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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[1] This includes consideration of the Health Legislation Amendment (Improved Medicare Integrity and other Measures) Bill 2024, which was deferred in *Scrutiny Digest 15 of 2024*.

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.

Commonwealth Entities (Payment Surcharges) (Consequential Provisions and Other Matters) Bill 2024[2]

Purpose	The Commonwealth Entities (Payment Surcharges) (Consequential Provisions and Other Matters) Bill 2024 made relevant consequential amendments and retrospectively applies the legislative authority to charge and collect payment surcharges to payments made on or after 1 January 2003.
Portfolio	Treasury
Introduced	House of Representatives on 25 November 2024
Bill status	Received Royal Assent on 2 December 2024

Retrospective validation[3]

1.2 This bill (now Act) provides that at any time on or after 1 January 2003, Commonwealth entities are taken to have always been authorised to charge and collect payment surcharges.[4] This therefore retrospectively validates these payments.

1.3 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively. This is on the basis that a core concept of the rule of law is that all government action be authorised by law. A corollary of this is that people are entitled to have the legality of any governmental interference with their rights and obligations determined by reference to the legality

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2 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commonwealth Entities (Payment Surcharges) (Consequential Provisions and Other Matters) Bill 2024, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 2.

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

4 Payment surcharges are commonly imposed by businesses and governments across Australia, including by Commonwealth entities. A surcharge is an additional amount paid by a person when using certain payment methods to pay an underlying amount (e.g. for use of debit cards). Payment surcharges are limited to the amount it costs the merchant (including a Commonwealth entity) to accept that type of payment for that transaction under arrangements with the merchant's banking provider. See explanatory memorandum, p. 4.

of government action at the time they allege their rights have been adversely affected. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.4 Generally, where proposed legislation will have a retrospective effect, the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, whether any persons are likely to be adversely affected, and the extent to which their interests are likely to be affected. In relation to the retrospective validation provisions the explanatory memorandum notes:

> The Consequential and Other Matters Bill applies to payment surcharges charged and collected on or after 1 January 2003. This provides legislative certainty in relation to surcharges imposed from when the RBA first regulated payment surcharging. As this maintains the ongoing approach to surcharging by Commonwealth entities, and noting the amount of any surcharge previously paid by any individual is likely to have been minor, this is not likely to materially disadvantage any person.
>
> Where the Commonwealth or a Commonwealth entity would be liable to pay a person an amount as a result the person paying or purportedly paying an amount which a Commonwealth entity charged or purportedly charged as payment surcharge in relation to a base payment which was not a surchargeable payment, that person is liable to pay a payment surcharge tax. The Commonwealth or Commonwealth entity must set off the amount of payment surcharge tax that the person is liable to pay against the liability owed to that person.[5]

1.5 The committee acknowledges that this measure is unlikely to materially disadvantage any person as any surcharge paid previously is likely to have been minor. However, the committee draws attention to the fact that these payments have been charged and collected since January 1, 2003, without proper legislative basis.

1.6 Noting that this bill has now passed both Houses of Parliament, the committee makes no further comment in relation to this matter.

Parliamentary scrutiny[6]

1.7 The committee notes with concern, from a scrutiny perspective, the speed with which this bill has passed both Houses of Parliament. The bill was introduced in the House of Representatives on 25 November 2024 and passed both Houses on 28 November 2024.

1.8 The committee notes that the timeline for the passage of the bill diminishes the ability of this committee to undertake its usual scrutiny process, including to

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5 Explanatory memorandum, p. 9.

6 Schedule 2. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

engage in meaningful dialogue with the executive to address any concerns. The committee also notes that the standing orders of both houses of the Parliament with respect to legislation are designed to provide members of the Parliament with sufficient time to consider and reconsider the proposals contained in bills. The committee is of the view that truncated parliamentary processes by their nature limit parliamentary scrutiny and debate.

1.9 The committee notes with concern the speed at which this bill has passed the Parliament. While the procedure to be followed in the passage of legislation is ultimately a matter for each house of the Parliament, the committee reiterates its consistent scrutiny view that legislation, particularly where it may trespass on personal rights and liberties, should be subject to thorough parliamentary scrutiny.

Commonwealth Workplace Protection Orders Bill 2024[7]

Purpose	This bill seeks to establish a new principal Act to provide legal protections for Commonwealth workplaces and workers by enabling courts to issue Commonwealth workplace protection orders, breach of which would be a criminal offence.
Portfolio	Attorney-General
Introduced	House of Representatives on 27 November 2024
Bill status	Before the House of Representatives

Undue trespass on rights and liberties[8]

1.10 The bill seeks to establish a scheme for courts[9] to make Commonwealth workplace protection orders (protection orders). The court could make such an order if satisfied that personal violence against a Commonwealth workplace or worker has occurred out of, or in direct connection with the workplace or worker's official functions or duties and that there is a real risk that the respondent will engage in further violence.[10] The court would have discretionary powers regarding the conditions or prohibitions of the protection order in line with what the court considers is necessary to prevent the respondent from engaging in further personal violence and to ensure the safety of a Commonwealth worker or individuals at a Commonwealth workplace.[11]

1.11 In determining the conditions of the protection order, the court must consider a range of matters, including:

- any hardship that it considers is likely to be caused to the respondent by the condition;
- any likely hardship to any other person if the condition is not imposed;
- previous personal violence engaged in by the respondent;
- whether the condition achieves the objects of the Act while minimising restrictions on the rights and liberties of the respondent; and

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7 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commonwealth Workplace Protection Orders Bill 2024, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 3.

8 Clauses 15 and 18. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

9 Namely a State or Territory Magistrates Court, Federal Court or the Federal Circuit and Family Court of Australia, see clause 38.

10 See clauses 14, 17 and 20.

11 Clause 25.

- any other matters that the court considers relevant.[12]

1.12 The penalty for contravening a protection order would be two years imprisonment and/or 120 penalty units.[13]

1.13 The bill sets out that an authorised person can apply for three different types of orders. The court must be satisfied of the same test (as set out above) in relation to all three types of orders. The difference between the orders is whether the application for the order has been served personally on the respondent, namely:

- interim orders – an application for an interim order can be made if an application for a final order has been made but not yet finally determined, and the court may make an interim order even if the respondent has not been notified of the application;[14]
- urgent interim order – an application for an urgent interim order can be made without needing to have first made an application for a final order, and the application can be made by telephone, fax, email or other electronic means and without the respondent being notified;[15]
- final order – the court can only make a final order if the application has been served personally on the respondent.[16]

1.14 As such, an interim order and urgent interim order can be made *ex parte* – that is in the absence of, and without representation of or notification to, the other party. The courts have held that "it is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard."[17] As such "[w]henever a Court acts *ex parte* it is departing from one of the primary rules of natural justice, that each party should be given an opportunity to present his or her case to the Court".[18] The courts have referred, with approval, to the United Kingdom Court of Appeal which emphasised that if an order is made *ex parte* it should be limited in time to avoid serious injustice; the time should be the shortest period which must elapse before a preliminary hearing could be arranged.[19]

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12 Subclause 25(3).

13 Clause 31.

14 Clauses 13 and 14.

15 Clauses 16 and 17.

16 Clauses 19 and 20.

17 See *The Commissioner of Police v. Tanos* [1958] HCA 6; (1957-58) 98 CLR 383, pp. 395-396.

18 See Sieling and Sieling (1979) FLC 90-627, para [8].

19 See *Ansah v Ansah* (1977) 2 WLR 760 at 764, approved in in *Sieling & Sieling* (1979) 4 Fam LR 713 and *Stowe & Stowe* (1981) FLC 91-027).

1.15 In this case, the bill provides that an interim order and an urgent interim order can be in force for the period specified in the order 'which must be no longer than 12 months'.[20]

1.16 The committee considers a period of up to 12 months for such an order to remain in place, when the respondent was not able to be represented when the order was made, may not be consistent with the principle that an *ex parte* order should be limited to the shortest possible period. While the committee appreciates that the ultimate length of the order would be a matter for the court to determine, it is not clear that it is appropriate that the maximum period should be set at one year, particularly when such an order may have been made over the phone or email, and without any opportunity for the respondent to present their case.

1.17 The explanatory memorandum does not provide any explanation as to why this period of time has been chosen as the maximum period by which such an order may remain in force, merely restating the operation of the provisions.

1.18 As such, the committee seeks the minister's advice as to:

- **why it is necessary and appropriate to allow an interim order or urgent interim order (made *ex parte*) to potentially remain in force for up to 12 months; and**
- **whether the bill could be amended to set a shorter maximum period.**

Tabling of documents in Parliament[21]

1.19 Clause 47 requires the minister to cause a review of the operation and effectiveness of the Act within three years after commencement. This includes consideration as to whether all provisions should continue and whether any amendments are necessary or desirable. Subclause 47(4) provides that the minister 'may' publish the report in such manner as the minister considers appropriate. If the minister 'decides to publish' the report the minister must omit personal information and cause a copy of the report to be tabled in both Houses of the Parliament.

1.20 The committee's consistent scrutiny view is that the tabling of documents in Parliament is important to parliamentary scrutiny, as it alerts parliamentarians to the existence of documents and provides opportunities for debate that are not available where documents are not made public. In this instance, as the review relates solely to the operation and effectiveness of legislation, it is unclear to the committee why it would be left to ministerial discretion as to whether the report should be made public and tabled in Parliament.

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20 See paragraph 15(2)(a) and subparagraph 18(2)(b)(i).

21 Clause 47. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

1.21 The explanatory memorandum does not provide any information as to why it is left to the minister's discretion whether to publish the report. If the minister chooses not to publish it, there is no requirement that the report be tabled in Parliament.

1.22 Noting that there may be impacts on parliamentary scrutiny where reports associated with the operation of legislation are not tabled in the Parliament, the committee requests the minister's advice as to why the proposed review of the operation and effectiveness of this legislation is not required to be tabled in the Parliament (rather than left to ministerial discretion).

Future Made in Australia (Production Tax Credits and Other Measures) Bill 2024[22]

Purpose	Schedule 1 to the Bill establishes the Hydrogen Production Tax Incentive, in the form of a new tax offset called the hydrogen production tax offset. Schedule 2 to the Bill establishes the Critical Minerals Tax Production Incentive (CMPTI), in the form of a new refundable tax offset, the CMPTI tax offset, to support the processing of critical minerals in Australia. Schedule 3 amends the *Aboriginal and Torres Straits Islander Act 2005* to enable Indigenous Business Australia to leverage their capital to invest in First Nations communities and businesses.
Portfolio	Treasury
Introduced	House of Representatives on 25 November 2024
Bill status	Before the House of Representatives

Instruments not subject to an appropriate level of parliamentary oversight[23]

1.23 This bill provides that a company that produces hydrogen products and holds a registered production profile for these products, may apply to the Clean Energy Regulator for the profile to be certified.[24] When applying for certification, the application is taken not to be made unless it complies with certain requirements, which include being in a prescribed form and being accompanied by any prescribed information, documents or materials.[25] The Clean Energy Regulator may prescribe a form or information, documents or materials to be included in the application by a notifiable instrument.[26]

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22 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Future Made in Australia (Production Tax Credits and Other Measures) Bill 2024, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 4.

23 Schedule 1, item 3, proposed subsection 421-50(5) and schedule 2, item 1, proposed section 419-150. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

24 Proposed subsection 421-50(1).

25 Proposed subsection 421-50(3).

26 Proposed subsection 421-50(5).

1.24 Similarly, another provision in the bill allows the Industry Secretary to approve a form or require the form to be accompanied by specified information, documents or other materials as specified by notifiable instrument.[27]

1.25 A notifiable instrument is not subject to the tabling, disallowance or sunsetting requirements that apply to legislative instruments,[28] and as such, this precludes any parliamentary oversight over the content of such instruments. Noting the importance of parliamentary scrutiny, the committee expects that where legislation confers a power to make a notifiable instrument, the explanatory materials should include a justification as to why the matters to be contained in the instrument are not considered to be legislative in character.[29] The committee notes that, in general, an instrument will be legislative in character if it:

(a) is made under a power delegated by the Parliament; and

(b) any provision of the instrument:

(iv) determines, or alters the content of, the law (rather than determining particular cases or circumstances in which the law is to apply); and

(v) affects a privilege or interest or imposes, creates, varies or removes an obligation or right.[30]

1.26 In this instance, the explanatory memorandum only restates the operation of both provisions and does not provide a justification as to the use of notifiable instruments.

1.27 It is not clear to the committee how an instrument that prescribes the form in which applications should be made and information, documents or materials that should accompany an application is not legislative in character. The committee understands that the failure to comply with these requirements would result in the application being taken to have not been properly made in all instances, which would appear to determine the content of that law as a result.

1.28 In light of the above, the committee seeks the Treasurer's advice as to why it is considered necessary and appropriate that the Clean Energy Regulator and the Industry Secretary may prescribe requirements such as forms, information, documents and materials in relation to applications by notifiable, rather than legislative instrument, and why these instruments are not considered legislative in character.

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27 Proposed section 419-150.

28 See *Legislation Act 2003*.

29 By reference to the criteria set out in the *Legislation Act 2003,* subsection 8(4).

30 *Legislation Act 2003,* subsection 8(4).

Significant matters in delegated legislation[31]

1.29 This bill seeks to provide that the minister may make rules, known as the Indigenous Business Australia rules.[32] These rules may prescribe the circumstances in which Indigenous Business Australia may borrow money for a purpose in connection with its functions and may prescribe limits or conditions on the borrowing of such money.

1.30 Where a bill includes matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

1.31 In this instance, the committee notes that this matter may be appropriate for inclusion in delegated legislation due to its highly technical nature. However, this is unclear as the explanatory materials do not provide any justification as to why it is appropriate to include these matters in the Indigenous Business Australia rules.

1.32 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation,[33] the committee considers that a justification for the inclusion of the these matters in the Indigenous Business Australia rules should be included in the explanatory memorandum of this bill.

1.33 The committee requests that the explanatory memorandum to the bill be updated to include information addressing the committee's concerns.

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31 Schedule 3, item 2, proposed subsections 183(2) and 189A(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

32 Proposed subsection 189A(2).

33 See *Acts Interpretation Act 1901*, section 15AB.

Health Legislation Amendment (Improved Medicare Integrity and Other Measures) Bill 2024[34]

Purpose	The Health Legislation Amendment (Improved Medicare Integrity and Other Measures) Bill 2024 (the Bill) seeks to amend the Health Insurance Act 1973 (the Health Insurance Act), the National Health Act 1953 (the National Health Act), the Human Services (Medicare) Act 1973 (the Human Services Medicare Act), the Dental Benefits Act 2008 (the Dental Benefits Act), the Therapeutic Goods Act 1989 (the Therapeutic Goods Act), and the Public Health (Tobacco and Other Products) Act 2023 (the Tobacco Act) to implement a number of public health measures.
Portfolio	Health and Aged Care
Introduced	House of Representatives on 28 November 2024
Bill status	Before the House of Representatives

Broad delegation of administrative powers[35]

1.34 The *Therapeutic Goods Act 1989* (TG Act) currently provides that the Secretary can delegate specified powers and functions under the TG Act to state and territory officers.[36] This bill seeks to amend this provision of the TG Act to expand the powers that may be delegated. These include powers in relation to requiring information or documents, inspecting and copying documents and retaining documents.[37]

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

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34 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Health Legislation Amendment (Improved Medicare Integrity and Other Measures) Bill 2024, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 5.

35 Schedule 2, item 51, proposed subsection 57(1A). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

36 *Therapeutic Goods Act 1989,* subsection 57(1A).

37 Proposed subsection 57(1A).

1.36 In this instance, the explanatory memorandum provides:

> The capacity of state and territory officers to undertake investigations and take enforcement action is critical to the effective implementation of the reforms relating to the regulation of vaping goods, and so investigation and enforcement powers in relation to vaping goods have been delegated to certain officers within relevant parts of state and territory health departments, police services and similar institutions responsible in each jurisdiction for monitoring the lawful therapeutic vaping goods supply chain, and investigating and halting the black market.
>
> However, subsection 57(1A) currently does not allow for the delegation to such state or territory officers of many of the Secretary's powers to require the provision of information or the production of documents under the Therapeutic Goods Act. Such powers are essential to providing investigators with necessary information to investigate potential non-compliance with the Therapeutic Goods Act and develop a case against a person where non-compliance is found.
>
> …
>
> This approach will complement current processes concerning checks and balances concerning the authorisation of state and territory officers and the delegation of powers, including ensuring that those to whom powers are delegated are of an appropriate level of seniority within their respective agency, and that there is national consistency in the use of these powers.
>
> It is anticipated that these powers will only be delegated to senior investigating officers within relevant health authorities, police forces and other state and territory agencies engaged in the regulation and investigation of vaping goods and therapeutic goods to minimise associated risks.[38]

1.37 While the committee notes that the intent is to only delegate these powers to senior investigating officers and ensure there is national consistency in the use of these powers, the committee is concerned that the provision does not specify this limit and allows for the Secretary to delegate the specified powers to an 'officer',[39] which would be expanded by the amendments introduced by this bill.

1.38 Further, the committee notes with concern that the provision does not contain a requirement that the powers and functions be delegated to officers with the requisite skills, qualifications or experience to exercise those powers or perform those functions. While again the committee notes the stated *intent* to delegate to officers with appropriate seniority, the committee considers this intent should also be reflected in the provision itself. While the committee appreciates that a federal Secretary may be unable to know whether the relevant state or territory officer possesses the relevant skills, the committee also queries whether it may be possible

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38 Explanatory memorandum, pp. 59–61.

39 *Therapeutic Goods Act 1989,* subsection 57(1A).

for the Secretary to instead delegate the specified powers to a sufficiently senior officer, who may then appropriately subdelegate those powers if satisfied the subdelegate possesses the appropriate skills, qualifications and experience.

