360J(4), 360KB(2) and 360KB(4) to modify the operation of the *Telecommunications Act 1997*.

Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023⁵⁷

Purpose	The bill has eight schedules which seek to amend a range of Acts including the <i>Income Tax Assessment Act 1997</i> , the <i>Australian Charities and Not-for-profits Commission Act 2012</i> , the <i>Corporations Act 2001</i> and the <i>Payment Systems (Regulation) Act 1998</i> .
Portfolio	Treasury
Introduced	House of Representatives on 30 November 2023
Bill status	Before the House of Representatives

Henry VIII clause – modification of primary legislation by delegated legislation⁵⁸

1.84 Schedule 7, item 5, seeks to insert proposed section 911F into the *Corporations Act 2001* (the Corporations Act). Proposed section 911F would allow regulations made under the Corporations Act to prescribe particular financial products or services, or particular classes, to which the professional investor exemption does not apply.⁵⁹ The professional investor exemption provides that a person is not required to hold an Australian Financial Services License in specified circumstances.

1.85 Provisions enabling delegated legislation to modify the operation of primary legislation are akin to Henry VIII clauses, which authorise delegated legislation to make substantive amendments to primary legislation (generally the relevant parent statute). The committee has significant scrutiny concerns with Henry VIII-type clauses, as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. Consequently, the committee expects a sound justification to be included in the explanatory memorandum for the use of any clauses that allow delegated legislation to modify the operation of primary legislation.

1.86 The committee is also concerned when provisions enable delegated legislation to exempt persons or entities from the operation of primary legislation. These provisions have the effect of limiting, or in some cases removing, parliamentary

⁵⁷ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Better Targeted Superannuation Concessions and Other Measures) Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 7.

⁵⁸ Schedule 7, item 5, proposed section 911F of the *Corporations Act 2001*. The committee draws senators' attention to the bill provision pursuant to Senate Standing Order 24(1)(a)(iv).

⁵⁹ The professional investor exemption is set out in subsection 911A(2E) of the Corporations Act.

scrutiny. The committee is particularly concerned where such provisions permit exemptions or modifications that apply to a broad range of entities or legislative provisions. The committee expects a justification for the use of such provisions to be included in the explanatory memorandum.

1.87 In relation to proposed section 911F the explanatory memorandum states:

This power provides for regulations to be made prescribing a particular financial product or financial service, or a particular class of financial product or financial service.

The regulations may also be used to exclude a particular type or class of professional investor but may not be used to exclude a specific professional investor.

- For example, the regulations may prescribe that superannuation funds (or a class of superannuation funds) are excluded from the exemption. However, the regulations could not be used to exclude a specific superannuation fund. Please note that this example is for illustrative purposes only.

Regulations prescribing exceptions to the professional investor exemption are only intended to be made in exceptional circumstances where the application of the professional investor exemption to a particular kind of financial product, financial service, financial market, or professional investor is considered to pose a risk to investors, the regulatory regime, or the market.

If regulations are made prescribing a kind of professional investor, the provision of financial services to this type of professional investor would require the person to hold an AFS licence.

The regulation-making power to exclude particular kinds of financial products, financial services, financial markets, or professional investors from the professional investor exemption is intended to provide the Government with the ability to ensure the effective operation of the professional investor exemption and to respond to emerging risks and changes in global financial markets. In accordance with the *Legislation Act 2003*, regulations made under this power would be subject to disallowance and would therefore be subject to appropriate parliamentary scrutiny.⁶⁰

1.88 The committee notes that the explanatory memorandum indicates that exemptions to the Corporations Act would only be made by regulations in this context in 'exceptional circumstances'. However, there is nothing on the face of the bill to limit the ability of the regulations to amend the operation of the Corporations Act to such exceptional circumstances. It is the view of the committee that this safeguard would be more effective if contained in the bill itself.

⁶⁰ Explanatory memorandum, p. 99.

1.89 The committee therefore requests the Treasurer's advice as to:

- **what would constitute 'exceptional circumstances' permitting regulations made under proposed section 911F to amend the operation of the *Corporations Act 2001*, and whether any examples of such exceptional circumstances could be provided;**
- **whether there is any guidance or relevant matters to be considered in exercising this power; and**
- **whether proposed section 911F can be amended to include an express requirement that the regulations may only prescribe financial products, services, or classes of such as, being exempt from the professional investor exemption in exceptional circumstances.**

Instruments not subject to an appropriate level of parliamentary oversight⁶¹

1.90 Schedule 8 to the bill amends the payments regulatory framework set out in the *Payment Systems (Regulation) Act 1998* (the PSRA). The schedule would insert a range of powers to make legislative instruments which are not subject to parliamentary oversight:

- proposed subsection 11B(1) would provide the minister with the power to designate a payment system as a special designated payment system by notifiable instrument if the minister considers to do so is in the national interest;
- proposed subsection 12(1A) would provide that a nominated special regulator can impose an access regime by legislative instrument;
- proposed subsection 18(1B) would provide that the Reserve Bank or the nominated special regulator may specify participants or classes of participants to whom standards do not apply or apply differently; and
- amended subsection 18(6) would provide that the Reserve Bank or the nominated special regulator must provide a notification when determining, varying or revoking a standard.

