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Committee for the
Scrutiny of Bills

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TABLE OF CONTENTS

Membership of the committee	iii
Introduction	ix
Chapter 1 – Initial scrutiny	
Commentary on bills	
Appropriation Bill (No. 3) 2018-2019.....	1
Appropriation Bill (No. 4) 2018-2019.....	5
Australian Business Securitisation Fund Bill 2019	8
Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019	10
Coal Prohibition (Quit Coal) Bill 2019	14
Combatting Child Sexual Exploitation Legislation Amendment Bill 2019	16
Commonwealth Registers Bill 2019 and Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019	24
Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019	30
Counter-Terrorism (Temporary Exclusion Orders) Bill 2019	32
Counter-Terrorism Legislation Amendment Bill 2019.....	40
Foreign Influence Transparency Scheme Amendment Bill 2019	47
Murray-Darling Basin Commission of Inquiry Bill 2019.....	50
National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019	52
National Sports Tribunal Bill 2019	53
Native Title Legislation Amendment Bill 2019.....	56
Office for Regional Australia Bill 2019	58
Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019.....	60
Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019	62
Treasury Laws Amendment (Consumer Data Right) Bill 2019	64
Treatment Benefits (Special Access) Bill 2019.....	73
No comment on bills	75
Aged Care Amendment (Movement of Provisionally Allocated Places) Bill 2019	

Appropriation (Parliamentary Departments) Bill (No. 2) 2018-2019

Australian Veterans' Recognition (Putting Veterans and their Families First) Bill 2019

Banking Amendment (Rural Finance Reform) Bill 2019

Banking System Reform (Separation of Banks) Bill 2019

Broadcasting Services Amendment (Audio Description) Bill 2019

Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019

Civil Aviation Amendment Bill 2019

Corporations (Fees) Amendment (Registries Modernisation) Bill 2019

Customs Amendment (Immediate Destruction of Illicit Tobacco) Bill 2019

Customs Tariff Amendment (Craft Beer) Bill 2019

Environment Legislation Amendment (Protecting Dugongs and Turtles) Bill 2019

Excise Tariff Amendment (Supporting Craft Brewers) Bill 2019

Export Control Amendment (Banning Cotton Exports to Ensure Water Security) Bill 2019

Export Control Amendment (Banning Cotton Exports to Ensure Water Security) Bill 2019 [No. 2]

Export Finance and Insurance Corporation Amendment (Support for Infrastructure Financing) Bill 2019

Fair Work Amendment (Right to Request Casual Conversion) Bill 2019

Galille Basin (Coal Prohibition) Bill 2019

Governor-General Amendment (Salary) Bill 2019

Higher Education Legislation Amendment (Voluntary Student Services and Amenities Fee) Bill 2019

Human Services Amendment (Photographic Identification and Fraud Prevention) Bill 2019

Military Rehabilitation and Compensation Amendment (Single Treatment Pathway) Bill 2019

Ministers of State (Checks for Security Purposes) Bill 2019

National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019

National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019

National Health Amendment (Pharmaceutical Benefits) Bill 2019

National Sports Tribunal (Consequential Amendment and Transitional Provisions) Bill 2019	
Refugee Protection Bill 2019	
Reserve Bank Amendment (Australian Reconstruction and Development Board) Bill 2019	
Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019	
Social Services Legislation Amendment (Overseas Welfare Recipients Integrity Program) Bill 2019	
Telecommunications Legislation Amendment (Unsolicited Communications) Bill 2019	
Treasury Laws Amendment (2019 Measures No. 1) Bill 2019	
Treasury Laws Amendment (2019 Petroleum Resource Rent Tax Reforms No. 1) Bill 2019	
Treasury Laws Amendment (Increasing the Instant Asset Write-Off for Small Business Entities) Bill 2019	
Treasury Laws Amendment (Mutual Reforms) Bill 2019	
Treasury Laws Amendment (Putting Member's Interests First) Bill 2019	
Treatment Benefits (Special Access)(Consequential Amendment and Transitional Provisions) Bill 2019	
Water Amendment (Indigenous Authority Member) Bill 2019	
Water Amendment (Purchase Limit Repeal) Bill 2019	
Wine Australia Amendment (Trade with United Kingdom) Bill 2019	
Commentary on amendments and explanatory materials	
Industrial Chemicals Bill 2017	77
Chapter 2 – Commentary on ministerial responses	
Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018.....	79
Defence Legislation Amendment Bill 2018.....	88
Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018.....	90
Chapter 3 – Scrutiny of standing appropriations	93

Introduction

Terms of reference

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

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Commentary on Bills

1.1 The committee seeks a response or further information from the relevant minister or sponsor of the bill with respect to the following bills.

Appropriation Bill (No. 3) 2018-19

Purpose	This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the <i>Appropriations Act (No. 1) 2018-19</i>
Portfolio	Finance
Introduced	House of Representatives on 14 February 2019

Parliamentary scrutiny—ordinary annual services of the government¹

1.2 Under section 53 of the Constitution the Senate cannot amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. Further, section 54 of the Constitution provides that any proposed law which appropriates revenue or moneys for the ordinary annual services of the government shall be limited to dealing only with such appropriation.

1.3 This bill seeks to appropriate money from the Consolidated Revenue Fund for the ordinary annual services of the government. However, it appears to the committee, for the reasons set out below, that the initial expenditure in relation to certain measures may have been inappropriately classified as ordinary annual services.

1.4 The inappropriate classification of items in appropriation bills as ordinary annual services, when they in fact relate to new programs or projects, undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. This is relevant to the committee's role in reporting on whether the exercise of legislative power is subject to sufficient parliamentary scrutiny.²

1 Various. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

2 See Senate standing order 24(1)(a)(v).

1.5 The Senate Standing Committee on Appropriations and Staffing³ has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration for many years.⁴ It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.⁵

1.6 As a result of continuing concerns relating to the misallocation of some items, on 22 June 2010 the Senate resolved:

- 1) To reaffirm its constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the Government; [and]
- 2) That appropriations for expenditure on:
 - a) the construction of public works and buildings;
 - b) the acquisition of sites and buildings;
 - c) items of plant and equipment which are clearly definable as capital expenditure (but not including the acquisition of computers or the fitting out of buildings);
 - d) grants to the states under section 96 of the Constitution;
 - e) new policies not previously authorised by special legislation;
 - f) items regarded as equity injections and loans; and
 - g) existing asset replacement (which is to be regarded as depreciation),

are not appropriations for the ordinary annual services of the Government and that proposed laws for the appropriation of revenue or moneys for expenditure on the said matters shall be presented to the Senate in a separate appropriation bill subject to amendment by the Senate.

1.7 The committee concurs with the view expressed by the Appropriations and Staffing Committee that if 'ordinary annual services of the government' is to include items that fall within existing departmental outcomes then:

completely new programs and projects may be started up using money appropriated for the ordinary annual services of the government, and the Senate [may be] unable to distinguish between normal ongoing activities

3 Now the Senate Standing Committee on Appropriations, Staffing and Security.

4 Senate Standing Committee on Appropriations and Staffing, *50th Report: Ordinary annual services of the government*, 2010, p. 3; and annual reports of the committee from 2010-11 to 2014-15.

5 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

of government and new programs and projects or to identify the expenditure on each of those areas.⁶

1.8 The Appropriations and Staffing Committee considered that the solution to any inappropriate classification of items is to ensure that new policies for which money has not been appropriated in previous years are separately identified in their first year in the bill that is *not* for the ordinary annual services of the government.⁷

1.9 Despite these comments and the Senate resolution of 22 June 2010, it appears that a reliance on existing broad 'departmental outcomes' to categorise appropriations, rather than on an individual assessment as to whether a particular appropriation relates to a new program or project, continues. The committee notes that in recent years the Senate has routinely agreed to annual appropriation bills containing such broadly categorised appropriations, despite the potential that expenditure within the broadly-framed departmental outcomes may have been inappropriately classified as 'ordinary annual services'.⁸

1.10 Based on the Senate resolution of 22 June 2010, it appears that the initial expenditure in relation to the following measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No.3) 2018-2019:

- Inspector-General of Live Animal Exports (\$1.8 million over four years);⁹
- Mutual Understanding, Support, Tolerance, Engagement and Respect Initiative—establishment (\$60 million over three years).¹⁰

1.11 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of occasions;¹¹ however, the government has consistently advised that it does not

6 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

7 Senate Standing Committee on Appropriations and Staffing, *45th Report: Department of the Senate's Budget; Ordinary annual Services of the government; and Parliamentary computer network*, 2008, p. 2.

8 See, for example, debate in the Senate in relation to amendments proposed by Senator Leyonhjelm to Appropriation Bill (No. 3) 2017-18, see *Senate Hansard*, 19 March 2018, pp. 1487-1490.

9 Mid-Year Economic and Fiscal Outlook 2018-19, p. 152.

10 Mid-Year Economic and Fiscal Outlook 2018-19, p. 221.

11 Senate Standing Committee for the Scrutiny of Bills, *Tenth Report of 2014*, pp. 402-406; *Fourth Report of 2015*, pp. 267-271; *Alert Digest No. 6 of 2015*, pp. 6-9; *Fourth Report of 2016*, pp. 249-255; *Alert Digest No. 7 of 2016*, pp. 1-9; *Scrutiny Digest 2 of 2017*, pp. 1-5; *Scrutiny Digest 6 of 2017*, pp. 1-6; *Scrutiny Digest 12 of 2017*, pp. 89-95.

intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

1.12 The committee again notes that the government's approach to the classification of items that constitute ordinary annual services of the government is not consistent with the Senate resolution of 22 June 2010.

1.13 The committee notes that any inappropriate classification of items in appropriation bills undermines the Senate's constitutional right to amend proposed laws appropriating revenue or moneys for expenditure on all matters not involving the ordinary annual services of the government. Such inappropriate classification of items impacts on the Senate's ability to effectively scrutinise proposed appropriations as the Senate may be unable to distinguish between normal ongoing activities of government and new programs or projects.

1.14 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain items in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 3) 2018-2019 which should only contain appropriations that are not amendable by the Senate).

Appropriation Bill (No. 4) 2018-2019

Purpose	This bill provides for additional appropriations from the Consolidated Revenue Fund for certain expenditure in addition to the appropriations provided for by the <i>Appropriations Act (No. 2) 2018-19</i>
Portfolio	Finance
Introduced	House of Representatives on 14 February 2019

Parliamentary scrutiny—appropriations determined by the Finance Minister¹²

1.15 Section 12 of the *Appropriation Act (No. 2) 2018-19* (Appropriation Act No. 2) enables the Finance Minister to allocate additional appropriations for items when satisfied that there is an urgent need for expenditure and the existing appropriations are inadequate. The allocated amount is referred to as the Advance to the Finance Minister (AFM). The additional amounts are allocated by a determination made by the Finance Minister (an AFM determination). AFM determinations are legislative instruments, but they are not subject to disallowance or parliamentary scrutiny by the Senate Standing Committee on Regulations and Ordinances. Subsection 12(2) of Appropriation Act No. 2 provides that when the Finance Minister makes such a determination the Appropriation Act has effect as if it were amended to make provision for the additional expenditure. Subsection 12(3) caps the amounts that may be determined under the AFM provision in Appropriation Act No. 2 at \$380 million. Identical provisions appear in *Appropriation Act (No. 1) 2018-19* (Appropriation Act No. 1), although there is a separate (\$295 million) cap in that Act.

1.16 The committee notes that the AFM provisions allow non-disallowable delegated legislation to, at least in effect, modify the operation of primary legislation, and therefore they delegate significant legislative power to the Executive. As the committee has previously noted, one of the core functions of the Parliament is to authorise and scrutinise proposed appropriations. High Court jurisprudence has emphasised the central role of the Parliament in this regard. In particular, while the High Court has held that an appropriation must always be for a purpose identified by the Parliament, '[i]t is for the Parliament to identify the degree of specificity with which the purpose of an appropriation is identified'.¹³

12 Clause 12. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and 24(1)(a)(v).

13 *Combet v Commonwealth* (2005) 224 CLR 494, 577 [160]; *Wilkie v Commonwealth* [2017] HCA 40 (28 September 2017) [91].

1.17 When the committee considered identical AFM provisions in 2017, the committee requested the Finance Minister's advice as to each instance in which the AFM provisions had been used over the previous ten financial years. In response, the Finance Minister confirmed that the AFM provisions had been used in 49 instances in the preceding twelve financial years. The committee published details of a selection of AFMs issued from 2006-07 to 2017 in the body of its report, as well as the full list of AFMs in an appendix to the report.¹⁴

1.18 In concluding comments, the committee noted that, given determinations made under the AFM provisions are not subject to parliamentary disallowance, the primary accountability mechanism in relation to those determinations (beyond the initial passage of the authorising provision in the regular appropriations bills) is an annual report tabled in Parliament. These reports are referred to legislation committees considering estimates and are also considered in committee of the whole.¹⁵ In addition, the reports are published on the Department of Finance website.¹⁶ The committee drew this report, and the AFM provisions themselves, to the attention of senators.

1.19 Subclause 12(1) of the present bill seeks to provide that any determinations made under the AFM provisions in Appropriation Act No. 2 are to be disregarded for the purposes of the \$380 million cap in subsection 12(3) of that Act. The note to subclause 12(1) clarifies that this means that the Finance Minister would have access to the full \$380 million for the purposes of making AFM determinations under section 12 of Appropriation Act No. 2, regardless of any amounts that have already been determined under that section.¹⁷

1.20 It appears to the committee that, for the 2018-19 financial year, the sole amount determined by the Finance Minister under the AFM provisions was \$75.4 million to enable the Department of Infrastructure, Regional Development and Cities to fund an expansion of the Drought Communities Program. This advance was made under section 12 of Appropriation Act No. 2.¹⁸ Under clause 12 of the bill, this amount would be disregarded for the purposes of the \$380 million cap imposed by subsection 12(3) of Appropriation Act No. 2.

14 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, pp. 95-98 and Appendix 1.

15 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), pp 395–396.

16 See http://www.finance.gov.au/publications/advance_to_the_finance_minister/.

17 Clause 10 of Appropriation Bill (No. 3) 2018-2019 contains identical provisions, which apply to determinations made under the AFM provisions in Appropriation Act No. 1.

18 Advance to the Finance Minister Determination (No. 1 of 2018-2019), <https://www.legislation.gov.au/Details/F2018L01816>.

1.21 In light of the matters raised by the committee in relation to the Advance to the Finance Minister provisions in Appropriation Acts No. 1 and No. 2,¹⁹ the committee draws to the attention of senators the proposal to disregard previous expenditure of \$75.4 million for the purposes of the cap on amounts that may be determined under the Advance (resulting in more money being available for expenditure via a non-disallowable instrument).

1.22 The committee will continue to draw this important matter to the attention of senators where appropriate in the future.

19 Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 6 of 2018, pp. 7-8.

Australian Business Securitisation Fund Bill 2019

Purpose	This bill seeks to establish the Australian Business Securitisation Fund
Portfolio	Treasury
Introduced	House of Representatives on 13 February 2019

Significant matters in delegated legislation²⁰

1.23 The bill seeks to establish the Australian Business Securitisation Fund (the fund) which is intended to provide access to debt finance for small to medium businesses. Clause 12 provides that the minister may, on behalf of the Commonwealth, invest amounts standing to the credit of the fund in any authorised debt security and clause 13 provides that the minister may, by legislative instrument, give directions about the exercise of those powers. The explanatory memorandum states that the fund will be credited with \$2 billion between 1 July 2019 and 1 July 2023.²¹

1.24 The bill sets out the type of debt securities²² that the minister can invest in, however, it also allows the rules to prescribe other requirements or restrictions that the debt security must comply with and allows the rules to modify the amount of credit to which the debt security relates. In particular, while the bill provides that authorised debt securities are limited to securities where the underlying credit provided to each business is less than \$5 million, the rules may prescribe an amount that is greater or lesser than that amount. The explanatory memorandum does not explain why it is necessary to allow the rules to modify this limit in any way. Instead, the explanatory memorandum simply states that the bill 'sets the outer limits on the types of debt securities the Minister can invest in' but the rules 'have the flexibility to prescribe other limitations as required depending on how the market develops'.²³

1.25 In addition, the minister may make directions under clause 13 as to how the powers under clause 12 are to be exercised. The bill does not otherwise provide any rules or guidance as to how the powers under clause 12 are to be exercised and there is no requirement for the minister to give such directions. Directions given by

20 Clauses 12 and 13. The committee draws senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(iv) and (v).

21 The explanatory memorandum states that the fund will be credited with \$2 billion between 1 July 2019 and 1 July 2023, p. 5.

22 See the definition of 'authorised debt security' in subclause 12(4).

23 Explanatory memorandum, pp. 9-10.

the minister will be legislative instruments but will not be subject to disallowance or sunseting.²⁴ This is because the directions will be covered by an exemption under the Legislation (Exemptions and Other Matters) Regulation 2015.²⁵ The explanatory memorandum acknowledges that the directions made under clause 13 would not be subject to disallowance.²⁶ However, it does not explain why this is considered appropriate.

1.26 The committee's consistent view is that significant matters, such as the rules or guidance relating to the exercise of a power to invest significant amounts of Commonwealth money, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. Where significant matters are left to non-disallowable legislative instruments, the committee would also expect a sound justification for this approach to be included in the explanatory materials.

1.27 The committee notes its scrutiny concerns regarding the inclusion of significant matters in delegated legislation (including in a non-disallowable legislative instrument). The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

1.28 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

24 Subclause 13(1).

25 See section 9, item 2, and section 11, item 3 of the Legislation (Exemptions and Other Matters) Regulation 2015.

26 Explanatory memorandum, p. 11.

Australian Sports Anti-Doping Authority Amendment (Enhancing Australia's Anti-Doping Capability) Bill 2019

Purpose	<p>This bill seeks to amend the <i>Australian Sports Anti-Doping Authority Act 2006</i> to:</p> <ul style="list-style-type: none"> • amend the administrative phase of the Anti-Doping Rule Violation process; • extend statutory protection against civil actions to cover other persons in their exercise of Anti-Doping Rule Violation functions; • amend statutory protections for information provided to National Sporting Organisations by the Australian Sports Anti-Doping Authority (ASADA); and • amend ASADA's disclosure notice regime
Portfolio	Regional Services, Sport, Local Government and Decentralisation
Introduced	Senate on 14 February 2019

Removal of merits review²⁷

1.29 Under the *Australian Sports Anti-Doping Authority Act 2006* (ASADA Act), the process for investigating anti-doping rule violations (ADRVs) currently involves consideration of potential ADRVs by the Anti-Doping Rule Violation Panel (the Panel). The statement of compatibility explains this process as follows:

- the CEO of the Australian Sports Anti-Doping Authority (ASADA) writes to the relevant athlete or support person giving notice of a possible ADRV and inviting the recipient to make a submission in response;²⁸
- ASADA prepares material for consideration by the Panel, and the Panel determines whether a possible ADRV has occurred.