1.39 In light of the above, the committee seeks the minister's advice as to whether proposed subsection 57(1A) of the bill can be amended to either:

- **limit the persons to whom these powers can be delegated, such as to senior investigating officers or to specified persons of sufficient seniority in state and territory departments and offices; or**
- **provide that the Secretary may only delegate the specified powers to the heads of relevant departments or agencies and those heads may only subdelegate when satisfied the subdelegate possesses the appropriate skills, qualification or experience to exercise the powers or perform the functions.**

Strict liability offences[40]

1.40 The TG Act currently provides for a number of offences, which this bill seeks to consolidate into a set of tiered offences.[41] These offences include doing an act or omitting to do an act that breaches a condition of an exemption, approval or authority granted under various sections of the TG Act. The first 'tier' is where the act or omission has resulted in, will result in or is likely to result in harm or injury to any person, the maximum penalty is imprisonment for 5 years or 4000 penalty units or both. [42] The second tier captures fault-based offences with the same conduct that do not result in harm or injury and carries a maximum penalty of 12 months imprisonment or 1000 penalty units or both.[43] The third tier is in relation to the same conduct but creates strict liability offences with a maximum penalty of 100 penalty units.[44]

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

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40 Schedule 2, item 78, proposed section 32CP. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

41 Proposed section 32CP.

42 Proposed subsection 32CP(1).

43 Proposed subsection 32CP(2).

44 Proposed subsection 32CP(3).

1.42 As the imposition of strict liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[45] The committee notes in particular that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[46]

1.43 In this instance, the explanatory memorandum provides:

> The inclusion of a strict liability offence at new subsection 32CP(3) for a breach of an exemption, approval or authority in relation to a biological is a purposeful deterrence measure. A requirement for the prosecution to prove the existence of a fault element, such as intention or recklessness, would not adequately protect the public from the supply, and advertising for supply, of biologicals in such circumstances, particularly if the breach involves non-compliance with a condition designed to ensure the safety of the biological for patients.
>
> The strict liability provision in subsection 32CP(3) pursues a legitimate objective in acting as a deterrent to behaviour that may otherwise represent a risk to patients, in relation to potentially unsafe biologicals, and as such the provision is reasonable and proportionate in achieving that outcome. Where the prosecution is satisfied that the defendant is culpable and the relevant fault elements such as intention and recklessness can be established, the normal fault-based offence could be pursued.[47]

1.44 While acknowledging the need for a deterrent to behaviour that could represent a risk to patients and in order to protect the public from the supply of biologicals, the committee remains concerned that the penalty for this strict liability offence is 100 penalty units, which is higher than the threshold of 60 penalty units in the *Guide to Framing Commonwealth Offences*. No information has been provided as to why it is appropriate to seek to impose a penalty inconsistent with the threshold set out in the *Guide to Framing Commonwealth Offences*. Although the application of strict liability to this offence has been justified in the explanatory memorandum, the committee does not consider that the penalty applicable to the offence is appropriate.

1.45 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the strict liability offence under proposed subsection 32CP(3) of the bill carrying a maximum penalty of 100

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45 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 25–26.

46 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 25–26.

47 Explanatory memorandum, p. 25.

penalty units (which is inconsistent with the *Guide to Framing Commonwealth Offences*).

Health Legislation Amendment (Modernising My Health Record—Sharing by Default) Bill 2024[48]

Purpose	This bill seeks to amend the *My Health Records Act 2012*, the *Health Insurance Act 1973* and related legislation to require key health information to be shared with the My Health Record system by: • requiring constitutional corporations providing health services to register with My Health Record and upload health information to healthcare recipients' My Health Records; and • making Medicare benefits for specific health services conditional on upload of information about health services
Portfolio	Health and Aged Care
Introduced	House of Representatives on 21 November 2024
Bill status	Before the House of Representatives

Significant matters in delegated legislation

Privacy[49]

1.47 This bill seeks to makes it compulsory for certain prescribed healthcare providers to upload patient health records onto the My Health Record site, if that patient is registered with My Health Record. The My Health Record system is an electronic summary of an individual's health records. Since 2018, it has operated on an opt-out basis.[50] This means that a My Health Record is automatically created for all healthcare recipients[51] who can choose to cancel or suspend their registration at any time.

1.48 Currently, healthcare providers are not obliged to register with My Health Record and upload health records. This bill seeks to amend the *My Health Records*

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48 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Health Legislation Amendment (Modernising My Health Record—Sharing by Default) Bill 2024, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 6.

49 Schedule 1, item 3, definition of 'prescribed healthcare provider organisation'; item 13, proposed section 70AA and proposed paragraph 70AA(2)(c); item 14 proposed paragraph 73C(2)(c) and proposed section 73D, table item 5; item 16, proposed section 78A; and item 26, proposed section 19AD; Schedule 2, item 19, proposed section 132A. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

50 My Health Records (National Application) Rules 2017.

51 *My Health Records Act 2012*, section 5 defines 'healthcare recipient' to mean 'an individual who has received, receives, or may receive, healthcare'.

Act 2012 to require that a prescribed healthcare provider organisation[52] must, subject to exceptions, share with the My Health Record system healthcare information or a healthcare record created in relation to a healthcare recipient who has a My Health Record, as specified in the My Health Records rules.[53] Where a prescribed healthcare provider organisation does not meet these requirements, the provider would be subject to a civil penalty of 30 penalty units (currently $9,900)[54] and the provider (not the patient) would not be eligible to receive a Medicare benefit for the service provided.[55]

1.49 A number of provisions in the bill seek to include matters in delegated legislation. Examples of these include:

- which healthcare providers will be subject to these new requirements.[56] The minister's second reading speech indicates that the information intended to be specified in the My Health Records rules would initially be pathology and diagnostic imaging, with the intention that this will expand over time;[57]
- what health information can be disclosed to the CEO of Medicare, the Secretary or a Commonwealth entity;[58]
- what entities are considered Commonwealth entities (to whom My Health Record information may be disclosed);[59] and
- exceptions to when healthcare information does not need to be shared with My Health record.[60]

1.50 Where a bill includes matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by the executive is not

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52 Schedule 1, item 3 seeks to insert 'prescribed healthcare provider organisation' to mean a healthcare provider organisation that is a corporation to which paragraph 51(xx) of the Constitution applies and of a kind specified in the My Health Records rules.

53 Schedule 1, item 16, proposed section 78A.

54 Schedule 1, item 16, proposed subsections 78A(1) and (2).

55 Schedule 1, item 26, proposed section 19AD. Healthcare recipients are unaffected by a healthcare provider's non-compliance regarding receipt of any Medicare rebate.

56 Schedule 1, item 3, definition of 'prescribed healthcare provider organisation'.

57 Mr Mark Butler MP, Minister for Health and Aged Care, *House of Representatives Hansard*, 21 November 2024.

58 Schedule 1, item 13, proposed section 70AA.

59 Schedule 1, item 13, proposed paragraph 70AA(2)(c); item 14 proposed paragraph 73C(2)(c); item 14, proposed section 73D, table item 5.

60 Schedule 1, item 16, proposed section 78A; item 26, proposed section 19AD.

subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

1.51 In this instance, the explanatory memorandum provides little to no explanation as to why such matters are appropriate for inclusion in delegated legislation, generally just restating the operation of the provision. In relation to what health information can be collected, used and disclosed for the purpose of monitoring, investigating or enforcing compliance, the explanatory memorandum states:

> By prescribing health information in the My Health Records Rules, it can be limited to only what is necessary for compliance purposes which will be refined through further consultation. While required information may evolve over time, the types of information to be shared is expected to be limited to:
>
> • record type / type of healthcare service or episode, for example, pathology test, diagnostic imaging scan, chronic disease management plan; and
>
> • date healthcare service was performed.
>
> Test results or other sensitive contents of health records, will not be used or disclosed for compliance purposes.[61]

1.52 While this explains the need for further consultation, if the required information is currently expected to be limited to the matters set out in the explanatory memorandum, it is not clear why this is not set out on the face of the bill (with scope for additional matters to be prescribed should this become necessary in the future).

1.53 Further, the committee notes that the My Health Record scheme as a whole has privacy implications for patients whose personal healthcare information is uploaded to the My Health Record register. While this bill does not as a matter of law expand the personal information that may be uploaded on the register, it in practice will likely expand the amount of personal information that is uploaded (noting the object of the bill is to force certain healthcare providers to upload this information). As registration with My Health Records is on an opt-out basis, rather than opt-in, the scheme as a whole raises questions as to whether inclusion of a large amount of personal healthcare information is done by way of informed consent. It is noted that the bill requires that if a healthcare provider is *not* sharing information with the My Health Records system they must have a notice on their premises and website to this effect.[62] However, there does not appear to be any such equivalent requirement for providers to clearly notify patients that their personal healthcare information will automatically be included in the My Health Record system, unless the patient has opted out.

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61 Explanatory memorandum, p. 16.

62 See Schedule 1, item 16, proposed section 78D.

1.54 This bill also seeks to set out a new definition of a 'permitted purpose' under the *National Health Act 1973*.[63] It remakes an existing provision to enable data matching of information for a range of purposes, such as checking on Medicare fraud, recovering overpayments, analysing services and educating healthcare providers. It also adds to the provision to allow health information stored on the My Health Record to be data-matched to ensure compliance with the new share by default requirements. The remade provision (and existing provision) provides no specific limit on what data can be shared and matched. Enabling personal healthcare information to be data matched against other data sets raises questions regarding what privacy protections apply. Bills which enable the collection, use or disclosure of personal information may trespass on an individual's right to privacy. Where a bill contains provisions for the collection, use or disclosure of personal information, the committee expects the explanatory memorandum to the bill to address why it is appropriate for the bill to provide for this, what safeguards are in place to protect the personal information, and whether these are set out in law or in policy. In relation to this data matching provision, the explanatory memorandum provides no information about applicable privacy protections and the statement of compatibility merely states that the amendments limit the data matching activities for specific purposes 'that are necessary to effectively manage compliance with share by default requirements'.[64]

1.55 The committee notes that the bill leaves a number of potentially significant matters to be set out in delegated legislation and includes amendments to existing data matching powers that may trespass on an individual's right to privacy. The committee notes that the explanatory memorandum provides no justification for the inclusion of significant matters in delegated legislation or any details as to what privacy protections apply in relation to these data matching provisions.

1.56 The committee requests that an addendum to the explanatory memorandum containing such matters be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.[65]

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

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63 Schedule 2, item 19, proposed section 132A.

64 See statement of compatibility, p. 7.

65 See section 15AB of the *Acts Interpretation Act 1901*.

Transport Security Amendment (Security of Australia's Transport Sector) Bill 2024[66]

Purpose	The Transport Security Amendment (security of Australia's Transport Sector) Bill 2024 seeks to introduce amendments to the *Aviation Transport Security Act 200*4 (ATSA) and the *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFSA) in order to safeguard against unlawful interference with aviation and maritime transport, and offshore facilities.
Portfolio	Home Affairs
Introduced	House of Representatives on 28 November 2024
Bill status	Before the House of Representatives

Privacy

Strict liability offences[67]

1.58 This bill seeks to create a number of additional offences in relation to cyber, aviation and maritime security incidents applicable to airport and port operators, aviation and maritime industry participants, and other persons with incident reporting responsibilities. The offences would be committed where an individual has an incident reporting responsibility, becomes aware of a security incident with a relevant impact on an asset (for example, an aircraft), and fails to report the incident to the relevant authorities after the person becomes aware. The maximum penalties applicable to each offence vary between 100 and 200 penalty units. A number of these specific offences, as listed in the footnote below, are stated to be offences of strict liability.

1.59 The committee notes that under general principles of the common law, fault is required to be proven before a person can be found guilty of a criminal offence. This ensures that criminal liability is imposed only on persons who are sufficiently aware of what they are doing and the consequences it may have. When a bill states that an offence is one of strict liability, this removes the requirement for the prosecution to prove the defendant's fault. In such cases, an offence will be made out if it can be proven that the defendant engaged in certain conduct, without the prosecution having

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66 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Transport Security Amendment (Security of Australia's Transport Sector) Bill 2024, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 7.

67 Schedule 1, item 5, proposed subsections 100(3), 100(5) and 100; Schedule 1, item 7, proposed subsections 101(4), 101(5) and 101(6); Schedule 1, item 9, proposed subsections 102(3A), 102(3B) and 102(3C); Schedule 1, item 28, proposed subsections 171(4), 171(5), 172(4), 172(5), 173(4), 173(5), 174(4), 174(5), 175(3A), 175(3B) and 175(3C); Schedule 1, item 59, proposed section 26AC; Schedule 1, item 86, proposed subsections 78B(1) and 78B(2); Schedule 1, item 93, proposed subsections 100TB(1) and 100TB(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

to prove that the defendant had the intention to engage in the relevant conduct or was reckless or negligent while doing so.

1.60 As the imposition of strict liability undermines fundamental common law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.[68] The committee notes in particular that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is not punishable by imprisonment and only punishable by a fine of up to 60 penalty units for an individual.[69]

1.61 In this instance, the explanatory memorandum provides:

> It is important to note that the penalty applies to a limited number of persons, specifically airport operators failing to report a cyber security incident which has had, is having, or is likely to have, a significant impact on the availability of a maritime asset and not to the general public. This means that the enhanced deterrence is tailored specifically to an appropriate cohort of persons, and not the public at large. As a consequence, this is a reasonable penalty to impose, as it has the necessary element of deterrence whilst not being a manifestly excessive penalty for a strict liability offence.
>
> […]
>
> In consideration of the guidance within the FOINEP Guide for offences of strict liability, it is noted that, as strict liability applies to all of the physical elements of this offence:
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> • the absence of the element of fault in subsections 100(4) and (5) are justified as it allows the Government to maintain a robust sanctions system which acts as both a deterrent and a positive incentive to comply for AIPs who are aircraft operators; and
>
> • reporting on relevant security incidents is such common practice for AIP who are airport operators that it should be an easily discharged matter; and
>
> • in this circumstance, penalising these persons in the absence of proof of fault is appropriate to apply because of the nature of the offence within the context of maintaining the security of an aviation asset; and
>
> • the defence of honest and reasonable mistake of fact is still available for defendants under section 9.2 of the Criminal Code.

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68 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 25–26.

69 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 25–26.

> The strict liability offence provision is balanced by an absolute defence for AIPs who are airport operators can prove they took reasonable precautions, and exercised due diligence, to avoid contravening the reporting requirement. This in turn is intended to promote a culture of corporate compliance.
>
> Failing to comply with the reporting requirements for a cyber security incident which has had, is having, or is likely to have, a significant impact on the availability of a maritime asset poses a risk to the national interest. Imposing strict liability offences with penalties at this high threshold for AIPs who are airport operators is fully justified in this circumstance.[70]

1.62 The explanatory memorandum provides a similar justification for all of the listed offences.

1.63 While acknowledging the need for a robust scheme of corporate compliance to protect national assets from unlawful interference and other security threats, the committee remains concerned that the penalty for these strict liability offences range from 100 to 200 penalty units, which is higher than the threshold of 60 penalty units in the *Guide to Framing Commonwealth Offences*. No information has been provided as to why it is appropriate to seek to impose penalties inconsistent with the threshold set out in the *Guide to Framing Commonwealth Offences*. Although the application of strict liability to these offences has been justified in the explanatory memorandum, the committee does not consider that the penalties applicable to the offences are appropriate. The committee also does not consider that consistency across various schemes is sufficient as a justification for seeking to impose penalties inconsistent with the threshold set out in the *Guide to Framing Commonwealth Offences.*

1.64 Additionally, the committee notes that these offences criminalise the failure to report information to relevant authorities. It is unclear from the bill and explanatory memorandum what information is required to be reported as part of the reporting obligations imposed on airport and port operators, aviation and maritime industry participants, and other persons with incident reporting responsibilities. The committee considers that the explanatory memorandum should have included further information as to the nature of information that must be reported, and whether this could include personal information and if so, what privacy protections apply.

1.65 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of the strict liability offences in this bill carrying maximum penalties of 100 and 200 penalty units (which are inconsistent with the *Guide to Framing Commonwealth Offences*).

1.66 The committee also notes it is unclear whether personal information may be disclosed as part of these reporting obligations, and if so, what privacy protections apply. As such, the committee requests that an addendum to the explanatory memorandum containing this information be tabled in the Parliament as soon as

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70 Explanatory memorandum, pp. 19–20.

practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.[71]

Immunity from civil liability[72]

1.67 The bill provides an immunity from civil or criminal liability to the maritime security inspector in relation to the power to test a security system. The immunity is only applicable where the power is exercised in good faith, does not seriously endanger the health or safety of any person and does not result in significant loss of or serious damage to property.

1.68 This therefore removes any common law right to bring an action to enforce legal rights, unless it can be demonstrated that a lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.69 The committee expects that if a bill seeks to provide immunity from civil liability this should be soundly justified. In this instance, the explanatory memorandum provides:

> The purpose of this provision is to permit a MSI to perform the full range of their duties, including covert vulnerabilities testing using an item or weapon. A MSI would not be subject to civil or criminal liability under another Commonwealth, State or Territory law if they can raise the possibility of the defence in paragraphs 139(4)(a), (b) and (c).[73]

1.70 While the committee acknowledges this is a limited immunity and that there is a need for a maritime security inspector to be able to perform their duties, the committee queries whether in instances where there is no danger to health or safety or significant loss or serious damage to property, what recourse an affected person is able to seek, and from which entity.

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

- **what recourse is available for affected individuals, other than by demonstrating a lack of good faith by the entity; and**

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71 See section 15AB of the *Acts Interpretation Act 1901*.

72 Schedule 1, item 120, proposed subsection 139(4); schedule 1, item 124, proposed subsection 140A(5); schedule 1, item 129, proposed subsection 141(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

73 Explanatory memorandum, p. 99.

- **whether affected individuals will be able to seek recourse from the Commonwealth or whether it is intended that the immunity from civil liability will extend to the Commonwealth as a whole.**

Coercive powers

Broad discretionary powers[74]

1.72 Currently, the *Aviation Transport Security Act 2004* (ATSA) provides that the Secretary may give special security directions in specified circumstances.[75] This bill seeks to amend the ATSA to include that the Secretary may make a special security direction where a general threat of unlawful interference with aviation is made or exists. This bill also seeks to amend the *Maritime Transport and Offshore Facilities Security Act 2003* (MTOFSA) to specify the circumstances in which the Secretary may make a security direction, which includes where a general threat of unlawful interference with maritime transport or offshore facilities is made or exists.

1.73 It is unclear from the bill, Acts and explanatory memorandum what actions may be taken as part of a security direction. The explanatory memorandum restates the operation of this provision and provides the following:

> This item amends subsection 67(1) of the ATSA to insert new paragraph 67(1)(aa), which has the effect that the Secretary may, in writing, direct that additional security measures be taken or complied with if general threat of unlawful interference with aviation is made or exists.
>
> […]
>
> Given the novel nature of emerging and not yet present threats, this section is intentionally broad to allow for future threats not yet present in the environment can be captured as they emerge. This will allow the issuing of an SSD to mitigate the consequences that warrant one.[76]

1.74 In addition, the committee has a long-standing scrutiny concern with provisions that give administrators seemingly ill-defined and wide-ranging powers. In this case, it is unclear what measures may be included in a special security direction, and it may be exercised whenever the Secretary is satisfied of a number of broad matters, such as if there is a 'change in the nature of an existing general threat'. While the committee appreciates that there may be threats that are not yet present which are intended to be addressed by this measure, the committee is concerned if a special security direction may include the exercise of coercive powers, such as searching and seizing materials from the persons these measures are directed against. The

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74 Schedule 3, item 24, proposed paragraph 67(1)(a); schedule 3, item 28, proposed subsection 33(1). The committee draws senators' attention to this provision pursuant to Senate standing orders 24(1)(a)(i) and (ii).