1.91 Instruments made under proposed subsections 12(1A), 18(1B) and 18(6) would be exempt from disallowance as per item 26 in the table at section 10 of the *Legislation (Exemptions and Other Matters) Regulations 2015*. Notifiable instruments

⁶¹ Schedule 8, item 29, proposed subsection 11B(1), item 33, subsection 12(1A), and items 61 and 63, subsections 18(1B) and 18(6) in the *Payment Systems (Regulation) Act 1998*. The committee draws senators' attention to the bill provisions pursuant to Senate Standing Order 24(1)(a)(iv).

made under proposed subsection 11B(1) would not be subject to parliamentary scrutiny due to their status as non-legislative instruments.

1.92 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.⁶²

1.93 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*⁶³, and by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its inquiry into the exemption of delegated legislation from parliamentary oversight.⁶⁴

1.94 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.

1.95 Broadly, the committee does not consider the fact that an instrument will fall within one of the classes of exemption in the Legislation (Exemptions and Other Matters) Regulation 2015 is, of itself, a sufficient justification for excluding parliamentary disallowance.⁶⁵ The committee agrees with the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation that 'any exclusion from

⁶² Senate resolution 53B. See *Journals of the Senate*, No. 101, 16 June 2021, pp. 3581–3582.

⁶³ 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.

⁶⁴ 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).

⁶⁵ The committee further notes that the Senate Standing Committee for the Scrutiny of Delegated Legislation has recommended that the blanket exemption of instruments that are 'a direction by a Minister to any person or body' should be abolished. See Senate Standing Committee for the Scrutiny of Delegated Legislation, [Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report](#), 16 March 2021, p. 101.

parliamentary oversight...requires that the grounds for exclusion be justified in individual cases, not merely stated'.⁶⁶

1.96 In relation to proposed subsection 11B(1), the explanatory memorandum states that '[a]s the designation will be administrative in character, and will not, in itself, impose binding legal requirements on entities, any designation will be a notifiable instrument, which is required to be made publicly available on the Federal Register of Legislation'.⁶⁷

1.97 In relation to proposed subsections 12(1A), 18(1B) and 18(6) the explanatory memorandum states that 'allowing instruments made under these sections to be disallowable may cause significant commercial uncertainty and delay'.⁶⁸

1.98 As noted about, the committee does not consider the fact that the Legislation (Exemptions and Other Matters) Regulation 2015 authorises an exemption from disallowance is sufficient to exclude legislation from parliamentary oversight. Further, the justification that excluding these instruments from disallowance is to prevent significant commercial uncertainty and delay does not, in the committee's view, amount to a sufficiently robust explanation as to the exemption.

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

- **why it is necessary and appropriate for instruments made under proposed subsections 12(1A), 18(1B) and 18(6) to be exempt from disallowance; and**
- **why it is necessary and appropriate for instruments made under proposed subsection 11B(1) to be notifiable instruments which are exempt from the full range of parliamentary scrutiny.**

1.100 The committee also draws these provisions to the attention of the Senate Standing Committee for the Scrutiny of Delegated Legislation.

⁶⁶ Senate Standing Committee for the Scrutiny of Delegated Legislation, *Inquiry into the exemption of delegated legislation from parliamentary oversight: Final report*, 16 March 2021, pp. 75–76.

⁶⁷ Explanatory memorandum, p. 138.

⁶⁸ Explanatory memorandum, p. 149.

Private senators' and members' bills that may raise scrutiny concerns⁶⁹

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

Bill	Relevant provisions	Potential scrutiny concerns
Customs Amendment (Preventing Child Labour) Bill 2023	Schedule 1, item 4, proposed subsection 57A(1)	The provisions may raise scrutiny concerns under principle (i) trespass unduly on personal rights and liberties in relation to abrogation of privilege against self-incrimination.
	Schedule 1, item 4, proposed section 57D	The provisions may raise scrutiny concerns under principle (i) trespass unduly on personal rights and liberties in relation to privacy.

⁶⁹ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 8.

Bills with no committee comment⁷⁰

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

- Australian Naval Nuclear Power Safety (Transitional Provisions) Bill 2023
- COAG Legislation Amendment Bill 2023
- Customs Tariff Amendment (Incorporation of Proposals) Bill (No. 2) 2023
- Digital ID (Transitional and Consequential Provisions) Bill 2023
- Help to Buy (Consequential Provisions) Bill 2023
- Help to Buy Bill 2023
- Human Rights (Parliamentary Scrutiny) Amendment (Consideration of UNDRIP) Bill 2023
- Modern Slavery Amendment (Australian Anti-Slavery Commissioner) Bill 2023
- Superannuation (Better Targeted Superannuation Concessions) Imposition Bill 2023
- Treasury Laws Amendment (Reserve Bank Reforms) Bill 2023

⁷⁰ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 9.