27 Schedule 1, Part 1, items 1-42. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iii).

28 'Athlete' is defined in section 4 of the ASADA Act as a person who competes in a sport and who is subject to the national anti-doping scheme. 'Athlete support personnel' includes any coach, trainer, manager, agent, team staff, official, medical, paramedical personnel, parent or any other person working with, treating or assisting an athlete participating or preparing for sports competition. See World Anti-Doping Agency, *World Anti-Doping Code* (2015), p. 132, <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>.

- If the Panel is satisfied that an ADRV has occurred, the ASADA CEO notifies the athlete of the Panel's decision.²⁹

1.30 Currently, an athlete or support person may apply to the Administrative Appeals Tribunal (AAT) for review of a decision by the Panel to make an assertion relating to a potential ADRV.³⁰ Further, following an assertion by the Panel that an ADRV has occurred, the relevant athlete or support person will generally receive an infraction notice in accordance with their sport's anti-doping policy. The athlete or support person may contest this notice in a sports tribunal.³¹

1.31 The bill seeks to abolish the Panel and to make consequential amendments to the ASADA Act to remove the Panel from the ADRV investigation process. This would include removing the right for an athlete or support person to appeal to the AAT before an ADRV matter proceeds to a formal hearing.

1.32 The statement of compatibility indicates that the proposal to abolish the Panel follows findings by a review of Australia's sports integrity arrangements (the Wood Review)³² that the Panel's involvement in the ADRV process is 'time consuming, overly complicated and duplicate[s] procedures'.³³ It also indicates that, despite the removal of the right to appeal to the AAT, athletes and support persons would retain the right to seek judicial review of a decision handed down by ASADA, as well as the right to have any allegations heard by a tribunal.³⁴

1.33 The committee acknowledges the importance of simplifying processes for determining ADRVs, and notes that athletes and support persons would still have access to a number of review mechanisms: that is, review by the sport's anti-doping tribunal and by the proposed National Sports Tribunal (the tribunals).³⁵ However, it remains unclear whether those mechanisms would constitute sufficiently independent merits review. In this regard, the committee notes that the explanatory materials provide no information about the independence of the tribunals, their

29 Statement of compatibility, p. 3.

30 Subsection 14(4) of the ASADA Act.

31 See Australian Sports Anti-Doping Authority, *Rule violation management process*, at <https://www.asada.gov.au/rules-and-violations/rule-violation-management-process>.

32 The Wood Review was commissioned by the government in August 2017. The review report was presented to government in March 2018. See <http://www.health.gov.au/internet/main/publishing.nsf/Content/the-review-of-australias-sports-integrity-arrangements>.

33 Statement of compatibility, p. 3.

34 Statement of compatibility, p. 3. In this regard, the explanatory memorandum (p. 10) also notes that 'the role of the AAT is replicated through a number of other more efficient pathways'.

35 The proposed National Sports Tribunal would be established by the National Sports Tribunal Bill 2019.

procedures or powers. Given the potentially very significant consequences of an ADRV determination for an athlete's reputation and future employment prospects, the committee would expect a more comprehensive explanation in the explanatory materials as to the review mechanisms that would be available.

1.34 The committee also notes that it does not generally consider the availability of judicial review, on its own, to be sufficient justification for excluding or removing merits review. This is because (unlike merits review) judicial review does not allow the court to undertake a full review of the facts and to determine whether the correct or preferable decision has been made.

1.35 The committee notes its scrutiny concerns regarding the proposal to remove review by the Administrative Appeals Tribunal of assertions by the Anti-Doping Rule Violation Panel in relation to potential anti-doping rule violations (consequential on the abolition of the Panel). The committee considers that the explanatory materials do not adequately address these concerns, and draws this matter to the attention of the Senate.

Privacy³⁶

1.36 Under the ASADA Act, the ASADA CEO may issue a written notice (disclosure notice) requiring a person to attend an interview to answer questions, or to produce documents or things. Currently, the CEO may only issue such a notice if the CEO reasonably believes that the recipient has information, documents or things that may be relevant to the administration of the National Anti-Doping Scheme (NAD), and three members of the Panel are in agreement with the CEO's belief.³⁷

1.37 The bill seeks to replace the requirement that the CEO 'reasonably believes' that the recipient of a disclosure notice has relevant information, with a requirement that CEO 'reasonably suspects' that the recipient has such information. It also seeks to remove the requirement that three members of the Panel agree with the CEO's belief, as a consequence of abolishing the Panel. This would have the effect of lowering the threshold for the issue of disclosure notices.

1.38 The explanatory memorandum explains that it is proposed to lower the threshold for issuing disclosure notices because:

[t]he current requirement necessitates that the ASADA CEO effectively already has evidence that suggests that an ADRV has taken place. By amending the threshold to 'reasonably suspects', the CEO will be able to issue disclosure notices to progress matters where there is a reason to

36 Schedule 1, items 13, 46 and 47. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

37 Section 13(1)(ea) and section 13A of the ASADA Act.

suspect an ADRV has occurred but insufficient evidence to substantiate it. This brings the threshold into line with comparable statutory schemes.³⁸

1.39 The statement of compatibility further notes that the Wood Review concluded that the current 'reasonable belief' standard means that disclosure notices are generally only sought and granted where ASADA already has evidence suggesting that an ADRV has taken place. It also states that lowering the threshold for issuing disclosure notices is necessary given the reliance on intelligence and investigations in increasingly sophisticated anti-doping matters.³⁹

1.40 The committee appreciates the importance of ensuring that potential ADRVs are effectively investigated, however, it is unclear why a disclosure notice could not be issued under the existing standard; that is, why a 'reasonable belief' could not be formed on the basis of intelligence gathered while investigating a potential ADRV.

1.41 The committee also notes that a disclosure notice may require the recipient to provide personal information relating to the investigation of a potential ADRV. The improper use or disclosure of this information may trespass significantly on the right to privacy. For example, the release of information that suggests an athlete has committed an ADRV could cause significant damage to the athlete's reputation, and limit future employment prospects. The committee would therefore expect the explanatory materials to identify any relevant safeguards against the unauthorised use or disclosure of personal information. The committee notes that no such safeguards are identified in the explanatory materials.

1.42 Finally, it is unclear to the committee whether lowering the threshold for issuing disclosure notices would result in an increase to the number of such notices that are issued (thereby exposing a greater number of persons to trespasses on the right to privacy). The explanatory materials provide no information in this regard.

1.43 The committee notes its scrutiny concerns regarding the expansion of the basis on which persons may be required to disclose certain information and the impact this may have on the right to privacy. The committee considers that the explanatory materials do not adequately address these concerns, and draws this matter to the attention of the Senate.

38 Explanatory memorandum, p. 14.

39 Statement of compatibility, pp. 4-5.

Coal Prohibition (Quit Coal) Bill 2019

Purpose	This bill seeks to prohibit the mining, burning and the export and importation of thermal coal in Australia by 2030
Sponsor	Mr Adam Bandt MP
Introduced	House of Representatives on 18 February 2019

Strict liability offences⁴⁰

1.44 The bill seeks to insert proposed section 112AA into the *Customs Act 1901*. Proposed subsection 112AA(10) seeks to make it an offence for a person not to comply with conditions or requirements, or to engage in conduct that contravenes the conditions or requirements, specified in a written permission to export thermal coal granted by the minister under proposed subsection 112AA(3). The proposed offence is stated to be one of strict liability and is subject to 100 penalty units. The explanatory memorandum provides no justification as to why the offence is subject to strict liability.

1.45 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring 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 intended this, or was reckless or negligent.

1.46 As the imposition of strict liability undermines fundamental criminal 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*.⁴¹

1.47 The committee also notes that the *Guide to Framing Commonwealth Offences* states that the application of strict liability is only considered appropriate where the offence is punishable by a fine of up to 60 penalty units for an individual.⁴²

40 Item 6, proposed subsection 112AA(11). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

41 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22-25.

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

In this instance, the bill proposes applying strict liability to an offence that is subject to 100 penalty units.

1.48 The committee notes its scrutiny concerns regarding the application of strict liability. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

Reversal of evidential burden of proof⁴³

1.49 The bill seeks to insert proposed section 24H into the *Environment Protection and Biodiversity Conservation Act 1999*, to make it an offence to take certain actions involving thermal coal activity. Proposed subsection 24H(4) provides an exception (offence specific defence) to these offences, stating that the offences do not apply if the action is approved under Part 9 of the Act or the minister has made a decision that section 24H is not a controlling provision for the action. The offences each carry a maximum penalty of imprisonment for 7 years or 420 penalty units or both.

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

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

1.52 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. In this instance, the explanatory memorandum provides no information about the relevant provision.

1.53 The committee notes its scrutiny concerns regarding the reversal of the evidential burden of proof. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

43 Item 7, proposed subsection 24H(4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Combatting Child Sexual Exploitation Legislation Amendment Bill 2019

Purpose	This bill seeks to amend various Acts to create a number of new offences and amend existing offences relating to child pornography material and child abuse material, overseas child sexual abuse, forced marriage, failing to report child sexual abuse and failing to protect children from such abuse.
Portfolio	Home Affairs
Introduced	House of Representatives on 14 February 2019

Privilege against self-incrimination⁴⁴

1.54 Proposed subsections 273B.5(1) and (2) seek to create two new offences relating to failures by Commonwealth officers to report child sexual abuse to the Australian Federal Police (AFP), or to the police service of a state or territory, in circumstances where the officer reasonably believes or reasonably suspects that a person has committed or will commit a child sexual abuse offence.⁴⁵

1.55 Proposed subsection 273B.5(5) provides that an individual is not excused from failing to disclose information relating to a child sexual abuse offence on the basis that to do so might tend to incriminate the individual or otherwise expose the individual to a penalty. That provision overrides the common law privilege against self-incrimination, which provides that a person cannot be required to answer questions or produce material which may tend to incriminate himself or herself.⁴⁶

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

44 Schedule 1, item 3, proposed subsection 273B.5(5). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

45 'Commonwealth officer' is defined in proposed section 273B.1, and includes ministers, parliamentary secretaries, APS employees, and a variety of other persons employed by Commonwealth authorities or exercising powers under Commonwealth laws. 'Child sexual abuse offence' is also defined in that section, and includes a Commonwealth child sex offence within the meaning of the *Crimes Act 1914*, or a state or territory registrable child sex offence.

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

justification for abrogating the privilege and explain any safeguards that may apply. In this instance, the explanatory memorandum gives a detailed justification as to why it is necessary to abrogate the privilege:

The Royal Commission identified underreporting as a significant barrier to victims and survivors of child sexual abuse accessing justice. Children are likely to have fewer opportunities and less ability to report the abuse to police or to take effective steps to protect themselves, leaving them particularly in need of the active assistance and protection of persons charged with providing care, supervision or authority. The Royal Commission also identified that, perhaps more so than with other serious criminal offences, those who commit child sexual abuse offences may have multiple victims and may offend against particular victims repeatedly.

These unique circumstances justify overriding the privilege against self-incrimination to achieve the objective of encouraging all Commonwealth officers who provide care, supervision or exercise authority in relation to children to report abuse or take protective actions to protect against abuse. For example, a person should not be excused from this obligation if they are concerned that reporting that an employee was abusing a child will expose that they had not ensured that the employee held a valid working with children check card.⁴⁷

1.57 In considering whether it is appropriate to abrogate the privilege against self-incrimination, the committee will also consider the extent to which self-incriminating evidence is limited by 'use' or 'derivative use' immunities. A 'use' immunity provides that information or documents produced in response to the statutory requirement (in this case, a requirement to disclose information to police) will not be admissible in evidence against the person that produced it. A 'derivative use' immunity provides that anything obtained as a direct or indirect consequence of the production of the relevant information or documents will also not be admissible in evidence against the person that produced them.

1.58 In this instance, a 'use' immunity is provided in proposed subsection 273B.9(10), which provides that, if an individual who engages in protected conduct by disclosing information, the information is not admissible in evidence against the individual in relation to liability in any relevant proceedings. However, a 'derivative use' immunity does not appear to be available. Indeed, proposed subsection 273B.9(11) expressly provides that section 273B.9 does not affect the admissibility of evidence in relevant proceedings of any information obtained as an indirect consequence of a disclosure that constitutes protected conduct. In relation to this matter, the explanatory memorandum provides that:

Applying a derivative use immunity would defeat the central purpose of the failure to report offence as, where a perpetrator of child sex abuse

47 Explanatory memorandum, p. 34.

discloses information to authorities, this would severely undermine the ability of law enforcement to investigate and subsequently prosecute this criminal conduct.

For example, where a person makes such a disclosure, an investigator in a criminal matter relating to the perpetrator of the conduct that was not reported may be required to prove the provenance of all subsequent evidentiary material before it can be admitted. This creates an unworkable position wherein pre-trial arguments could be used to inappropriately undermine and delay the resolution of charges against the accused.

It should be noted that a person will only be compelled to make a disclosure to the police, which are bound by extensive obligations under State, Territory and Commonwealth privacy law. It should also be noted that the offence will not affect the inherent power of the court to manage criminal prosecutions that are brought before it where it finds that those proceedings have been unfairly prejudiced or that there is a real risk of prejudice to the accused.⁴⁸

1.59 While noting this information, the committee reiterates that the privilege against self-incrimination is an important common-law right, and any abrogation of the privilege represents a significant loss to personal liberty. The committee considers that any justification for abrogating the privilege will be more likely to be appropriate if accompanied by both a 'use' and a 'derivative use' immunity. In this respect, the committee notes that not including a 'derivative use' immunity can undermine the effectiveness of a 'use' immunity, as it allows investigators to disregard the usual features of the accusatorial justice system and compel a potential accused to provide information that could be indirectly used to incriminate them.

1.60 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of abrogating the privilege against self-incrimination in circumstances where a 'derivative use' immunity would not be available.

Significant penalties⁴⁹

1.61 Proposed section 273A.1 would make it an offence for a person to possess a doll or other object that resembles a person who is or appears to be under 18 years of age, or resembles part of the body of such a person, in circumstances where a reasonable person would consider it likely that the doll or object is intended to be

48 Explanatory memorandum, p. 38.

49 Schedule 2, item 6, proposed section 273A.1 and item 7. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

used by a person to simulate sexual intercourse. The offence would be punishable by up to 15 years imprisonment.

1.62 Item 7 of the bill provides that proposed section 273A.1 applies in relation to a doll or other object possessed on or after the commencement of the item, irrespective of whether the doll or object was obtained before, on or after that commencement. The commencement provisions in clause 2 make clear that this offence will commence the day after the Act receives royal assent.

1.63 The explanatory memorandum explains that it is proposed to criminalise the possession of the proscribed dolls and objects in order to prevent children from being abused, as the relevant dolls and objects 'normalise abusive behaviour towards children, encourage the sexualisation of children and increase the likelihood that a person will engage in sexual activity with or towards children'.⁵⁰ The explanatory memorandum further explains that the penalty that may be imposed:

appropriately reflects the seriousness of the misconduct captured by the offence and is equivalent to the penalties for offences such as possession, controlling, producing, supplying or obtaining child pornography material for use through a postal or similar service (section 471.17) or carriage service (section 472.20).⁵¹

1.64 The committee appreciates the paramount importance of protecting children from exploitation and abuse, and notes that the penalties that may be imposed under proposed section 273A.1 appear to be consistent with comparable offences in other Commonwealth legislation, which are also subject to significant penalties. Nevertheless, the committee is concerned that the provision seeks to impose significant custodial penalties in relation to the mere possession of the proscribed dolls and objects, and that the offence would apply on the day after the bill receives royal assent.⁵² This means that persons currently in lawful possession of a proscribed doll or object, and who are unaware of the proposal to criminalise this possession, may immediately commit an offence punishable by up to 15 years imprisonment on the day after the bill receives royal assent. This matter is not addressed in the explanatory materials.

1.65 The committee notes its scrutiny concerns regarding the application of a significant custodial penalty to the proposed offence of possession of certain dolls and other objects, including making current lawful possession unlawful, the day after the Act receives royal assent. The committee considers that the explanatory

50 Explanatory memorandum, p. 3.

51 Explanatory memorandum, p. 41. Section references refer to the *Criminal Code Act 1995*.

52 In this respect, clause 2 (commencement) provides that the offence commences on the later of the day after the bill receives royal assent and the commencement of item 2 of Schedule 6 to the *Crimes Legislation Amendment (Sexual Crimes Against Children and Community Protection Measures) Act 2019*.

materials do not adequately address these concerns, and draws this matter to the attention of the Senate.

Reversal of evidential burden of proof⁵³

1.66 As outlined at paragraph [1.54] above, proposed subsections 273B.5(1) and (2) seek to create two offences relating to failures by Commonwealth officers to provide information relating to child sexual abuse to the AFP, or to the police service of a state or territory, in certain circumstances. Proposed subsection 273B.5(4) sets out a series of offence-specific defences, which provide that the offences in subsections 273B.5(1) and (2) do not apply if:

- the defendant reasonably believes that the information is already known to the police force or police service of a state or territory, to the AFP, or to a person or body to which the disclosure of the information is required by certain statutory schemes;
- the defendant has already disclosed the information to a person or body for the purposes of such a statutory scheme;
- the defendant reasonably believes the disclosure of the information would put at risk the safety of any person other than the potential offender; or
- the information is in the public domain.