75 *Aviation Transport Security Act 2004*, section 67.

76 Explanatory memorandum, pp. 149-150.

committee is also concerned if they may include measures which require the collection of personal data, such as by requiring any person subject to a direction to answer questions. The committee's concerns are heightened in this instance given a special security direction can be made in relation to aviation and maritime passengers[77] and the failure to comply with a special security direction results in the commission of strict liability offence.[78] Further, a special security direction may be in force for a period of up to 6 months.[79] Noting these matters, the committee considers that at a minimum, some guidance should be provided as to the exercise of the broad power to give a special security direction, such as what actions the Secretary can require a person to do, whether this includes the exercise of coercive powers and whether it may trespass on an individual's privacy. The committee is also concerned that on the face of the bill, there are no constraints on this power except for the broadly defined circumstances in which a special security direction may be given.

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

- **whether guidance and examples can be provided in relation to the exercise of the power to give a special security direction, such as what directions or additional security measures the Secretary may require a person to comply with; and**
- **whether there are any limits or constraints on the exercise of this power, and if so, where any constraints on the exercise of this power are located.**

Significant matters in delegated legislation[80]

1.76 A number of provisions in the bill seek to include matters in delegated legislation. Examples of these include that the regulations may prescribe:

- matters for the purpose of safeguarding against unlawful interference with aviation[81] or maritime transport or offshore facilities;[82]

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77 *Aviation Transport Security Act 2004*, section 69; *Maritime Transport and Offshore Facilities Security Act 2003,* subsection 35(1).

78 *Aviation Transport Security Act 2004*, section 73; *Maritime Transport and Offshore Facilities Security Act 2003,* subsections 35(4) and 35(6).

79 *Aviation Transport Security Act 2004*, subsection 71(2).

80 Schedule 1, item 55, proposed subsection 16(2D); Schedule 1, item 56, proposed subsection 16(4); Schedule 1, item 75, proposed subsection 47(4); schedule 1, item 77, proposed subsection 48(2); Schedule 1, item 82, proposed subsection 66(3); Schedule 1, item 82, proposed subsection 66(4); Schedule 1, item 86, proposed paragraph 78A(3)(c); Schedule 1, item 90, proposed subsection 100H(2). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

81 Schedule 1, item 55, proposed subsection 16(2D).

82 Schedule 1, item 90, proposed subsection 100H(2).

- matters in relation to the contents of transport security programs;[83]
- matters to be included in the statement of compliance for a ship security plan;[84]
- minimum requirements for security assessments for maritime industry participants for the purpose of safeguarding against unlawful or operational interference with maritime transport or offshore facilities;[85]
- how matters relating to unlawful or operational interference with maritime transport or offshore facilities must be dealt with in maritime security plans;[86]
- matters in relation to security assessments for particular kinds or classes of ships[87] and minimum requirements for particular kinds or classes of regulated ships for the purposes of safeguarding against unlawful or operational interference with maritime transport or offshore facilities.[88]

1.77 Where a bill includes matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

1.78 In this instance, the committee notes that many of these matters may be appropriate for inclusion in delegated legislation due to their highly technical nature. However, this is unclear as the explanatory materials do not provide sufficient justification as to why it is appropriate to include these matters in delegated legislation. In relation to the listed matters, the explanatory memorandum merely restates or explains the operation of the provision. For instance, in relation to providing that the regulations may be made for the purpose of safeguarding against unlawful or operational interference with maritime transport and offshore facilities, the explanatory memorandum states:

> The purpose and effect of amendments in this item is to ensure that entities take a holistic approach to considering hazards which may impact their operations or assets. The inclusion of a security assessment here will position it as a key element in the development of a security plan. This will further encourage entities to identify which all hazards security risks may

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83 Schedule 1, item 56, proposed subsection 16(4).

84 Schedule 1, item 86, proposed paragraph 78A(3)(c).

85 Schedule 1, item 75, proposed subsection 47(4).

86 Schedule 1, item 77, proposed subsection 48(2).

87 Schedule 1, item 82, proposed subsection 66(3).

88 Schedule 1, item 82, proposed subsection 66(4).

impact their operations, and allow them to establish appropriate mitigations that are proportionate to what they have identified. [89]

1.79 Although this explanation provides clarity as to how the provision is intended to operate and why this amendment is necessary, it is not clear why this matter is appropriate for inclusion in delegated legislation.

1.80 The committee requests that an addendum to the explanatory memorandum containing a justification for the use of delegated legislation be tabled in the Parliament as soon as practicable, noting the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation.[90]

89 Explanatory memorandum, pp. 82-83.

90 See section 15AB of the *Acts Interpretation Act 1901*.

Private senators' and members' bills that may raise scrutiny concerns[91]

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

Bill	Relevant provisions	Potential scrutiny concerns
Genocide Risk Reporting Bill 2024	Clause 32	The provision may raise scrutiny concerns under principle (i) in relation to immunity from liability.
	Paragraph 61(1)(d)	The provision may raise scrutiny concerns under principle (iv) in relation to significant matters in delegated legislation
Online Safety Amendment (Digital Duty of Care) Bill 2024	Schedule 1, item 6, proposed sections 28G and 28J	The provisions may raise scrutiny concerns under principle (iv) in relation to significant matters in delegated legislation.
	Schedule 1, item 16	The provision may raise scrutiny concerns under principle (i) in relation to immunity from liability

91 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 2025*; [2025] AUSStaCSBSD 8.

Bills with no committee comment[92]

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

- Commonwealth Entities (Payment Surcharges) Bill 2024
- Commonwealth Entities (Payment Surcharges) Tax (Imposition) Bill 2024
- Customs Amendment (Expedited Seizure and Disposal of Engineered Stone) Bill 2024
- Defence Trade Controls Amendment (Genocide, War Crimes and Crimes Against Humanity) Bill 2024
- Doctors for the Bush Bill 2024
- Treasury Laws Amendment (Divesting from Illegal Israeli Settlements) Bill 2024
- Treasury Laws Amendment (Fairer for Families and Farmers and Other Measures) Bill 2024
- Treasury Laws Amendment (Tax Incentives and Integrity) Bill 2024

92 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 1 of 2025;* [2025] AUSStaCSBSD 9.

Commentary on amendments[93]

Aged Care Bill 2024

1.81 On 21 November 2024, the Senate agreed to 90 Government, five Opposition and four Independent (Senator Pocock) amendments. Senator Gallagher, on behalf of the Minister for Aged Care, also tabled a supplementary explanatory memorandum.

1.82 Five of the Government amendments were in response to amendments suggested by the committee in *Scrutiny Digest 14 of 2024*[94] relating to the use of coercive powers without a warrant, the de-identification of personal information and a broad delegation of administrative powers.

1.83 The committee welcomes amendments made in response to scrutiny concerns raised by the committee relating to coercive powers, privacy and broad delegation of administrative powers. The committee makes no comment on the remaining amendments.

Help to Buy Bill 2023

1.84 On 26 November 2024, the Senate agreed to three government amendments and the bill was passed with these amendments by both Houses on 27 November 2024.

Delegated legislation modifying and exempting primary legislation (Henry VIII clause)
Retrospective application
Parliamentary scrutiny[95]

1.85 Amendment (3) sets out six new substantive provisions related to the interaction of the new Help to Buy scheme with State and Territory laws. In particular, new section 41A provides that a State and Territory law (which could be primary or delegated) can declare all or part of the provisions in the bill to be excluded (except certain provisions as set out in section 42B). Section 42 provides that if the State or Territory laws have so displaced the Commonwealth law, the Commonwealth law will not operate to the extent necessary to ensure no inconsistency.

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93 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 1 of 2025;* [2025] AUSStaCSBSD 10.

94 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 60–85.

95 Amendment (3), government sheet [PC106]. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i), (iv) and (v).

1.86 In addition, the amendments provide that the Commonwealth may make regulations stating that a State or Territory declaration does not apply[96] or a State or Territory law does not displace the Commonwealth provision.[97] The amendments also provide that despite the usual prohibition on the retrospective application of delegated legislation when it might have a detrimental effect, this does not apply to regulations made under these new powers.[98]

1.87 Further, new section 42D provides that the minister may, by legislative instrument, modify the operation of the Help to Buy program if satisfied it is necessary or desirable because of the effect of sections 41A or 42. This power is limited in that the legislative instrument cannot 'directly amend the text of this Act' or 'substantially remove or override section 41A or 42'.

1.88 The effect of these provisions is to enable delegated legislation to modify the operation of primary legislation. As such, these 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 the level of parliamentary scrutiny of legislation 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.

1.89 In this instance, the supplementary explanatory memorandum states:

> The Minister must be satisfied that the modification is necessary or desirable. This ensures that the Minister has a mechanism to address in a timely way impacts on the operation of the Help to Buy program that could adversely affect participants in the program. While the modification power enables delegated legislation to alter or override the operation of the primary law, the scope for any delegated legislation created pursuant to the Minister's power is confined to matters that address the inconsistency or the excluded matter. The intent of this modification power is to provide the Minister with the ability to enable Help to Buy to operate concurrently with State and Territory laws, which is an important objective both for the Commonwealth and the States and Territories.[99]

1.90 The committee acknowledges the importance of addressing inconsistency when a State or Territory law excludes the operation of the Commonwealth law. However, the committee notes that these powers allow State or Territory law to effectively modify the operation of Commonwealth law as well as allowing delegated Commonwealth legislation to also modify the operation of this primary legislation. The

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96 Amendment (3), government sheet [PC106], new subsection 41A(3).

97 Amendment (3), government sheet [PC106], new subsection 42(5).

98 Amendment (3), government sheet [PC106], new subsection 42A(2).

99 Supplementary explanatory memorandum, pp. 9–10.

supplementary explanatory memorandum does not explain why it is appropriate for State or Territory laws, which may included delegated legislation, to be able to exclude the operation of the law, other than it is an 'appropriate mechanism for addressing any inconsistencies and interactions between the provisions of the Help to Buy program with State and Territory laws'.

1.91 The committee notes that the Australian Law Reform Commission (ALRC), in its Review of the Legislative Framework for Corporations and Financial Services Regulation, set out some helpful guidance as to when delegated legislation should be permitted to override or modify the operation of an Act. The review states that it should only be done in exceptional circumstances where there is a strong need or benefit in doing so, the empowering provision is as circumscribed as possible, and there are sufficient safeguards in place to reflect the significance of the power. The ALRC also set out some criteria in relation to when it may be appropriate to delegate a power of exclusion or exemption.[100]

1.92 In this case, it has not been established in the supplementary explanatory memorandum that the modification or exemption powers are as circumscribed as possible or contain sufficient safeguards to justify their use. The committee notes that there is no criteria which must be considered before a State or Territory excludes the operation of the law, and if the minister seeks to modify the operation of the primary legislation, they must only be satisfied that it is 'necessary or desirable' because of the effect of sections 41A or 42 on the operation of a provision of the Help to Buy program, including an effect it might have in the future.[101] There is also no time limit on how long these powers can be exercised. It is unclear why it is necessary for this power to apply for an unlimited period of time, including once the program has been fully established. Finally, the committee notes that these provisions were introduced by way of an amendment to the legislation (and agreed to one day prior to the bill's passage). Amendments are not subject to the same level of parliamentary scrutiny and debate as bills. The committee considers that the use of Henry VIII type clauses should be subject to a higher, rather than lesser, degree of parliamentary scrutiny.

1.93 Finally, the amendments allow for regulations to be made that could apply retrospectively. Retrospective application challenges a basic principle of the rule of law that laws should only operate prospectively. The committee therefore has long-standing scrutiny concerns in relation to provisions which have the effect of applying retrospectively. These concerns will be particularly heightened if the legislation will, or might, have a detrimental effect on individuals.

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100 Australian Law Reform Commission, Report 141, *Confronting Complexity: Reforming Corporations and Financial Services Legislation* (November 2023), Appendix D, pp. 298–301. See also Andrew Edgar, *Regulation-Making in the United Kingdom and Australia: Democratic Legitimacy, Safeguards and Executive Aggrandisement*, Hart (2023), pp. 162–165.

101 Amendment (3), government sheet [PC106], new section 42D.

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

> Retrospective application is necessary and appropriate to allow for the effective administration of the Help to Buy program, in particular in circumstances where the Commonwealth is not able to respond to a declaration in a timely manner that would have a significant adverse impact on Help to Buy. For example, this could be where a declaration made under a declaring law commences immediately, but requires the Commonwealth to undertake detailed consideration of the effect of the declaration.
>
> The scope for retrospective application of the regulations provides the Commonwealth with the ability to account for any timing differences between the commencement of a declaring law and the time taken for the Commonwealth to make regulations in response to the declaring law. The process for making any such regulations under the Act includes several stages, including engagement with States and Territories and in particular the affected State or Territory. The scope for retrospective application allows the Commonwealth to carefully consider the displacement provision and the effects of retrospective application as well as any engagement undertaken with States and Territories prior to making regulations with retrospective application to avoid adverse impacts to participants in the Help to Buy program.[102]

1.95 It is not completely clear from this explanation whether the retrospective application of these amendments would have any detrimental impact on individuals. The committee notes the advice that the retrospective application could avoid adverse impacts to participants, yet the amendments displace the operation of subsection 12(2) of the *Legislation Act 2003,* which provides that if regulations commence retrospectively, they will not be applicable if it would disadvantage a person. As such, if the regulations are not intended to disadvantage a person it would appear unnecessary to disapply this provision.

1.96 The committee considers that the use of Henry VIII-type powers, which enable delegated legislation to modify or exempt the operation of primary law, raises significant scrutiny concerns. The committee does not consider it has been established that the powers introduced by these amendments have been sufficiently justified.

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[102] Supplementary explanatory memorandum, p. 7.

1.97 However, in light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment.

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

Migration Amendment (Removal and Other Measures) Bill 2024

1.99 On 28 November 2024, the Senate agreed to 11 government amendments and the bill passed both Houses of Parliament, as amended, on 29 November 2024.

Significant matters in delegated legislation
Broad discretionary powers[103]

1.100 One of the amendments was to proposed section 199F.[104] Proposed section 199F originally provided that the minister may, by legislative instrument, designate a country as a removal concern country if they think it is in the national interest to do so (the effect of which would be that non-citizens from such countries could generally not obtain a visa to Australia).[105]

1.101 The only requirement in making such a legislative instrument was that the minister must consult with the Prime Minister and the Minister for Foreign Affairs before designating a country. The committee originally raised concerns about this broad discretionary power:

> The committee is concerned that such a significant matter is being left to the broad and unfettered discretion of the minister and is to be set out in delegated legislation. The committee considers that the designation of a country as a 'removal concern country', the effect of which is to effectively ban those citizens from applying for an Australian visa, is a significant matter which is more appropriate for primary legislation and the full parliamentary consideration afforded to Acts of parliament. A legislative instrument, made by the Executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.[106]

1.102 The amendments made to the bill[107] ensure that section 199F now provides that before the minister designates a country, they must have regard to any matters prescribed by the regulations. The committee considers that this amendment, on its own, may help to address concerns over the breadth of the minister's powers, if regulations set out some criteria as to the exercise of these powers. However, the

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103 See government amendment (7) [sheet SV105]. The committee draws senators' attention to this amendment pursuant to Senate standing order 24(1)(a)(iv).

104 See Schedule 1, item 3.

105 See Schedule 1, item 3, section 199G.

106 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2024* (27 March 2024) p. 7

107 See government amendment (7), new subsection (2A), sheet [SV105].

committee notes that the criteria for the exercise of such powers is a significant matter and it has not been established that it is appropriate for inclusion in delegated legislation. The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the supplementary explanatory memorandum contains no justification regarding why it is necessary to allow such significant matters to be set out in delegated legislation.

1.103 Further, the amendments provide that the new requirement to have regard to the regulations before designating a country, or the prescription of particular matters by the regulations, does not limit or otherwise affect the matters the minister may consider when deciding if it is in the national interest to designate a country.[108] This appears to the committee to effectively nullify the requirement for the minister to have regard to any prescribed matters – thereby leaving it to the minister's discretion. The supplementary explanatory memorandum provides no explanation as to the reasoning for this and what effect it would have in practice.

1.104 The committee retains significant scrutiny concerns that the bill (now Act) provides the minister with a broad discretionary power and leaves significant matters to be dealt with by delegated legislation. However, as the bill has now passed the committee makes no further comment.

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

Online Safety Amendment (Social Media Minimum Age) Bill 2024

1.106 On 28 November 2024, the Senate agreed to eight government amendments. The Bill finally passed both Houses of Parliament on 29 November 2024.

Significant matters in delegated legislation
Immunity from civil liability[109]

1.107 Amendment (1), new section 63DA[110] stipulates that a provider of an age-restricted social media platform must not collect information for the purposes of complying with certain obligations if the information is of a kind prescribed in the rules. Failure to comply with this is subject to a civil penalty of up to 30,000 penalty units (almost $1 million).[111]

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108 See government amendment (7), new subsection (2B), sheet [SV105].

109 Amendment (1) and (7), government amendment sheet [SY115]. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i) and (iv).

110 See government sheet [SY115].

111 $9,900,000, based on the current penalty unit amount of $330 per penalty unit, see *Crimes Act 1914*, section 4AAA.

1.108 Where a bill includes matters in delegated legislation, the committee expects the explanatory memorandum to the bill to address why it is appropriate to include the relevant matters in delegated legislation and whether there is sufficient guidance on the face of the primary legislation to appropriately limit the matters that are being left to delegated legislation. A legislative instrument made by the executive is not subject to the full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill.

1.109 In this instance, the supplementary explanatory memorandum states:

> The rule-making power gives the Minister the discretion to prohibit the collection of specified kinds of information, subject to advice from the eSafety Commissioner and Information Commissioner. This is intended to enhance the privacy of users and their information. The civil penalty provision will help ensure that only necessary forms of personal information are collected as a result of the minimum age obligation.[112]

1.110 The committee notes that this provides little detail as to why it is appropriate to include such matters in delegated legislation. It is not clear why the type of information that providers are prohibited from collecting is appropriate for delegated legislation, particularly as failure to comply would be subject to a penalty of up to almost $1 million.

