

The Senate

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Committee for the
Scrutiny of Bills

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Terms of Reference

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate or the provisions of bills not yet before the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, 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.
- (b) The committee, for the purpose of reporting on its terms of reference, may consider any proposed law or other document or information available to it, including an exposure draft of proposed legislation, notwithstanding that such proposed law, document or information has not been presented to the Senate.
- (c) The committee, for the purpose of reporting on term of reference (a)(iv), shall take into account the extent to which a proposed law relies on delegated legislation and whether a draft of that legislation is available to the Senate at the time the bill is considered.

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 in relation to:

- whether it unduly trespasses on personal rights and liberties;
- whether administrative powers are described with sufficient precision;
- whether appropriate review of decisions is available;
- whether any delegation of legislative powers is appropriate; and
- whether the exercise of legislative powers is subject to sufficient 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 often correspond with the responsible minister or sponsor seeking further explanation or clarification of the matter. 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 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.

Australian Nuclear Science and Technology Organisation Amendment Bill 2017

Purpose	This bill seeks to amend the <i>Australian Nuclear Science and Technology Organisation Act 1987</i> to provide greater flexibility to the Australian Nuclear Science and Technology Organisation, including the use of its property, facilities and resources for science, technology, and innovation purposes
Portfolio	Industry, Innovation and Science
Introduced	Senate on 20 June 2017

The committee has no comment on this bill.

Competition and Consumer Amendment (Paper Bills and Statements) Bill 2017

Purpose	This bill seeks to amend consumer law to ensure that when a supplier provides a customer with an itemised bill or proof of transaction, that document is given in paper form without charge unless the customer consents to receive it electronically
Sponsor	Mr Andrew Wilkie MP
Introduced	House of Representatives on 19 June 2017

The committee has no comment on this bill.

Competition and Consumer Amendment (Safeguarding the Reputation of Australian Beef) Bill 2017

Purpose	This bill seeks to amend <i>Competition and Consumer Act 2010</i> to provide that a pecuniary penalty may be imposed where Australian cattle exporters do not take reasonable steps to ensure that Australian cattle that is slaughtered, or processed after slaughter in a foreign country, is not marketed as Australian beef
Sponsor	Ms Rebekha Sharkie MP
Introduced	House of Representatives on 21 June 2017
Scrutiny principle(s)	Standing Order 24(1)(a)(i)

Broad scope of pecuniary penalty provision¹

1.2 Proposed subsection 137A(2) seeks to impose a pecuniary penalty where a person engaged in the business of exporting cattle does not take 'reasonable steps' to ensure that Australian cattle that is slaughtered, or processed after slaughter in a foreign country, is not marketed as Australian beef. Breach of this section would carry a pecuniary penalty of \$1.1 million for a body corporate or \$220,000 for a non-body corporate.

1.3 It is unclear on the face of the bill, and the explanatory memorandum provides no guidance, as to what would constitute taking all 'reasonable steps' to ensure that no product resulting from a slaughter or processing is marketed as Australian beef.

1.4 The committee draws to the attention of Senators its scrutiny concerns regarding the broad scope of the pecuniary penalty provision and leaves this issue to the Senate as a whole.

¹ Schedule 1, item 3, proposed subsection 137A(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

Competition and Consumer Amendment (Truth in Labelling—Palm Oil) Bill 2017

Purpose	This bill seeks to provide for the labelling of palm oil in food and other goods
Portfolio	Senator Nick Xenophon
Introduced	Senate on 21 June 2017

The committee has no comment on this bill.

Customs Tariff Amendment (Incorporation of Proposal and Other Measures) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Customs Tariff Act 1995</i> to:</p> <ul style="list-style-type: none">• incorporate Customs Tariff Proposal (No. 1) 2017 to correct the customs duty rate assigned to tariffs in relation to mosaic tiles;• amend the classification of machining centres;• reclassify paraquat dichloride to realign the Australian classification with international practice;• extend the concession for automotive prototype and components; and• remove the \$12,000 special customs duty on used and second-hand motor vehicles
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 21 June 2017

The committee has no comment on this bill.