Commentary on amendments and explanatory materials⁷¹

Water Amendment (Restoring Our Rivers) Bill 2023

1.101 On 27 November 2023, the Assistant Minister for Climate Change and Energy (the Hon Jenny McAllister) tabled an addendum to the revised explanatory memorandum.

1.102 The committee thanks the assistant minister for tabling an addendum to the revised explanatory memorandum, which responds to the committee's request for further information in relation to the inclusion of significant matters in the Water Markets Intermediaries Code, significant penalties and the provision of procedural fairness.⁷²

Counter-Terrorism Legislation Amendment (Prohibited Hate Symbols and Other Measures) Bill 2023

1.103 On 29 November 2023, 34 Government amendments were made in the House of Representatives and the Attorney-General (the Hon Mark Dreyfus KC MP) presented an addendum to the explanatory memorandum to the bill.

1.104 The committee thanks the Attorney-General for tabling an addendum to the explanatory memorandum, which includes key information requested by the committee in relation to clarifying and providing additional guidance regarding certain key terms.⁷³

Public Health (Tobacco and Other Products) Bill 2023

1.105 On 4 December 2023 the Senate agreed to five opposition amendments to the bill and the Assistant Minister for Indigenous Australians (Senator the Hon Malarndirri McCarthy) tabled an addendum to the explanatory memorandum to the bill.

1.106 The committee thanks the minister for tabling an addendum to the explanatory memorandum, which responds to key matters raised by the committee in *Scrutiny Digest 14 of 2023*.⁷⁴

⁷¹ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 10.

⁷² Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 43–48.

⁷³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 57–73.

⁷⁴ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2023* (15 November 2023) pp. 10–17;

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

- Economic Inclusion Advisory Committee Bill 2023
 - On 5 December 2023 the Senate agreed to one Australian Greens amendment and four independent (Senator David Pocock) amendments to the bill.
- Fair Work Legislation Amendment (Closing Loopholes) Bill 2023
 - On 7 December 2023 the House of Representatives agreed to 20 Government amendments to the bill made in the Senate, including to split the bill into the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 and the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023. The Minister for Employment and Workplace Relations (the Hon Tony Burke MP) circulated a replacement supplementary explanatory memorandum to the bills.
- Identity Verification Services (Consequential Amendments) Bill 2023
 - On 6 December 2023, the Senate agreed to one Government amendment to the bill.
- Identity Verification Services Bill 2023
 - On 6 December 2023 the Minister for Finance (Senator the Hon Katy Gallagher) tabled a replacement explanatory memorandum relating to the bills and a supplementary explanatory memorandum relating to the government amendments to be moved to the bills.
- Infrastructure Australia Amendment (Independent Review) Bill 2023
 - On 5 November 2023, the Senate agreed to two opposition amendments, six Australian Greens amendments and one independent (Senator David Pocock) amendment to the bill.
- Nature Repair (Consequential Amendments) Bill 2023
 - On 5 December 2023 the Senate agreed to two Government amendments and one Australian Greens amendment, and the Assistant Minister for Climate Change and Energy (Senator the Hon Jenny McAllister) tabled a supplementary explanatory memorandum to the bill.
- Nature Repair Bill 2023
 - On 5 December 2023, the Senate agreed to 11 Australian Greens amendments to the bill.

Chapter 2

Commentary on ministerial responses

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

Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023⁷⁵

Purpose	The Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023 (the bill) seeks to amend the <i>Defence Act 1903</i> (the Defence Act), through the insertion of a new Part IXAA which regulates the work that certain former defence staff members – called foreign work restricted individuals – can perform without a foreign work authorisation. The bill also regulates the training that Australian citizens and permanent residents, other than foreign work restricted individuals, may provide without a foreign work authorisation.
Portfolio	Defence
Introduced	House of Representatives on 14 September 2023
Bill status	Before the House of Representatives

Procedural fairness⁷⁶

2.2 Proposed section 115E provides that the Minister for Defence (the minister) must cancel a foreign work authorisation granted to an individual if the minister reasonably believes, as a result of a change in circumstances, that the individual's performance of work or provision of training as specified in the authorisation would prejudice the security, defence or international relations of Australia (proposed paragraph 115E(1)(a)).⁷⁷ Proposed subsection 115E(2) provides that the minister is not required to observe any requirements of the natural justice hearing rule in relation to cancelling a foreign work authorisation.

⁷⁵ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Defence Amendment (Safeguarding Australia's Military Secrets) Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 11.