1.111 In addition, amendment (7) introduces a new section 222A[113] that provides that the Information Commissioner is not liable for damages for anything done in good faith in the performance or exercise of their legislative functions or powers.

1.112 This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of negligence or defamation), unless it can be demonstrated that lack of good faith is shown. The committee notes that in the context of judicial review, bad faith is said to imply the lack of an honest or genuine attempt to undertake a task. Proving that a person has not engaged in good faith will therefore involve personal attack on the honesty of a decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.113 Further, the committee notes that neither the bill nor the supplementary explanatory memorandum clarifies whether the immunity is intended to extend to the Commonwealth as a whole, or whether the Commonwealth would be vicariously liable for these actions. Courts have generally taken the view that, in the absence of any

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112 Supplementary explanatory memorandum, p. 1.

113 See government sheet [SY115].

express provision to the contrary, the intention of Parliament is for such immunities to extend to the Commonwealth as a whole.[114]

1.114 The committee's position is that it is appropriate for the Commonwealth to remain liable for the actions of its officers and delegates, even those taken in good faith, where there is likely to be an adverse impact on an individual's rights and liberties. This is to ensure appropriate avenues of recourse are available for affected individuals who are prevented from bringing claims for damages against officers of the Commonwealth.

1.115 The committee considers the amendments include significant matters in delegated legislation and provide for a broad immunity from liability, neither of which were fully justified in the explanatory material accompanying the amendments.

1.116 However, in light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment.

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

Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023

Overview

1.118 Item 5 of Schedule 2 to this bill (now Act) amended the *Criminal Code Act 1995* (the Criminal Code) to insert Division 395, which established the Community Safety Order (CSO) scheme.[115] The object of the scheme is to protect the community from serious harm by providing that non-citizens who pose an unacceptable risk of committing serious violent or sexual offences[116] are subject to either a Community Safety Detention Order (CSDO) or Community Safety Supervision Order (CSSO).[117]

1.119 A 'serious violent or sexual offence' is defined as an offence that is punishable by life imprisonment or for at least seven years and the conduct constituting the offence involves:

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114 See, for example, *Dunstan v Orr (No. 2)* [2023] FCA 1536 at [113]; *Commonwealth of Australia v Griffiths & Anor* [2007] NSWCA 370 at [115]; *Bell v State of Western Australia* [2004] WASCA 205 [34].

115 Note the remainder of the provisions in the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023 were considered by the committee in *Scrutiny Digest 15 of 2023* (29 November 2023) pp. 7–27. The committee's concluded consideration of these matters is set out in Chapter 2 of this Digest.

116 Schedule 2, item 5, paragraph 395.1(a).

117 Schedule 2, item 5, paragraphs 395.1(c) and (d).

- loss of a person's life or serious risk of loss of a person's life;
- serious personal injury or serious risk of serious personal injury;
- sexual assault or sexual assault involving a person under 16;
- the production, publication, possession, supply or sale of, or other dealing in, child abuse material; or
- consenting to or procuring the employment of a child, or employing a child, in connection with child abuse material; or
- acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16.[118]

1.120 Serious foreign violent or sexual offences are also intended to be captured by the CSO scheme and include offences that are punishable by imprisonment for at least seven years and includes conduct that forms an offence against a law of a foreign country that would constitute a serious violence or sexual offence if engaged in Australia.[119]

1.121 CSOs may be made on application by the minister to a Supreme Court of a state or territory.[120] They may be made in relation to a non-citizen of adult age who has been convicted of a serious, or serious foreign, violent or sexual offence where there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future.[121]

1.122 Prior to making a CSO, the court must hold a preliminary hearing to determine whether to appoint one or more relevant experts.[122] If an expert is appointed, the expert must conduct an assessment of the risk of the offender committing a serious violent or sexual offence and must provide a report containing the expert's assessment to the court, the minister and the non-citizen.[123]

1.123 A number of mandatory matters that the court must have regard to in determining an application for a CSO are listed in section 395.11 and include any report received from an expert appointed to assess the non-citizen and the level of the non-citizen's participation in the assessment, any treatment or rehabilitation programs the non-citizen has had an opportunity to participate in, the level of the non-citizen's compliance with any conditions attaching to a visa the non-citizen holds,

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118 Schedule 2, item 5, subsection 395.2(1).

119 Schedule 2, item 5, subsection 395.2(1).

120 Schedule 2, item 5, subsection 395.8(1).

121 Schedule 2, item 5, subsection 395.5(1).

122 Schedule 2, item 5, subsection 395.9(1).

123 Schedule 2, item 5, subsection 395.9(5).

and the non-citizen's history of prior convictions for serious violent or sexual offences.[124]

Community Safety Detention Orders

1.124 The effect of a CSDO is that the non-citizen is detained in custody for the period specified in the order by the court.[125]

1.125 In making a CSDO, the court must, after having regard to the matters discussed above, be satisfied to a high degree of probability (rather than merely on the balance of probabilities), on the basis of admissible evidence, that the offender poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence.[126] The court must also be satisfied that there is no less restrictive measure available under Division 395 that would be effective in protecting the community from serious harm by addressing the unacceptable risk.[127]

1.126 A CSDO may be made for a maximum of three years. The court may make successive detention orders, similar to a supervision order.[128] A CSDO must be reviewed before the end of the 12-month period after the order began.[129]

Community Safety Supervision Orders

1.127 A CSSO may be made on direct application by the minister or if the minister has applied for a CSDO but the court is not satisfied that a CSDO is appropriate.[130] Such an order allows the court to impose any conditions considered, on the balance of probabilities, reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the community from serious harm by addressing the unacceptable risk of the offender committing a serious violent or sexual offence.[131] 'General' conditions that may be imposed by the court as part of a CSSO are listed in subsection 395.14(5) and include conditions that the non-citizen not be present at specified areas or places; that the non-citizen reside at specified premises; that the non-citizen not leave a specified State or Territory; that the non-citizen not access or use specified forms of telecommunications or other technology, including the internet; and that the non-citizen provide specified information to a specified authority.[132] The court is not, however, confined to this inclusive list of conditions.

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124 Schedule 2, item 5, section 395.11.

125 Schedule 2, item 5, subsection 395.5(3).

126 Schedule 2, item 5, paragraph 395.12(1)(b).

127 Schedule 2, item 5, paragraph 395.12(1)(c).

128 Schedule 2, item 5, subsections 395.12(5) and 395.12(6).

129 Schedule 2, item 5, subsection 395.23(1).

130 Schedule 2, item 5, subparagraph 395.13(1)(a)(ii).

131 Schedule 2, item 5, subsection 395.14(1).

132 Schedule 2, item 5, subsection 395.14(5).

1.128 In addition to the above, as part of a CSSO, subsection 395.14(7) clarifies that the court may impose conditions relating to monitoring and enforcement, such as the requirement to submit to testing by a specified authority in relation to the possession or use of certain articles or substances or that the non-citizen be subject to electronic monitoring and comply with directions given by a specified authority in relation to electronic monitoring.[133]

1.129 Prior to making a CSSO, the court must be satisfied on the balance of probabilities (rather than a high degree of probability, as with a CSDO), on the basis of admissible evidence, that the offender poses an unacceptable risk of seriously harming the community by committing a serious violent or sexual offence. The court must also be satisfied that each of the conditions and the combined effect of all conditions imposed on the non-citizen is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community.[134]

1.130 It is possible for a non-citizen subject to a CSSO to apply for exemptions to certain conditions that are imposed as part of the order, provided that the court has specified these conditions to be exemption conditions.[135] This process requires the non-citizen to apply to a specified authority, who may either grant or refuse the exemption or grant the exemption subject to any 'reasonable' directions specified in writing by the specified authority.[136]

1.131 A CSSO may be made for a maximum of three years and must be reviewed before the end of the 12 months after the order began to be in force.[137] The court is able to make successive supervision orders directly following from the completion of a previous CSSO.[138] A breach of a condition imposed as part of a CSSO is an offence carrying a mandatory one year sentence of imprisonment, up to a maximum penalty of five years, or 300 penalty units.[139]

Undue trespass on rights and liberties[140]

1.132 In *Scrutiny Digest 3 of 2024,* the committee raised concerns regarding various aspects of the CSO scheme, including:

- the ability for the courts to preventatively detain individuals, and the application of monitoring and curfew conditions based on the risk of future offending;

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133 Schedule 2, item 5, subsection 395.14(7).

134 Schedule 2, item 5, paragraph 395.13(1)(d).

135 Schedule 2, item 5, subsections 395.15(1) and 395.15(2).

136 Schedule 2, item 5, subsection 395.15(5).

137 Schedule 2, item 5, subsections 395.5(3), 395.5(4) and 395.23(1).

138 Schedule 2, item 5, subsection 395.13(6).

139 Schedule 2, item 5, subsection 395.38(1) and section 395.40.

140 Schedule 1, items 2 and 4. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

- the potential for a non-citizen to be indefinitely detained or subject to continuing conditions that seriously infringe on personal rights and liberties as the court is able to make successive orders; and
- the practical enforcement of the obligation to treat a person who is detained in custody under a CSDO as 'a person who is not serving a sentence of imprisonment', which is provided for in section 395.7 of the Criminal Code as part of the CSO scheme.

1.133 The committee sought the minister's detailed justification for the approach taken in the legislation which addresses these concerns.[141]

Minister for Home Affairs' response[142]

1.134 The minister advised that in addition to the development of new monitoring conditions, the establishment of the CSO scheme was a measure the government felt was required to best mitigate the risk of harm to the community. The minister advised that this scheme is applicable to a class of persons (namely, the holders of specific visas) a number of whom have previously committed serious violent or sexual offences, and some of whom constitute a reasonable concern in relation to possible reoffending.

1.135 The minister also advised that for either a CSSO or a CSDO to be made, the minister must be convinced of the risk of harm posed to the community based on a body of evidence from the Community Protection Board, after which the minister may then apply to the court for the making of an order. Further, the minister advised that while the court could make successive orders, these orders would not be extensions of previous orders but would be considered, made and reviewed on their own merits. The minister advised this ensures any detention or deprivation of liberty could not be arbitrary or indefinite.

Committee comment

1.136 The committee thanks the minister for this response. The committee notes with disappointment that this response, which was originally requested by 14 March 2024, was received more than nine months late on 23 December 2024.

1.137 The committee notes the minister's advice that any imposition of a CSSO or CSDO would be done by the courts following an independent judicial process and that the courts, in making each order, must consider the order on its own merits. While acknowledging this, the committee does not consider that this addresses all of the committee's concerns but rather, only mitigates one aspect of its concerns in relation to the potential for indefinite or arbitrary detention.

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141 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2024* (28 February 2024), pp. 55–61.

142 The minister responded to the committee's comments in a letter dated 23 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

1.138 The committee reiterates its consistent view that the imposition of an order, that will significantly curtail individual rights and freedoms, which is said to be made not on the basis of criminal conviction but on the basis of future risk of offending, is a serious measure for the state to take. While the proceedings for an order would appear be characterised by the usual procedures and rules for civil proceedings, the application of these indicia of judicial processes does not alter the fact that this scheme, like other comparable schemes relating to terrorism offences, fundamentally inverts basic assumptions of the criminal justice system: that persons may only be punished on the basis of offences, the existence of which has been proven beyond reasonable doubt.[143] The committee also reiterates a fundamental principle of the Australian criminal justice system that a criminal sentence should reflect the objective seriousness of a crime and is set firmly against double jeopardy (noting that many of those who may be subject to such orders would have fully served their sentence for the crime that is being considered as part of assessing their risk of future offending).[144] Finally, the committee notes that a number of its other concerns in relation to this scheme were not addressed by the minister's response, such as what steps must be taken by prison administrators to ensure a person subject to a CSDO is not treated as a person who is serving a sentence of imprisonment. The committee continues to remain concerned as to what measures will be put in place to reduce the risk detainees pose to the community (such as through rehabilitation programs) as part of mitigating the overall risk to the community, which the committee notes is an objective of this scheme.

1.139 The committee reiterates its concern that this scheme allows for the preventative detention, or the otherwise significant curtailing of individual rights and freedoms, of non-citizens on the basis of the risk of future offending. As the basis for the order is triggered by past offending on the basis of predicted future offending, this necessarily compromises basic assumptions of the criminal justice system.

1.140 However, in light of the fact that this bill has long since passed both Houses of Parliament, the committee makes no further comment.

Security of Critical Infrastructure and Other Legislation Amendment (Enhanced Response and Prevention) Bill 2024

1.141 On 25 November 2024, the bill passed both Houses of Parliament, with six government amendments agreed to.

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143 For the committee's consideration of preventative detention orders in relation to alleged terrorists, see Senate Scrutiny of Bills Committee, *Report 10 of 2016* (30 November 2016), pp. 631–636.

144 *Veen v The Queen (No 2)* (1988) 164 CLR 465 at [477].

Availability of judicial and merits review[145]

1.142 Section 38 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) provides that when the Australian Security Intelligence Organisation (ASIO) gives an adverse or qualified assessment about a person to a government department, that department should notify the person about the assessment and inform them they can apply to the Administrative Review Tribunal for review of the decision. However, section 38 provides that the minister can override this and not provide the person with any notice if they consider that withholding the notice is essential to the security of the nation or the disclosure of a statement of grounds (or part of it) would be prejudicial to the interests of security.

1.143 Prior to the amendments, this provision would not apply if section 38A applied.[146] Section 38A previously provided that if the ASIO assessment is in relation to certain decisions under the *Telecommunications Act 1997* (Telecommunications Act) or the *Security of Critical Infrastructure Act 2018* (SOCI Act), the assessment must be given to the person. The minister was able to exclude any matter in the assessment if the disclosure of it would be prejudicial to the interests of security. However, the person would still be notified that an adverse assessment was made and of their right to seek review of that decision by the ART (and be able to bring a judicial review claim if applicable).

1.144 The amendments to the bill repealed section 38A to ensure the general approach in section 38 applies. This means that the minister can decide to not provide any notification to an affected person.

1.145 In *Scrutiny Digest 15 of 2024*, the committee requested the minister's advice as to:

- the necessity of removing section 38A from the ASIO Act, in particular why the amendment has become necessary now (noting section 38A was introduced as a safeguard 20 years ago);
- why the power of the minister to exclude any matter if it would be prejudicial to the interests of security from the information given to an affected person is insufficient to protect national security risks; and
- how will the right to seek review of administrative decisions be afforded to a person if they are never notified that an adverse ASIO assessment was made against them.[147]

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145 See government amendment (5) [sheet ZC305]. The committee draws senators' attention to this amendment pursuant to Senate standing order 24(1)(a)(iii).

146 See *Australian Security Intelligence Organisation Act 1979*, subsection 38(1A).

147 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2024* (27 November 2024) pp. 33–35.

Minister for Home Affairs response[148]

1.146 The minister advised that since 2018 where the minister responsible for exercising the specific powers referenced in section 38A (namely under the Telecommunications Act or SOCI Act) (SOCI Act minister) is different to the minister administering the ASIO Act (ASIO minister), section 38A has not been operable, as section 38 was the applicable section. The minister advised that repealing section 38A clarifies the operation of section 38 and 'mitigates risks associated with any prior notice of certificate given under section 38 in relation to the powers in section 38A'.

1.147 The minister also advised that the powers in section 38A relate to applications made under the Telecommunications Act or directions made by the SOCI Act minister, and the affected person would either receive notice that the matter is under government consideration or consideration is being given to issuing a direction. The minister advised that the ASIO minister could not withhold notice if the affected person has already been informed in this manner. As such, the ASIO minister under section 38 was only able to exclude disclosure of certain matters from an assessment (not exclude the notice of an adverse assessment entirely). As such, the minister advised that 'section 38 affords the subject of a security assessment the same notification and review rights as under section 38A'.

Committee comment

1.148 The committee thanks the minister for this response. While the committee notes the advice about the relevant ministries, it remains unclear to the committee why this amendment has now become necessary, noting that the section 38A has existed since 2004 and amendments regarding the responsible minister occurred in 2018. The committee notes that the minister's advice relates only to where the ASIO minister and SOCI Act minister are two separate people – a matter which relates to machinery of government and presumably could change at any time.

1.149 The committee appreciates that the ASIO minister was previously only able to exclude certain matters from an assessment and was not able to exclude notice of an adverse assessment entirely. The amendments that allow the minister to withhold notice entirely are those that raise the committee's scrutiny concerns. The committee reiterates 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?*[149] In this case the committee acknowledges that the measure does not specifically exclude review, however, if an affected person is not notified of an adverse assessment made against

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148 The minister responded to the committee's comments in a letter dated 13 January 2025. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

149 Administrative Review Council, *What decisions should be subject to merit review?* (1999).

them, in practice they would be unable to seek merits or judicial review of this as they would be unaware that such an assessment had been made.

1.150 The committee notes that the minister's response failed to address its question as to how an affected person would be afforded a right to seek review of this administrative decision if they are never notified that an adverse ASIO assessment was made against them.

1.151 The committee remains concerned that these amendments effectively remove an affected person's rights of judicial or merits review. However, as the bill has now passed, the committee makes no further comment.

Chapter 2
Commentary on ministerial responses

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

Migration Amendment (Bridging Visa Conditions) Bill 2023

Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023[150]

Purpose	The Migration Amendment (Bridging Visa Conditions) Bill 2023 (now Act): amended the *Migration Act 1958* and Migration Regulations 1994 in response to the High Court's judgment in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (S28/2023) to provide for conditions to be placed on bridging visas granted to certain non-citizens released from immigration detention. The Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (now the renamed Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023): amended the *Migration Act 1958* to amend the amendments made by the earlier bill. When first introduced, it introduced new criminal offences for relevant visa holders, and amended collection, use and disclosure of information provisions.
Portfolio	Home Affairs
Introduced	House of Representatives on 16 and 27 November 2023
Bill status	Received Royal Assent on 17 November and 7 December 2023

Overview

2.2 On 16 November 2023, the Migration Amendment (Bridging Visa Conditions) Bill 2023 (the first bill) was introduced and passed. This bill was in response to a High Court ruling in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*[151] (*NZYQ*). The first bill amended the *Migration Act 1958* (Migration Act) to create a new

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150 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 11.

151 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37.

framework for Subclass 070 Bridging (Removal Pending) Visa ('BVR') holders for whom there is no real prospect of removal from Australia becoming practicable in the reasonably foreseeable future.