Education and Training Legislation Repeal Bill 2017

Purpose	This bill seeks to repeal four spent and redundant Acts within the Education and Training portfolio
Portfolio	Education and Training
Introduced	House of Representatives on 22 June 2017

The committee has no comment on this bill.

Fair Work Amendment (Protecting Take Home Pay of All Workers) Bill 2017

Purpose	This bill seeks to amend the <i>Fair Work Act 2009</i> to protect the take home pay of employees who are affected by proposed changes to award penalty rates
Sponsor	Mr George Christensen MP
Introduced	House of Representatives on 19 June 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Retrospective application²

1.5 Proposed subsection 135A(2) provides that a determination of the Fair Work Commission made on or after 22 February 2017 that would reduce a penalty rate in a modern award so that the penalty rate would be lower than that in force under the award on 30 June 2017 has no effect. This provision therefore will operate retrospectively in relation to any determination that is made after 22 February 2017 but prior to commencement.

1.6 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.7 The committee notes that while the retrospective application of this law could operate beneficially (in relation to employees who may be retrospectively entitled to higher levels of pay), it could also have a detrimental effect on others (employers who may be required to provide back-pay from the date of passage of the bill to the date of any determination). Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum provides that the amendment will ensure that overall take-home pay of employees is not reduced by either the Fair Work Commission decision handed down in February 2017 or by

2 Schedule 1, item 1, proposed subsection 135A(2) of the *Fair Work Act 2009*. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

future enterprise agreements.³ It does not set out whether any person may be detrimentally affected by applying the provisions retrospectively.

1.8 The committee notes that, in general, it considers laws should only operate prospectively (not retrospectively), particularly where legislation may have a detrimental effect on individuals. The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of applying the amendments retrospectively.

3 Explanatory memorandum, p. 2.

Live Animal Export (Slaughter) Prohibition Bill 2017

Purpose	This bill seeks to amend the <i>Export Control Act 1982</i> to end the export of live animals for slaughter
Portfolio	Senator Lee Rhiannon
Introduced	Senate on 21 June 2017

The committee has no comment on this bill.

Migration Agents Registration Application Charge Amendment (Rates of Charge) Bill 2017

Purpose	This bill seeks to amend the <i>Migration Agents Registration Application Charge Act 1997</i> to ensure that a migration agent who paid the non-commercial registration application charge in relation to their current period of registration, but gives immigration assistance otherwise than on a non-commercial basis, is liable to pay an adjusted charge.
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 21 June 2017

The committee has no comment on this bill.

Migration Amendment (Regulation of Migration Agents) Bill 2017

Purpose	<p>This bill seeks to amend the <i>Migration Act 1958</i> to:</p> <ul style="list-style-type: none"> • remove legal practitioners from regulation by the Migration Agents Registration Authority (MARA); • provide that the time period in which a person can be considered an applicant for repeat registration as a migration agent is set out in delegated legislation; • remove the 12-month time limit within which a person must apply for registration following completion of a prescribed course; • enable MARA to refuse an application to become a registered migration agent where the applicant does not respond to requests for further information; • require migration agents to notify MARA that they have ceased acting on a non-commercial basis and commenced acting on a commercial basis; • ensure that the definitions of 'immigration assistance' and 'immigration representations' include assisting a person in relation to a request to the minister to revoke a character-related visa refusal or cancellation decision; and • remove redundant regulatory provisions
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 21 June 2017
Scrutiny principles	Standing Order 24(1)(a)(i), (ii) and (iv)

Broad delegation of administrative powers⁴

1.9 Proposed subsection 320(1) would allow any of the powers or functions given to the Migration Agents Registration Authority (MARA) under Part 3 of the *Migration Act 1958* to be delegated to 'any APS employee in the Department'. Some of these powers and functions are significant including, for example, the power to cancel or suspend the registration of a registered migration agent,⁵ require registered migration agents or former registered migration agents to give

4 Schedule 3, item 17, proposed subsection 320(1). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

5 *Migration Act 1958*, s 303.

information,⁶ and bar former registered migration agents from being registered for up to 5 years.⁷

1.10 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 officers or to senior executive service (SES) officers. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum.