1.67 Further and as outlined at paragraph [1.61] above, proposed section 273A.1 seeks to make it an offence for a person to possess certain proscribed dolls and objects. Proposed section 273A.2 sets out two offence-specific defences to this offence, which provide that a person is not criminally responsible for the offence if:

- where the person engages in prohibited conduct (that is, possessing a proscribed doll or object), the conduct is of public benefit and does not go beyond what is of public benefit;⁵⁴ or
- at the time of the offence, the person was a law enforcement officer or an intelligence or security officer acting in the course of their duties, and the conduct was reasonable for the purposes of performing the duty.⁵⁵

53 Schedule 1, item 3, proposed subsection 273B.5(4) and Schedule 2, item 6, proposed section 273A.2 and 273B.5. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

54 Proposed subsection 273A.2(1). Proposed subsection 273A.2(2) provides that conduct is of public benefit only if it is necessary for enforcing, monitoring compliance with or investigating a contravention of Commonwealth, state or territory law, for the administration of justice, or for conducting scientific, medical or educational research that has been approved by the minister administering the *Australian Federal Police Act 1979* (AFP Minister).

55 Proposed subsection 273A.2(3).

1.68 In both of these instances the evidential burden of proof would be reversed by the use of offence-specific defences.⁵⁶ At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interfere with this common law right.

1.69 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

1.70 The explanatory memorandum provides a very brief justification for reversing the evidential burden in relation to the defences in proposed subsection 273.B(4), stating that it is appropriate to reverse the burden because:

the information to prove their existence would be peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁵⁷

1.71 The explanatory memorandum provides a similarly brief justification for the defences in proposed section 273A.2:

The use of the defence in subsection 471.18(1) is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The Guide refers to the principle that it is legitimate to case a matter as a defence where a matter is peculiarly within the defendant's knowledge and is not available to the prosecution.

1.72 However, it is not apparent to the committee that each of the matters in proposed subsection 273B.5(4) and proposed section 273A.2 would be peculiarly within the knowledge of the defendant. For example, the question of whether information is in the public domain (in proposed paragraph 273B.5(4)(d)) would appear to be *public* knowledge. Moreover, the question of whether particular research has been approved by the AFP Minister (in proposed paragraph 273A.2(2)(d)) would appear to be a matter of which the minister would be particularly apprised.

1.73 The committee notes its scrutiny concerns regarding the reversal of the evidential burden of proof in proposed sections 273B.5 and 273A.2, noting that all relevant matters may not be peculiarly within the knowledge of the defendant. The

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

57 Explanatory memorandum, pp. 33-34.

committee considers that the explanatory materials do not adequately address these concerns, and draws this matter to the attention of the Senate.

Reversal of legal burden of proof⁵⁸

1.74 Subsections 272.12(1) and 272.13(1) of the *Criminal Code Act 1995*, respectively, currently make it an offence for a person to engage in sexual intercourse or sexual activity outside Australia with a person between the ages of 16 and 18, in circumstances where the alleged offender is in a position of trust or authority in relation to the young person.

1.75 Section 272.17 currently sets out offence-specific defences to these offences which require the defendant to prove the existence of a genuine, valid marriage. The defences also apply to the offences of engaging in sexual intercourse or sexual activity with a child under the age of 16,⁵⁹ and to the offences of procuring or 'grooming' a child to engage in sexual activity outside Australia.⁶⁰

1.76 Item 1 of Schedule 6 to the bill seeks to repeal section 272.17, and replace it with a new offence-specific defence, which would apply only to the offences in subsections 272.12(1) and 272.13(1) relating to engaging in sexual intercourse or sexual activity with a young person. Proposed section 272.17 would require the defendant to prove that:

- at the time of the sexual intercourse or activity, there existed between the defendant and the young person a marriage that was valid, or recognised as valid, under the law of the place where the marriage was solemnised, the place where the intercourse or activity was alleged to have taken place, or the place of the defendant's residence or domicile; and
- when the marriage was solemnised, the marriage was genuine, and the young person had attained the age of 16 years.

1.77 By requiring the defendant to prove the matters in proposed section 272.17, the provision reverses the legal burden of proof.⁶¹

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

58 Schedule 6, item 1, proposed section 272.17. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

59 Respectively, subsections 272.8(1) and 272.9(1) of the *Criminal Code*.

60 Respectively, subsections 272.14(1) and 272.15(1) of the *Criminal Code*.

61 Paragraph 13.4(b) of the *Criminal Code Act 1995* provides that a burden of proof imposed on the defendant is a legal burden if the law expressly requires the defendant to prove the matter.

innocent until proven guilty. Provisions that reverse the burden of proof, and require a defendant to disprove one or more elements of an offence, interfere with this common law right. The committee would expect any provision that reverses the legal burden of proof to be fully justified in the explanatory materials. Additionally, the committee notes that the *Guide to Framing Commonwealth Offences* states that placing a legal burden of proof on a defendant should be kept to a minimum and, where a defendant is required to discharge a legal burden of proof, the explanatory material should justify why a legal burden of proof has been imposed instead of an evidential burden.⁶²

1.79 In this instance, the explanatory memorandum states that a legal burden is appropriate 'because the defence relates to a matter that is peculiarly within the defendant's knowledge and not available to the prosecution'.⁶³

1.80 Matters such as whether a valid marriage existed between the defendant and the relevant young person would appear to be matters that may be peculiarly within the defendant's knowledge,⁶⁴ and so it may be justified to reverse the *evidential* burden of proof. However, it is not apparent to the committee why it is necessary to reverse the *legal* burden of proof in relation to those matters. The committee notes that no specific justification for reversing the legal burden is included in the explanatory materials.

1.81 The committee notes its scrutiny concerns regarding the reversal of the legal burden of proof in proposed section 272.17. The committee considers that the explanatory materials do not adequately address these concerns, and draws this matter to the attention of the Senate.

62 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp. 51-52.

63 Explanatory memorandum, p. 69.

64 In this respect, the committee notes that such matters may be peculiarly within the knowledge of the two parties, and that it may be inappropriate to seek information from the relevant young person (for example, due to risks of re-traumatisation).

Commonwealth Registers Bill 2019

Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019

Purpose	<p>The Commonwealth Registers Bill 2019 seeks to create a set of core provisions related to the administration of business registers in the <i>Superannuation Industry (Supervision) Act 1993</i> and the <i>A New Tax System (Australian Business Number) Act 1999</i></p> <p>The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 seeks to provide the legislative framework to the Australian Securities and Investments Commission registers and the Australian Business Register; and the legal framework for the introduction of director identification numbers</p>
Portfolio	Treasury
Introduced	House of Representatives on 14 February 2019

Significant matters in delegated legislation

Privacy⁶⁵

1.82 The Commonwealth Registers Bill 2019 (the Registers Bill) and the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 (the Amendment Bill) establish a registry regime for the holding of information.⁶⁶

1.83 Under the registry regime, a Commonwealth body is appointed as the Registrar.⁶⁷ The functions and powers of the Registrar are to be governed by two disallowable legislative instruments made by the Registrar: the data standards and the disclosure framework.

65 Clauses 13 and 16 of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed sections 62H and 62L; item 10, proposed sections 1270G and 1270K; item 18, proposed sections 212H and 212L. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i), (iv) and (v).

66 The registry regime created by the Registers Bill cannot extend to a law that relies on a referral by a State under s 51(xxxvii) of the Constitution (see explanatory memorandum, p. 5). The amendments made by Schedule 1 of the Amendment Bill, Part 1 establish the same registry regime as the Registers Bill for the *Business Names Registration Act 2011*, *Corporations Act 2001*, and the *National Consumer Credit Protection Act 2009*.

67 Clause 6 of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed section 62A; item 10, proposed section 1270; item 18, proposed section 212A.

1.84 The data standards will govern the performance of the Registrar's functions and the exercise of the Registrar's powers. The data standards may provide for the type of information that may be collected by the Registrar, how that information may be given and how it is to be stored. As the registry regime does not set out any requirements in primary legislation that will govern the Registrar's functions and powers, the data standards will be the only source of such requirements that the registry regime itself provides.

1.85 The disclosure framework governs how the Registrar is to disclose protected information,⁶⁸ which the statement of compatibility notes could include personal information.⁶⁹ The legislative instrument that contains the disclosure framework may set out the circumstances in which protected information may be disclosed or not disclosed, and any conditions that may be imposed on disclosure. The disclosure of protected information by the Registrar is largely dealt with using the disclosure framework. Furthermore, an offence for failing to comply with a confidentiality agreement relating to the disclosure of protected information relies on the disclosure framework providing for the circumstances when such an agreement is required.⁷⁰

1.86 The committee's view is that significant matters, such as the governance of the performance and exercise of the Registrar's functions and powers and the collection and disclosure of personal information, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory memorandum provides no justification for the extent to which the registry regime relies on the data standards and the disclosure framework to govern the performance and exercise of the Registrar's functions and powers. The explanatory memorandum does emphasise the need for flexibility in providing the Registrar to make data standards and the disclosure framework.⁷¹ However, the committee does not consider that the need for administrative flexibility adequately justifies leaving how the Registrar is to perform or exercise its functions and powers, and the disclosure of protected information, to delegated legislation to the extent that the registry regime does.

68 For the definition of protected information, see clause 5 of the Registers Bill and Schedule 1 to the Amendment Bill, items 1, 8, 14 (which respectively insert a definition of protected information in the *Business Names Registration Act 2011*, the *Corporations Act 2001* and the *National Consumer Credit Protection Act 2009*).

69 Statement of compatibility, p. 70.

70 Subclause 16(4) of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed subsection 62L(4); item 10, proposed subsection 1270K(4); item 18, proposed subsection 212L(4).

71 Explanatory memorandum, pp.16 and 24.

1.87 Additionally, where Parliament delegates its legislative power in relation to significant matters, the committee considers that it is appropriate that specific consultation obligations (beyond those in the *Legislation Act 2003*) are included in the bill and that compliance with those obligations is a condition of the validity of the relevant legislative instrument, which has not been provided for in relation to the registry regime.

1.88 The committee notes its scrutiny concerns regarding significant matters being left to delegated legislation (including the circumstances for the collection and disclosure of personal information). The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

1.89 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Broad delegation of administrative powers⁷²

1.90 The registry regime provides that the Registrar may delegate all or any of the Registrar's functions or powers (except the power to make data standards or the disclosure framework) to:

- any person that the Registrar, as a Commonwealth body, may delegate its functions to; or
- any person of a kind specified in the rules.

1.91 This means that the extent of the Registrar's power to delegate will depend on what is provided for in the legislation that establishes the Commonwealth body appointed as the Registrar when it comes to delegating powers, or what is specified in the rules. There is no limit therefore in these bills as to any requirement that the Registrar's functions or powers be delegated only to persons with appropriate expertise.

1.92 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

72 Clause 10 of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed section 62E; item 10, proposed section 1270D; item 18, proposed section 212E. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii).

provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. The explanatory materials provide no information about why these powers are proposed to be delegated to such a large class of persons.

1.93 The committee notes its scrutiny concerns regarding the broad delegation of administrative powers. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

Reversal of evidential burden of proof⁷³

1.94 The registry regime makes it an offence for a person to make a record of information obtained by the person in the course of the person's official employment, or to disclose such information to another person.⁷⁴ The offence carries a maximum penalty of imprisonment for 2 years.

1.95 The registry regime provides an exception (offence-specific defence) to this offence if the recording or disclosure of the information occurs in the following circumstances:

- the recording or disclosure of the information is for the purposes of the registry regime or occurs in the performance of the person's official employment;
- the disclosure of the information is to another person for use, in the course of the performance of the duties of the other person's official employment, in relation to the performance or exercise of the functions or powers of a government entity; or

73 Subclause 17(3) of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed subsection 62M(3); item 10, proposed subsection 1270L(3); item 18, proposed subsection 212M(3); Schedule 2 to the Amendment Bill, item 5, proposed subsection 308-20(2) and 308-40(2) and (3); item 11, proposed subsection 1272C(2) and 1272G(2) and (3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

74 Clause 17(3) of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed section 62M of the *Business Names Registration Act 2011*; Schedule 1 to the Amendment Bill, item 10, proposed section 1270L of the *Corporations Act 2001*; Schedule 1 to the Amendment Bill, item 18, proposed section 212M of the *National Consumer Credit Protection Act 2009*.

- the disclosure of the information is in accordance with the disclosure framework or each person to whom the information relates consents to the disclosure.⁷⁵

1.96 In addition, the Amendment Bill makes it an offence for an eligible officer not to have a director identification number (DIN), or to apply for a DIN knowing that the officer already possesses a DIN. There are also exceptions (offence-specific defences) to these offences if the officer applied before a certain period and the application has not been finally determined; the Commonwealth Registrar directed the person to make the application; or the person purports to make the application only in relation to the *Corporations Act 2001*.⁷⁶

1.97 In making these offence-specific defences the defendant will bear the evidential burden of proof.⁷⁷ At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.98 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified.

1.99 The committee notes that the *Guide to Framing Commonwealth Offences*⁷⁸ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.⁷⁹

75 Subclause 17(3) of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed subsection 62M(3); item 10, proposed subsection 1270L(3); item 18, proposed subsection 212M(3).

76 Schedule 2 to the Amendment Bill, item 5, proposed subsection 308-20(2) and 308-40(2) and (3); item 11, proposed subsection 1272C(2) and 1272G(2) and (3).

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

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

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

1.100 With respect to the reversal of the evidential burden of proof, the explanatory materials state in relation to each that the details of the relevant matters are peculiarly within the knowledge of the defendant and such matters would be significantly more difficult for the prosecution to disprove than for the defendant to establish,⁸⁰ without giving any explanation of why this would be the case. It is not apparent that all the circumstances identified as an exception to the offence are peculiarly within the knowledge of the defendant. The circumstances identified in paragraphs [1.95] to [1.96] would not appear to be peculiarly within the knowledge of the defendant, as, for example, whether the disclosure was for the purposes of the registry regime, in accordance with a person's official functions, or where a person was directed by the Registrar, would appear to be a matter the prosecution could readily ascertain. Furthermore, the explanatory memorandum does not explain why it would be significantly more difficult and costly for the prosecution to disprove the matters than for the defendant to establish.

1.101 The committee notes its scrutiny concerns regarding the reversal of the evidential burden of proof. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

80 Explanatory memorandum, p. 66.

Competition and Consumer Amendment (Prevention of Exploitation of Indigenous Cultural Expressions) Bill 2019

Purpose	This bill seeks to amend the <i>Competition and Consumer Act 2010</i> to make it an offence to supply or offer commercial goods to a consumer that include Indigenous cultural expression unless it is supplied by, or in accordance with a transparent arrangement with an Indigenous artist or relevant Indigenous community
Sponsor	Senator Sarah Hanson-Young
Introduced	Senate on 12 February 2019

Reversal of evidential burden of proof⁸¹

1.102 A number of provisions in the bill seek to reverse the evidential burden of proof in relation to a person trading, supplying or offering to supply a good to a person that includes Indigenous cultural expressions.

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

1.104 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. In these instances, the explanatory memorandum provides no such justification.

1.105 The committee notes its scrutiny concerns regarding the reversal of the evidential burden of proof. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

81 Proposed subsections 50A(4) and (6), and 50AB(5). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

Strict liability offences⁸²

1.106 The bill seeks to insert proposed section 50AB into the *Competition and Consumer Act 2010*. Proposed subsection 50AB(1) makes it an offence to supply, or offer to supply, a good to a person that includes an Indigenous cultural expression or to create, provide or rely on a document for the purposes of subsection 50A(3) that the person knows is false. Proposed subsection 50AB(6) makes the offence in subsection 50AB(1) one of strict liability. The explanatory memorandum provides no justification as to why it is proposed to make the offence one of strict liability.

1.107 In a criminal law offence the proof of fault is usually a basic requirement. However, offences of strict liability remove the fault (mental) element that would otherwise apply. 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, Infringement Notices and Enforcement Powers*.

1.108 The committee notes its scrutiny concerns regarding the application of strict liability. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

82 Proposed subsection 50AB(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

Purpose	This bill seeks to introduce an exclusion orders scheme to delay Australians of counter-terrorism interest from re-entering Australia
Portfolio	Home Affairs
Introduced	House of Representatives on 21 February 2019

Trespass on personal rights and liberties

Broad discretionary power⁸³

1.109 The bill provides that the minister may make a temporary exclusion order (an exclusion order), which would exclude an Australian citizen from returning to Australia, if the minister suspects on reasonable grounds that making the exclusion order would substantially assist in:

- preventing a terrorist attack;
- preventing training being provided to, received from or participated in with a listed terrorist organisation;
- preventing the provision of support for, or the facilitation of, a terrorist attack; or
- preventing the provision of support or resources to an organisation that would help the organisation engage in a terrorist act.⁸⁴

1.110 The minister may also make an exclusion order if the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security for reasons related to politically motivated violence.

1.111 An exclusion order could be made in relation to an Australian citizen who is at least 14 years of age and located outside of Australia. Once issued, an exclusion order would prevent the person from entering Australia for up to two years,⁸⁵ with it an offence punishable by up to two years imprisonment to enter Australia, or help a person to enter, if an exclusion order is in force.⁸⁶ However, the bill also provides

83 Various provisions. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

84 Clause 10.

85 Paragraph 10(4)(c).

86 Clauses 8 and 9.

that if a person applies for a 'return permit' the minister must grant a permit permitting the person to enter Australia, but in doing so, the minister may impose certain monitoring conditions as specified in the permit.⁸⁷

1.112 The statement of compatibility explains that there is a need to reform Australia's approach to managing individuals who may represent a threat to public safety as the number of Australians travelling to join terrorist organisations overseas has significantly increased and the 'collapse of the Islamic State's territorial control complicates the threat environment as more Australians participating in or supporting the conflict, leave the conflict zone and seek to return home'.⁸⁸ It also states that the purpose of the bill is not necessarily to prevent Australian citizens from returning to Australia but to 'control the return of individuals who may pose a threat to Australia' by delaying their return and enabling the minister to impose conditions on individuals once they have returned to Australia.⁸⁹

1.113 The committee has significant scrutiny concerns regarding the power of the minister to exclude Australian citizens from entering Australia, noting that the issuing of an exclusion order severely limits the citizenship rights of Australians to freely enter their country of nationality and could potentially leave an Australian citizen stranded in a conflict zone. There are also significant scrutiny concerns in subjecting persons to strict monitoring conditions without any requirement that the person needs to have been convicted of, let alone charged with, any offence.