2.3 A number of conditions were attached to the BVR, including requirements to report at specified locations or report specified information to the minister, requirements to remain at a specified address at certain times (curfews) and requirements to wear monitoring devices (referred to as the 'monitoring' condition).[152] Under this scheme, the monitoring and curfew conditions were automatically applied to any holder of a BVR unless the minister was satisfied that those conditions were not reasonably necessary for the protection of any part of the Australia community.[153] Further, section 76E of the Migration Act was introduced that provided that the rules of natural justice did not apply to the making of this visa with such conditions imposed. Subsections 76E(3) and (4) provided that a person subject to a BVR may make representations to the minister to relax the application of the conditions automatically attached to their visa.[154] If the minister was satisfied that the visa conditions are 'not reasonably necessary for the protection of any part of the Australian community', the minister must grant a visa that is not subject to the BVR conditions (including the monitoring and curfew conditions).[155] It also created new offences for breach of certain BVR conditions, each carrying maximum penalties of five years imprisonment and mandatory minimum sentences of one year.[156]

2.4 On 27 November 2023, the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (the second bill) was introduced in the House of Representatives. This bill amended some of the earlier amendments, and created three additional offences, each carrying the same maximum penalties and mandatory minimum sentences.[157] The bill also introduced powers for authorised officers to administer monitoring devices worn by non-citizens, and retrospectively validated any actions already undertaken (after the passage of the first bill) to administer monitoring devices.[158] The bill was later amended and renamed the Migration and Other

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152 Migration Amendment (Bridging Visa Conditions) Act 2023, Schedule 2, item 7, subclause 070.612(1).

153 See Migration Regulations, 070.612A (as it existed prior to 7 November 2024).

154 *Migration Act 1958*, subsections 76E(3) and (4).

155 *Migration Act 1958*, paragraph 76E(4)(b).

156 Migration Amendment (Bridging Visa Conditions) Act 2023, Schedule 1, item 4, subsections 76B(1), 76C(1), 76D(1), 76D(2), 76D(3) and 76D(4) and section 76DA. Note that Migration Amendment (Bridging Visa Conditions and Other Measures) Act 2024 also created three additional offences for breach of conditions; powers for authorised officers to administer monitoring devices worn by non-citizens; and power for courts to make a Community Safety Order (CSO) that would allow for the preventative detention or supervision (including curfews and electronic monitoring) of non-citizens holding a BVR.

157 Schedule 1, item 1, subsections 76DAA(1), 76DAB(1) and 76DAC(1), and item 2.

158 Schedule 1, item 4, section 76F.

Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023. Substantial amendments were made to the bill to introduce a community safety order scheme.[159]

2.5 The committee outlined its scrutiny concerns in relation to these powers in *Scrutiny Digest 15 of 2023*.[160] These scrutiny concerns included the significant penalties for breaching BVR conditions, the undue trespass on personal rights and liberties in relation to the imposition of curfews and monitoring devices, the infringement of privacy through the use of monitoring devices and the retrospective authorisation of officers to administer monitoring devices. Specifically, the committee expressed concern that the automatic imposition of these conditions would prove to be a disproportionate response to community risk due to the lack of any mechanism to consider individual circumstances and risk posed by the affected person. The committee also expressed concern about the practical burden for an individual in convincing the minister that the BVR conditions are not reasonably necessary for the protection of the community. There are difficulties with proving a negative, and where a person may have been convicted of an offence previously, that would prejudice them in being able to make representations as to why the conditions are not reasonably necessary.[161]

2.6 On 6 November 2024, the High Court delivered its judgment in relation to the YBFZ matter and determined the BVR conditions, namely, the monitoring and curfew conditions, as introduced by the first bill (and amended by the second bill), was unconstitutional:

> As the power to impose each of the curfew condition and the monitoring condition on a non-citizen by the Executive Government of the Commonwealth is prima facie punitive and there is no legitimate non-punitive purpose justifying the power, the power is to be characterised as punitive and therefore infringes on the exclusively judicial power of the Commonwealth in Chapter III of the Constitution.[162]

2.7 In response to this decision, the Migration Amendment (Bridging Visa Conditions) Regulations 2024 and the Migration Amendment Bill 2024 (the 2024 bill) were introduced. Together, these changed the test the minister must be satisfied of before a condition is imposed. The committee's concerns in relation to the amendments following the *YBFZ* decision are set out in *Scrutiny Digest 14 of 2024*.[163] While the committee acknowledged the amendments to the law had ameliorated

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159 The committee considered these amendments in *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 55–62. Note that the minister provided a response to the committee in relation to these amendments which is considered in the *Commentary on amendments* section of this Digest.

160 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 7–27.

161 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 7–27.

162 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [83].

163 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2024* (20 November 2024), pp. 13–35.

some of its initial concerns, the committee reiterated its significant concerns as to the trespass on personal rights and liberties, such as by the imposition of monitoring and curfew visa conditions based on the risk of future offending without a requirement for procedural fairness.

2.8 Following the passage of the 2024 bill on 23 December 2024, the minister provided a response addressing the committee's concerns in relation to the first bill and second bill (first requested on 30 November 2023). This entry considers the minister's response in relation to the first and second bills, which is a point-in-time response as the bills were when initially passed (prior to the changes made following the *YBFZ* decision).

Undue trespass on rights and liberties
Broad scope of offence provisions
Significant penalties in primary legislation[164]

2.9 In *Scrutiny Digest 15 of 2023*, the committee outlined concerns in relation to the mandatory imposition of monitoring and curfew conditions on BVR holders, the significant penalties applicable to the offences of failing to comply with certain BVR conditions (including a period of mandatory minimum imprisonment), the implementation of a reasonable excuse defence, and the lack of clarity as to the operation of certain parts of this scheme. The committee asked five specific questions in relation to these matters.[165]

Minister for Home Affairs' response[166]

2.10 The minister advised that the measures (as at the point when they were first introduced) allow for the risk each BVR holder poses to be assessed and that conditions, including monitoring and curfew conditions, are applied in consideration of that risk. The minister also advised that the measures being reviewed following a 12-month period would ensure regular review that the conditions remain appropriate. In relation to the appropriateness of monitoring and curfew conditions overall, the minister advised that the NZYQ-affected cohort includes individuals with serious criminal histories who are no longer able to be managed in immigration detention where there remains no prospect of removal in the reasonably foreseeable future. The minister also advised that these measures are intended to protect public order and the rights and freedoms of others, and would not be arbitrary, and are necessary, reasonable and proportionate to achieving that objective.

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164 Schedule 1, items 2 and 4. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

165 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 9–18.

166 The minister responded to the committee's comments in a letter dated 23 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

2.11 The minister also advised that the mandatory minimum sentence of one year imprisonment and the maximum penalty of five years imprisonment that is applicable to the offence of a BVR holder failing to comply with a visa condition reflects the seriousness of the regard with which the NZYQ-affected cohort are expected to have towards the conditions imposed on their BVR and the seriousness of the offence if these conditions are contravened. In relation to the conditions which, if contravened, do not constitute an offence, the minister advised that affected individuals would be warned and counselled about expected conduct. The minister also noted that the government has introduced the Community Safety Order scheme, which allows for Community Safety Detention Orders and Community Safety Supervision Orders to be made by the court on application by the minister.[167] The minister finally advised that the reasonable excuse defence ensures that the offences strike the appropriate balance between deterring and punishing offending and affording reasonably excusable behaviour (which would be determined by the court).

Committee comment

2.12 The committee thanks the minister for this response. While the committee appreciates that this response is intended to address the committee's concerns outlined in *Scrutiny Digest 15 of 2023*, the committee notes that this response has been provided over a year later than initially requested. As a result, the justifications provided are no longer applicable to the law as it stands currently, and this delay has frustrated the committee's scrutiny process which is intended to be contemporaneous with parliamentary debate.

2.13 In relation to the minister's advice that the measures, namely, the monitoring and curfew conditions, are reasonable and proportionate to achieving the objective of community safety, the committee draws on the jurisprudence of the High Court in the *YBFZ* decision. The High Court found that 'protection of…the Australian community from harm' is too general to constitute a legitimate non-punitive purpose, and that consequently, the curfew and monitoring conditions attaching to any BVR holder were imposed without a legitimate non-punitive purpose, rendering them unconstitutional.[168]

2.14 The committee also notes the minister's advice that these measures are not arbitrary. However, in the *YBFZ* decision, the High Court described the operation of these measures as:

> …cast[ing] its net over all members of the class in circumstances where escape from this net depends on the Minister forming an opinion which the Minister is legally entitled not to form in a broad and flexible, as well as

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167 See the committee's consideration of these orders in *Scrutiny Digest 3 of 2024* (28 February 2024) pp. 55–62 and the minister's recent response considered in the *Commentary on amendments* section of this Digest.

168 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [82]–[83].

> uncertain and unpredictable, range of circumstances not necessarily connected to the existence of any real risk of physical or other harm to any member of the Australian community.[169]

2.15 The High Court also found the following:

> …there may be cases where the Minister never has the information necessary to meaningfully assess whether the imposition of the condition is not reasonably necessary for the protection of the Australian community. In these cases, the condition will generally remain imposed for up to 12 months, notwithstanding that it is not reasonably necessary to impose the condition to protect any part of the Australian community.[170]

2.16 The committee notes that the minister's justification that the monitoring and curfew conditions are reasonable and proportionate is not consistent with the reasoning of the High Court. Nor is the minister's advice that the conditions were framed to allow for an individual assessment of each BVR holder. The committee notes that the law has now been amended in response to the High Court's judgment and that monitoring and curfew conditions can no longer attach to all BVR holders as a result of their visa status.

2.17 The committee notes the minister's advice in relation to the reasonable excuse defence applicable to a number of offences under this scheme. Although the committee acknowledges it provides BVR holders with a safeguard to some extent, this alone does not fully mitigate the overall breadth of the offence provisions, the extensive trespasses on personal rights and liberties and the lack of procedural fairness afforded to a BVR holder.

2.18 The committee notes with significant disappointment that the minister was over one year late in responding to the committee's queries, and in that time the law under consideration was declared unconstitutional and has since been amended. The delay in the minister's response has frustrated the committee's scrutiny process which is intended to be contemporaneous with parliamentary debate. The committee reiterates its consistent scrutiny view that legislation, particularly legislation that may trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny. This includes ensuring the scrutiny committees can engage in a meaningful and timely dialogue with the executive.

2.19 The committee reiterates its concern as to the significant trespass on personal rights and liberties posed by the imposition of monitoring and curfew visa conditions, which despite the amendments made to these provisions continues to be based on the risk of future offending, breach of which is punishable by a mandatory minimum sentence of one year imprisonment. The committee has

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169 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [81].

170 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 at [85].

outlined its concerns in relation to the amended provisions in *Scrutiny Digest 14 of 2024*.[171]

2.20 However, in light of the fact that these bills have long since passed both Houses of Parliament, the committee makes no further comment.

Procedural fairness[172]

2.21 In *Scrutiny Digest 15 of 2023*, the committee raised a number of scrutiny concerns in relation to the process by which a BVR holder may seek to have conditions attaching to their visa removed. These include the lack of guidance as to how the minister may determine whether the conditions are reasonably necessary for the protection of any part of the Australian community and the practical burden resting on a non-citizen to convince the minister of this matter. The committee also expressed concern that oral notice provided to a non-citizen of a decision or a requirement to report at a certain location is sufficient. The committee sought a response in relation to six specific questions relating to this from the minister.[173]

Minister for Home Affairs' response[174]

2.22 The minister advised that the information to be disclosed by BVR holders in making a representation to the minister is a matter for that visa holder. The BVR holder will be able to provide information that the person considers relevant to making representations regarding the application of the BVR conditions and why the holder should not be subject to one or more of them.

2.23 The minister advised that the individual circumstances of each BVR holder will be considered to assess whether conditions are necessary for the protection of the Australian community. The minister noted that certain BVR conditions may only be applied in the presence of relevant criminal history, such as condition 8624, which is only applied where a person has been convicted of an offence involving violence or sexual assault.

2.24 The minister advised that decisions made under subsection 76E(4) of the Migration Act are subject to merits review. This decision is in relation to refusing to grant a visa without monitoring or curfew condition attached.

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171 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2024* (20 November 2024), pp. 30–34.

172 Schedule 1, item 4, subsection 76E(3); schedule 2, items 9, 10, 11 and 12. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (ii).

173 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 18–21.

174 The minister responded to the committee's comments in a letter dated 23 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

2.25 Finally, in relation to providing oral notice to BVR holders, the minister advised that all BVR holders will be provided notice of the decision to grant the visa in writing. Oral notice is intended to complement written notice, as it allows the officer of the department to explain the conditions that apply and affords the BVR holder a chance to ask questions to clarify and confirm their understanding in their preferred language.

Committee comment

2.26 The committee thanks the minister for this response. The committee notes that minister's advice that the decision made under proposed subsection 76E(4) of the Migration Act is subject to review and the intention behind providing oral notice to BVR holders. However, while the committee notes the minister's advice that providing oral advice of applicable conditions is 'in addition' to written advice, the committee remains concerned that, as a matter of law, the notice can be provided orally *or* in writing.[175]

2.27 The committee does not consider that the minister's advice addresses the committee's concerns that the representations a BVR holder is able to make applies only *after* monitoring and curfew conditions have already been applied to that individual. Without any guidance or examples as to what matters should be addressed or on what basis the minister may conclude that the conditions are not reasonably necessary for the protection of any part of the Australian community, the committee reiterates that it appears difficult for a BVR holder to make representations as to their level of risk of harm to the community.

2.28 Further, the committee reiterates its view that even if the minister is able to take individual circumstances of each BVR holder into consideration, this is only applicable where the BVR holder has made representations following the imposition of conditions. The BVR holder is unable to make submissions at the time of the imposition of the conditions and will have to suffer significant intrusions to their personal rights and liberties prior to being able to make submissions.

2.29 The committee remains concerned at the overall lack of procedural fairness afforded to BVR holders, particularly in relation to BVR holders being unable to make submissions prior to the imposition of conditions and that any consideration of individual circumstances is only done following the imposition of these conditions.

2.30 The committee notes that the provisions in relation to this issue have been amended since the time of requesting the minister's advice, particularly in relation to the matters that must be addressed when making representations. The

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175 See Migration Regulations 1994, Schedule 8, conditions 8401, 8542, 8543 and 8561. These conditions were originally introduce by the Migration Amendment (Bridging Visa Conditions) Bill 2023, Schedule 2, items 9–12.

committee has outlined its concerns in relation to the amended provision in *Scrutiny Digest 14 of 2024*.[176]

2.31 However, in light of the fact that these bills have long since passed both Houses of Parliament, the committee makes no further comment.

Significant matters in delegated legislation[177]

2.32 In *Scrutiny Digest 15 of 2023*, the committee noted that the wording of visa conditions contained in the Migration Regulations could be amended at any time, thereby changing the conduct to which offences under sections 76B, 76C and 76D of the first bill apply to. The committee sought the minister's advice as to why it was necessary and appropriate to include this matter in delegated legislation, noting the elements of an offence are significant matters that are more appropriate for inclusion in primary legislation.[178]

Minister for Home Affairs' response[179]

2.33 The minister advised that section 76B includes provision to carve out certain conditions from the scope of the offence, and that this ensures that the BVR visa conditions that remain within the scope of the offence focuses appropriately on establishing criminal liability on the most serious threats to community safety, with the legislative framework providing for a graduated approach to sanctions and penalties. Any regulations made for this purpose are a disallowable legislative instrument, and would be appropriately subject to parliamentary scrutiny.

Committee comment

2.34 The committee thanks the minister for this response. The committee notes that section 76B enables delegated legislation to determine what is *not* a monitoring condition that is subject to the relevant offence. As such, the regulations cannot expand the scope of the offence, but can decrease its scope. The committee has less concerns, from a question of whether the measure trespasses unduly on rights and liberties, with provisions that reduce the scope of an offence. However, it remains unclear to the committee why it is appropriate for delegated legislation to determine the scope of an offence. The committee notes that this leaves to the executive the question of whether to narrow an offence that Parliament has enacted, and as such may subvert the appropriate relationship between the Parliament and the executive.

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176 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2024* (20 November 2024), pp. 30–34.

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

178 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 21-22.

179 The minister responded to the committee's comments in a letter dated 23 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

Although any instrument made may be subject to disallowance and parliamentary scrutiny, the committee stresses that the inclusion of significant matters in delegated legislation is a separate matter entirely as delegated legislation is not subject to the full range of parliamentary scrutiny that primary legislation is subject to.

2.35 Where significant matters are included in delegated legislation, the committee expects a justification as to why these matters are appropriate for inclusion in delegated legislation. The committee considers the minister has not addressed this aspect of its question, and it therefore remains unclear why it is appropriate that delegated legislation determine the scope of the offence in section 76B.

2.36 However, in light of the fact that these bills have long since passed both Houses of Parliament, the committee makes no further comment.

Broad delegation of administrative powers and functions
Significant matters in delegated legislation
Privacy
Retrospective application[180]

2.37 In *Scrutiny Digest 15 of 2023*, the committee raised concerns regarding the delegation of powers and functions to a large class of 'authorised officers' in relation to monitoring, fitting, maintaining and operating monitoring devices. The committee also noted that this may have been done without a lawful basis prior to the introduction of section 76F and that any limitations on these powers would be prescribed by regulations rather than contained in the section itself. Further, the committee raised concerns in relation to privacy, as authorised officers are permitted to collect, use and disclose personal information in relation to BVR holders to any person for the broad purpose of protecting the community in relation to persons subject to monitoring. The committee sought the minister's advice in relation to seven specific questions.[181]

Minister for Home Affairs' response[182]

2.38 In relation to the categories of persons who may be authorised to do anything necessary and convenient in relation to a BVR holder who is subject to a monitoring

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180 Schedule 1 to the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i), (ii) and (iv).

181 Senate Scrutiny of Bills Committee, *Scrutiny Digest 15 of 2023* (29 November 2023), pp. 22–27.

182 The minister responded to the committee's comments in a letter dated 23 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

condition, the minister advised that the department has established policies and processes in place for considering the appropriate delegation of power or functions and ensuring appropriate consideration is given at the time of making a delegation or authorisation instrument to requisite qualifications, training or experience.

2.39 In relation to safeguards, the minister advised that the exercise of powers under subsection 76F(1) is subject to any conditions, restrictions or other limitations prescribed by the regulations and that any regulations made for these purposes would be subject to disallowance and parliamentary scrutiny.

2.40 In relation to the collection, use and disclosure of personal information, the minister advised that the approach adopted is necessary and appropriate in circumstances when disclosures are made to law enforcement bodies, for example, where a person who is subject to monitoring is released into the community in a different state or territory and the relevant police service would have to be notified.