1.11 In this case, the explanatory memorandum notes that proposed new subsection 320(1) is similar to existing subsection 320(1) which already provides that the Minister may delegate MARA's powers or functions to 'a person in the Department who is appointed or engaged under the *Public Service Act 1999*'. The most significant change is to remove the reference in current subsection 320(1) to the Migration Institute of Australia.⁸

1.12 While the committee notes that, in effect, this provision largely replicates existing subsection 320(1), the committee still expects that the explanatory memorandum will explain why it is considered necessary to allow the broad delegation of MARA's powers and functions as provided for in proposed new subsection 320(1). The committee notes that there is no guidance on the face of the bill as to the relevant skills or experience that would be required to undertake delegated functions. Nor is there any limitation on the level to which significant powers or functions could be delegated. 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.

1.13 The committee requests the Assistant Minister's advice as to why it is considered necessary to allow *all* of MARA's powers and functions to be delegated to *any* APS employee in the Department and requests the Minister's advice as to the appropriateness of amending the bill to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated. For example, the committee notes that it may be possible to provide that MARA's significant cancellation, suspension and information gathering powers (such as those referred to in paragraph [1.9] above) may only be delegated to SES officers.

6 *Migration Act 1958*, ss 308, 311EA.

7 *Migration Act 1958*, s 311A.

8 Explanatory memorandum, p. 31.

Significant matters in delegated legislation⁹

1.14 The purpose of the proposed amendments in Schedule 4 is to allow MARA to refuse an application to become a registered migration agent where the applicant has been required to, but has failed to, provide information or answer questions in relation to their application.¹⁰ Proposed paragraph 288B(4)(a) provides that MARA may consider refusing an application for registration if the applicant fails to provide the information or answer the questions 'within the period prescribed for the purposes of this section' (unless MARA has approved an extension).

1.15 The committee's view is that significant matters, such as time limits for providing information, where failure to provide the requested information could have significant adverse consequences, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, no information is provided in the explanatory memorandum.

1.16 The committee requests the Assistant Minister's advice as to why it is proposed to leave the determination of the time limit for complying with a request for information to delegated legislation.

Strict liability offence¹¹

1.17 Subitem 4(1) of Schedule 5 sets out a notification obligation in relation to registered migration agents who, prior to commencement, had paid the charge applicable to migration agents who act solely on a non-commercial or non-profit basis, but who then gave immigration assistance otherwise than on a non-commercial basis. Individuals subject to the notification obligations will be required to notify MARA in writing within 14 days of commencement of the Schedule. Subitem 4(2) provides that failing to comply with the notification obligation is an offence of strict liability. The offence is subject to a maximum penalty of 100 penalty units. The explanatory memorandum provides no justification as to why this offence is subject to strict liability, other than to note that the proposed notification obligation is consistent with current notification obligation on migration agents set out in section 312 of the *Migration Act 1958*.¹²

1.18 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

9 Schedule 4, item 1, proposed paragraph 288B(4)(a). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

10 Explanatory memorandum, p. 33.

11 Schedule 5, item 4. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

12 Explanatory memorandum, p. 40.

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 liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.¹³

1.19 In the this case, it is noted that the proposed penalty of 100 penalty units for an individual is above the recommended maximum of 60 penalty units outlined in the Guide. In addition, the fact that individuals will only have 14 days from commencement to comply with the notification obligation raises questions as to whether all affected individuals will be placed on notice to guard against the possibility of inadvertently contravening this proposed strict liability provision.¹⁴