⁷⁶ Schedule 1, item 1, proposed subsection 115E(2) and proposed section 115M. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

⁷⁷ The minister must also cancel an authorisation if so requested by the individual, as per proposed paragraph 115E(1)(b).

2.3 In addition, proposed section 115K makes provision for internal review of relevant decisions. However, proposed subsection 115K(7) provides that the minister is taken to have affirmed the reviewable decision if the minister does not give the applicant written notice of a decision to affirm, vary or revoke the reviewable decision within 90 days.

2.4 Further, proposed subsection 115M(1) provides that if the minister makes a relevant decision which requires reasons to be given in a notice, the notice must not disclose reasons which the minister reasonably believes the disclosure of which would prejudice Australian security, defence or international relations. The relevant decisions are those covered by proposed subsection 115J(5), a reviewable decision, and a decision under proposed section 115K to affirm, vary or revoke a reviewable decision. This includes decisions such as the granting and cancelling of foreign work authorisations, and the suspension of authorisations.

2.5 In *Scrutiny Digest 12 of 2023* the committee sought the minister's advice as to:

- whether it would be possible for the reasons for the decision made under proposed section 115E to be disclosed where the minister's reasonable belief as to the individual change in circumstances relates to considerations which are personal or unique to the person, rather than national security or international relations;
- why it is necessary and appropriate for proposed subsection 115K(7) to provide that the minister is taken to have affirmed a reviewable decision if the minister does not give the applicant written notice of a decision to affirm, vary or revoke the reviewable decision within 90 days; and
- what consideration was given to the impact of proposed subsection 115K(7) on an individual's procedural fairness rights.

Minister for Defence response⁷⁸

2.6 The minister responded to the committee's concerns in a letter on 8 December 2023.

2.7 In relation to proposed section 115E, the minister advised that written reasons for cancellations could be provided where the reasons relate to personal or unique factors of the individual.

2.8 Further, the minister advised that proposed subsection 115K(7) is a standard deeming provision that would ensure that review is not unreasonably delayed by the inaction of a decision maker. The minister noted that such provisions are 'commonly

⁷⁸ The minister responded to the committee's comments in a letter dated 8 December 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to Scrutiny Digest 1 of 2024).

used to ensure that an affected individual's review rights arise after an appropriate period of time', and provided an example of a similar provision in the *Freedom of Information Act 1982*.

Committee comment

2.9 The committee notes the advice provided by the minister in relation to the cancellation of foreign work authorisations made under proposed section 115E. However, the minister's response does not address the impact of proposed subsection 115M(1) which prevents the minister from disclosing reasons for cancellations which would prejudice Australian security, defence or international relations. When reasons for a cancellation under proposed section 115E are withheld from the applicant as a result of proposed subsection 115M(1), the committee considers that in circumstances where such reasons may be personal to the applicant they may be suitable to disclose without prejudicing national security.

2.10 In addition, while noting the minister's advice that proposed subsection 115K(7) will limit the length of time under which a review decision may be pending, the minister has not advised why it is necessary and appropriate for a lapsed review to result in the original decision being affirmed. In most, if not all, cases affirming the original decision would mean that a cancellation or refusal decision is upheld, contrary to the applicant's wishes. The committee's view is that it would be more appropriate for review decisions which lapse after the specified timeframe to set aside the original decision, which would require decision makers to make timely decisions.

2.11 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed subsection 115M(1) and proposed subsection 115K(7).

Disability Services and Inclusion Bill 2023⁷⁹

Purpose	The bill is seeking to repeal and replace the <i>Disability Services Act 1986</i> and establish a modern legislative framework for the funding and regulation of programs targeted for the benefit of people with disability, their families and carers.
Portfolio	Social Services
Introduced	House of Representatives on 14 September 2023
Bill status	Received the Royal Assent on 4 December 2023

Availability of independent merits review⁸⁰

2.12 There are a range of clauses in the bill which provide for discretionary decisions that may affect individual rights and liberties and to which neither internal nor external merits review apply.

2.13 In *Scrutiny Digest 12 of 2023*, the committee requested the Minister for Social Services advice as to:

- whether the exclusion of merits review from decisions made under clause 9 of the bill is in line with Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and
- in relation to clause 13:
 - whether consideration could be given to methods of ensuring compliance with the Commonwealth Rules and Procurement Guidelines; and
 - whether consideration has been given to providing redress for individuals who are denied grants due to an allocation process that has not been based on merit (similar to the process in relation to government procurement under the *Government Procurement (Judicial Review) Act 2018*); and
- in relation to paragraph 14(6)(g):
 - whether the grants and funding agreements made under this Act would enable a person to sue on the basis of the agreement, and

⁷⁹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Disability Services and Inclusion Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 12.

