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.
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> 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.
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> 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.
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> …
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> 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.
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> 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.
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> 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:
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> • record type / type of healthcare service or episode, for example, pathology test, diagnostic imaging scan, chronic disease management plan; and
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> • date healthcare service was performed.
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> 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.
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> […]
>
> 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:
>
> • 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
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> • 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.