Temporary exclusion orders

1.114 The threshold by which an exclusion order may be made is one of ministerial suspicion on reasonable grounds. The statement of compatibility notes that this 'incorporates an objective test which precludes the arbitrary exercise of many statutory powers'⁹⁰. However the committee notes that the decision to issue an exclusion order is based on whether the minister 'suspects' rather than that the minister 'believes' that making the order would assist in preventing certain terrorist related acts. The committee notes that the High Court has previously noted there is a different standard between a reasonable suspicion and a reasonable belief and 'the facts which can reasonably ground a suspicion may be quite insufficient to ground a belief'.⁹¹ The explanatory materials do not provide any justification for imposing this lower threshold on which an exclusion order may be made.

1.115 In addition, the committee notes that while the bill states that these are 'temporary' exclusion orders, there is no limit in the bill about the number of

87 Clause 12.

88 Statement of compatibility, p 16.

89 Statement of compatibility, p 16.

90 Statement of compatibility, p 21.

91 *George v Rockett* [1990] 170 CLR 104, at 115.

exclusion orders that may be issued in relation to a person. Subclause 10(5) of the bill makes it clear that the minister is not prevented from making another exclusion order once an initial exclusion order has expired and there is no limit regarding the number of times this may be done. While the explanatory memorandum states that the minister may issue a further exclusion order 'if new or further information comes to light which warrants making a temporary exclusion order',⁹² the committee notes that there are no such restrictions on the face of the bill. The committee notes that it may be unlikely that the minister would come to a different conclusion regarding whether a person should be subject to a new exclusion order after an initial one has expired. As a result, the committee is concerned that these measures could amount, in practice, to the permanent exclusion of an Australian citizen if the person is unwilling or unable to make an application for a return permit.

Return permits

1.116 Clause 12 of the bill provides that if an exclusion order is in force in relation to a person, the minister must provide a return permit to the person on application (or where the person is being deported by another country to Australia). The minister also has the discretion to give a permit where an exclusion order is in place if the minister considers it is appropriate to do so. In granting a return permit, the minister has the discretion to impose a number of pre-entry conditions, such as preventing the person from entering Australia for up to 12 months and specifying the date and manner of the person's arrival. The minister may also impose a number of post-entry conditions, including that while in Australia the person is required to notify a specified person or body of:

- their place of residence, employment and education (and of any changes within 24 hours of the change occurring);
- any contact with specified persons;
- any intention to travel to another State or Territory or to leave Australia;
- any access, or intention to access, 'specified forms of telecommunications or other technology in Australia' (and to provide sufficient information to the specified person or body to enable the specific telecommunications service, account or device to be identified).

1.117 Conditions may also be imposed stating that a person may be required to surrender their Australian travel document and is not permitted to apply for or obtain another travel document. Failure to comply with a condition of a return permit (including notifying specified persons within 24 hours of any change occurring) would constitute an offence punishable by up to two years imprisonment.⁹³

92 Explanatory memorandum, p 8.

93 Clause 14.

1.118 The minister may impose one or more of the listed pre or post entry conditions if he or she is 'satisfied' that the imposition of the conditions are reasonably necessary, and reasonably appropriate and adapted for the purpose of preventing certain acts. The committee notes that this provides the minister with a very broad discretionary power to impose conditions as it is based only on the opinion of the minister. In addition, under subclause 12(8) of the bill the minister is not required to justify imposing each individual condition; it is only necessary to be satisfied that the conditions imposed as a whole are reasonably necessary, appropriate and adapted.⁹⁴ The committee notes that there would be limited scope for a person to seek judicial review of the decision to impose conditions given the breadth of the discretionary power.

1.119 The committee expects that the inclusion of such a broad discretionary power, that has the potential to unduly trespass on personal rights and liberties, would be thoroughly justified in the explanatory materials. In this instance, the explanatory materials give limited information as to why it is necessary to enable the minister to impose potentially onerous conditions on Australian citizens subject to return permits. The statement of compatibility states:

The conditions specified under a return permit will assist law enforcement and security agencies to monitor the whereabouts, activities and associations of a person, by requiring the person to provide timely notification to authorities and enable them to intervene early to respond to a threat to public safety.⁹⁵

1.120 The committee considers that the ministerial restrictions that can be imposed on a person subject to a return permit could be characterised as similar, in some respects, to a control order. The committee has previously raised serious concerns about the impact of control orders on an individual's personal liberty as a control order may be issued by a court without any criminal conviction (or without even a charge being laid).⁹⁶ In this instance, the order would be issued by the minister exercising a broad personal discretionary power rather than a court. While the committee notes that the restrictions on a return permit may be less restrictive than a control order (particularly as it does not allow for the detention of a person), the conditions may nevertheless be onerous. In particular, the committee notes that the conditions would allow for the monitoring of all internet or phone activity by a person, who the person associates with and where they live, work or are educated.

1.121 The committee also has scrutiny concerns that an exclusion order may be made in relation to children aged between 14 and 17, and as such a return permit,

94 Explanatory memorandum, p. 10.

95 Statement of compatibility, p 16.

96 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, pp. 13-16 and *Alert Digest No. 7 of 2016* and *Report No. 8 of 2016*.

with all of the associated conditions (including pre-entry conditions that mean the child may be unable to enter Australia for up to 12 months), can also be imposed on a child under 18 years of age.⁹⁷ While the committee notes that subclauses 10(3) and 12(4) require the minister to consider the best interests of a person aged 14 to 17 years as a primary consideration, this is offset by the requirement that the minister makes the protection of the community the paramount consideration.

Merits review

1.122 The bill also contains no avenue for merits review of decisions by the minister to either issue an exclusion order or impose conditions on a return permit. As such, only judicial review would be available. Yet, the committee has outlined above the limitations of judicial review in providing an adequate review mechanism. Although the decision to impose an exclusion order or apply conditions to a return permit to prevent certain terrorist acts must be based on reasonable grounds, the courts are unlikely to be able to supervise such matters closely given the courts have generally acknowledged their limitations in evaluating national security considerations.

1.123 Given the potential impact on personal rights and liberties in making an exclusion order or imposing conditions on a return permit, the committee considers that it may be appropriate for the bill to be amended to allow for merits review of decisions by the minister by a tribunal with appropriate national security expertise.

1.124 In addition, given the serious potential consequences and breadth of power contained in the bill, the committee considers it may be appropriate to increase parliamentary oversight over such measures. This could include a requirement to report to the Parliament on the operation of the bill and include a sunset provision similar to those applying to other counter-terrorism measures, such as control orders and preventative detention orders (which sunset one to three years after they are made or extended).⁹⁸

1.125 The committee notes its scrutiny concerns regarding the broad discretionary powers granted to the minister to exclude Australian citizens from Australia and to impose monitoring conditions on persons not convicted of any offence. The committee considers that the bill, as currently drafted, has the potential to significantly and unduly trespass on personal rights and liberties.

97 In contrast, the committee notes that under section 104.28 of the *Criminal Code Act 1995*, a control order can only be made in relation to a person between 14 and 17 years of age for a period of 3 months.

98 See subsections 104.32(1) and (2) (control orders); subsections 105.53(1) and (2) (preventative detention orders); and subsection 119.2(6) (declared area provisions) of the *Criminal Code Act 1995* and subsections 3UK(1), (2) and (3) of the *Crimes Act 1914* (stop, search and seizure powers) and section 34ZZ of the *Australian Security Intelligence Organisation Act 1979* (ASIO's special powers relating to terrorism offences).

1.126 The committee notes, at a minimum, that consideration should be given to providing for some form of merits review of the minister's broad discretionary powers, and to increase parliamentary oversight of the measures, such as requiring a sunset provision.

1.127 The committee considers that the explanatory materials do not adequately address the committee's scrutiny concerns and draws this matter to the attention of the Senate.

Procedural fairness⁹⁹

1.128 Clause 17 of the bill provides that the minister is not required to observe any requirements of procedural fairness in exercising his or her powers under this bill. The committee notes that the right to procedural fairness has two basic rules. It requires that decision-makers are not biased and do not appear to be biased, and requires that a person who may be adversely affected by a decision is given an adequate opportunity to put their case before the decision is made. The committee considers that the right to procedural fairness is a fundamental common law right and it expects that any limitation on this right be comprehensively justified in the explanatory memorandum.

1.129 In justifying clause 17 the statement of compatibility states:

Procedural fairness requirements, specifically enabling the potential subject of [an exclusion order] to respond to allegations against them, can frustrate the policy intention of this Bill by providing advance notice that they are being considered for [an exclusion order] and may be practically difficult to implement in circumstances where that individual is overseas, potentially in conflict zones.¹⁰⁰

1.130 The committee does not consider this explanation adequately justifies the decision to remove in its entirety the right to procedural fairness. The committee notes that while judicial review will be available, judicial review is undertaken after a decision has already been made and focuses on whether a legal error has been made. This does not provide the person who may be subject to an exclusion order with the opportunity to address whether the issuing of an exclusion order is appropriate or correct any mistakes of fact. This is combined with a lack of merits review (as discussed above at paragraph [1.122]) and as a result severely limits a person's avenue for review of a decision under this bill. In addition the committee notes that it may be difficult or prohibitive for a person subject to an exclusion order

99 Clause 17. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

100 Statement of compatibility, p. 24.

to initiate the judicial review process in circumstances where the person is located outside of Australia and may not have access to the necessary services.

1.131 The committee also notes that the courts have consistently interpreted procedural fairness obligations flexibly based on specific circumstances and the statutory context. If it could, in the circumstances of a particular case, be demonstrated that no hearing could be afforded without undue prejudice to national security, then the rules of natural justice may require no more than a consideration of the extent to which it is possible to give notice to the affected person and how much (if any) detail of the reasons for the proposed decision should be disclosed.¹⁰¹ The explanatory materials do not address why this level of flexibility would not adequately deal with situations where it would be impractical or inappropriate to grant a reasonable opportunity to be heard.

1.132 The restriction on procedural fairness would also apply to decisions by the minister to revoke an exclusion order or to vary or revoke a return permit. The decision to vary or revoke a return permit could be made while the subject of the permit was in Australia. The justification in the explanatory materials does not address why procedural fairness in these circumstances would not be appropriate.

1.133 Finally, the committee notes that the explanatory materials only address the natural justice aspect of procedural fairness and does not provide any explanation why the other limb of the right to procedural fairness, the bias rule, has also been excluded.

1.134 The committee notes its scrutiny concerns regarding removing the obligation of the minister to observe the requirements of procedural fairness. The committee considers that, given the serious scrutiny concerns raised and the potential consequences for an individual in excluding them from Australia or imposing monitoring conditions on their return, it may be appropriate to amend the bill to remove clause 17 to ensure the minister is required to observe the usual requirements of procedural fairness when exercising powers under the bill.

1.135 The committee considers that the explanatory materials do not adequately address the committee's scrutiny concerns and draws this matter to the attention of the Senate.

Reverse evidential burden of proof¹⁰²

1.136 Clauses 9 and 15 of the bill provide that it is an offence for a person to permit the use of a vessel or aircraft to convey another person to Australia if the

101 For example, see *Leghaei v Director General of Security* [2005] FCA 1576; [2007] FCAFC 27.

102 Clauses 9, 15 and 16. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

person knows the other person is subject to an exclusion order or is entering Australia in violation of a condition of their return permit. Both clauses provide an offence-specific defence which provide that the offence does not apply if the second person is being deported or extradited to Australia. In addition, clause 16 provides that it is an offence for a person to give information or produce documents as required by their return permit knowing that the information or document is false or misleading. The clause provides an offence-specific defence if the information or document is not false or misleading in a material particular. In each instance, the offence-specific defences mean the evidential burden of proof is reversed.¹⁰³

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

1.138 While in these instances the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in clauses 9, 15 and 16 have not been addressed in the explanatory materials.

1.139 The committee notes its scrutiny concerns regarding the proposed reversal of the evidential burden of proof. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

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

Counter-Terrorism Legislation Amendment Bill 2019

Purpose	This bill seeks to amend the <i>Crimes Act 1914</i> and the <i>Criminal Code Act 1995</i> to: <ul style="list-style-type: none"> introduce new restrictions on the existing arrangements for bail and parole; and amend the operation of the continuing detention order scheme
Portfolio	Attorney-General
Introduced	House of Representatives on 20 February 2019

Right to liberty – presumption against bail and parole¹⁰⁴

1.140 Section 15AA of the *Crimes Act 1914* (Crimes Act) currently provides for a presumption against bail for persons charged with, or convicted of, certain Commonwealth terrorism offences unless exceptional circumstances exist.

1.141 Schedule 1 to the bill proposes to significantly expand the presumption against bail in section 15AA in relation to several categories of people:

- items 1 and 3 seeks to extend the presumption against bail to any person under any Commonwealth law, who has been charged with, or convicted of, a terrorism offence listed in subsection 15AA(2). In practice this appears to mean that a person may be charged or convicted under any Commonwealth law (including non-terrorist related offences) and will have a presumption against bail as long as they have at some point (including in the past) been charged with, or convicted of, terrorism related offences;
- item 4 seeks to extend the presumption against bail to persons charged with, or convicted of, an offence of associating with a terrorist organisation;¹⁰⁵ and
- item 7 seeks to insert proposed subsection 15AA(2A) to expand the presumption against bail to people who are subject to a control order as well as to people who have made statements or carried out activities supporting, or advocating support for, terrorist acts.¹⁰⁶

1.142 The presumption against bail applies both to those convicted of, but also those charged with, certain offences. The committee notes that it is a cornerstone of

104 Schedule 1. The committee draws senators' attention to this Schedule pursuant to Senate Standing Order 24(1)(a)(i).

105 An offence under section 102.8 of the *Criminal Code Act 1995*.

106 Within the meaning of Part 5.3 of the *Criminal Code Act 1995*.

the criminal justice system that a person is presumed innocent until proven guilty, and presumptions against bail (which deny a person their liberty before they have been convicted) test this presumption. As such the committee expects that a clear justification be given in the explanatory materials for imposing a presumption against bail and expects that the explanatory materials would include any evidence that courts are currently failing to consider the serious nature of an offence in determining whether to grant bail.

1.143 In relation to the expansion of the presumption against bail to persons for any offences against a law of the Commonwealth where a person has previously been charged with, or convicted of, terrorist offences, the statement of compatibility notes that a person 'who is convicted of a terrorism offence has been proven, to the satisfaction of the law, to be a danger to the Australian community'.¹⁰⁷ However the explanatory materials do not address why or how a person who has been previously been *charged* with but not necessarily convicted of a terrorism offence is a risk to the community. The committee notes a person may have been charged with a terrorism offence but charges were later dropped or they may have been acquitted, yet a presumption against bail would exist in relation to them if later charged with *any* Commonwealth offence. The committee notes that this places the onus of proof onto the accused to prove that exceptional circumstances exist. It is not clear to the committee that providing evidence that a past charge for terrorism was dropped will be sufficient in all circumstances to satisfy the high bar of proving exceptional circumstances exist to override a presumption.

1.144 The committee also notes that no justification has been provided for expanding the presumption against bail to apply to the offence of associating with terrorist organisations. The committee notes that when the offence of associating with a terrorist organisation was introduced,¹⁰⁸ the Senate Legal and Constitutional Affairs Committee raised concerns about the breadth of the offence and recommended that provisions relating to the presumption against bail not apply to this offence.¹⁰⁹ Government amendments were introduced in 2004 in line with this recommendation. It is of concern that the presumption against bail is proposed to be extended to an offence of association with a terrorist organisation in circumstances where previously the Senate has rejected this extension and where no justification is provided in the explanatory memorandum as to why it is necessary to do so.

1.145 In relation to expanding the presumption against bail to persons subject to control orders, the explanatory memorandum states:

107 Statement of compatibility, p. 10.

108 In the Anti-Terrorism (No. 2) Bill 2004.

109 See Senate Legal and Constitutional Legislation Committee, *Provisions of the Anti-terrorism Bill (No. 2) 2004*, August 2004, recommendation 4, p. 34.

A person who is subject to a control order has been identified by law enforcement as posing a risk to society. It is therefore appropriate for the court to be able to take this into account in deciding whether a person, accused of a separate offence, should be released on bail – a decision that focuses on the risk posed by that person to the community.¹¹⁰

1.146 In relation to expanding the presumption against bail to persons who have made statements or carried out activities supporting, or advocating support for, terrorist acts, the explanatory memorandum states:

A person who supports or advocates support for terrorist acts poses a risk to society and it is appropriate that a bail authority can take this factor into account when considering bail, regardless of the current offence that the person is charged with or convicted of.¹¹¹

1.147 The committee has previously raised serious scrutiny concerns about the impact of control orders on an individual's personal liberty as a control order may be issued by a court without any criminal conviction (or without even a charge being laid).¹¹² The committee notes that no evidence has been provided in the explanatory materials to address whether courts are currently not taking into account the risks posed by persons subject to control orders or persons who support or advocate support for terrorist acts when exercising their discretion to grant bail. Rather, the only evidence pointed to is that the amendments are in response to one incident in 2017 committed by a person on parole (not bail) for Victorian offences in circumstances where he had previously been acquitted of a terrorism offence.¹¹³

1.148 The committee also notes that what could constitute someone 'who supports or advocates support for terrorist acts' may be very broad and may, for example, include statements on social media made a number of years ago. As a result, a person may be subject to a permanent presumption against bail for any offence against a Commonwealth law regardless of whether they have continued to support or advocate support for terrorist acts. The committee also notes that the explanatory materials do not indicate whether there are any other comparable instances in other Commonwealth or state legislation where such a broad presumption against bail exists.

1.149 In addition, the committee notes that proposed section 19ALB seeks to introduce a presumption against parole for persons who have been convicted of a terrorism offence, persons subject to control orders and persons who have made statements, or carried out activities supporting, or advocating support for, terrorist

110 Explanatory memorandum, p 25.

111 Explanatory memorandum, p 25.

112 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 6 of 2018*, pp. 13-16 and *Alert Digest No. 7 of 2016* and *Report No. 8 of 2016*.

113 Explanatory memorandum, p. 5.

acts. The committee considers that this provision similarly limits a person's right to liberty as outlined above in relation to the presumption against bail. The explanatory memorandum states that:

The presumption against parole gives primacy to the first purpose of parole stated in section 19AKA of the Crimes Act – the protection of the community – by placing the onus on the terrorism-related offender to demonstrate exceptional circumstances exist to justify their release on parole.¹¹⁴

1.150 The committee notes that the expansion of the presumption against parole includes persons who may not have been convicted for terrorism related offences. The explanatory materials do not adequately justify why the presumption against parole should apply to persons who have not (or may never have been) convicted of a terrorism offence. In addition, the committee notes that while the presumption against parole will not technically be of retrospective effect, in practice there may be people who have been convicted of offences prior to the commencement of this bill who will now be subject to a presumption against parole that did not exist when they were initially sentenced.