⁸⁰ Subclause 9(2) and (4); subclause 13(1); subclause 21(1), (5) and (8); subclause 26(1) and (4). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii).

whether a person who is affected but not party to an agreement would have grounds to sue; and

- why the exclusion of merits review is appropriate in relation to the established grounds set out in the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and

in relation to clause 21:

- whether the exclusion of merits review from decisions made under clause 21 of the bill is in line with Administrative Review Council's guidance document, *What decisions should be subject to merits review?*; and
- whether an aggrieved party would be provided with reasons for a refusal or internal merits review by the relevant certification body; and

in relation to clause 26:

- whether an aggrieved party would be provided with reasons for a refusal or internal merits review by the relevant accrediting authority; and
- whether and on what basis the decisions made under clause 26 would be subject to judicial review.⁸¹

2.14 In *Scrutiny Digest 14 of 2023*,⁸² the minister provided a detailed response to each question about the availability of review.⁸³ In relation to clause 26, the minister advised that certification bodies who are refused accreditation by the accrediting authority will be provided with reasons for the refusal by the accrediting authority and would have recourse through the accrediting authority's internal complaints process.

2.15 The minister further advised that paragraph 25(1)(b) requires the secretary to be satisfied that an accredited authority will perform its functions in an independent and impartial way, and that part of this decision making process will be ensuring that an accrediting authority has appropriate internal controls and complaints processes. The minister further advised that decisions made by an accrediting authority under clause 26 of the bill are administrative in nature and subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*.

2.16 The committee thanked the minister for the response and requested that the bill be amended to explicitly include a requirement that an accrediting authority have

⁸¹ Senate Scrutiny of Bills Committee, [Scrutiny Digest 12 of 2023](#) (18 October 2023) pp. 18–22.

⁸² Senate Scrutiny of Bills Committee, [Scrutiny Digest 14 of 2023](#) (15 November 2023) pp. 7–9.

⁸³ The minister responded to the committee's comments in a letter dated 2 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 14 of 2023*).

appropriate internal controls and complaints processes under subclause 25(1). The committee also requested that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to the availability of independent merits review be tabled in the Parliament as soon as practicable.

Minister for Social Services' response⁸⁴

2.17 The minister noted that an amendment to include a requirement that an accrediting authority have appropriate internal controls and complaints processes under subclause 25(1) was moved and passed by the Senate on 17 November 2023.

2.18 The minister further noted that an addendum to the explanatory memorandum dealing with the availability of independent merits review was tabled in the Senate on 17 November 2023.

Committee comment

2.19 The committee thanks the minister for this response and welcomes the amendment and the addendum to the explanatory memorandum which includes key information requested by the committee.⁸⁵

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

⁸⁴ The minister responded to the committee's comments in a letter received on 7 December 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 1 of 2024*).

⁸⁵ This was also noted in Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 15 of 2023* (29 November 2023) p. 33.

National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2023⁸⁶

Purpose	The National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2023 (the bill) seeks to amend the <i>National Redress Scheme for Institutional Child Sexual Abuse Act 2018</i> (the Redress Act). The bill seeks to amend existing provisions of the Redress Act, and also seeks to introduce new provisions and concepts to further strengthen the National Redress Scheme for Institutional Child Sexual Abuse (the Scheme).
Portfolio	Social Services
Introduced	House of Representatives on 15 November 2023
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Instruments not subject to an appropriate level of parliamentary oversight⁸⁷

2.21 Item 12 of Schedule 1 to the bill seeks to introduce proposed section 96A, which authorises the National Redress Scheme Operator (the Operator)⁸⁸ to disclose protected information to the public trustee or other government institutions in relation to financial management orders to which a person under the scheme may be subject. Proposed subsection 96A(6) allows the Operator of the scheme to impose conditions to be complied with in relation to protected information disclosed under subsection 96A(1). Proposed subsection 96A(8) provides that the Operator may do so in an instrument that is not a legislative instrument.

2.22 It was unclear to the committee that the content of an instrument under proposed subsection 96A(8) is 'declaratory of the law' and that its contents do not 'determine or alter the content of the law'. The committee noted the instruments will determine conditions to be complied with in relation to the disclosure of protected information under the Redress Act, which is a significant matter to include in delegated legislation.

⁸⁶ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, National Redress Scheme for Institutional Child Sexual Abuse Amendment Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 13.

⁸⁷ Schedule 1, item 12, proposed subsections 96A(6) and 96A(8). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

⁸⁸ The National Redress Scheme Operator is the person who is the Secretary of the Department, in the person's capacity as Operator of the scheme under section 6 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018*.