1.20 The committee requests a detailed justification from the Assistant Minister for the proposed imposition of strict liability in this instance, with particular reference to the principles set out in the *Guide to Framing Commonwealth Offences*.¹⁵

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

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

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

Migration Amendment (Validation of Decisions) Bill 2017

Purpose	This bill seeks to amend the <i>Migration Act 1958</i> to preserve existing section 501 character decisions made relying on information provided by gazetted law enforcement and intelligence agencies which is protected from disclosure
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 21 June 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Retrospective validation¹⁶

1.21 The purpose of this bill is to validate certain decisions to cancel a visa or refuse a visa application on character grounds, particularly on the basis that a non-citizen has committed a crime in Australia and poses a risk to the Australian community.¹⁷

1.22 Section 503A of the *Migration Act 1958* provides that information supplied to an authorised Commonwealth migration officer by identified law enforcement or intelligence agencies for the purposes of making a decision to refuse or cancel a visa on character grounds is protected from disclosure to any person. This includes disclosure to a court reviewing any decision to cancel or refuse to grant a visa. The consequences of existing section 503A is that information which is relevant and significant to the exercise of the power to cancel or refuse a visa, and which would otherwise need to be disclosed to afford an affected non-citizen a fair hearing, need not be disclosed.

1.23 The committee notes that at the time of tabling the High Court of Australia had reserved its judgment in relation to two cases that have challenged the constitutional validity of section 503A.¹⁸ If the provisions of this bill are not enacted, and the High Court were to hold that section 503A is constitutionally invalid, an exercise of power in reliance on this provision would itself have no legal foundation and would therefore also be invalid.

16 Proposed subsection 503E. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

17 Decisions made under sections 501, 501A, 501B, 501BA, 501C or 501CA of the *Migration Act 1958*.

18 See *Graham v Minister for Immigration and Border Protection*, M97/2016, and *Te Puia v Minister for Immigration and Border Protection*, P58/2016.

1.24 The effect of proposed section 503E would be to deem decisions which have been made in reliance on, or having regard to, information purportedly covered by section 503A, or where the Minister failed to disclose such information, to have been validly made, even if that provision is held to be constitutionally invalid. The committee notes that proposed subsection 503E(2) provides that the validation provisions would not apply in relation to the current High Court proceedings.

1.25 In the event that section 503A is held to be constitutionally invalid, the effect of the bill would be to retrospectively validate invalid decisions with significant consequences for affected persons. The committee has a long-standing scrutiny concern about provisions that apply 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 a particular concern if the legislation will, or might, have a detrimental effect on individuals. Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this instance, the explanatory memorandum does not address the appropriateness or fairness of the retrospective effect of this bill.

1.26 The committee considers there may be cases where a judicial declaration that an administrative decision is invalid would result in such significant consequences that it may justify legislation seeking to validate other decisions infected by the same error. For instance, where the invalidity resulted from an administrative oversight that does not affect the substance of the power exercised,¹⁹ the value of legal certainty of administrative decisions may override the principle that invalid decisions are of no force and effect. However, much would depend on the nature of the error and whether that error affected the fairness of any individual decision. Other relevant matters would include the number of decisions affected and alternative ways of addressing the administrative problems and uncertainty created.

1.27 In this instance, the issue before the High Court is whether the non-disclosure provided for by current section 503A affects the proper administration of justice and strikes at the role of the court in granting a fair hearing. Deeming decisions reached in these circumstances to be valid, even though the decision applied or relied on a potentially unconstitutional provision, cannot, therefore, be characterised as curing a mere technical or administrative failing.