2.41 The minister advised that any use of personal information by Australian Border Force officers and departmental staff would 'likely' be consistent with the *Privacy Act 1988* and personal information collected in the monitoring process would be held in accordance with the collection and security requirements of the Australian Privacy Principles. Any personal information held by the department that is lost or subject to unauthorised access or disclosure would be handled in accordance with the Office of the Australian Information Commissioner's guidelines.

2.42 Finally, the minister advised that section 76F is intended to clarify the powers that an authorised officer may exercise in relation to a person who is subject to monitoring and in relation to the collection, use and disclosure of personal information. It applies prospectively and the bill did not include a validation provision in relation to past actions.

Committee comment

2.43 The committee thanks the minister for this advice. The committee notes the minister's comments in relation to the collection, use and disclosure of personal information. While the committee remains concerned that this would only 'likely' be in accordance with the Privacy Act, the committee welcomes the advice in relation to safeguards applicable to the collection, use and disclosure of this information and considers it should have been included in the explanatory memorandum when the bill was introduced. However, the committee reiterates the potential impact on personal privacy by these measures. Enabling an authorised officer under proposed subsection 76F(1) to do all things 'necessary or convenient' relating to a person's monitoring device in itself limits the right to privacy. This is because a person required to wear a device has to make the device (which is attached to them) available to the authorised officer at any time for the purpose of maintaining the device. Further, providing an authorised officer with the power to determine or monitor the location of the person through the operation of a monitoring device also limits the visa holder's right to privacy. In addition, proposed subsection 76F(2) provides that personal information

may be shared with 'any other person' for the broad purpose of 'protecting the community in relation to persons who are subject to monitoring'. Noting that this is stated to operate despite any other law,[183] this would appear to allow authorised officers to share information about the person in circumstances, for example, sharing their name and address with the media, if the officer considers it would help to protect the community. None of these issues were addressed in the minister's response.

2.44 The committee also notes the minister's advice that the department has established policies and procedures in relation to delegations and authorisations of powers and functions. However, the committee queries why the bill, now an Act, cannot be amended so that these processes and the delegation of powers to those with appropriate skills, qualifications and training is captured in primary legislation.

2.45 The committee also notes the minister's advice that the exercise of powers under subsection 76F(1) is subject to any conditions, restrictions or other limitations prescribed by the regulations. However, the committee observes that over one year after these powers have been in force, no regulations have been made prescribing any safeguards that are applicable to the exercise of these powers or functions (namely relating to the fitting, installation or other maintenance or operation of monitoring devices). As such, the committee notes that there are no safeguards currently applicable to the exercise of these powers and functions.

2.46 As such, the committee remains concerned that the wording in proposed subsection 76F(1) is overly broad, as it empowers the authorised officer to 'do all things necessary or convenient' in relation to the prescribed powers. This authorisation is overly broad because nearly any requirement could be justified on the grounds that it is convenient for the officer to impose in this context. It could encompass, for example, requirements that a person subject to monitoring travel significant distances to facilitate the authorised person maintaining the monitoring equipment, at unreasonable times and for unreasonable amounts of time. The committee notes that there is no requirement for reasonableness attached to these powers.

2.47 The fact that the safeguards were intended to be set out in delegated legislation, and yet no such safeguards have been provided for, demonstrates that such matters should be included in primary legislation, rather than left to delegated legislation. The committee therefore does not consider that subsection 76F(4) operates as an effective limit on the exercise of these powers noting no limitations are actually prescribed by the regulations. The committee considers the Act itself should set out relevant conditions, restrictions or limitations on the exercise of an authorised officer's powers, especially noting that currently such powers can be exercised despite any other laws and on extremely broad grounds.

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183 See proposed subsection 76F(3).

2.48 Finally, while the committee understands that section 76F was only intended to apply prospectively, the committee notes that monitoring devices had been fitted and installed from the passage of the Migration Amendment (Bridging Visa Conditions) Act 2023 on 17 November 2023, which was prior to the commencement of subsection 76F(1) in the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023 on 8 December 2023. The committee observes the possibility that for a period of 21 days, monitoring devices were fitted, installed and otherwise maintained or operated potentially without lawful basis and expresses its concern at the significant trespass on personal rights and liberties caused by these actions being potentially conducted without a lawful basis.

2.49 The committee remains concerned that authorised officers are granted overly broad powers to do 'all things necessary or convenient' relating to a person's monitoring device and equipment, without any applicable safeguards and despite any other law, and considers this unduly trespasses on personal rights and liberties.

2.50 However, in light of the fact that these bills have long since passed both Houses of Parliament, the committee makes no further comment.

Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2024[184]

Purpose	The bill (now Act) amends the *Migration Act 1958* to expand on search and seizure powers exercised by authorised officers. These powers are able to be exercised to seize 'prohibited things', which is to be determined by the minister (examples include mobile phones or other communication devices). The bill also expands circumstances in which search and seizure powers may be exercised by authorised officers without warrant or reasonable suspicion both within and without detention facilities.
Portfolio	Home Affairs
Introduced	House of Representatives on 21 November 2024
Bill status	Received Royal Assent on 4 December 2024

Undue trespass on rights and liberties

Parliamentary scrutiny[185]

2.51 The bill (now Act) amends the *Migration Act 1958* (Migration Act) to allow the minister to determine, by legislative instrument, that a thing is a 'prohibited thing' in relation to immigration detention facilities and detainees (whether or not they are in an immigration detention facility). The minister may make such a determination if satisfied that possession is prohibited by law, or possession or use of the thing in an immigration detention facility might be a risk to the health, safety or security of persons in the facility or to 'the order of the facility' (known as an 'immigration detention facility risk').[186] An example is given in the bill of the 'things' that may be determined to be a prohibited thing, including mobile phones, SIM cards or computers and other internet-capable electronic devices.[187] The explanatory memorandum states that prescription and non-prescription medications, as well as health care supplements, may also be determined to be prohibited things if the person in

184 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Migration Amendment (Prohibiting Items in Immigration Detention Facilities) Bill 2024, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 12.

185 Schedule 1. The committee draws senators' attention to this Schedule pursuant to Senate standing order 24(1)(a)(i) and (v).

186 Schedule 1, item 2, proposed section 251A.

187 Schedule 1, item 2, proposed subsection 251A(2) example.

possession of them is not the person to whom they have been prescribed or supplied for use.[188]

2.52 If a thing is determined to be a prohibited thing, the bill sets out (or amends) powers enabling an authorised officer to search for the prohibited thing if they believe on reasonable grounds that it is necessary to prevent or lessen an immigration detention facility risk,[189] including to:

- search a detainee's person, clothing and property to find out whether a prohibited thing is hidden on the person, in the clothing or in their property;
- require a detainee, or their possessions, to be strip-searched or screened by screening equipment to find out whether a prohibited thing is hidden on the person, in their clothing or in their possession;
- enable authorised officers and their assistants to search, without a warrant, the rooms and personal effects of immigration detainees to find out if a prohibited thing, weapon or other thing capable of being used to inflict injury or help a detainee escape is in the detention facility (and to use detector dogs for this purpose); and
- require authorised officers to seize a prohibited thing, weapon or escape aid or any documents or other thing that may be evidence or grounds for cancelling the visa of the person being searched.

2.53 The bill also indirectly empowers authorised officers to use force against a person or property when conducting a search so long as it is reasonably necessary in order to conduct the search.[190]

2.54 In *Scrutiny Digest 15 of 2024* the committee requested the minister's advice as to the following:

- why the power to search or seize 'prohibited things' applies to all detainees, regardless of whether possession of such a thing by that individual detainee poses a specific risk;
- would the legislation enable authorised officers to seize prohibited things (such as mobile phones) from all detainees, even where only certain detainees pose a risk of possessing them, on the basis that the authorised officer considers seizing the thing to be necessary to lessen a risk to the good order of the facility;
- when would the search or seizure of a prohibited thing be likely to be considered necessary to prevent or lessen a risk to 'the order of the immigration detention facility', and why is it appropriate to include 'order of

188 Explanatory memorandum, p. 11.

189 Schedule 1, item 2, proposed section 251AA.

190 Schedule 1, item 19, proposed subsection 252BA(7).

the detention facility' in addition to risks to health, safety or security or persons;

- why does the bill not provide that strip searches to seize 'prohibited items' are only conducted when absolutely necessary;
- why is there no requirement that the authorised officer have formed a reasonable suspicion that the person to be searched possesses them prior to the search occurring; and
- whether there exists any monitoring and oversight over the use of force by authorised officers and their assistants, including access to review for detainees to challenge the use of force and the strip search powers.[191]

Minister for Home Affair's response[192]

2.55 The minister restated the operation of the provisions in the bill and the Migration Act. The minister advised that it may be necessary to seize mobile phones, SIM cards and internet capable devices from detainees in certain circumstances to ensure the health, safety and security of detainees, staff and visitors and 'the stability of the facility'. The minister advised that the Commonwealth has a duty of care to avoid reasonably foreseeable risks of harm to people in the facilities, and the amendments in the bill are appropriate and necessary to support the Commonwealth to discharge this duty.

2.56 The minister advised that the amendments make clear that a search power may be exercised, or a screening procedure conducted for a thing, whether or not the thing is visible or intentionally concealed. The minister advised that the amendments will reduce the Australian Border Force's (ABF) reliance on State and Federal police to attend immigration detention facilities and support searches of a detainee's person.

2.57 The minister advised that the amendments in the bill do not change the authorisations currently in place for strip searches, or any safeguards in sections 252A and 252B of the Migration Act. The minister advised that strip searches 'must only be conducted as a matter of last resort and where absolutely necessary'.

Committee comment

2.58 The committee thanks the minister for this response. However, the committee notes that the minister's response only addressed one out of the committee's six specific questions. The only question addressed related to the why the bill does not provide that strip searches to seize prohibited things are only conducted when absolutely necessary. The minister advised that there are no amendments to the

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191 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2024* (27 November 2024), pp. 11–15.

192 The minister responded to the committee's comments in a letter dated 13 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

safeguards in sections 252A and 252B of the Migration Act. However, the committee notes that prior to these amendments, strip searches were only empowered to find out if there was hidden, or in a detainee's possession, a weapon, or other thing, capable of being used to inflict bodily injury or to help a detainee escape.[193] The bill amends section 252A to provide that a strip search can occur, without the need to find out if the item is hidden, for a weapon or escape aid as well as 'a prohibited thing'.[194] This thereby expands the strip search powers so that instead of searching for a weapon that the officer suspects on reasonable grounds is hidden on the detainee or their clothing, the strip search can now occur if the officer suspects on reasonable grounds a mobile phone or SIM card is on the detainee's body or clothing. Further, the existing safeguards in the Migration Act require the officer to suspect on reasonable grounds that it is necessary to conduct a strip search to recover that thing.[195] This is not, contrary to the minister's advice, a requirement to conduct the strip search only as a last resort and only when absolutely necessary.

2.59 The committee considers that these amendments, in expanding the search and seizure powers and thereby effectively restricting the possessions a detainee may have inside immigration detention facilities, and further empowering authorised officers to search without a warrant (including strip searches and searches of a detainee's room and personal effects), unduly trespasses on the detainee's rights and liberties, particularly their right to privacy (and if mobile phones are unduly limited, also potentially their right to freedom of expression).[196]

2.60 While the committee acknowledges the stated difficulties posed by detainees with serious criminal histories and that there may be a need to restrict access for high-risk detainees to items that could be used to attempt to commit offences, the committee reiterates that the amendments in the bill apply to all immigration detainees equally. While the committee notes that searches may only be conducted if the authorised officer believes that exercising the power is necessary to prevent or lessen an 'immigration detention facility risk', the committee notes that this is defined broadly to include searching for any prohibited thing that 'might be a risk' to the 'order of the facility'. As such, this does not specify that possession of the thing by a specific detainee poses a risk, just that there might be a risk to the general order of the facility by a detainee possessing it. For example, it may be that all low-risk detainees will be

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193 *Migration Act 1958*, subsection 252A(1).

194 See Schedule 1, items 11–14.

195 *Migration Act 1958*, paragraph 252A(3)(b).

196 It is noted that Schedule 1, item 2, proposed section 251AB provides that if a prohibited things used to communicate with a person has been seized from a detainees, they must be given access to an alternative means of communication sufficient to enable them to communicate with a member of the family unit or for the purpose of obtaining legal advice or communicating governmental or political matters. This assists with ensuring freedom of expression is not unduly limited, but it is noted that this does not apply to detainees communicating with friends or their wider family, and much will depend on how this is applied in practice.

prevented from possessing mobile phones on the basis that to have mobile phones in the facility might cause a risk to the good order of the facility. There is nothing in the bill that would prevent such a scenario from occurring. This concern is heightened by the minister's broad power to direct authorised officers to seize a thing (as described below), that could apply to all persons in a specified facility or all persons in a specified class of persons.[197] In this regard, the committee reiterates that persons detained in immigration detention facilities are detained on the basis that they are non-citizens who do not possess a valid visa, and not as punishment for having committed a crime.

2.61 The committee also notes the minister's advice that these amendments will reduce the ABF's reliance on police attending immigration detention facilities to support searches and seize items from detainees. The committee notes that the use of non-police personnel to undertake strip searches of detainees, and potentially use force, compounds its concerns, noting that police are specifically trained in such powers, whereas it is not clear that employees of detention service providers would have equivalent training. The committee notes that the minister failed to answer its question as to whether there exists any monitoring and oversight of the use of force by authorised officers and their assistants, including access to review for detainees to challenge the use of force and the strip search powers. The committee remains concerned that these broad discretionary and coercive powers may be used arbitrarily without sufficient oversight.

2.62 From a scrutiny perspective, the committee also notes with concern the speed with which this bill passed the Parliament. The bill was introduced in the House of Representatives on 21 November 2024 and passed both Houses of Parliament four sitting days later on 28 November 2024. In the Senate it was introduced one day prior to its passage. The committee notes that the truncated time between introduction of the bill and its passage may have impacted the ability of senators to meaningfully engage with the bill, in order to scrutinise the bill to the fullest extent.

2.63 The committee notes that the timeline for the passage of the bill also impacts the ability of this committee to undertake its usual scrutiny process, including to engage in meaningful dialogue with the Executive in order to address any possible concerns. The committee notes the minister's response to its queries was received after the bill had received the Royal Assent.

2.64 The committee is of the view that truncated parliamentary processes by their nature limit parliamentary scrutiny and debate. This is of particular concern in relation to bills that may seriously impact on personal rights and liberties.

2.65 The committee is concerned that the minister's response failed to address the specific questions raised by the committee. The committee considers the amendments made by this bill are likely to unduly trespass on personal rights and liberties, particularly noting the breadth of the search and seizure powers that apply

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197 See Schedule 1, item 2, proposed 251B(6).

regardless of the individual risk posed by a detainee and can be exercised on the imprecise basis of preventing or lessening a risk to the 'order of the facility'.

2.66 The committee also reiterates its consistent scrutiny view that while the procedure to be followed in the passage of legislation is ultimately a matter for each house of the Parliament, legislation, particularly legislation that may trespass on personal rights and liberties, should be subject to a high level of parliamentary scrutiny.

2.67 However, in light of the fact that the bill has already passed, the committee makes no further comment.

Significant matters in delegated legislation[198]

2.68 Proposed subsection 251A(2) provides that the minister may, by disallowable legislative instrument, determine that a 'thing' is prohibited in an immigration detention facility. While proposed subsection 251A(3) provides that a medication or health care supplement prescribed or supplied for a detainee's individual use may not be determined to be a prohibited thing, there is otherwise no limit on the type of things that the minister may determine to be prohibited.

2.69 In *Scrutiny Digest 15 of 2024,* the committee requested the minister's advice as to the necessity and appropriateness of allowing the minister to determine, by legislative instrument, what things are prohibited in immigration detention facilities and why these matters are not appropriate to be set out in primary legislation.[199]

Minister for Home Affair's response[200]

2.70 The minister advised that determining what is a prohibited thing in delegated legislation affords the necessary flexibility to designate new or different things from time to time, informed by intelligence and incident reporting. The minister advised that it would also provide capacity for the minister to revise the instrument to de-list items determined to no longer pose a risk. Specifying prohibited things in primary legislation would not afford the necessary level of responsiveness to address new and emerging risks.

Committee comment

2.71 The committee thanks the minister for this response. The committee acknowledges the potential need to amend the listing of a prohibited thing. However,

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198 Schedule 1, item 2, proposed subsection 251A(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

199 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2024* (27 November 2024), pp. 15–16.

200 The minister responded to the committee's comments in a letter dated 13 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

the committee notes the serious consequences flowing from declaring an item to be prohibited. As set out above, the bill provides authorised officers with broad coercive powers to search for and seize prohibited things, and the exercise of the minister's power to determine a prohibited thing can expand the scope of what an authorised officer may search for or seize.

2.72 The committee reiterates that it expects that matters left to be dealt with in delegated legislation should be technical or administrative in nature and should not involve substantive policy questions, particularly where such measures could trespass on personal rights and liberties. The committee considers that determining what are prohibited things in immigration detention facilities delegates to the executive important policy decisions and enables the executive to set the scope of coercive powers.

2.73 The committee understands the importance of being able to designate things as being prohibited from time to time based on intelligence and risk assessments, but remains concerns that highly coercive powers are enlivened by what is, or is not, specified in delegated legislation.

2.74 However, in light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment.

Broad discretionary powers
Significant matters in delegated legislation
Broad delegation of administrative powers[201]

2.75 Proposed subsection 251B(6) provides that the minister may, by non-disallowable legislative instrument, direct an authorised officer (or an authorised officer in a specified class of relevant officers) to seize a prohibited thing by exercising the relevant seizure powers when conducting searches of facilities and screenings and strip searches of detainees. The minister may give a direction, to prevent or lessen an immigration detention facility risk,[202] in relation to:

- a person in a specified class of persons, or all persons, to whom the relevant seizure power relates;
- a specified thing, a thing in a specified class of things, or all things, to which the relevant seizure power relates;
- a specified immigration detention facility, an immigration detention facility in a specified class of such facilities, or all immigration detention facilities; or

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201 Schedule 1, item 2, proposed subsection 251B(6). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii) and (iv).

202 See Schedule 1, item 2, proposed subsection 251AA(1).

- any circumstances specified in the directions.

2.76 In *Scrutiny Digest 15 of 2024* the committee requested the minister's advice as to the necessity and appropriateness of providing the minister with broad discretionary powers requiring an authorised officer to exercise seizure powers and why the minister's determination is not subject to disallowance.[203]

Minister for Home Affair's response[204]

2.77 The minister advised that this new ministerial direction power will allow for the implementation of a targeted, intelligence-led, risk-based approach in relation to the seizure of certain things in certain facilities. The minister advised that such a direction could be based on risk assessment of security or safety concerns prevalent at a specific facility. The minister advised that it is expected that this power will only be exercised in relation to the most serious circumstances.