2.23 In *Scrutiny Digest 15 of 2023*, the committee requested the minister's detailed advice as to:

- why it is considered appropriate that instruments made under proposed subsection 96A(8) are not legislative instruments; and
- whether the bill could be amended to provide that these instruments are legislative instruments to ensure that they are subject to appropriate parliamentary oversight.⁸⁹

Minister for Social Services' response⁹⁰

2.24 The Minister for Social Services (the minister) advised that proposed section 96A gives the Operator a discretionary power to disclose protected information about a redress applicant to a public trustee (or similar entity) in relation to financial management orders, which can only be disclosed for specified purposes and to specified people. The minister advised proposed subsection 96A(6) allows the Operator to impose conditions to be complied with.

2.25 The minister also advised that an instrument made under proposed subsection 96A(6) is not legislative in nature as it does not determine or alter the content of the law. These instruments are applicable only to specific disclosure of protected information, not information disclosures broadly, and may contain the personal information of redress applicants. The minister advised that it would be a significant breach of their privacy for such instruments to be subject to publication and parliamentary oversight.

Committee comment

2.26 The committee thanks the minister for this advice.

2.27 The committee welcomes the explanation that instruments made under proposed subsection 96A(6) are made to disclose specified protected information about a redress applicant in relation to financial management orders and may contain personal information relating to the applicant.

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

⁸⁹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 28–30.

⁹⁰ The minister responded to the committee's comments in a letter dated 11 December 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to Scrutiny Digest 1 of 2024).

Primary Industries Levies and Charges Collection Bill 2023

Primary Industries Levies and Charges Disbursement Bill 2023⁹¹

Purpose	<p>The Primary Industries Levies and Charges Collection Bill 2023 seeks to establish a collection and compliance framework for levies and charges collected under the agriculture levy system.</p> <p>The Primary Industries Levies and Charges Disbursement Bill 2023 seeks to enable disbursement of amounts of agricultural levy and charge components for investment in strategic activities for the benefit of levied industries. It also seeks to provide a mechanism for the Commonwealth to make matching payments for research and development.</p>
Portfolio	Agriculture, Fisheries and Forestry
Introduced	House of Representatives on 18 October 2023
Bill status	Before the Senate

Coercive powers

Infringement notices

Broad delegation of administrative powers⁹²

2.29 Clause 20 of the Primary Industries Levies and Charges Collection Bill 2023 (the Collection bill) seeks to empower a compliance officer to exercise a range of monitoring powers under Part 2 of *the Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) in relation to: the provisions of this bill or the rules; or an offence against the *Crimes Act 1914* (Crimes Act) or the *Criminal Code 1995* (Criminal Code) that relates to this bill or its rules.

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

⁹¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Primary Industries Levies and Charges Collection Bill 2023; Primary Industries Levies and Charges Disbursement Bill 2023, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 14.

⁹² Clauses 20, 21 and 23 of the Primary Industries Levies and Charges Collection Bill 2023 (Collection bill). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (ii).

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

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

- subclauses 17(1), (2), (3) or (4) (penalties for failure to give return or notice under the rules);
- subclauses 18(1) or (2) (penalties for failure to make or keep records under the rules);
- subclauses 26(4) or (5) (Secretary may require information or documents);
- subclauses 47(1),(3),(5) or (8) (civil penalty provisions for false or misleading information or documents).

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

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

2.35 In *Scrutiny Digest 13 of 2023* the committee sought the minister's advice as to:

- why it is necessary and appropriate for any APS employee of the department to be conferred monitoring and investigative powers as a compliance officer, or person assisting a compliance officer, and as an infringement officer; and
- whether the bill can be amended to require that the only employees in possession of the appropriate training, qualifications, skills or experience be designated compliance officers or persons assisting compliance officers.⁹³

2.36 In response, the minister advised that the bill seeks to replicate the existing practice of empowering the secretary to appoint APS employees with relevant training and experience to compliance officer roles. The minister advised that currently there are around 20 compliance officers, all of whom are specialised staff. The minister explained that this arrangement is intended to continue despite there being no legislative requirement for compliance officers to have specialised training, qualifications and experience. The minister also advised that experienced compliance officers will supervise any officers assisting, and there are safeguards which limit the

⁹³ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20–30.

powers of such assisting officers. The minister further advised that due to the large volume of compliance related activities in this context it would not be feasible to restrict compliance officers to members of the Senior Executive Service. The minister advised that, in light of these reasons, it would not be necessary to amend the bill to expressly require that officers have particular skills, experience or training.⁹⁴

2.37 In *Scrutiny Digest 15 of 2023*, the committee requested that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable.⁹⁵

Minister for Agriculture, Fisheries and Forestry's response⁹⁶

2.38 The Minister for Agriculture, Fisheries and Forestry (the minister) advised that an addendum to the explanatory memorandum including the key information requested by the committee will be tabled in Parliament as soon as practicable.

Committee comment

2.39 The committee thanks the minister for this response.

2.40 The committee welcomes the minister's undertaking to table an addendum to the explanatory memorandum to the Primary Industries Levies and Charges Collection Bill 2023 in relation to these scrutiny concerns.