1.151 The committee notes its significant scrutiny concerns regarding the expansion of the presumption against bail and parole. The committee considers that these measures, as currently drafted, have the potential to significantly and unduly trespass on personal rights and liberties. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

Trespass on rights and liberties – continuing detention orders¹¹⁵

1.152 Schedule 2 of this bill seeks to make amendments to the continuing detention order scheme (the scheme). The scheme allows for the continued detention of those judged to be high risk terrorist offenders who are serving custodial sentences, after those sentences have been served. Schedule 2 of the bill seeks to extend the scheme to persons serving concurrent or cumulative sentences for an eligible terrorism offence and another offence.

1.153 Currently the Australian Federal Police (AFP) Minister can apply for a continuing detention order not more than 12 months before the end of a person's sentence for an eligible terrorism offence, at the end of which a person would be required to be released into the community. The AFP Minister is currently unable to

114 Explanatory memorandum, p 27.

115 Schedule 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

apply for such an order where an eligible offender has also been sentenced for a further non-terrorist related offence that expires after the eligible sentence.

1.154 The committee commented on the introduction of the scheme by the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 in *Alert Digest 10 of 2016*.¹¹⁶ The committee raised significant scrutiny concerns in relation to the scheme. The committee noted that while proceedings for a continuing detention order are characterised by the usual procedures and rules for civil proceedings, the application of these indicia of judicial process did not change the fact that the scheme for the continuing detention of terrorist offenders fundamentally inverts basic assumptions of the criminal justice system. The committee noted that 'offenders' in our system of law may only be punished on the basis of offences which have been proved beyond reasonable doubt, whereas the scheme proposed to detain persons, who have committed offences and have completed their sentences for those offences, on the basis that there is a high degree of probability they will commit similar offences in the future.

1.155 The committee also noted that it may be accepted that in some circumstances detention may be justified on the basis of protecting the public from unacceptable risks without undermining the presumption of innocence, or the principle that persons should not be imprisoned for crimes they may commit. For example, detention on the basis of risks associated with the spread of communicable disease does not threaten these basic assumptions of our criminal law. However, where the trigger for the assessment of whether or not a person poses an unacceptable risk to the community is prior conviction for an offence, the protective purpose cannot be clearly separated from the functioning of the criminal justice system. If the continuing detention is triggered by past offending, then it can plausibly be characterised as retrospectively imposing additional punishment for that offence. If the continuing detention is not conceptualised as imposing additional punishment, then the fact that it is triggered by past offending on the basis of predicted future offending necessarily compromises the principles identified above.

1.156 The committee reiterates these significant scrutiny concerns in relation to the proposed expansion of the continuing detention order scheme. The committee does not consider that the explanatory materials have adequately justified the need for this expansion. While the explanatory materials extensively discuss the operation of the scheme in general, the explanatory materials do not indicate why it is necessary to expand the scheme beyond stating that 'expanding the eligibility criteria for the [scheme] is consistent with the overall objective of the [scheme]'.¹¹⁷

116 See Senate Standing Committee for the Scrutiny of Bills, *Report 10 of 2016*, pp. 631-643 and *Alert Digest No. 7 of 2016*.

117 Explanatory memorandum, p. 3.

1.157 The committee notes its significant scrutiny concerns regarding the expansion of the continuing detention of high risk terrorist offenders after their sentences for imprisonment have been served. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

Procedural fairness¹¹⁸

1.158 Schedule 2 of the bill also seeks to make amendments to how information regarding an application for a continuing detention order will be provided to an offender. Currently, section 105A.5 of the *Criminal Code Act 1995* provides that a terrorist offender who is the subject of a continuing detention order application must be given a 'complete copy' of that application. It provides that sensitive information can be withheld from the offender for a period of time but ultimately requires all information in the application to be given to the offender. Item 16 of the bill seeks to repeal the current requirement to provide a complete copy of the application with a requirement that the offender only receive a complete copy subject to any court orders or protective orders made relating to the protection of information in the application. These protective orders can limit the information provided to the offender, including by providing a summary or statement of facts instead of the complete information.

1.159 Paragraph 105A.5(3)(aa) currently provides that an application for a continuing detention order must include materials and a statement of facts that would reasonably be regarded as supporting a finding that the order should not be made (exculpatory information). Item 14 of Schedule 2 would also allow the AFP Minister to redact or withhold information, material or facts, provided in relation to exculpatory material, which is likely to be protected by public interest immunity.

1.160 In *Alert Digest 7 of 2016*, the committee raised concerns that the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 did not allow for the provision of sufficient information to offenders prior to the hearing of an application for a continuing detention order. In response to the committee's concerns, the Attorney-General advised that amendments would be made to ensure that an offender would be provided with a complete copy of the application within a reasonable period before the preliminary hearing.¹¹⁹

1.161 In relation to the current requirement to provide a complete copy of an application to an offender, the explanatory memorandum states that this 'places unique obligations on the AFP Minister that go beyond the ordinary information

118 Schedule 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

119 Senate Standing Committee for the Scrutiny of Bills, *Report 10 of 2016*, p. 640.

disclosure requirements that operate in other contexts, such as in criminal prosecutions'.¹²⁰ This justification is also used in relation to the ability to remove information on the basis of public interest immunity.¹²¹ The committee has generally not accepted the existence of similar provisions in other Acts to be an adequate justification and notes that the proposed amendments may limit an offender's right to a fair hearing as the offender may not have access to all of the relevant information on which the application for the order is made. These concerns are heightened given the serious consequences for the right to liberty that may flow from the making of a continuing detention order.

1.162 The committee notes its scrutiny concerns regarding the limitation of an offender's right to receive a complete copy of the application for a continuing detention order. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

120 Explanatory memorandum, p. 36.

121 Explanatory memorandum, p. 38.

Foreign Influence Transparency Scheme Amendment Bill 2019

Purpose	<p>This bill seeks to amend the <i>Foreign Influence Transparency Scheme Act 2018</i> to:</p> <ul style="list-style-type: none"> • amend the definition of 'communication activity'; • provide that a person's belief about the intention of a foreign principal may be taken into account when determining the purpose of an activity; • provide that the reporting obligations under the foreign influence transparency scheme apply to persons that are liable to register, but who have not yet actually registered; • extend the obligation to make disclosures in registrable communications activity to any person who undertakes a registrable communication activity on behalf of a foreign principal; and • make technical amendments to certain offence provisions
Portfolio	Attorney-General
Introduced	House of Representatives on 20 February 2019

Expansion of the foreign influence transparency scheme¹²²

1.163 Under the *Foreign Influence Transparency Scheme Act 2018* (FITS Act), a person who is registered under the scheme in relation to a foreign principal, and who undertakes a registrable communications activity on behalf of that principal, must make a disclosure about the foreign principal in accordance with prescribed rules.¹²³ A person undertakes a 'communications activity' if the person 'communicates or distributes information or material to the public or a section of the public'.¹²⁴

1.164 Additionally, the FITS Act provides that a person is liable to register under the scheme in relation to a foreign principal if they undertake an activity on behalf of that foreign principal that is registrable.¹²⁵

122 Schedule 1, items 2, 19 and 20. The committee draws senators' attention to these provisions pursuant to Senate Standing Orders 24(1)(a)(i), (ii) and (iv).

123 See section 38 of the FITS Act.

124 Subsection 13(1) of the FITS Act.

125 Section 18 of the FITS Act. Sections 20, 21, 22 and 23 of that Act provide for the activities that are registrable in relation to particular foreign principals.

1.165 The bill seeks to expand the scope of the scheme under the FITS Act. In particular, it seeks to:

- expand the definition of 'communications activity' to include where a person 'produces information or material for the purpose of the information or material being communicated to the public or a section of the public';¹²⁶ and
- extend the obligation to make disclosures about a foreign principal in accordance with prescribed rules to any person who undertakes a registrable communications activity on behalf of a foreign principal.¹²⁷ This would include persons who are not registered under the scheme.

1.166 The committee raised a number of concerns in relation to the FITS Act when the Foreign Influence Transparency Scheme Bill 2017 (FITS bill) was before the Parliament.¹²⁸ In particular, the committee was concerned that the FITS bill sought to create a number of offences relating to registration obligations. The committee noted that the offences would be punishable by potentially significant terms of imprisonment, and could apply to a broad range of persons.

1.167 The committee was also concerned that the FITS bill sought to:

- create a number of offence-specific defences (which would reverse the evidential burden of proof);
- leave a number of significant matters (for example, how a person is to make a disclosure in relation to a communications activity) to delegated legislation;
- create an offence relating to record-keeping, to which absolute liability would apply; and
- confer a broad power of delegation on the secretary.

1.168 By expanding scope of the scheme under the FITS Act, the amendments proposed by the present bill may lead to a broader range of persons being captured by the scheme. This may lead to a greater number of persons being subject to significant custodial penalties, as well as to a greater number of persons being affected by the issues identified at [1.167] above.

126 Item 2. 'Produce' does not appear to be defined in the bill or the broader FITS Act.

127 Items 19 and 20.

128 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, pp. 63-74; and *Scrutiny Digest 3 of 2018*, pp. 207-233.

1.169 The committee notes its scrutiny concerns regarding the expansion of the operation of the scheme provided by the *Foreign Influence Transparency Scheme Act 2018*. In this regard, the committee reiterates its concerns raised in relation to the Foreign Influence Transparency Scheme Bill 2017,¹²⁹ and draws this matter to the attention of the Senate.

129 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, pp. 63-74; and *Scrutiny Digest 3 of 2018*, pp. 207-233.

Murray-Darling Basin Commission of Inquiry Bill 2019

Purpose	This bill seeks to establish a commission of inquiry into the Murray-Darling Basin
Sponsor	Senator Sarah Hanson-Young
Introduced	Senate on 13 February 2019

Coercive powers¹³⁰

1.170 The bill seeks to establish a commission of inquiry into the Murray-Darling Basin. Clause 11 provides that the *Royal Commissions Act 1902* (the RC Act) and regulations made under that Act, apply in relation to the Commission as if the Commission were a Royal Commission.

1.171 The committee notes that the RC Act contains some significant coercive powers, including powers to summon witnesses and take evidence.¹³¹ Under the RC Act, hearings may be open or closed, or restricted to certain classes of persons.¹³² It is an offence to fail to give evidence or produce documents to a Royal Commission if a person is summonsed to appear or produce documents.¹³³ When giving evidence, which may be on oath or affirmation, a person is not excused from answering a question on the grounds of self-incrimination, or other grounds of confidentiality.¹³⁴ These broad powers granted to a Royal Commission are not ordinarily available to other agencies of government. In addition, subsection 6O(2) of the RC Act purports to confer on certain Royal Commissioners the same powers as a judge sitting in court to determine certain forms of contempt. Subsection 6B(1) also provides that the President or Chair of a Royal Commission may issue a warrant for the arrest of a person, if the person has been served with a summons to attend the Commission as a witness but fails to attend the Commission in answer to the summons.

1.172 The committee generally expects that where a bill seeks to confer coercive powers on bodies, the explanatory materials should address the principles set out in chapters 7–10 of the *Guide to Framing Commonwealth Offences*.¹³⁵ In this instance,

130 Clause 11. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(1).

131 *Royal Commissions Act 1902*, section 2.

132 *Royal Commissions Act 1902*, section 6D(5).

133 *Royal Commissions Act 1902*, sections 3 and 6B.

134 *Royal Commissions Act 1902*, section 6A.

135 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, Chapters 7–10.

the explanatory materials do not address the need for the proposed Commission to have each of these significant coercive powers.

1.173 The committee notes its scrutiny concerns regarding the conferral of significant coercive powers on the proposed commission of inquiry into the Murray-Darling Basin. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

National Consumer Credit Protection Amendment (Small Amount Credit Contract and Consumer Lease Reforms) Bill 2019

Purpose	This bill seeks to amend the <i>National Consumer Credit Protection Act 2009</i> and the National Credit Code in relation to small amount credit contracts and consumer leases
Sponsor	Ms Madeleine King MP
Introduced	House of Representatives on 18 February 2019

1.174 This bill is identical to bills that were introduced in the House of Representatives on 26 February 2018¹³⁶ and 22 October 2018.¹³⁷ The committee raised a number of scrutiny concerns in relation to the earlier bills in [Scrutiny Digest 3 of 2018](#)¹³⁸ and reiterates those comments in relation to this bill.

136 The bill was initially introduced by the former Member for Perth, Mr Tim Hammond MP, and was removed from the House of Representatives *Notice Paper* in accordance with standing order 42. See explanatory memorandum, p. 2.

137 The identical bill was then introduced by the Member for Indi, Ms Cathy McGowan MP.

138 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2018*, at pp. 24-27.

National Sports Tribunal Bill 2019

Purpose	This bill seeks to establish the National Sports Tribunal as a specialist independent tribunal to provide a system of sports dispute resolution
Portfolio	Regional Services, Sport, Local Government and Decentralisation
Introduced	House of Representatives on 14 February 2019

Reversal of evidential burden of proof¹³⁹

1.175 Clause 69 of the bill provides that it will be an offence if an entrusted person discloses or otherwise uses protected information, carrying a maximum penalty of two years imprisonment. Subclauses 69(2) – (4) provide a number of exceptions (offence-specific defences) to this offence. This includes where the disclosure was:

- for the purposes of the Act, rules, the performance of the functions or powers of the CEO or in a person's capacity as an entrusted person;
- consented to by the person to whom the information relates; or
- information that has already been lawfully made available to the public.

1.176 In these instances the evidential burden of proof would be reversed by the use of offence-specific defences.¹⁴⁰ At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

1.177 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. In this instance, the explanatory memorandum states:

The placement of the evidential burden on the defendant can be justified in this instance as the facts as to whether they disclosed information in

139 Clause 69. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

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

accordance with an applicable exception to the prohibition are likely to be peculiarly within the knowledge of the defendant.¹⁴¹

1.178 The committee notes that the *Guide to Framing Commonwealth Offences*¹⁴² provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

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

1.179 In this case, it is not apparent from the explanatory materials that matters such as whether the disclosure was for the purpose of the Act or in accordance with obligations under yet-to-be-made rules, or whether the information has already been lawfully made public, are matters that would be peculiarly within the defendant's knowledge, and that it would be difficult or costly for the prosecution to establish the matters.

1.180 The committee notes its scrutiny concerns regarding the reversal of the evidential burden of proof. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

Immunity from liability¹⁴³

1.181 Clause 70 provides that members of the proposed National Sports Tribunal (the Tribunal) will have the same protection and immunity as a Justice of the High Court. Barristers, solicitors and witnesses will also have the same protections when appearing before the Tribunal as they would have before the High Court. Witnesses would also be subject to the same liabilities as witnesses in proceedings in the High Court.

1.182 The committee expects that if a bill seeks to provide immunity from liability, particularly where such immunity could affect individual rights, this should be soundly justified. The committee notes that the Tribunal is not exercising judicial powers, rather the powers are arbitral in nature. The explanatory memorandum provides no explanation as to why it is necessary that the Tribunal have the same

141 Explanatory memorandum, p 41.

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

143 Clauses 70 and 71. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

level of protection or immunity as proceedings in the High Court, nor does it provide any similar examples from other Commonwealth legislation.¹⁴⁴

1.183 In addition, clause 71 provides that no civil liability will arise from any action taken by the CEO, a person assisting the CEO or a person engaged as a consultant or expert witness, in good faith in the performance, or purported performance, of any function of the CEO or in the exercise, or purported exercise, of any power of the CEO. This therefore removes any common law right to bring an action to enforce legal rights (for example, a claim of 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 a lack of an honest or genuine attempt to undertake the task and that it will involve a personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances. In this instance, the explanatory memorandum provides no explanation for this provision, merely restating the terms of the provision.¹⁴⁵

1.184 The committee notes its scrutiny concerns regarding the broad immunities from liability. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

144 Explanatory memorandum, p. 41.

145 Explanatory memorandum, p. 42.

Native Title Legislation Amendment Bill 2019

Purpose	This bill seeks to amend the <i>Native Title Act 1993</i> and the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> to modify the native title claims resolution, agreement-making, Indigenous decision making and dispute resolution processes
Portfolio	Attorney-General
Introduced	House of Representatives on 21 February 2019

Retrospective application¹⁴⁶

1.185 Schedule 9 of the bill deals with the validation of section 31 agreements made on or before the commencement of the Act. Section 31 agreements are agreements made under section 31 of the *Native Title Act 1993*, which deals with the normal negotiation procedure for agreements made under that Act.

1.186 In *McGlade v Native Title Registrar*¹⁴⁷ (*McGlade*), the Full Federal Court held that it was necessary for all members of a 'registered native title claimant' to sign an Indigenous Land Use Agreement for that agreement to be validly registered by the Native Title Registrar. The statement of compatibility to this bill states:

The reasoning in *McGlade* could similarly affect section 31 agreements, which primarily relate to the grant of mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights.¹⁴⁸

1.187 In *Scrutiny Digest 3 of 2017*, the committee commented on the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, which contained amendments to retrospectively validate Indigenous Land Use Agreements made prior to the decision in *McGlade*. The committee stated that the fact that a court overturns previous authority is not, in itself, a sufficient basis for Parliament to retrospectively reinstate the earlier understanding of the previous legal position. In saying this, the committee recognised that when precedent is overturned this itself necessarily has a retrospective effect and may overturn legitimate expectations about what the law requires. Nevertheless, the committee considered that where Parliament acts to validate decisions which are put at risk, in circumstances where previous authority has been overturned, it is necessary for Parliament to consider:

146 Schedule 9, item 2. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

147 [2017] FCAFC 10.

148 Statement of compatibility, p 14.

- whether affected persons will suffer any detriment by reason of the retrospective changes to the law and, if so, whether this would lead to unfairness; and
- that too frequent resort to retrospective legislation may work to sap confidence that the Parliament is respecting basic norms associated with the rule of law.

1.188 The committee considers that the same considerations would apply in relation to the proposed retrospective validations of section 31 agreements by this bill.