1.28 Underlying the basic rule of law principle that all government action must be legally authorised, is the importance of protecting those affected by government decisions from arbitrary decision-making and enabling affected persons to rely on the law as it currently exists. Retrospective legislation threatens these values (even

19 For example, an administrative oversight relating to the appointment of the officer who made the decision.

accepting that in limited cases it may be justified). In addition, legislation which deems invalid administrative decisions to be valid, where the reason for the invalidity rests on reliance on an unconstitutional statutory provision, has significant implications for the rule of law. The practical effect of such legislation would be to reverse a judicial finding of constitutional invalidity (even if there is a specific exemption in relation to the existing cases before the High Court). There are also questions as to whether such deeming legislation is itself constitutionally valid.²⁰

1.29 In light of the discussion above, the committee requests the Minister's detailed justification for seeking to retrospectively validate decisions made in circumstances which may have denied an applicant the right to a fair hearing, and where the practical effect of the legislation would be to reverse any High Court declaration of constitutional invalidity.

20 Considerable uncertainty attends this question, see Will Bateman, 'Legislating Against Constitutional Invalidity: Constitutional Deeming Legislation' (2012) 34 *Sydney Law Review* 712.

Public Governance and Resources Legislation Amendment Bill (No. 1) 2017

<p>Purpose</p> <p>Portfolio</p> <p>Introduced</p> <p>Scrutiny principles</p>	<p>This bill seeks to amend various Acts in relation to the governance, performance and accountability of, and the use and management of resources by, the Commonwealth, Commonwealth entities and Commonwealth companies to:</p> <ul style="list-style-type: none"> • prescribe listed entities for the purposes of the <i>Public Governance, Performance and Accountability Act 2013</i> (the PGPA Act) within entities' enabling legislation; • repeal provisions covering issues now provided for by the PGPA Act, such as disclosure of interests and annual reporting requirements; and • update references in legislation from the <i>Financial Management and Accountability Act 1997</i> and the <i>Commonwealth Authorities and Companies Act 1997</i> to the PGPA Act <p>The bill also makes minor amendments to legislation consequential to the sale of Medibank Private Limited in 2014</p> <p>Finance</p> <p>House of Representatives on 22 June 2017</p> <p>Standing Order 24(1)(a)(i) and (iv)</p>
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Retrospective application²¹

1.30 Schedule 4 to the bill contains transitional and application provisions. Item 4 provides that despite subsections 12(2) and (3) of the *Legislation Act 2003* (which restricts the retrospective application of legislative instruments), legislative instruments that amend another legislative instrument as a consequence of amendments or repeals made by the bill may be expressed to have taken effect from a date before the amending instrument is registered.²²

1.31 The committee has a long-standing scrutiny concern about provisions which facilitate the retrospective application of the law, as such provisions challenge a basic value of the rule of law that, in general, laws should only operate prospectively (not

21 Schedule 4, item 4. The committee draws Senators' attention to this provision pursuant to principles 1(a)(i) and (iv) of the committee's terms of reference.

22 Explanatory memorandum, p. 20.

retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.32 Generally, where proposed legislation facilitates the retrospective application of the law the committee expects the explanatory materials should set out the reasons why retrospectivity is required, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected. In this case, the explanatory materials merely repeat the effect of the provision without providing any detail as to why it is necessary to authorise the making of retrospective legislative instruments.

1.33 The committee therefore requests the Minister's advice as to why it is considered necessary to authorise the making of retrospective legislative instruments in this instance, including examples of circumstances where such a power may be used, whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

Social Services Legislation Amendment (Better Targeting Student Payments) Bill 2017

Purpose	<p>This bill seeks to amend various Acts relating to social security and veterans' entitlements to:</p> <ul style="list-style-type: none">• amend the relocation scholarship assistance for Youth Allowance students;• introduce a four tier education entry payment; and• cease payment of the pensioner education supplement during semester breaks and holiday periods
Portfolio	Social Services
Introduced	House of Representatives on 21 June 2017

The committee has no comment on this bill.