Vicarious liability⁹⁷

2.41 Subclause 56(1) of the Collection bill seeks to provide that the bill and the rules apply to a partnership as if it were a person. Subclause 56(4) seeks to provide that an offence against the bill or rules is taken to have been committed by each partner in the partnership who, at the time of the offence, did the conduct or act, aided, abetted, counselled or procured the relevant act or omission, or was in any way knowingly concerned in, or party to, the relevant act or omission whether directly or indirectly. Subclause 56(5) seeks to provide a mirror provision for the contravention of civil penalties in the bill and rules. Clause 57 is a mirror provision seeking to impose vicarious liability in relation to trusts, and clause 58 is a mirror provision seeking to impose vicarious liability in relation to unincorporated bodies or associations.

⁹⁴ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

⁹⁵ Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 44–46.

⁹⁶ The minister responded to the committee's comments in a letter dated 13 December 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 1 of 2024*).

⁹⁷ Clauses 56, 57 and 58 of the Collection bill. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

2.42 In *Scrutiny Digest 13 of 2023*, the committee sought the minister's advice as to the rationale for imposing vicarious liability in clauses 56, 57 and 58, and whether the principles identified in the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*⁹⁸ (*Guide to Framing Commonwealth Offences*) have been considered.⁹⁹

2.43 In response, the minister advised that these clauses are based on standard provisions which are used in several other Commonwealth Acts that provide that partnerships, trusts and unincorporated bodies or associations are considered legal entities for the purposes of the bill and the rules. In addition, the minister advised that there is a safeguard included in each clause; and this is consistent with the *Guide to Framing Commonwealth Offences* which holds that a person should only be responsible for their own acts or omissions, and that responsibility has traditionally been imposed on the partners of a partnership and members of an unincorporated association in the context of tax law.¹⁰⁰

2.44 In *Scrutiny Digest 15 of 2023*, the committee requested that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to vicarious liability be tabled in the Parliament as soon as practicable.¹⁰¹

Minister for Agriculture, Fisheries and Forestry's response¹⁰²

2.45 The minister advised that an addendum to the explanatory memorandum including the key information requested by the committee will be tabled in Parliament as soon as practicable.

Committee comment

2.46 The committee thanks the minister for this response.

2.47 The committee welcomes the minister's undertaking to table an addendum to the explanatory memorandum to the Primary Industries Levies and Charges Collection Bill 2023 in relation to this scrutiny concern.

⁹⁸ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#), September 2011, pp 32–33.

⁹⁹ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20–30.

¹⁰⁰ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

¹⁰¹ Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 51–53.

¹⁰² The minister responded to the committee's comments in a letter dated 13 December 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 1 of 2024*).

Significant penalties¹⁰³

2.48 Subclause 72(1) of the Primary Industries Levies and Charges Disbursement Bill 2023 (the Disbursement bill) seeks to provide that an entrusted person may disclose relevant National Residue Survey (NRS) information to a person who holds an approval in force under this section. Subclause 72(9) seeks to provide that a person commits an offence if, while the person holds an approval in force under this section, the person receives relevant NRS information, the information is protected information,¹⁰⁴ the person uses or discloses that information, and the use or disclosure is not in accordance with the approval. The penalty would be 12 months imprisonment.

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

- the person is or has been an entrusted person;
- has obtained or generated information in the course of or for the purposes of carrying out or administering particular activities under the Act;
- the information is protected information;¹⁰⁵ and
- the person uses or discloses the information. The penalty is 12 months imprisonment.

2.50 In *Scrutiny Digest 13 of 2023*, the committee sought the minister's detailed advice as to why it is considered appropriate to impose a significant penalty of 12 months imprisonment for the offences in subclause 72(9) and 81(1), by reference to comparable Commonwealth offences and the requirements in the *Guide to Framing Commonwealth Offences*.¹⁰⁶

2.51 In response, the minister advised that each of the proposed penalties are appropriate to effectively deter the commission of the relevant offence and are

¹⁰³ Subclauses 72(9) and 81(1) of the Primary Industries Levies and Charges Disbursement Bill 2023 (Disbursement bill). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

¹⁰⁴ Protected information, for the purpose of subclause 72(9), is defined in subclause 72(10) to mean information (including commercially sensitive information) the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence, and information the disclosure of which could reasonably be expected to prejudice constitutional trade or commerce.

¹⁰⁵ Protected information, for the purpose of subclause 81(1), is defined in subclause 81(3) to mean information (including commercially sensitive information) the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence, and information the disclosure of which could reasonably be expected to prejudice constitutional trade or commerce.