1.189 In justifying the retrospective application of the amendments, the statement of compatibility states:

Section 31 agreements underpin commercial operations and provide benefits for affected native title groups. The uncertainty created by their potential invalidity poses a significant risk to both those commercial operations and the benefits flowing to native title groups. Potential challenges to section 31 agreements may also divert resources away from finalising native title claims to litigate affected agreements and re-negotiate agreements that are already significantly resource-intensive.¹⁴⁹

1.190 The committee notes this explanation and acknowledges the statement that the majority of stakeholders favoured the retrospective validation of agreements. However, no detail is provided about whether there will be any detrimental effect to any involved parties. The committee reiterates that it has long-standing scrutiny concerns 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 (not retrospectively). The committee has particular concerns if the legislation will, or might, have a detrimental effect on individuals. The committee considers that the explanatory materials have not adequately addressed this issue.

1.191 The committee notes its scrutiny concerns regarding the retrospective validation of certain native title agreements. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

149 Statement of compatibility, p 14.

Office for Regional Australia Bill 2019

Purpose	This bill seeks to establish the Office for Regional Australia as a statutory agency
Sponsor	Ms Cathy McGowan
Introduced	House of Representatives on 18 February 2019

Reversal of evidential burden of proof¹⁵⁰

1.192 The bill seeks to establish the Office for Regional Australia (the Office), which would have the power to hold inquiries about certain matters relating to regional Australia. Subclause 15(2) makes it an offence for a person, summoned to appear at a hearing held by the Office, to intentionally fail to attend that hearing as required or from day to day. Subclause 15(3) provides an exception (offence specific defence) to this offence, stating that the offence does not apply if the person is excused, or released from further attendance, by the Chair of the Office. The offence carries a maximum penalty of imprisonment for 6 months.

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

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

1.195 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversal of the evidential burden of proof in subclause 15(3) has not been addressed in the explanatory materials.

1.196 The committee notes its scrutiny concerns regarding the reversal of the evidential burden of proof. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

150 Clause 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Immunity from civil liability¹⁵¹

1.197 Subclause 48(1) provides no civil proceedings may be brought against a member of the Office, or a person acting under the direction or authority of such a member, in relation to loss, damage or injury of any kind suffered by a person in the course of the proper performance or exercise of the Office's functions or powers. Subclause 48(2) provides a similar immunity to a person giving certain information in good faith to the Office in the course of the proper performance or exercise of the Office's functions or powers.

1.198 Both subclauses remove any common law right by a person to bring an action if that action relates to a loss, damage or injury of any kind suffered by the person. The immunity provided in subclause 48(1) is only excluded if the loss, damage or injury suffered did not arise in the course of the proper performance of the Office's functions or powers. The immunity in subclause 48(2) does not apply if the information mentioned in that subclause was not given in good faith in the course of the proper performance of the Office's functions or powers. The committee notes that in the context of judicial review, bad faith is said to imply a lack of an honest or genuine attempt to undertake the task and that it will involve personal attack on the honesty of the decision-maker. As such the courts have taken the position that bad faith can only be shown in very limited circumstances.

1.199 The committee expects that if a bill seeks to provide immunity from civil liability, particularly where such immunity could affect individual rights, this should be soundly justified. In this instance, the explanatory memorandum provides no explanation for clause 48, merely restating the terms of that clause.

1.200 The committee notes its scrutiny concerns regarding the immunity from civil liability. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

151 Clause 48. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

Telecommunications and Other Legislation Amendment (Miscellaneous Amendments) Bill 2019

Purpose	<p>This bill seeks to amend the timeframe in which the Independent National Security Legislation Monitor must review the operation of the <i>Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018</i></p> <p>The bill also seeks to amend the <i>Telecommunications Act 1997</i> to ensure Commonwealth and State anti-corruption bodies and Investigative Commissions may use the industry assistance measures</p>
Portfolio	Home Affairs
Introduced	Senate on 13 February 2019

Broad discretionary powers

Significant matters in delegated legislation

Privacy (Schedule 1)¹⁵²

1.201 The bill seeks to make amendments to the *Telecommunications Act 1997* to include additional agencies in the definition of 'interception agency' in section 317B of that Act.¹⁵³ The Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018 (the 2018 bill) introduced the legislative framework by which a communications provider may be requested or required to undertake a range of actions in order to assist law enforcement, intelligence and other security agencies. The agencies included in this bill were included in the initial version of the 2018 bill but were removed following the recommendations of the Parliamentary Joint Committee on Intelligence and Security.¹⁵⁴

152 Schedule 2. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (ii).

153 The additional agencies are the Australian Commission for Law Enforcement Integrity the Independent Commission Against Corruption of New South Wales, the New South Wales Crime Commission, the Law Enforcement Conduct Commission of New South Wales, the Independent Broad-based Anti-corruption Commission of Victoria, the Crime and Corruption Commission of Queensland, the Independent Commissioner Against Corruption (SA) and the Corruption and Crime Commission (WA).

154 See Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018*, p ix.

1.202 In [Scrutiny Digest 12 of 2018](#) and [Scrutiny Digest 14 of 2018](#) the committee made extensive comments about the 2018 bill.¹⁵⁵ The committee noted that Schedule 1 of the 2018 bill provided broad discretionary powers to interception agencies to issue a technical assistance request, a technical assistance notice, or a technical capability notice and noted that many of the details in relation to how these powers operated could be provided for in delegated legislation. The committee also raised significant scrutiny concerns regarding the bill's enhancement of the ability of agencies to utilise information gained under existing warrant or authorisation regimes.

1.203 As this bill is expanding the list of interception agencies empowered to require assistance from telecommunications providers, the committee reiterates the scrutiny concerns it raised in relation to the 2018 bill.

1.204 The committee notes its scrutiny concerns regarding the expansion of the definition of 'interception agency'. In this regard, the committee reiterates its concerns in relation to the Telecommunications and Other Legislation Amendment (Assistance and Access) Bill 2018,¹⁵⁶ and draws this matter to the attention of the Senate.

155 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, pp. 12-49; and *Scrutiny Digest 14 of 2018*, pp. 23 - 82.

156 See Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, pp. 12-49; and *Scrutiny Digest 14 of 2018*, pp. 23 - 82.

Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019

Purpose	<p>This bill seeks to amend the <i>Corporations Act 2001</i>, <i>A New Tax System (Goods and Services Tax) Act 1999</i> and the <i>Taxation Administration Act 1953</i> to:</p> <ul style="list-style-type: none"> • introduce new phoenixing offences; • prohibit directors from improperly backdating resignations or ceasing to be director when this could leave a company with no director; and • allow the Commissioner to collect estimates of anticipated GST liabilities and make company directors personally liable for their company's GST liabilities in certain circumstances
Portfolio	Treasury
Introduced	House of Representatives on 13 February 2018

Strict liability offences¹⁵⁷

1.205 The bill proposes to insert subsection 203AA(1) into the *Corporations Act 2001*, which specifies when the resignation of a company director is to take effect. Proposed subsection 203AA(6) sets out that if a court fixes the resignation day, the applicant must, within a set timeframe, lodge with ASIC a copy of the order made by the court. Proposed subsection 203AA(7) makes it an offence of strict liability, subject to 120 penalty units, not to comply with this requirement.

1.206 Under general principles of the criminal law, fault is required to be proved before a person can be found guilty of a criminal offence (ensuring 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 intended this, or was reckless or negligent. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum to provide a clear justification for any imposition of strict

¹⁵⁷ Schedule 2, item 2, proposed subsection 203AA(6) and items 5 and 6,. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.¹⁵⁸

1.207 The committee notes that the *Guide to Framing Commonwealth Offences* also 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.¹⁵⁹ In this instance, the bill proposes applying strict liability to offences that are subject to up to 120 penalty units.

1.208 The explanatory memorandum explains that the application of strict liability is consistent with the offence for failing to notify ASIC of the resignation on time under subsection 205B(5) (as amended by the Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018).¹⁶⁰ However, it does not explain why the application of strict liability is necessary or appropriate in these circumstances, and does not explain why strict liability applies to an offence subject to 120 penalty units (double the recommended limit in the *Guide to Framing Commonwealth Offences*).

1.209 The committee notes its scrutiny concerns regarding the application of strict liability. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

158 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 22–25.

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

160 Explanatory memorandum p. 45.

Treasury Laws Amendment (Consumer Data Right) Bill 2019

Purpose	This bill seeks to amend the <i>Competition and Consumer Act 2010</i> and the <i>Australian Information Commissioner Act 2010</i> to introduce a consumer data right for consumers to authorise data sharing and use
Portfolio	Treasury
Introduced	House of Representatives on 13 February 2019

No invalidity clauses¹⁶¹

1.210 The bill seeks to introduce a consumer data right (CDR) to provide individuals and businesses with a right to access specified data in relation to them held by businesses and to authorise secure access to this data by accredited third parties. The bill establishes a framework to enable the CDR to be applied to various sectors of the economy over time allowing the minister, by legislative instrument, to designate a sector of the Australian economy as a sector to which the CDR applies.¹⁶² Key elements of the CDR framework will be governed by consumer data rules. The consumer data rules are to be made by the Australian Competition and Consumer Commission (the ACCC), and apply to a range of elements of the CDR system, including disclosure, use, storage and security of CDR data.¹⁶³

1.211 Generally, the committee's view is that significant matters, such as key elements of what sectors the CDR applies to and how the framework will be governed, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.212 In this instance the explanatory memorandum explains that as it is intended to apply the CDR to sectors of the economy over time it is necessary to have a designation process that is flexible¹⁶⁴ and it is important to be able to tailor the

161 Schedule 1, item 1, proposed section 56AH and subsections 56BQ(2), 56BS(4) and 56DA(5). The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iii), (iv) and (v).

162 Explanatory memorandum, p. 11.

163 Explanatory memorandum p. 30. See also Schedule 1, item 1, proposed section 56BB.

164 Explanatory memorandum, p. 11.

consumer data rules to different sectors.¹⁶⁵ The committee acknowledges the need for flexibility in a context that will be changing and adapting as the CDR is rolled out across various sectors. Proposed sections 56AD, 56AE, 56AF and 56G impose extensive consultation obligations and matters that must be considered before a sector is designated by the minister. In addition, before the ACCC makes consumer data rules, emergency rules or recognises an external dispute resolution scheme, proposed subsections 56BQ(1), 56BS(1) and 56DA(4) set out consultation requirements that apply. The committee considers that these consultation obligations, and requirements to consider specified matters before instruments are made, assist in justifying including what amounts to significant matters in delegated legislation.

1.213 However, proposed section 56AH and subsections 56BQ(2), 56BS(4) and 56DA(5), provide that a failure to comply with these requirements before an instrument is made does not invalidate that instrument. A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause.

1.214 The committee's view is that where the Parliament delegates its legislative power in relation to significant regulatory schemes it is appropriate that specific consultation requirements (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these requirements is a condition of the validity of the legislative instrument. Providing that the instrument remains valid and enforceable even if there is a failure to comply with these requirements undermines including such obligations in the legislation.

1.215 As for the procedural requirements (aside from consultation) that apply to the minister making a designation instrument, the committee notes that those requirements are intended to provide assurance that certain matters will be taken into account by the minister when making the instrument. The committee's view is that the inclusion of the no-invalidity clause undermines that assurance.

1.216 The explanatory memorandum provides no justification for why a failure to comply with the procedural requirements that apply to the making of a designation instrument should not lead to invalidity. This is also the case in relation to the consultation requirements imposed by proposed section 56DA.

1.217 In relation to proposed section 56BQ, the explanatory memorandum states:

A failure to consult will not invalidate the consumer data rules. However, the consumer data rules are disallowable instruments so the Parliament has the capacity to intervene and disallow the rules.¹⁶⁶

165 Explanatory memorandum p. 31.

166 Explanatory memorandum, pp. 39, 40.

1.218 The committee notes this explanation provided in relation to proposed section 56BQ. However, the committee's view is that the instrument being disallowable is not a sufficient justification on its own for providing that a failure to comply with consultation requirements should not lead to invalidity. Although the instrument may be disallowable, it may be difficult for parliamentarians to know whether appropriate consultation has taken place within the timeframe for disallowance.

1.219 In relation to proposed section 56BS, which allows the ACCC to make consumer data rules in an emergency, the committee notes that a failure to consult with the Information Commissioner as required by that section will mean that those rules will cease to be in force 6 months after the day those rules are made. However, the consultation required by proposed section 56BS is limited to the Information Commissioner and the explanatory memorandum does not make clear why a failure to engage in that limited consultation should not lead to immediate invalidity.

1.220 The committee notes its scrutiny concerns regarding provisions that provide that a failure to comply with consultation and other procedural requirements does not invalidate an instrument. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

Delegated legislation not subject to disallowance¹⁶⁷

Significant matters in non-statutory standards¹⁶⁸

1.221 Proposed subsection 56DA(1) provides that the ACCC may recognise an external dispute resolution scheme, by notifiable instrument, for the resolution of certain disputes relating to the CDR scheme. The explanatory memorandum states that the rules may require data holders, accredited data recipients or designated gateways to have internal or external dispute resolution processes, and that there are a variety of dispute resolution schemes available which may be chosen when appropriate, for example existing ombudsman schemes or independent commercial arbitrators.

1.222 The committee notes that 'notifiable' instruments, unlike 'legislative' instruments, are not subject to tabling, parliamentary disallowance or scrutiny by the Senate Standing Committee on Regulations and Ordinances, nor are they subject to sunseting after 10 years.¹⁶⁹ Notifiable instruments are designed to cover

167 Schedule 1, item 1, proposed section 56DA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

168 Schedule 1, item 1, proposed section 56FA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

169 See *Legislation Act 2003*.

instruments that are not legislative in character.¹⁷⁰ The *Legislation Act 2003* sets out the general test as to when an instrument will be legislative in character; namely if a provision of the instrument determines the law or alters the content of the law and has the direct or indirect effect of affecting a privilege or interest, imposing an obligation or creating a right or varying or removing an obligation or right.¹⁷¹ It is not clear that determining the type of external dispute resolution scheme that will be available in relation to disputes regarding consumer data rights would not be legislative in character. Given the impact on parliamentary scrutiny by not making such an instrument a legislative instrument, the committee would expect the explanatory materials to provide a justification for the use of a notifiable instrument. However, there is no detail in the explanatory memorandum as to why it is proposed that the recognition of the scheme, and the specification of conditions relating to that recognition, is to be done by notifiable instrument, rather than legislative instrument.

1.223 In addition, proposed section 56FA provides that the Data Standards Chair may make data standards, which could relate to the disclosure and the collection, use and deletion of CDR data. Proposed subsection 56FA(4) provides that the data standards are not legislative instruments, and as such will not be subject to any parliamentary control or scrutiny.

1.224 A data standard does not appear to have any legal effect unless the data standard is specified to be a binding data standard. A data standard is a binding standard if the consumer data rules require that the standard specify that it is binding. Proposed sections 56FD and 56FE give legal effect to binding data standards by doing the following:

- proposed section 56FD creates a contract between certain persons in which those persons agree to comply with those standards; and
- proposed section 56FE allows, in relation to a failure by a person to meet an obligation to comply with a binding data standard, that an application may be made to the Federal Court by the ACCC or a person aggrieved by the failure.

1.225 The explanatory memorandum states that:

The data standards will be largely in the nature of specifications for how information technology solutions must be implemented to ensure safe, efficient, convenient and interoperable systems to share data. They will only describe how the CDR must be implemented in accordance with the

170 Office of Parliamentary Counsel, *Drafting Direction No. 3.8: Subordinate legislation*, p. 19.

171 Subsection 8(4) of the *Legislation Act 2003*.

rules which will set out the substantive rights and obligations of participants.¹⁷²

1.226 Although the explanatory memorandum explains that the data standards will cover largely technical matters, the committee notes that the power to make such standards is not so limited: the data standards could potentially cover a number of significant matters relating to the management of CDR data. The committee expects that a sound justification be provided for the use of non-disallowable standards, especially where those standards may potentially be addressing significant matters and could affect large classes of persons (as the standards may do as a result of proposed sections 56FD and 56FE). The explanatory memorandum provides no such justification.

1.227 The committee notes its scrutiny concerns regarding provisions enabling potentially significant matters to be included in instruments or standards that would not be subject to any parliamentary control or scrutiny. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

Reversal of evidential burden of proof¹⁷³

1.228 Proposed subsection 56BN(1) makes it an offence for a person to engage in conduct that the person knows is misleading or deceptive and the conduct has the effect of making another person believe a person is a CDR consumer or is acting in accordance with a valid request or consent from a CDR consumer.¹⁷⁴ Proposed subsection 56BN(2) provides an exception (offence-specific defence) to this offence, stating that the offence does not apply if the conduct is not misleading or deceptive in a material particular. This reverses the evidential burden of proof in relation to this defence.¹⁷⁵ The offence, if committed by a body corporate, attracts a maximum fine

172 Explanatory memorandum, p. 47.

173 Schedule 1, item 1, proposed subsection 56BN(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

174 Proposed subsection 56BO(1) provides a civil penalty for the same conduct and proposed subsection 56BO(2) provides the same defence as proposed subsection 56BN(2). The maximum amount of the civil penalty is \$500,000; see Schedule 1, item 20, proposed paragraph 76(1B)(ab).

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

of \$10,000,000.¹⁷⁶ Otherwise, the offence carries a maximum penalty of 5 years imprisonment, a fine of not more than \$500,000, or both.¹⁷⁷

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

1.230 The committee notes that the *Guide to Framing Commonwealth Offences*¹⁷⁸ provides that a matter should only be included in an offence-specific defence (as opposed to being specified as an element of the offence), where:

- it is peculiarly within the knowledge of the defendant; and
- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.¹⁷⁹

1.231 The explanatory memorandum states that the reversal of the burden is appropriate as the relevant evidence 'would most likely be known to the person' charged with the offence.¹⁸⁰ However, the explanatory memorandum does not explain how the defendant knowing that the conduct is not misleading or deceptive is a matter that is peculiarly within the knowledge of the defendant, nor that it would be significantly more difficult or costly for the prosecution to disprove, as set out in the *Guide to Framing Commonwealth Offences*.

1.232 The committee notes its scrutiny concerns regarding the reversal of the evidential burden of proof. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

176 Schedule 1, item 1, proposed subsection 56BN(3).

177 Schedule 1, item 1, proposed subsection 56BN(5).

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

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

180 Explanatory memorandum, p. 67.

Incorporation of external materials existing from time to time¹⁸¹

1.233 Proposed section 56GB provides that certain delegated legislation may make provision in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or writing as in force or existing from time to time.