Social Services Legislation Amendment (Payment Integrity) Bill 2017

Purpose	<p>This bill seeks to amend the law relating to family assistance, social security and veterans' entitlements</p> <p>Schedule 1 amends residency requirements for the Age Pension and the Disability Support Pension</p> <p>Schedule 2 ceases the payment of pension supplement after six weeks temporary absence overseas and immediately for permanent departures</p> <p>Schedule 3 introduces a 30 cents in the dollar income test taper for Family Tax Benefit Part A families with a household income in excess of the Higher Income Free Area</p> <p>Schedule 4 extends the maximum liquid assets waiting period for Newstart Allowance, Sickness Allowance, Youth Allowance and Austudy from 13 weeks to 26 weeks</p>
Portfolio	Social Services
Introduced	House of Representatives on 21 June 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

Retrospective effect²³

1.34 Schedule 1 to the bill seeks to amend the residency requirements for the Age Pension and Disability Support Pension (DSP) by changing certain timeframes which need to be met before claims will be deemed payable to eligible recipients. Currently, in order to qualify for the Age Pension or DSP a person must either have been an Australian resident for a continuous period of at least 10 years or, alternatively, for an aggregate period in excess of 10 years but including a continuous period of at least 5 years within that aggregate.

1.35 The proposed amendments to the residency requirements would introduce a new requirement that at least 5 years of the 10 year continuous Australian residency period must be during a person's working life. If this 5 year working life test is not met, then a person will be required to demonstrate self-sufficiency by having 10 years continuous Australian residency with greater than 5 years (in aggregate) relating to periods in which the person has not been in receipt of an activity tested income support payment. If a person does not meet either of these new

²³ Schedule 1. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference

requirements then they will have to demonstrate at least 15 years continuous Australian residency to satisfy the residency requirements for the Age Pension and DSP. The explanatory memorandum notes that 'access to Special Benefit will remain for those people who experience financial hardship, and existing exemptions will remain, such as for refugees or where a person incurs a continuing inability to work after arrival in Australia for DSP'.²⁴

1.36 Although the amendments in this Schedule are to commence prospectively on 1 July 2018, the effect of the proposed amendments is that a person who may have made arrangements based on an understanding of the existing law may have to wait a further five years to satisfy the residency requirements for the Age Pension or DSP. For example, a person who arrived in Australia on 1 February 2009 may have arranged their affairs on the expectation that they would be eligible to receive the Age Pension after 10 years of continuous Australian residence (i.e. from 1 February 2019). However, under the proposed amendments, if the person does not meet the new self-sufficiency test or the requirement for at least five of the 10 years to be within the person's working life, they would not be eligible to receive the Age Pension until 1 February 2024.

1.37 The committee has a long-standing scrutiny concern about provisions that, while not technically retrospective, may raise questions as to the fairness of applying a change in the law to individuals who have arranged their long-standing affairs on the basis of the existing law. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

1.38 Generally, where proposed legislation will have such an effect the committee expects the explanatory materials should set out whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

1.39 The committee therefore requests the Minister's advice as to why it is considered necessary to apply the amended residency requirements to individuals who may have arranged their affairs on the basis of the existing law, and the number of people likely to be adversely affected by these proposed changes.

24 Explanatory memorandum, pp 6–7.

Social Services Legislation Amendment (Welfare Reform) Bill 2017

Purpose

This bill seeks to amend the law relating to family assistance, social security, paid parental leave and student assistance

Schedule 1 introduces a single Jobseeker Payment, to replace seven existing payments as the main payment for people of working age

Schedules 2, 3, 4 and 5 ceases Widow B Pension; Wife Pension; Bereavement Allowance; and Sickness Allowance from 20 March 2020

Schedule 6 will close the Widow Allowance to new entrants from 1 January 2018 and will cease on 1 January 2022, when all recipients have moved to Age Pension

Schedule 7 ceases Partner Allowance from 1 January 2022

Schedule 8 allows the Minister to make rules of a transitional nature in relation to the amendments and repeals made by Schedules 1 to 7 to this bill