2.78 The minister advised that the direction will not be disallowable in order to provide appropriate and immediate operational effect and certainty for officers in relation to the status of the minister's direction.

Committee comment

2.79 The committee thanks the minister for this response. The committee reiterates that that subsection 251B(6)[205] provides the minister with broad discretionary powers to authorise the seizure of items from persons in immigration detention in circumstances where there is limited guidance on the face of the bill as to when those powers may be exercised. The committee acknowledges that proposed section 251AA, provides some guidance to the minister – namely that the exercise of the power must be to prevent or lessen an immigration detention facility risk. However, as set out above, this includes a risk to the good order of the facility, which is so broad that it does not appear likely to greatly constrain the exercise of the minister's powers.

2.80 The committee does not consider the minister's response adds any additional information as to why such a broad discretionary power has been provided to the minister to direct an authorised officer to exercise the relevant seizure powers. The committee notes that it is 'expected' that the power will only be exercised in relation to the most serious circumstances but notes that this is not a legislative requirement.

2.81 The committee also notes the minister's advice of the need for immediate operational effect and certainty for officers in relation to the status of the minister's direction. However, it is not clear to the committee how subjecting the instrument to

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203 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2024* (27 November 2024), pp. 16–18.

204 The minister responded to the committee's comments in a letter dated 13 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

205 Together with proposed subsection 251A(2).

disallowance creates uncertainty as to the effect of the instrument. An instrument can have effect from the day it is registered and will continue to have effect unless it is disallowed within the disallowance period.

2.82 The committee reiterates that as a body, the Senate acknowledged in June 2021 the significant implications exemptions from disallowance have for parliamentary scrutiny and resolved that delegated legislation should be subject to disallowance unless exceptional circumstances can be shown which would justify an exemption.[206] 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.

2.83 The committee does not consider the need for certainty in this context to be an indication of exceptional circumstances that warrant an exemption from disallowance. The committee also notes the point made by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its final report into the exemption of delegated legislation from parliamentary oversight:

> A well-formed instrument that is made according to its enabling legislation and enjoys broad support will not be disallowed, and is thus unlikely to manifest any of the consequences suggested by departments. Many rationales that point to the possibility of negative outcomes call for such a significant stretch to the credulity of the Parliament that they cannot be seriously considered.[207]

2.84 The committee reiterates its view that a need for certainty as to the status of the minister's direction is not an exceptional circumstance that, in and of itself, justifies an exemption from disallowance.

2.85 The committee considers that new subsection 251B(6) provides the minister with a broad discretionary power to authorise the exercise of coercive powers. The committee remains concerned that this direction is not subject to disallowance, and the committee does not consider it has been adequately justified as to why such a direction should be exempt from parliamentary oversight.

2.86 However, in light of the fact that the bill has now passed both Houses of Parliament, the committee makes no further comment.

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

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

207 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. 109.

Delegation of administrative powers[208]

2.88 Proposed section 252BA provides that an authorised officer may, without a warrant, conduct a search of a wide range of areas in immigration detention facilities operated by or on behalf of the Commonwealth, including of detainees' personal effects and rooms, to find out whether certain things, including a prohibited thing, are at the facility. Proposed sections 252C, 252CA and 252CB further provide for the seizure (and return) of prohibited things found during a search, strip search or screening procedure.

2.89 Proposed section 252BB provides that an authorised officer may be assisted by other persons in exercising powers or performing functions or duties in conducting a search of an immigration detention facility under section 252BA (other than subsection 252BA(4)) or in relation the seizure of prohibited things found during a search, strip search or screening of a detainee under section 252C, 252CA or 252CB, if that assistance is necessary and reasonable. Proposed subsection 252BA(7) also indirectly empowers authorised officers to use force against a person or property when conducting a search so long as it is reasonably necessary in order to conduct the search.

2.90 In *Scrutiny Digest 15 of 2024,* the committee requested the minister's advice as to the following matters:

- who is intended for authorisation as an 'authorised officer' and an 'authorised officer's assistant' to exercise coercive powers and if these include non-government employees;
- the necessity of conferring coercive powers on 'other persons' to assist authorised persons and how such persons are appointed; and
- training and qualifications required of persons conferred these powers, and why the bill does not provide legislative guidance on appropriate training and qualifications required of authorised officers and assistants. [209]

Minister for Home Affair's response[210]

2.91 The minister advised that authorised officers may be employees of the department or the detention services provider. The minister advised that authorised officers will receive training and guidance on the exercise of the relevant seizure powers; specific training relevant to carrying out searches of detainees (including in

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208 Schedule 1, item 2, proposed sections 252BA and 252BB. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

209 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2024* (27 November 2024), pp. 18–19.

210 The minister responded to the committee's comments in a letter dated 13 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

cultural awareness, civil rights and liberties, and the pre-conditions and procedures for strip searches); and the use of detector dogs for searches.

2.92 In relation to authorised officers' assistants, the minister advised that they must follow directions of the officer but can exercise any of their functions and powers. The minister gave examples of where the use of an assistant may be necessary and reasonable including the search of the whole facility where numerous officers are necessary in order for the search to be conducted, or where a locksmith is required on a one-off basis. In such instances an assistant will be deployed as and when assistance is necessary.

Committee comment

2.93 The committee thanks the minister for this response. The committee notes the minister's advice that persons authorised to exercise these coercive powers can include staff of detention service providers, who will be private contractors.

2.94 The committee's consistent scrutiny position is that coercive powers should generally only be conferred on government employees with appropriate training. This is particularly so when powers authorise the use of force against persons. Limiting the exercise of such powers to government employees has the benefit that the powers will be exercised within a particular culture of public service and values, which is supported by ethical and legal obligations under public service or police legislation. Although the *Guide to Framing Commonwealth Offences*[211] indicates that there may be rare circumstances in which it is necessary for an agency to give coercive powers to non-government employees, it is noted that this will most likely be where special expertise or training is required. The examples given relate to the need to appoint technical specialists in the collection of certain sorts of information. The conferral of coercive search and seizure powers on the employees of a detention service provider is therefore not aligned with the general approach suggested by the *Guide to Framing Commonwealth Offences*, and does not accord with the committee's consistent scrutiny position.

2.95 The committee notes that, in practice, such officers are provided with specific training in the exercise of search and seizure powers. However, there is no legislative requirement to this effect, and it is noted that the minister's advice does not refer to whether training is provided in relation to the use of force (which such officers are authorised to use). The committee is also concerned that there appears to be no training required to be provided to assistants, even though the minister's response envisaged such assistants helping to conduct a search of the whole facility.

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211 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers,* May 2024, pp 68–70.

2.96 The committee retains scrutiny concerns that this bill grants non-government employees highly coercive powers, and that assistants can exercise the same powers without any requirement to satisfy any training or qualifications.

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

Scams Prevention Framework Bill 2024[212]

Purpose	The bill seeks to establish a legislative basis to react to, and prevent, scams known as the Scam Prevention Framework (SPF). To do so, the bill seeks to primarily amend the *Competition and Consumer Act 2010*, to: • establish a legislative basis to require service providers to undertake certain actions in combatting scams which relate to, are connected to, or used by their services; • provide for codes, to be developed by the minister, to set out sector-specific requirements for governance arrangements, prevention, detection, disruption and responses to scams; • establish mechanisms for regulation and enforcement, as well as penalties; and • set out powers of regulators, including the use of consumer information to inform responses to scams, sharing of information between regulators, and to agencies of foreign governments where applicable.
Portfolio	Treasury
Introduced	House of Representatives on 7 November 2024
Bill status	Before the House of Representatives.

Privacy[213]

2.98 The bill provides that the Scams Prevention Framework (SPF) general regulator may disclose information relating to a scam (as defined in section 58AG of the bill or a scam within the ordinary meaning of that expression) to named entities.[214] A note to the relevant provision confirms this includes personal information. The information can be disclosed by the SPF regulator to a regulated entity,[215] a Commonwealth agency or authority involved in developing government policy relating to the SPF,[216] a law enforcement agency of the Commonwealth or a State or Territory,[217] and an agency

212 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Scams Prevention Framework Bill 2024, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 13.

213 Schedule 1, item 1, proposed sections 58BV and 58EI. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(i).

214 Schedule 1, item 1, proposed subsection 58BV(1).

215 Schedule 1, item 1, proposed paragraph 58BV(2)(a).

216 Schedule 1, item 1, proposed paragraph 58BV(2)(b).

217 Schedule 1, item 1, proposed paragraph 58BV(2)(c).

of a foreign country that is a law enforcement agency or regulatory agency responsible for scam prevention.[218] In disclosing information to an agency of a foreign country, the SPF general regulator must be satisfied that the agency has given an undertaking relating to controlling the storage, handling and use of the information, and ensuring the information will be used only for the purpose disclosed, and that it is appropriate, in all circumstances to disclose the information to the agency.[219] Information disclosed to a Commonwealth agency or authority involved in developing government policy relating to the SPF must be de-identified, unless the SPF general regulator reasonably believes that doing so would not achieve the object of the SPF framework.[220]

2.99 The bill further provides that the SPF rules may prescribe a scheme for authorising third parties to operate data gateways, portals or websites that give access to reports provided by regulated entities containing actionable intelligence about scams.[221] Persons authorised under the scheme may use or disclose SPF information, including personal information, to the extent that it is reasonably necessary to achieve the objects of the SPF scheme.[222]

2.100 In *Scrutiny Digest 14 of 2024*, the committee requested the Assistant Treasurer's advice as to:

- whether the power to use or disclose personal information under sections 58BT and 58BV contains sufficient safeguards to appropriately protect the right to privacy;
- the appropriateness and necessity of providing that the SPF regulator need not notify any person (including potential victims of scams) that they have collected, used or disclosed their personal information;
- the appropriateness of amending the bill:
    - to require that disclosures of SPF information containing personal information pursuant to proposed section 58BV can only be made by the SPF general regulator for specific purposes linked to the achieving the objectives of the SPF framework;
    - to require that all SPF information be de-identified when shared under proposed section 58BV, unless doing so would not achieve the object of the SPF framework;
    - to require regulated entities to de-identify personal information when reporting on actionable intelligence regarding scams, unless to do so would not achieve the object of the SPF framework, and/or requiring

218 Schedule 1, item 1, proposed paragraph 58BV(2)(d).

219 Schedule 1, item 1, proposed paragraphs 58BV(3)(a) and (b).

220 Schedule 1, item 1, proposed subsection 58BV(4).

221 Schedule 1, item 1, proposed section 58BT.

222 Schedule 1, item 1, proposed subsection 58BT(3).

the authorised person under proposed section 58BT to specifically consider the need for de-identification; and

- to provide that notice need not be given under proposed 58EI of the collection, use or disclosure of the personal information of alleged scammers only (enabling scam victims to be notified), and provide all persons to be notified once any investigation is complete.[223]

Assistant Treasurer's response[224]

2.101 The Assistant Treasurer advised that the bill, together with the obligations of the *Privacy Act 1988* (Privacy Act), contain sufficient safeguards to appropriately protect the right to privacy. The Assistant Treasurer advised that this includes:

- the requirement for an authorised third party to come to a view that the use or disclosure of personal information is needed to prevent and respond to scams impacting consumers;
- that the SPF rules may be used to prescribe conditions on any authorisations and may prescribe additional safeguards relating to personal information and this has currently not been provided for in the bill as the appropriate safeguards will depend on the authorised third party; and
- that the SPF rules will be used to prescribe the kinds of information to be provided in an actionable scam intelligence report and in reports about the outcomes of investigations.

2.102 The Assistant Treasurer also advised that Australian entities receiving personal information will generally be subject to the Privacy Act, or equivalent, obligations, and that additional safeguards are included in the bill in relation to entities that may not be covered by the Privacy Act, such as a foreign agency, such as the agency having to enter into an undertaking with the SPF general regulator in relation to the storing, handling and use of information.

2.103 In relation to the lack of an obligation to notify any person about the collection, use or disclosure of personal information, the Assistant Treasurer advised that in most cases, personal information shared will related to the persons perpetrating the scam or otherwise involved in the scam. These persons cannot be notified as it would inform the perpetrator of the scam of the investigation. The Assistant Treasurer advised that it would be impractical for the SPF regulator to contact each victim of a scam in the limited circumstances where the personal information of a victim is collected, used or disclosed. The Assistant Treasurer finally

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223 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 41–44.

224 The Assistant Treasurer responded to the committee's comments in a letter dated 20 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

advised that where it is appropriate to do so, the provision does not prevent regulated entities or SPF regulators from providing notifications where it is appropriate to do so.

2.104 In relation to whether the bill should be amended requiring that disclosure be made only for specific purposes linked to the achieving of the objectives of the SPF framework, the Assistant Treasurer advised that this would frustrate the objects of the framework as it would require an assessment of each piece of information before disclosure which may result in a delay in effectively disrupting scam activity and protecting consumers. The Assistant Treasurer noted a number of existing provisions which provide appropriate privacy protections in this context.

2.105 In relation to the de-identification of personal information, the Assistant Treasurer advised that this would require the SPF regulator to assess each piece of information prior to disclosure which would delay the disclosure of time-sensitive information with relevant entities and prevent the regulator from setting up automated intelligence sharing systems. The Assistant Treasurer advised that when sharing with law enforcement agencies or regulated entities, personal information will need to be shared quickly to enable the receiving entity to use the information to take effective disruptive action to prevent consumer loss.

2.106 Finally, in relation to providing notification to impacted persons once an investigation is completed, the Assistant Treasurer advised that in most cases, personal information being shared under the reporting obligations in the bill will be information about persons perpetrating the scam activity. Further, the Assistant Treasurer advised that there are practical challenges associated with notifying victims of scams where personal information relating to a victim is collected, used or disclosed, including the risk that scammers may be tipped off by notifications to scam victims. The Assistant Treasurer advised that this may impose a significant burden on regulators and may divert resources and focus from the objectives of the bill, and that regulated entities who may have a direct relationship with the consumer may be more appropriately placed to notify customers.

Committee comment

2.107 The committee thanks the Assistant Treasurer for this response. The committee notes this advice and acknowledges the need for timely action in this context, which may include the disclosure of personal information to law enforcement agencies and regulated entities. Based on this detailed advice, the committee now appreciates that the requirement to assess each piece of personal information prior to disclosure could frustrate the objectives of the legislation by slowing the movement of information. The committee also understands that requiring de-identification of personal information would prevent the use of automated systems and slow down activities designed to prevent and disrupt scams. The committee considers that had this information been included in the explanatory memorandum, the committee would have been assisted in its assessment of these concerns at the outset and may not have needed to correspond with the Assistant Treasurer on these matters.

2.108 However, the committee cautions that due to the breadth of the objects of the SPF and the need for rapid sharing of personal information there is the potential that more personal information may be shared than is strictly needed for the operation of this regulatory framework.

2.109 The committee acknowledges that it may be impractical for the SPF regulator to notify victims of scams in relation to the collection, use and disclosure of their personal information. However, the committee considers that affected persons still have a right to be informed of the use of their personal information, particularly noting that these individuals have already suffered intrusions to their privacy as a result of scam activity.

2.110 The committee recommends that consideration be given to amending the bill to require regulated entities to inform SPF consumers of the disclosure of their personal information on the completion of an investigation where this is reasonably practicable in the circumstances.

2.111 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation,[225] the committee considers that the key information provided by the Assistant Treasurer should be included in the explanatory memorandum of this bill.

Incorporation of external materials as existing from time to time[226]

2.112 The bill seeks to provide that SPF codes may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.[227]

2.113 In *Scrutiny Digest 14 of 2024*, the committee requested the Assistant Treasurer's advice as to:

- the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 58CC(4);
- whether documents applied, adopted or incorporated by reference under proposed subsection 58CC(4) will be made freely available to all persons interested in the law; and
- why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.[228]

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225 See *Acts Interpretation Act 1901*, section 15AB.

226 Schedule 1, item 1, proposed subsection 58CC(4). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(v).

227 Schedule 1, item 1, proposed subsection 58CC(4).

228 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 45–46.

Assistant Treasurer's response[229]

2.114 The Assistant Treasurer advised that an SPF code may apply, adopt or incorporate by reference material contained in State or Territory legislation, instruments made by an SPF regulator, or materials published on the SPF regulators' websites. The Assistant Treasurer also provided an example of a document that might be incorporated (namely a standard).

2.115 The Assistant Treasurer advised that generally, incorporated material will be freely accessible with no charge. However, there may be exceptional circumstances in which a fee is required for access and, where this is necessary, the Assistant Treasurer advised that affected entities may already have access to that material from the normal course of their business.

2.116 Finally, the Assistant Treasurer advised that the ability to incorporate extrinsic material from time to time is necessary and appropriate to achieve the objects of the SPF given the wide range of industries and sectors the framework applies to and the fluid nature of scam activity.

Committee comment

2.117 The committee thanks the Assistant Treasurer for this response. The committee welcomes the Assistant Treasurer's advice that incorporated materials will generally be freely accessible and acknowledges the advice that they will need to be incorporated from time to time due to the fluid nature of scam activity.

2.118 In relation to the exceptional circumstances where it is necessary for an SPD code to refer to material that may require a fee for access, the committee notes its general position that access to all materials which form the content of the law is essential for public confidence in the operation of regulatory schemes. Documents which are incorporated into the law should be freely available not only to the entities that are directly required to comply with these measures, but also to members of the public who have an interest in oversight and understanding of the law.

2.119 The committee draws to the department's attention its understanding that it is not uncommon for incorporated documents that may be subject to copyright to be made available by departments in other manners, such as via access through public library systems, the National Library of Australia, or at Departmental offices, for free viewing by interested parties.[230]

2.120 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with

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229 The Assistant Treasurer responded to the committee's comments in a letter dated 20 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

230 See, for example, correspondence between the Attorney-General and the Senate Standing Committee for the Scrutiny of Delegated Legislation in relation to the Disability (Access to Premises – Buildings) Amendment Standards 2020 [F2020L01245].

interpretation,[231] the committee considers that the key information provided by the Assistant Treasurer should be included in the explanatory memorandum of this bill.