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

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

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

1.236 The issue of access to material incorporated into the law by reference to external documents such as Australian and international standards has been an issue of ongoing concern to Australian parliamentary scrutiny committees. Most recently, the Joint Standing Committee on Delegated Legislation of the Western Australian Parliament has published a detailed report on this issue.¹⁸² This report comprehensively outlines the significant scrutiny concerns associated with the incorporation of material by reference, particularly where the incorporated material is not freely available.

1.237 The explanatory memorandum provides a justification as to why materials need to be incorporated from time to time, stating that it is important to have the flexibility to refer to or incorporate instruments or standards that may exist from time to time, noting that a consumer data rule may seek to refer to a particular standard of the International Organisation for Standardisation (IOS) as part of the

181 Schedule 1, item 1, proposed section 56GB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

182 Joint Standing Committee on Delegated Legislation, Parliament of Western Australia, *Access to Australian Standards Adopted in Delegated Legislation*, June 2016.

criteria to obtain accreditation.¹⁸³ However, the committee notes that IOS standards are often only available for purchase and may not be made freely available. The explanatory memorandum does not explain whether any incorporated standards would be made freely available to persons interested in the terms of the law.

1.238 The committee notes its scrutiny concerns regarding the accessibility of incorporated material. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

Broad discretionary power¹⁸⁴

Significant matters in delegated legislation¹⁸⁵

1.239 Proposed section 56GD provides that the ACCC may, by written notice, exempt a person from all or specified provisions of the new consumer data right scheme in proposed Part IVD, any regulations made for the purposes of that Part and the consumer data rules.

1.240 Similarly, proposed section 56GE allows for regulations to be made that would exempt a person, or a class of persons, from the same provisions, or declare that those provisions apply as if specified provisions were omitted, modified or varied.

1.241 Proposed section 56GD would therefore appear to grant a broad discretionary power for the ACCC to exempt persons from the operation of primary and delegated legislation. The explanatory memorandum states that the provisions provide the ACCC with the ability to ensure the new system 'does not operate in unintended or perverse ways in exceptional circumstances' and provides the ACCC with scope to ensure the system 'works in the best way possible for consumers and the designated industry'.¹⁸⁶

1.242 However, the committee notes that while there is a right for a person to apply to the Administrative Appeals Tribunal (AAT)¹⁸⁷ for review of a decision exempting, or refusing to exempt the person, there is no criteria in the bill setting out the basis on which the ACCC is to exercise this power or any conditions that must be satisfied before such powers are exercised.

183 Explanatory memorandum, p. 77.

184 Schedule 1, item 1, proposed section 56GD. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

185 Schedule 1, item 1, proposed section 56GE. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv) and (v).

186 Explanatory memorandum, p. 78.

187 Schedule 1, item 1, proposed subsection 56GD(5).

1.243 Additionally, proposed section 56GE grants a broad power for the regulations to exempt persons and classes of persons from the operation of primary and delegated legislation and to modify how that legislation is to operate. The committee has concerns about such provisions as provisions of this kind may have the effect of limiting parliamentary scrutiny (as delegated legislation is not subject to the same level of scrutiny as primary legislation). Consequently, the committee expects a sound justification for the use of such provisions. In this instance, the explanatory memorandum states that:

The regulations will only seek to declare that provisions of the [consumer data right] are modified or varied in exceptional circumstances. However, it is important to include the ability to modify the [consumer data right] regime via regulation in order to ensure that the system is dynamic and able to adapt quickly to a changing economy and the varied sectors within it. Regulations are disallowable instruments and the Parliament will have appropriate oversight over any regulation made under the [consumer data right] regime.¹⁸⁸

1.244 The committee notes that the explanatory memorandum does not explain what it meant by 'exceptional circumstances' that would justify making such regulations, nor is such a limitation included on the face of the bill. Nor does the bill set out any matters that the minister must be satisfied of before regulations are made and there is no explanation of why it is necessary to enable the regulations to exempt specified individuals, noting that an exemption provided in the regulations is not subject to the same review rights before the AAT as an exemption made by the ACCC.

1.245 Additionally, where Parliament delegates its legislative power in relation to significant legislative schemes (including the power to modify and exempt entities from the operation of primary legislation), the committee considers that it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) apply to the making of legislative instruments, and that compliance with those obligations is a condition of the relevant instruments' validity. The committee notes that no such requirements are currently set out in the bill in relation to proposed section 56GE.

1.246 The committee notes its scrutiny concerns regarding broad provisions that would allow the ACCC and the regulations to provide exemptions from the operation of the new consumer data right scheme. The committee considers that the explanatory materials do not adequately address these concerns and draws this matter to the attention of the Senate.

1.247 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

188 Explanatory memorandum, p. 78.

Treatment Benefits (Special Access) Bill 2019

Purpose	This bill seeks to provide eligible members of the Civilian Surgical and Medical teams who worked in South Vietnam under the Southeast Asia Treaty Organization aid program access to medical treatment through a DVA Gold Card
Portfolio	Veterans' Affairs
Introduced	House of Representatives on 14 February 2019

Broad delegation of administration powers¹⁸⁹

1.248 Division 2 of the bill deals with administrative and enforcement matters related to the treatment for eligible Australian citizens, including the delegation of the Repatriation Commission's functions and powers. Clause 42 provides that the Commission may, by resolution, delegate any of its functions or powers under the provision of this Act, or under the rules or any other legislative instrument made under this Act to:

- (a) a member of the Commission; or
- (b) a staff member assisting the Commission; or
- (c) a consultant to, or an employee of a consultant to, the Commission; or
- (d) a person who is engaged under the *Public Service Act 1999* and performing duties in the Department.

1.249 As such, the bill would allow the Commission to delegate all of its significant functions or powers to any level staff member or public servant or to persons outside the public service who have been engaged as consultants. The committee has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

189 Clause 42. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

1.250 In this instance, the explanatory memorandum states that clause 42 largely replicates subsection 32(1) of the *Australian Participants in British Nuclear Tests and British Commonwealth Occupation Force (Treatment) Act 2006*, and results in administrative efficiencies and the proper performance of its functions and the exercise of its powers.¹⁹⁰

1.251 The committee has generally not accepted a desire for administrative flexibility as a sufficient justification for allowing a broad delegation of administrative powers to officials at any level.

1.252 The explanatory memorandum further states that the appropriate qualifications or attributes which may be required and any limitations on the exercise of that power will be determined as part of the normal duties of the position held by that person and may be imposed administratively on the exercise of the delegation held by the person.¹⁹¹

1.253 Although the committee notes that some guidance is provided in the explanatory memorandum around when the Commission's functions and powers would be delegated, it remains concerned that the proposed limitations on the exercise of the power is not reflected on the face of the bill.

1.254 The committee notes its scrutiny concerns regarding allowing the Repatriation Commission to delegate any of its functions and powers to a broad range of persons. The committee considers that the explanatory materials do not adequately address these concerns and draws this to the attention of senators and leaves it to the Senate.

190 Explanatory memorandum p. 18.

191 Explanatory memorandum p. 19.

Bills with no committee comment

1.255 The committee has no comment in relation to the following bills which were introduced into the Parliament between 12 – 21 February 2019:

- Aged Care Amendment (Movement of Provisionally Allocated Places) Bill 2019;
- Appropriation (Parliamentary Departments) Bill (No. 2) 2018-2019;
- Australian Veterans' Recognition (Putting Veterans and their Families First) Bill 2019;
- Banking Amendment (Rural Finance Reform) Bill 2019;
- Banking System Reform (Separation of Banks) Bill 2019;
- Broadcasting Services Amendment (Audio Description) Bill 2019;
- Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019;
- Civil Aviation Amendment Bill 2019;
- Corporations (Fees) Amendment (Registries Modernisation) Bill 2019;
- Customs Amendment (Immediate Destruction of Illicit Tobacco) Bill 2019;
- Customs Tariff Amendment (Craft Beer) Bill 2019;
- Environment Legislation Amendment (Protecting Dugongs and Turtles) Bill 2019;
- Excise Tariff Amendment (Supporting Craft Brewers) Bill 2019;
- Export Control Amendment (Banning Cotton Exports to Ensure Water Security) Bill 2019;
- Export Control Amendment (Banning Cotton Exports to Ensure Water Security) Bill 2019 [No. 2];
- Export Finance and Insurance Corporation Amendment (Support for Infrastructure Financing) Bill 2019;
- Fair Work Amendment (Right to Request Casual Conversion) Bill 2019;
- Galille Basin (Coal Prohibition) Bill 2019;
- Governor-General Amendment (Salary) Bill 2019;
- Higher Education Legislation Amendment (Voluntary Student Services and Amenities Fee) Bill 2019;
- Human Services Amendment (Photographic Identification and Fraud Prevention) Bill 2019;

- Military Rehabilitation and Compensation Amendment (Single Treatment Pathway) Bill 2019;
- Ministers of State (Checks for Security Purposes) Bill 2019;
- National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019;
- National Disability Insurance Scheme Amendment (Worker Screening Database) Bill 2019;
- National Health Amendment (Pharmaceutical Benefits) Bill 2019;
- National Sports Tribunal (Consequential Amendment and Transitional Provisions) Bill 2019;
- Refugee Protection Bill 2019;
- Reserve Bank Amendment (Australian Reconstruction and Development Board) Bill 2019;
- Social Security (Administration) Amendment (Income Management and Cashless Welfare) Bill 2019;
- Social Services Legislation Amendment (Overseas Welfare Recipients Integrity Program) Bill 2019;
- Telecommunications Legislation Amendment (Unsolicited Communications) Bill 2019;
- Treasury Laws Amendment (2019 Measures No. 1) Bill 2019;
- Treasury Laws Amendment (2019 Petroleum Resource Rent Tax Reforms No. 1) Bill 2019;
- Treasury Laws Amendment (Increasing the Instant Asset Write-Off for Small Business Entities) Bill 2019;
- Treasury Laws Amendment (Mutual Reforms) Bill 2019;
- Treasury Laws Amendment (Putting Member's Interests First) Bill 2019;
- Treatment Benefits (Special Access) (Consequential Amendment and Transitional Provisions) Bill 2019;
- Water Amendment (Indigenous Authority Member) Bill 2019;
- Water Amendment (Purchase Limit Repeal) Bill 2019; and
- Wine Australia Amendment (Trade with United Kingdom) Bill 2019.

Commentary on amendments and explanatory materials

Industrial Chemicals Bill 2017

[Digests 6 & 8/17]

1.256 On 14 February 2019 the Senate agreed to 23 Government amendments, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time. On 18 February 2019 the House of Representatives agreed to the Senate amendments and the bill was passed.

1.257 The committee notes that the amendments contain a strict liability offence, subject to up to 60 penalty units. As the imposition of strict liability undermines fundamental criminal law principles, the committee expects the explanatory memorandum would provide a clear justification for any imposition of strict liability. However, in this instance the supplementary explanatory memorandum does not explain why the inclusion of a strict liability offence is necessary or appropriate.

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

1.259 The committee has no comments on amendments made or explanatory material relating to the following bills:

- Home Affairs Legislation Amendment (Miscellaneous Measures) Bill 2018;¹⁹²
- Electoral Legislation Amendment (Modernisation and Other Measures) Bill 2018;¹⁹³
- Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017;¹⁹⁴

192 On 6 December 2018 the Senate agreed to two Independent (Senator Storer) and Australian Greens amendments. On 12 February 2019 the House of Representatives agreed to the Senate amendments with amendments. On 13 February 2019 the Senate agreed to the House of Representatives amendments to Senate amendment no. 2 and the bill was passed.

193 On 14 February 2019 the Senate agreed to 38 Government amendments, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time. On 18 February 2019 the House of Representatives agreed to the Senate amendments and the bill was passed.

194 On 14 February 2019 the Senate agreed to 70 Government amendments, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time. On 18 February 2019 the House of Representatives agreed to the Senate amendments and the bill was passed.

- Industrial Chemicals Charges (Customs) Bill 2017; Industrial Chemicals Charges (Excise) Bill 2017; and Industrial Chemicals Charges (General) Bill 2017;¹⁹⁵
- Social Services and Other Legislation Amendment (Supporting Retirement Incomes) Bill 2018;¹⁹⁶
- Treasury Laws Amendment (2018 Measures No. 5) Bill 2018;¹⁹⁷
- Treasury Laws Amendment (Improving Accountability and Member Outcomes in Superannuation Measures No. 1) Bill 2019;¹⁹⁸
- Treasury Laws Amendment (Making Sure Foreign Investors Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2019;¹⁹⁹
- Treasury Laws Amendment (Protecting Your Superannuation Package) Bill 2018;²⁰⁰ and
- Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018.²⁰¹

195 On 14 February 2019 the Senate agreed to one Government amendment to the bills, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled three supplementary explanatory memoranda and the bills were read a third time. On 18 February 2019 the requested amendments by the Senate were made by the House of Representatives and the bills were passed.

196 On 13 February 2019 the Minister for Families and Social Services (Mr Fletcher) presented a replacement explanatory memorandum and the bill was read a third time.

197 On 14 February 2019 the Senate agreed to two Government and two Opposition amendments, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time. On 18 February 2019 the House of Representatives agreed to the Senate amendments and the bill was passed.

198 On 14 February 2019 the Senate agreed to 17 Government, two Opposition and three Australian Greens amendments, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled two supplementary explanatory memoranda and the bills were read a third time.

199 On 14 February 2019 the House of Representatives agreed to two Government amendments, the Minister for Energy (Mr Taylor) presented a supplementary explanatory memorandum and the bill was read a third time.

200 On 14 February 2019 the Senate agreed to 22 Australian Greens amendments, the Assistant Minister for Treasury and Finance (Senator Seselja) tabled a supplementary explanatory memorandum and the bill was read a third time. On 18 February 2019 the House of Representatives agreed to the Senate amendments and the bill was passed.

201 On 14 February 2019 the Senate agreed to 35 Opposition amendments and the bill was read a third time. On 18 February 2019 the House of Representatives agreed to the Senate amendments and the bill was passed.

Chapter 2

Commentary on ministerial responses

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

Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018

<p>Purpose</p>	<p>This bill seeks to amend the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (the Act) to:</p> <ul style="list-style-type: none"> • amend the classification structure for Aboriginal and Torres Strait Islander (ATSI) corporations; • make a number of changes in relation to corporations recognised under the Act regarding: <ul style="list-style-type: none"> - making of constitutions; - review of financial reports; - subsidiaries and other entities; - meeting and reporting obligations; - members and membership; - voluntary deregistration; - investigation and enforcement; - publication of notices; - independent directors; - qualified privilege for auditors; - resolutions; - unanimous requests for special administration; - conflicting duties under state or territory legislation; and • make technical amendments
<p>Portfolio</p>	<p>Indigenous Affairs</p>
<p>Introduced</p>	<p>Senate on 5 December 2018</p>
<p>Bill status</p>	<p>Before the Senate</p>

Significant matters in delegated legislation¹

2.2 In [Scrutiny Digest 1 of 2019](#) the committee requested the minister's advice as to:

- why it is considered appropriate to leave to delegated legislation the revenue thresholds that would determine whether an Aboriginal and Torres Strait Islander corporation is of a particular size; and
- the nature of any consultation that it is envisaged would be undertaken prior to making regulations of that nature.

2.3 The committee also requested the minister's advice as to the appropriateness of amending the bill to include specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*), with compliance with those obligations a condition of the validity of regulations which specify revenue thresholds for Aboriginal and Torres Strait Islander corporations.²

Minister's response³

2.4 The minister advised:

Appropriateness of delegated legislation

I agree with the Committee that revenue thresholds are a significant element in the regulatory scheme of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

I also acknowledge that the Committee does not generally consider operational flexibility to be sufficient justification for leaving significant elements of a regulatory scheme to delegated legislation. However, in my view there is a sound justification for prescribing revenue thresholds in the regulations for the purpose of proposed new section 37-10.

As noted by the Committee, size classifications determine various regulatory requirements, including reporting obligations, for Aboriginal and Torres Strait Islander corporations (ATSI corporations) under the CATSI Act and regulations. It is essential that these regulatory requirements remain proportionate and appropriate to the different classes of corporations.

Inevitably, there will be changes in the economic and regulatory environment that will warrant changes to the classification thresholds. Doing so in the regulations allows the regulatory framework to be

1 Item 1, Schedule 1, proposed section 37-10. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

2 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, pp. 1-3.

3 The minister responded to the committee's comments in a letter dated 13 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

responsive to change, while retaining an appropriate level of Parliamentary oversight.

It is important to understand that the regulatory scheme under the CATSI Act does not operate in isolation from other regulatory schemes in the corporate sector. Like the CATSI Act, both the *Corporations Act 2001* (Corporations Act) and the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) provide for size thresholds to be prescribed in regulations. Both these Acts are closely connected to the CATSI Act, and potential changes to the thresholds under either Act are variables that may influence size thresholds under the CATSI Act.

Of particular note is that 30 per cent of ATSI corporations are registered, and subject to reporting obligations, under the ACNC Act. Significantly, the ACNC Act has its own size classifications, which are determined by revenue thresholds that can be altered in the regulations under that Act. Currently, these do not align with the CATSI Act and regulations. Consequently, ATSI corporations may be required to prepare and lodge different reports under the CATSI Act on the one hand, and the ACNC Act on the other.

One of the reasons for the proposed reforms is to align classifications and reporting so that ATSI corporations can lodge the same reports under the CATSI Act and ACNC Act. Section 205-25 of ACNC Act also provides for regulations to prescribe thresholds for size classification for organisations registered under that Act. In this context, it is highly desirable and appropriate to allow revenue thresholds to be changed in order to adapt to changes in the broader regulatory environment.

There is also a close alignment between the CATSI Act and the Corporations Act. First, the CATSI Act is largely modelled on the Corporations Act and, in many instances, applies the Corporations Act directly. Secondly, many ATSI corporations hold subsidiary companies registered under the Corporations Act. Section 45B of the Corporations Act provides for regulations to prescribe thresholds for size classifications of companies limited by guarantee. In this context, changes to classification and reporting requirements under the Corporations Act and regulations will be relevant to classifications and reporting under the CATSI Act. Again, potential changes in this context may warrant consideration of changes to the thresholds under the CATSI Act and justify the flexibility allowed for by regulations.