¹⁰⁶ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 31–32.

consistent with or less than the penalty for equivalent offences in the *National Residue Survey Administration Act 1992* and the Collection bill.¹⁰⁷

2.52 In *Scrutiny Digest 15 of 2023*, the committee requested that an addendum to the explanatory memorandum containing the key information provided by the minister in relation to subclauses 72(9) and 81(1) be tabled in the Parliament as soon as practicable.¹⁰⁸

Minister for Agriculture, Fisheries and Forestry's response¹⁰⁹

2.53 The minister advised that an addendum to the explanatory memorandum including the key information request by the committee will be tabled in Parliament as soon as practicable.

Committee comment

2.54 The committee thanks the minister for this response.

2.55 The committee welcomes the minister's undertaking to table an addendum to the explanatory memorandum to the Primary Industries Levies and Charges Disbursement Bill 2023 in relation to this scrutiny concern.

Instruments not subject to an appropriate level of parliamentary oversight¹¹⁰

2.56 Clause 59 of the Collection bill would empower the secretary to make rules under the bill by way of legislative instrument. In addition, subclause 59(4) would provide that the rules may also confer on the minister or the secretary a power to make a legislative instrument, a notifiable instrument or other written instrument. Subclause 90(2) of the Disbursement bill provides for the same power.

2.57 In *Scrutiny Digest 13 of 2023*, the committee sought the minister's advice as to whether the bill can be amended to provide the power for the minister or secretary to make notifiable and other written non-legislative instruments on the face of the bill.¹¹¹

¹⁰⁷ The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

¹⁰⁸ Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 56–58.

¹⁰⁹ The minister responded to the committee's comments in a letter dated 13 December 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 1 of 2024*).

¹¹⁰ Subclause 59(4) of the Collection bill and subclause 90(2) of the Disbursement bill. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

¹¹¹ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 20–30.

2.58 In response, the minister advised that providing the power for the minister or secretary to make notifiable and other written non-legislative instruments on the face of the bill rather than in delegated legislation would ‘inhibit the ability for the scheme to respond to evolving industry needs’. Further, any instrument made under clause 59 which provided the minister or secretary with the power to make a non-legislative instrument would itself be subject to parliamentary scrutiny and disallowance.¹¹²

2.59 In *Scrutiny Digest 15 of 2023*, the committee noted its scrutiny concern relates to the ability for delegated legislation to further delegate legislative power (devolving parliament’s law-making power), especially the power for rules to make provision for a power to make a notifiable instrument which is not subject to parliamentary oversight. The committee reiterated its concerns and sought the minister’s further advice as to why it is necessary for subclause 59(4) to specifically authorise rules made under the bill to further empower the minister or secretary to make instruments.¹¹³

Minister for Agriculture, Fisheries and Forestry’s response¹¹⁴

2.60 The minister advised that a review of the legislation found it is ineffective in meeting industries’ needs now and into the future. The purpose of enabling delegated legislation to empower further instruments to be made is to provide the minister or secretary with the flexibility necessary for administering the system into the future.

2.61 The minister further noted that while the Collection Rules are still being developed, an exposure draft was published on 1 May 2023 and some examples of the administrative matters in mind that may require rules to provide the secretary with a power to make written instruments include the power to make approved forms by written instrument. The minister advised that any rule made under subclause 59(4) (including the Collection Rules) would be subject to parliamentary scrutiny and disallowance.

2.62 The minister noted that the advice in relation to subclause 59(4) of the Collection bill is the same as for subclause 90(2) of the Disbursement bill.

Committee comment

2.63 The committee thanks the minister for this response.

2.64 The committee acknowledges that disallowable instruments made by the minister or secretary would still be subject to parliamentary oversight, however notes that a notifiable instrument is not subject to the same tabling, disallowance or sunseting requirements. The committee considers that this kind of provision is

¹¹² The minister responded to the committee's comments in a letter dated 20 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 15 of 2023*).

¹¹³ Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 53-54.

¹¹⁴ The minister responded to the committee's comments in a letter dated 13 December 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 1 of 2024*).

unusual and does not consider its inclusion has been adequately justified in the circumstances.

2.65 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of providing for delegated legislation to confer on the minister or secretary a power to make a legislative instrument, a notifiable instrument or other written instrument, noting the impact this has on parliamentary oversight.

Chapter 3

Scrutiny of standing appropriations¹¹⁵

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.¹¹⁶ 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.¹¹⁷

¹¹⁵ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 1 of 2024*; [2024] AUSStaCSBSD 15.

¹¹⁶ 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*.

¹¹⁷ For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).

- 3.4 The committee draws the following bill to the attention of senators:
- Help to Buy Bill 2023¹¹⁸ – subclause 27(4)

Senator Dean Smith
Chair

¹¹⁸ Subclause 27(4) of the bill provides that the Consolidated Revenue Fund is appropriated for the purposes of providing amounts payable under subclause 27(1), where the Commonwealth must pay to Housing Australia amounts to enable Housing Australia to make contributions on behalf of the Commonwealth under Help to Buy arrangements.