Privacy
Procedural fairness[232]

2.121 The bill provides that the SPF general regulator or the SPF regulator for a regulated sector may issue a public written notice containing a warning about the conduct of a person if the regulator:

- reasonably suspects that the person's conduct may constitute a contravention of a specified provision of the SPF principles;[233]
- is satisfied that one or more persons has suffered, or is likely to suffer, detriment as a result of the conduct;[234] and
- is satisfied that it is in the public interest to issue the notice.[235]

2.122 The public warning notice will be published on the regulator's website.[236]

2.123 In *Scrutiny Digest 14 of 2024*, the committee requested the Assistant Treasurer's advice as to:

- the appropriateness of proposed section 58FZL enabling the SPF general regulator to issue public warning notices, with consideration provided to the impacts of such a notice on both procedural fairness and individual privacy, and how procedural fairness will be provided in practice to a person likely to be affected by a public warning notice;
- whether SPF regulators will be required to take down, within a reasonable time, any public warning notices that were issued but which, upon review, are incorrect;
- what type of matters may lead the regulator to reasonably suspect conduct may constitute a contravention of the SPF framework, and whether consideration was given to applying a higher threshold to the issuing of a public warning notice, or, if not, why not.[237]

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231 See *Acts Interpretation Act 1901*, section 15AB.

232 Schedule 1, item 1, proposed section 58FZL. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i) and (iii).

233 Schedule 1, item 1, proposed paragraph 58FZL(1)(a) and (2)(a).

234 Schedule 1, item 1, proposed paragraph 58FZL(1)(b) and (2)(b).

235 Schedule 1, item 1, proposed paragraph 58FZL(1)(c) and (2)(c).

236 Schedule 1, item 1, proposed subsection 58FZL(3).

237 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 45–46.

Assistant Treasurer's response[238]

2.124 The Assistant Treasurer advised that the obligations under the SPF apply to regulated entities only (which is expected to include banks, telecommunications providers and certain digital platforms), and as such any public notice issued is likely to relate to an entity rather than a natural person. The Assistant Treasurer also advised that these notices are intended to alert affected consumers, and consumers and small businesses more broadly, about the regulated entity's alleged conduct.

2.125 The Assistant Treasurer advised that this does not seek to limit the fundamental common law right of procedural fairness or negatively impact individual privacy. The Assistant Treasurer advised it is likely that the SPF regulator will alert a regulated entity to an investigation that has commenced with respect to that entity and the proposal to issue a public warning notice. The entity may be invited to respond to the allegations, where this is appropriate, however, the Assistant Treasurer advised that there may be circumstances where there have been substantial scam losses in a short period of time and issuing a public warning notice is critical. In these cases, limited engagement with the entity may be appropriate.

2.126 The Assistant Treasurer also noted that the conditions to be met prior to issuing a public warning notice, such as the SPF regulator having reasonable grounds to suspect certain conduct has constituted a contravention of the SPF, are designed to minimise the risk of any incorrect information being provided to the public. The Assistant Treasurer also advised that entities are informally able to seek correction of any incorrect information in a notice and are able to seek judicial review of the decision to issue a notice. The Assistant Treasure advised that the bill does not include a requirement for the SPF regulator to take down a public warning notice that is later found to be incorrect.

2.127 The Assistant Treasurer advised that section 58FZL does not unnecessary constrain, via an exhaustive list, the types of matters the regulator may reasonably suspect to be conduct that constitutes a contravention of the SPF. This reflects the principles-based nature of the SPF obligations and the fluid nature of the scam activity that leads to the consumer harm intended to be mitigated by this framework and allow the regulator to consider the evolving nature of scam activity in a particular sector which may impact what is a reasonable step for the purpose of an SPF principle.

2.128 The Assistant Treasurer finally advised that the existing threshold to issue a public warning notice is sufficient and a higher threshold would require a SPF regulator to undertake a longer investigation, which would limit the effectiveness of the notices in informing customers in order to lower the risk of scams harm to the community.

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238 The Assistant Treasurer responded to the committee's comments in a letter dated 20 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

Committee comment

2.129 The committee thanks the Assistant Treasurer for this response and notes the Assistant Treasurer's advice that these public warning notices are likely to only affect regulated entities and are not intended to limit the fundamental common law right to procedural fairness.

2.130 Further, the committee notes the Assistant Treasurer's advice that defining the types of conduct that may constitute a contravention of the SPF and applying a higher threshold to the issuing of a public warning notice would limit the effectiveness of public warning notices as an enforcement tool.

2.131 The committee reiterates that it relies on the quality of explanatory memoranda to perform its scrutiny function. The committee considers that had this information been included in the explanatory memorandum, the committee would have been assisted in its assessment of these concerns at the outset and may not have needed to correspond with the Assistant Treasurer on these matters.

2.132 The committee notes the advice that there is an informal mechanism for a regulated entity that has identified any incorrect information in a public warning notice to notify the relevant SPF regulator and this may result in the correction of that notice or revocation of that notice where appropriate. It is not clear to the committee why this cannot be included as a legislative safeguard.

2.133 The committee therefore recommends that consideration be given to amending the bill to require a SPF regulator to correct a public warning notice where the regulator is aware the notice is incorrect.

2.134 Noting the importance of explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation,[239] the committee considers that the key information provided by the Assistant Treasurer should be included in the explanatory memorandum of this bill.

Significant matters in delegated legislation

Henry VIII clause – modification of primary legislation by delegated legislation

No-invalidity clause[240]

2.135 In *Scrutiny Digest 14 of 2024*, the committee raised a number of concerns in relation to the inclusion of a number of matters integral to the operation of this regulatory scheme in delegated legislation. The committee also outlined its concerns

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239 See *Acts Interpretation Act 1901*, section 15AB.

240 Schedule 1, item 1, proposed sections 58AC, 58CB, 58AD and 58FH, and proposed subsections 58AE(2) and 58DB(2). The committee draws senators' attention to these provisions pursuant to Senate standing orders 24(1)(a)(iii) and (iv).

in relation to no-invalidity clauses included in the bill, where if the minister fails to meet requirements provide for in the bill prior to making an instrument, the validity of the instrument is not affected.[241]

Assistant Treasurer's response[242]

2.136 The Assistant Treasurer undertook to amending the explanatory memorandum to contain further justifications in order to address both concerns. The Assistant Treasurer advised that an updated explanatory memorandum will be tabled in Parliament as soon as practicable.

Committee comment

2.137 The committee thanks the Assistant Treasurer for this response and welcomes the undertaking to amend the explanatory memorandum in response to the committee's concerns.

241 Senate Scrutiny of Bills Committee, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 36–41.

242 The Assistant Treasurer responded to the committee's comments in a letter dated 20 December 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024[243]

Purpose	The bill seeks to amend the *Competition and Consumer Act 2010* to reform how mergers and acquisitions operate in Australia, by placing the Australian Competition and Consumer Commission (the Commission) as the centre point of a mandatory and suspensory administrative system. This system would require mergers and acquisitions, unless otherwise defined as not notifiable, to be presented to the Commission prior to fulfillment of the merger or acquisition.
Portfolio	Treasury
Introduced	House of Representatives on 10 October 2024
Bill status	Received Royal Assent on 10 December 2024

Exemption from disallowance[244]

2.138 The bill provides that entities are required to notify the Australian Competition and Consumer Commission (the Commission) of a proposed acquisition of certain shares or assets in specific circumstances.[245] The bill further provides that the minister may determine the form for the notification and the information or documents necessary to accompany the notification.[246] The Commission may determine that the notification is materially incomplete, misleading or false having had regard to a number of matters, including the extent to which the notification of the acquisition was in the required form and the extent to which the notification includes, or is accompanied, by the requisite information or documents.[247] The bill provides that the minister's determination, regarding the form and what information or documents must accompany the notification, is a legislative instrument but is exempt from disallowance.[248] The bill provides a similar process in relation to public benefit

243 This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 14.

244 Schedule 1, item 35, proposed subsections 51ABY(5) and 51ABZQ(6). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

245 See proposed sections 51ABW and 51ABX.

246 Proposed subsection 51ABY(5).

247 Proposed paragraph 51ABY(4)(a) and (b).

248 Proposed subsection 51ABY(7).

applications,[249] whereby the minister may determine the form or the information or documents for such an application, and that this determination is also a legislative instrument but not subject to disallowance.[250]

2.139 In *Scrutiny Digest 14 of 2024*[251] the committee requested that an addendum to the explanatory memorandum containing a justification for these exemptions from disallowance be tabled in the Parliament.

Assistant Minister for Competition, Charities and Treasury's response[252]

2.140 The assistant minister noted that reasons were provided in the explanatory memorandum justifying why ministerial determinations made in relation to notifications of proposed acquisitions should be exempt from disallowance.[253] Specifically, the reason given was that the exemption is considered appropriate and important to provide commercial certainty to merger parties in relation to forms and accompanying requirements, particularly for time-critical transactions.

2.141 The assistant minister advised that the forms and requirements for any accompanying information or documents for notifications and public benefit applications are critical to ensuring the Commission can acquit its functions and duties under the new system to scrutinise and prevent anti-competitive mergers. The exemption from disallowance minimises potential disruption to the Commission's functions and the time, cost and effort of businesses in preparing to comply with requirements.

2.142 The assistant minister further advised that the legislative instruments exempt from disallowance are part of an intergovernmental scheme under the Competition Code. The details of the system are the product of negotiations with states and territories as part of the 1995 Intergovernmental Conduct Code Agreement, and consequently, disallowance could create uncertainty about the application of the Competition Code under State and Territory laws.

Committee comment

2.143 The committee thanks the assistant minister for this response. The committee notes the advice that commercial certainty was provided as a reason in the explanatory memorandum for the exemption from disallowance for notifications of

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249 In a public benefit application, the Commission will undertake an economic and legal assessment of whether the acquisition is likely to substantially lessen competition in a market or if it is of public benefit.

250 Proposed section 51ABZQ.

251 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 53–57.

252 The assistant minister responded to the committee's comments in a letter dated 27 November 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

253 Explanatory memorandum, p. 38.

proposed acquisitions. However, the committee notes that this reasoning was not clearly set out in the explanatory memorandum that the provision relates to.[254]

2.144 The committee reiterates that the power of Parliament to disallow a legislative instrument is a key role in the review of legislative power delegated to the executive by the Parliament. Disallowance is the primary manner by which the Parliament exercises control of its delegated power.

2.145 The committee understands the need for commercial certainty, however, the Senate acknowledged in June 2021 the significant implications exemptions from disallowance have for parliamentary scrutiny and resolved that delegated legislation should be subject to disallowance unless exceptional circumstances can be shown which would justify an exemption.[255] 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.

2.146 In this instance, it is not clear to the committee how subjecting the instruments to disallowance would create uncertainty as to the effect of the instrument. An instrument has effect from the day it is registered, and will continue to have effect unless it is disallowed within the disallowance period. The committee does not consider the need for certainty in this context to be an indication of exceptional circumstances that warrant an exemption from disallowance. The committee also notes the point made by the Senate Standing Committee for the Scrutiny of Delegated Legislation in its final report into the exemption of delegated legislation from parliamentary oversight:

> A well-formed instrument that is made according to its enabling legislation and enjoys broad support will not be disallowed, and is thus unlikely to manifest any of the consequences suggested by departments. Many rationales that point to the possibility of negative outcomes call for such a significant stretch to the credulity of the Parliament that they cannot be seriously considered.[256]

2.147 The committee also does not consider the fact that an instrument is made to facilitate the operation of an intergovernmental scheme is reason, in itself, for exempting an instrument from the usual parliamentary disallowance or sunsetting

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254 The committee notes that the explanatory memoranda for bills in the Treasury portfolio (unlike other portfolios) do not explain the operation of each clause or item in a bill sequentially. In this case the provision containing the exemption from disallowance is explained on page 43 of the explanatory memorandum, however, the justification for the exemption appears on page 38, well before the provision itself.

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

256 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. 109.

process. In this regard, the committee notes the comments of the Senate Standing Committee for the Scrutiny of Delegated Legislation:

> Under section 44 of the Legislation Act, instruments (other than regulations) made for the purpose of intergovernmental schemes are exempted from disallowance. The implication is there has been significant negotiation and scrutiny in the process of obtaining agreement from all government parties. While this may be the case in some instances, this is not sufficient for it to stand as a blanket exemption from disallowance.
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> As expressed by the Centre for Comparative Constitutional Studies, this rationale establishes a domain of executive activity exempt from parliamentary oversight. And it would seem the justifications provided are not sufficient to allow for a departure from the principle of executive accountability to the Parliament. If indeed there has been significant negotiation and scrutiny, and all parties to the agreement are satisfied, that it might then be disallowed would seem a minute risk of insufficient size to justify an exemption.[257]

2.148 The committee's consistent scrutiny position is that any exemptions from parliamentary disallowance should be well justified. The committee considers that a need for certainty or because the matter relates to an intergovernmental scheme are not exceptional circumstances that, in and of themselves, justify an exemption from disallowance.

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

2.150 However, noting the bill has now passed both Houses of Parliament, the committee makes no further comment on this matter.

Abrogation of privilege against self-incrimination[258]

2.151 The bill provides for new information gathering powers in relation to potential mergers and acquisitions. These engage an existing provision in the *Competition and Consumer Act 2010* (CCA) which abrogates the privilege against self-incrimination.[259]

2.152 Currently, section 155 of the CCA provides that the Commission, the Chairperson or Deputy Chairperson can require a person to provide information, documents or evidence relating to specified matters[260] if they have reason to believe

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257 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. 106–107.

258 Schedule 1, item 66. The committee draws senators' attention to this item pursuant to Senate standing order 24(1)(a)(i).

259 *Competition and Consumer Act 2010,* section 155.

260 *Competition and Consumer Act 2010,* subsection 155(2).

the person is capable of doing so.[261] Under these provisions, a person is not excused from providing the information, documents or evidence on the grounds that it may tend to incriminate them, but the information cannot be used as evidence in proceedings against the person except in limited proceedings.[262] The bill seeks to amend section 155 of the CCA to add to the list of specified matters, to provide that the Commission may require the person to provide the information, documents or evidence if it is relevant to the making of an acquisition determination by the Commission.[263]

2.153 This provision therefore expands the basis on which information or evidence can be required in circumstances that override the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material which may tend to incriminate them.[264]

2.154 In *Scrutiny Digest 14 of 2024*[265] the committee requested the Treasurer's advice as to the appropriateness of:

(c) abrogating the privilege against self-incrimination when requiring a person to give or produce information, documents or evidence relating to the making of an acquisition determination; and

(d) not providing for a derivative use immunity in this context.

Assistant Minister for Competition, Charities and Treasury's response[266]

2.155 In relation to abrogating the privilege against self-incrimination, the assistant minister advised that the extension of the power to compel the production of evidence, information and documents under section 155 of the *Competition and Consumer Act 2010* is to support acquisitions determinations under the new merger control system. The assistant minister also noted that subsection 155(7) provides for a 'use immunity' which ensures that self-incriminating material cannot be used against a person in in criminal proceedings where the person may be liable to a criminal penalty (other than proceedings for an offence relating to section 155).

2.156 The assistant minister further advised that the existing use immunity that applies to the extension of section 155 to acquisition determinations balances the

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261 *Competition and Consumer Act 2010,* subsection 155(1).

262 *Competition and Consumer Act 2010,* subsection 155(7).

263 Schedule 1, item 66, proposed subparagraph 155(2)(b)(iia).

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

265 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 14 of 2024* (20 November 2024) pp. 53–57.

266 The assistant minister responded to the committee's comments in a letter dated 27 November 2024. A copy of the letter is available on the committee's webpage (see correspondence included with the committee's assessment of this bill).

Commission's need to access information with a natural person's right against self-incrimination, which is noted in the explanatory memorandum.[267] In particular, the public benefit in removing the right outweighs the loss to the individual because the information that could be obtained by the Commission is critical to performing its regulatory functions and seeking to enforce the obligation to notify and suspend certain transactions subject to review and ultimately prevent anti-competitive acquisitions.

2.157 In relation to not providing for a derivative use immunity, the assistant minister advised that introducing a derivative use immunity with general application to section 155 would create regulatory difficulties and have broad implications for the Commission's powers that would extend far beyond matters relevant to the making of acquisition determinations. The assistant minister noted that not providing for a derivative use immunity is consistent with the approach taken in the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* for extending the Commission's power to obtain information, documents and evidence in section 155 to cover merger authorisation determinations.

2.158 The assistant minister also noted the *Guide to Framing Commonwealth Offences* sets out the committee has accepted proposed legislation removing the privilege against self-incrimination where it exclusively provides for a use immunity in limited circumstances, including legislation governing the regulatory activities of the Commission.

Committee comment

2.159 The committee thanks the assistant minister for this response. The committee notes the reasons provided by the assistant minister for extending the Commission's power to obtain information, documents and evidence in section 155 without the provision of a 'derivative use immunity'.

2.160 In determining whether it is appropriate to abrogate the privilege against self-incrimination, the committee will consider whether the public benefit in doing so significantly outweighs the loss to personal liberty. Any justification for abrogating the privilege against self-incrimination will be more likely to be considered appropriate if accompanied by both a 'use immunity' and a 'derivative use immunity'. A use immunity provides that information or documents produced are not admissible in evidence in most proceedings. By contrast, a derivative use immunity provides that anything obtained as a direct, or indirect, consequence of the information or documents is not admissible in most proceedings. The committee will also consider the extent to which safeguards to protect individual rights and liberties, such as a use or a derivative use immunity, are included within the bill.

2.161 The committee recognises there are circumstances in the past where it has accepted that the privilege can be overridden where it is accompanied by only a 'use

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267 Explanatory memorandum, p. 119.

immunity' in regulatory contexts. In particular, the committee has accepted limited immunities due to difficulties in corporate regulation where a 'derivative use immunity' would unacceptably fetter the investigation and prosecution of corporate misconduct offences.[268] In this case, the assistant minister has advised that the extension of information gathering powers in section 155 is critical to performing the Commission's regulatory functions and seeking to enforce the obligation to notify and suspend transactions subject to the Commission's review.

2.162 The committee considers that any justification for the expansion of an abrogation of the privilege against self-incrimination should be included in the explanatory memorandum to the bill. Where there is no accompanying 'derivative use immunity' as in this instance,[269] reasons should also be provided in the explanatory memorandum. The committee considers the assistant minister's advice on this issue would have been a useful inclusion to the explanatory memorandum.

2.163 However, noting the bill has now passed both Houses of Parliament, the committee makes no further comment on this matter.

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268 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, May 2024, pp. 89–90.

269 Explanatory memorandum, p. 119.

Chapter 3
Scrutiny of standing appropriations[270]

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.[271] 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.[272]

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

Senator Dean Smith

Chair

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270 This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 1 of 2025*; [2025] AUSStaCSBSD 15.

271 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*.

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