Consultations

Regulations are currently being drafted, including revenue thresholds, in anticipation of the Bill being enacted by Parliament. The proposed revenue thresholds have been determined following a thorough review of the current classifications and thresholds, which was undertaken by a leading national law firm, DLA Piper in 2017. That review included extensive consultations with the Indigenous corporate sector, followed by further consultations with the sector in August and September 2018. Additionally, the review included close engagement with other regulators in the wider

corporate sector, including the Australian Securities and Investment Commission and the Australian Charities and Not-for-profits Commission. I anticipate that any change to the regulations in the future will follow a similarly rigorous process of review and consultation.

I note in particular that the Office of the Registrar of Indigenous Corporations (ORIC) published a discussion paper in July 2018 and invited all CATSI corporations, individuals and stakeholders to attend public information sessions. ORIC also invited submissions through its website. The discussion paper outlined very clearly the proposed size thresholds and related reporting obligations. The 14 public information sessions discussed the proposed size thresholds at some length, and submissions commented on them.

Section 17 of the *Legislation Act 2003* (the Legislation Act) prescribes the consultation obligations of the rule-maker before making legislative instruments, which includes undertaking appropriate consultation. Paragraph 6(1)(a) of the Legislation Act defines the rule-maker, for an instrument made by the Governor-General, His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd), under enabling legislation, to be the Minister responsible for administering the provision of the enabling legislation under which the instrument is made. For the purposes of the proposed section 37-10 of the Bill, I would be the rule-maker.

I am satisfied that the anticipated new thresholds for the purpose of proposed new section 37-10 have been determined following a thorough review of the current thresholds. Further, I am satisfied there were extensive consultations with the Indigenous corporate sector during the course of the review. Following the completion of the review, there were further consultations with the sector in August and September 2018. I am satisfied that both the review and the extensive consultations in relation to thresholds were appropriate in the circumstances and complied with the requirements of section 17 of the Legislation Act.

Whether the same consultation process is appropriate for future proposed changes to the thresholds will depend on the circumstances in which those changes are being contemplated. In my view, it is not appropriate to prescribe specific consultations as a precondition to amending the revenue thresholds. Doing so will create a real risk that inappropriate and unnecessary consultations are undertaken, which are wasteful of valuable public resources, for the sole purpose of satisfying a prescribed statutory process.

Committee comment

2.5 The committee thanks the minister for this detailed response. The committee notes the minister's advice that prescribing revenue thresholds in regulations is necessary to ensure that the regulatory framework in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) is able to respond to

changes in the economic and regulatory environment, while retaining an appropriate level of parliamentary oversight.

2.6 In this regard, the committee notes the minister's advice that a substantial number of ATSI corporations are subject to obligations under the *Corporations Act 2001* (Corporations Act) and the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act). The committee notes the advice that the application of those obligations may be determined by revenue thresholds set out in regulations, and that those thresholds may not align with those in the CATSI Act and regulations.

2.7 The committee notes the necessity, in this instance, of specifying revenue thresholds relating to the size of Aboriginal and Torres Strait Islander (ATSI) corporations in regulations. However, the committee emphasises that, as a general rule, significant elements of a regulatory regime should be set out in primary legislation.

2.8 The committee further notes the minister's advice that regulations specifying revenue thresholds for ATSI corporations are currently being drafted (in anticipation of the bill being enacted). The committee notes the advice that these thresholds have been determined following a thorough review of current thresholds, which included multiple rounds of consultation with the Indigenous corporate sector and a series of public information sessions with CATSI corporations and other interested stakeholders. The committee also notes the advice that it is envisaged that future changes to the regulations will follow a similarly rigorous process of review and consultation.

2.9 Finally, the committee notes the minister's advice that whether the *same* consultation process is appropriate for future proposed changes to the revenue thresholds will depend on the circumstances in which the changes are being contemplated. In this respect, the committee notes the advice that it is not appropriate to prescribe specific consultations as a precondition to amending the revenue thresholds, as doing so will create a risk that inappropriate and unnecessary consultations are undertaken.

2.10 The committee acknowledges that it may not be appropriate to prescribe 'specific consultations' (for example, with specific entities) as a precondition to amending revenue thresholds. However, it remains unclear to the committee why it would not be possible to include at least some consultation obligations that must be satisfied before such amendments may be made; for example, requiring consultation with affected persons and entities (such as members of the Indigenous corporate sector and/or Indigenous community organisations).

2.11 In this regard, the committee notes that the *Legislation Act 2003* does not strictly require that consultation be undertaken before an instrument is made. Rather, it requires that a rule-maker be satisfied that any consultation he or she

thinks is appropriate is undertaken. Where a rule maker does not consider consultation appropriate, there is no requirement that consultation be undertaken.

2.12 The committee requests that the information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.13 The committee draws its scrutiny concerns to the attention of senators, and leaves to the Senate as a whole the appropriateness of not including any specific consultation obligations in relation to instruments setting out the revenue thresholds that determine whether an Aboriginal and Torres Strait Islander corporation is of a particular size (and therefore subject to certain regulatory obligations).

2.14 The committee also draws this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

Power for delegated legislation to amend primary legislation (Henry VIII clause)⁴

2.15 In [Scrutiny Digest 1 of 2019](#) the committee requested the minister's advice as to why it is considered necessary and appropriate to allow regulations to modify proposed section 66-5.⁵

Minister's response

2.16 The minister advised:

Proposed new section 66-5 is one of several amendments that reform the way replaceable rules operate in relation to ATSI corporations. If applicable, replaceable rules form part of the internal governance rules of an ATSI corporation. Replaceable rules apply by default unless modified or replaced in a corporation's constitution. However, if replaceable rules do apply, currently there is no requirement that they be included in the corporation's constitution.

Consultations during the Technical Review of the CATSI Act in 2017 revealed that many corporations were not aware that their internal governance rules might include replaceable rules because they stand outside their constitutions. This lack of visibility can be confusing to members and undermine good governance.

4 Schedule 1, item 33, proposed subsections 66-5(3) and (4). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

5 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, pp. 3-4.

Part 2 of the Bill reforms the operation of replaceable rules by requiring that, if they apply, they be included in a corporation's constitution. The central amendment is subsection 66-1(3), which requires that a corporation's constitution must include provisions that "modify or replace" each of the replaceable rules. Proposed section 66-5 supports subsection 66-1(3) by defining "modify" and "replace".

The CATSI Act is a special measure for the purpose of the Racial Discrimination Act 1975 and is intended to establish a flexible regulatory framework that benefits Aboriginal and Torres Strait Islander Australians. The CATSI Act envisages that the internal governance rules of ATSI corporations will be tailored to suit the unique cultural characteristics of different Indigenous communities across the country. It is vitally important that the Act's framework of replaceable rules does not operate in a way that frustrates the need for ATSI corporations to have internal governance rules that suit their members. To this end, subsection 66-5(3) is designed as a safeguard against the rigid application of subsections (1) and (2) contrary to the interests of ATSI corporations and their members. Allowing regulations to modify section 66-5 for this purpose is an effective solution that can be sufficiently responsive to needs as they emerge, while retaining an appropriate level of Parliamentary oversight.

Committee comment

2.17 The committee thanks the minister for this response. The committee notes the minister's advice that, as a special measure under the *Racial Discrimination Act 1975*, the CATSI Act envisages that the internal governance rules of ATSI corporations will be tailored to suit the unique characteristics of different Indigenous communities across Australia. The committee notes the advice that it is therefore vitally important that the framework of replaceable rules in the CATSI Act does not operate so as to frustrate the need for ATSI corporations to have internal governance arrangements that suit their members.

2.18 In this respect, the committee also notes the minister's advice that proposed subsection 66-5(3) is intended to operate as a safeguard against the potential rigid operation of sections 66-5(1) and (2)⁶ contrary to the interests of ATSI corporations and their members. The committee notes the advice that allowing regulations to modify proposed section 66-5 for this purpose is an effective solution to this issue, which can be sufficiently responsive to needs as they emerge, while retaining an appropriate level of parliamentary oversight.

2.19 The committee requests that the information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic

6 Proposed subsections 66-5(1) and (2) allow the constitution of an ATSI corporation to modify or replace a replaceable rule.

material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Immunity from liability⁷

2.21 In [Scrutiny Digest 1 of 2019](#) the committee requested the minister's advice as to why it is considered necessary and appropriate to confer immunity from liability (that is, a qualified privilege) on auditors and associated persons, in respect of things done in the course of their duties.⁸

Minister's response

2.22 The minister advised:

The CATSI Act creates, for auditors, a legal duty of disclosure of certain circumstances with the prospect of criminal sanctions for non-disclosure (section 339-90).

Under the general law, the defence of qualified privilege in proceedings for defamation is available if a statement is made in the performance of any legal duty to a person having a corresponding duty or interest to receive it. Consequently, the defence of qualified privilege is available under the general law to auditors exercising their statutory functions in respect of statements that the auditor may make in the performance of their statutory duties. Furthermore, statutes in each jurisdiction provide for the defence of qualified privilege in relation to the provision of certain information, additional to any other defence available under the general law, for example, sections 24 and 30 of the *Defamation Act 2005* (NSW).

The Technical Review of the CATSI Act in 2017 noted the defence of qualified privilege is expressly stated in the Corporations Act, but is not expressly stated in the CATSI Act, and recommended the latter be amended to bring it into alignment with the Corporations Act.

The policy reason for including the privilege expressly in the CATSI Act is the same as for including it in the Corporations Act, being that while it is recognised legal practitioners should be familiar with the law of defamation, the law in this area is specialised and is most likely unfamiliar to many people who may be affected by it. Stating the qualified privilege expressly in the CATSI Act is necessary and appropriate to ameliorate the

7 Schedule 1, items 246 and 247, proposed sections 610-1 and 694-120. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

8 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, pp. 6-7.

lack of familiarity with the law of defamation and assist users of the Act dealing with this aspect of the law.

I thank the Committee for their consideration and would like to note that the Finance and Public Affairs Legislation Committee conducted an enquiry into the Bill and, in their report published on 11 February 2019, recommended that the Bill be passed.

Committee comment

2.23 The committee thanks the minister for this response. The committee notes the minister's advice that qualified privilege, as a defence in proceedings for defamation, would be available under the general law to auditors in relation to statements made in the performance of their statutory duties. The committee also notes the advice that statutes in each Australian jurisdiction provide for the defence of qualified privilege in certain circumstances.

2.24 The committee also notes the minister's advice that while legal practitioners should be familiar with the law of defamation, the law in this area is specialised and may not be familiar to many people who may be affected by it. In this regard, the committee notes the advice that stating the qualified privilege expressly in the CATSI Act is necessary and appropriate to ameliorate this lack of familiarity with the law of defamation and to assist users of the Act dealing with this aspect of the law.

2.25 The committee requests that the information provided by the minister be included in the explanatory memorandum, noting the importance of that document as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.26 In light of the information provided by the minister, and noting that the defence of qualified privilege already exists under the general law, the committee makes no further comment on this matter.

Defence Legislation Amendment Bill 2018

Purpose	This bill seeks to amend the <i>Defence Force Discipline Act 1982</i> (the DFDA Act) and the <i>Defence Reserve Service (Protection Act 2001)</i> (the DRS(P) Act) to: <ul style="list-style-type: none"> • make changes to the DFDA Act in relation to the selection, remuneration and termination of members of the Judge Advocates' Panel; • move the complaint, investigation and mediation scheme from regulations into the DRS(P) Act; and • make a number of minor and technical amendments to the DFDA Act
Portfolio	Defence
Introduced	House of Representatives on 5 December 2018
Bill status	Passed both Houses on 14 February 2019

Broad delegation of administrative powers⁹

2.27 In [Scrutiny Digest 1 of 2019](#) the committee considered it may be appropriate to amend the bill to require that the Chief of the Defence Force be satisfied that persons performing delegated functions or exercising delegated powers have the expertise appropriate to the function or power delegated, and requested the minister's advice in relation to this matter.¹⁰

Minister's response¹¹

2.28 The minister advised:

I note that the Bill has passed both Houses of Parliament. It is regrettable that the Committee's advice was not received until after the Bill was passed.¹²

9 Schedule 2, item 35, proposed subsection 79(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(ii).

10 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, pp. 8-9.

11 The minister responded to the committee's comments in a letter dated 28 February 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

12 The committee notes that the bill finally passed both Houses of Parliament within five sitting days of its introduction.

The Committee has expressed concern about the delegation provision in Item 35 of Schedule 2, which inserts new subsection 79(2), providing that the Chief of the Defence Force (CDF) may delegate all or any of their powers and functions under Part 10, or Divisions 18, 1C or 3 of Part 11. Delegates must be at or above Executive Level 2 or Colonel and equivalent ranks. The explanatory memorandum states that these are appropriate levels for the delegations, noting the experience and skills of people at these levels, the history of administration of similar powers, and the need for flexibility.

The Committee has indicated that it does not consider administrative flexibility sufficient justification for enabling delegation of these powers beyond Senior Executive Service employees, proposing amendment of the Bill to require that CDF be satisfied that persons performing delegated functions have expertise appropriate to the function or power.

I acknowledge the Committee's concerns about the delegation of administrative powers to relatively large classes of persons, and I have asked the Department to pursue further amendments when possible, as proposed by the Committee.

Committee comment

2.29 The committee thanks the minister for this response. The committee notes the minister's advice that delegates must be at or above Executive Level 2 or Colonel and equivalent ranks. The committee further notes that the minister has acknowledged the committee's concerns, and in light of the fact that the bill has already passed both Houses, has asked the Department to pursue further amendments when possible, as proposed by the committee.

2.30 The committee welcomes the minister's commitment to pursue further amendments when possible to limit the broad delegation of administrative powers.

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

Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018

Purpose	This bill seeks to amend the <i>Competition and Consumer Act 2010</i> to: <ul style="list-style-type: none"> • implement a legislative framework consisting of new prohibitions and remedies in relation to electricity retail, contract and wholesale markets; and • allow the Australian Energy Regulator to gather and use information concerning energy businesses
Portfolio	Treasury
Introduced	House of Representatives on 5 December 2018
Bill status	Before the House of Representatives

Reversal of evidential and legal burden of proof¹³

2.32 In [Scrutiny Digest 1 of 2019](#)¹⁴ the committee requested the Treasurer's advice as to why it is proposed to use offence-specific defences (which reverse both the evidential and legal burden of proof).

Treasurer's response¹⁵

2.33 The Treasurer advised:

Item 5 of Schedule 2 to the Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2018 amends the Competition and Consumer Act 2010 (CCA) to insert new sections 44AAFA and 44AAFB. These provisions provide the Australian Energy Regulator (AER) with new compulsory information gathering powers and create an offence that applies if a person fails to comply.

The Committee has sought advice as to the appropriateness of the offence-specific defences that reverse the evidential and legal burden of proof in these provisions.

13 Schedule 2, item 5, proposed section 44AAFB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2019*, pp. 20-21.

15 The minister responded to the committee's comments in a letter dated 5 March 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 2 of 2019* available at: www.aph.gov.au/senate_scrutiny_digest

The new information gathering powers can only be used where the AER has reason to believe that a person is capable of providing information, producing a document or giving evidence that the AER requires for the performance of the functions referred to in existing section 44AH of the CCA. Section 44AH refers to functions conferred by a Commonwealth Act or regulations made under the CCA. As mentioned in the explanatory memorandum, paragraph 44AH(b) could be used to confer on the AER the function of setting maximum default offer prices for electricity retailed to small customers. In this event, the section 44AFA power would be expected to be used against affected electricity retailers only.

Failure to comply with a notice issued under section 44AAF A is an offence. However, a person who fails to comply with a notice does not commit an offence to the extent that the person is not capable of complying with the notice (subsection 44AFB(2)) (for example, because a requested document does not exist) or the person proves that, after a reasonable search, the person is not aware of the document (subsection 44AFB(3)). A person who wishes to rely on the defence contained in subsection 44AFB(2) bears the evidential burden of proving the circumstance (subsection 13.3(3) of the Criminal Code). That is, the person must produce evidence that suggests that the person is not capable of complying with the notice. A person who wishes to rely on the defence contained in subsection 44AFB(3) bears the legal burden of proving that, after a reasonable search, the person is not aware of a requested document (subsection 13.4(b) of the Criminal Code). That is, the person must prove, on the balance of probabilities that, after a reasonable search, the person is not aware of a requested document (section 13.5 of the Criminal Code).

The reverse burden of proof is appropriate in the circumstances of this provision. The capacity of a person to comply with a notice, and information as to whether a person has undertaken a reasonable search for a requested document, are all matters that are peculiarly within the person's knowledge and would not generally be available to the prosecution. Affected persons (generally, electricity retailers) are expected to maintain thorough records of their business activities. Raising evidence of their capacity to comply with a notice, or proving on the balance of probabilities that they have undertaken a reasonable search for a document, should place no significant additional burden on them.

If the burden of proof was not reversed, the prosecutor would be required to undertake costly and difficult investigations. In many cases the prosecutor may have some difficulty accessing information about the person's capacity to comply with a notice or whether they have undertaken a reasonable search for a requested document. This could in turn undermine the effectiveness of the information gathering regime and the ability of the AER to perform its Commonwealth functions.

Committee comment

2.34 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the reverse burdens in proposed section 44AFB are appropriate in the circumstances as the capacity of a person to comply with a notice, and information as to whether a person has undertaken a reasonable search for a requested document, are all matters that are peculiarly within the person's knowledge and would not generally be available to the prosecution.

2.35 The committee also notes the Treasurer's advice that affected persons, who would generally be electricity retailers, are expected to maintain thorough records of their business activities and that the reversals of the burden of proof should place no significant additional burden on them. The committee further notes the Treasurer's advice that in many cases the prosecutor may have some difficulty accessing information about the person's capacity to comply with a notice or whether they have undertaken a reasonable search for a requested document.

2.36 The committee requests that the key information provided by the Treasurer be included in the explanatory memorandum, noting the importance of that document as a point of access to understanding the law and if necessary, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

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

Chapter 3

Scrutiny of standing appropriations

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

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

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

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

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

- **Australian Business Securitisation Fund Bill 2019**— clause 11; and
- **Treatment Benefits (Special Access) Bill 2019**— clause 62.

Senator Helen Polley
Chair

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

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