Schedule 9 amends the activity tests for Newstart Allowance and certain Special Benefit recipients aged 55 to 59 who engage in voluntary work for at least 30 hours

Schedule 10 amends the start day for some participation payments and the RapidConnect arrangements

Schedule 11 removes intent to claim provisions, resulting in social security claimants receiving payments from the date they lodge a complete claim

Schedule 12 provides for the trialling of drug testing 5000 new recipients of Newstart Allowance and Youth Allowance in three locations over two years

Schedule 13 provides that exemptions from the activity test and participation requirements will no longer be available in relation to circumstances directly attributable to drug or alcohol misuse for certain social security recipients

Schedule 14 amends the reasonable excuse rules

Schedule 15 introduces a new compliance framework for mutual obligation requirements in relation to participation payments

Schedule 16 would allow a request to provide a tax file number and/or a relevant third party's tax file number as part of a claim for a social security payment or seniors health card

	Schedule 17 allows information and documents obtained by the Department of Human Services to be used in welfare fraud prosecution proceedings starting from 1 January 2018
	Schedule 18 aligns the social security and disability discrimination laws
Portfolio	Social Services
Introduced	House of Representatives on 22 June 2017
Scrutiny principle(s)	Standing Order 24(1)(a)(i), (ii), (iii), (iv) and (v)

Significant matters in delegated legislation (Schedule 12)²⁵

1.40 Schedule 12 provides for a two year trial in three regions for the mandatory drug testing of 5,000 recipients of Newstart Allowance and Youth Allowance. Proposed section 38FA provides that the Minister may make rules (legislative instruments) providing for a number of matters relating to the establishment of the drug testing trial. This includes a number of significant matters, such as the confidentiality and disclosure of drug test results and the keeping and destroying of records relating to samples and drug tests. Proposed section 64A also provides that the drug test rules may require contracts for the carrying out of drug tests to meet certain requirements, including provisions requiring the giving, withdrawal or revocation of a notice to the Secretary saying that a person should be subject to income management,²⁶ with the intention that the circumstances in which such a notice may be given to be provided in the drug test rules.²⁷

1.41 In addition, proposed subsection 123UFAA(1B) provides that the Secretary may, by legislative instrument, determine a period longer than 24 months as to when a person may be subject to income management. This would give the Secretary the power, via legislative instrument, to extend the period of income management for longer than the 24 month trial period.²⁸

1.42 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum does not explain why the confidentiality and disclosure of drug test results, the keeping and destroying of records relating to samples and drug tests, and requirements regarding the

25 Schedule 12, item 3, proposed section 38FA; item 18, proposed section 64A; and item 24, proposed subsection 123UFAA(1B). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) and (v) of the committee's terms of reference.

26 Schedule 12, item 18, proposed section 64A.

27 Explanatory memorandum, p. 76.

28 See explanatory memorandum, p. 76.

contractual arrangements for drug testing are to be included in delegated legislation rather than set out in the primary legislation. In relation to extending the trial period beyond 24 months, the explanatory memorandum suggests this might be used 'where it is considered to be beneficial to a person's drug rehabilitation outcome to remain on income management for a longer period of time'.²⁹ The committee notes that no time limit is set in the bill on the period that the trial could be extended via legislative instrument.

1.43 The committee requests the Minister's advice as to:

- **why it is considered necessary to leave significant matters of the type referred to above to delegated legislation; and**
- **the type of consultation that it is envisaged will be conducted prior to the making of rules and determinations and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).**

Broad delegation of administrative power (Schedule 12)³⁰

1.44 Proposed section 64A provides that the Secretary may enter into contracts for the carrying out of drug tests of drug trial pool members. Such a contract must meet any requirements to be prescribed in rules (legislative instruments). Proposed paragraph 123UFAA(1A)(c) provides that a person will be subject to income management on a number of specified bases, including that the contractor who carried out the drug test has given a written notice to the Secretary 'saying that the person should be subject to the income management regime'.³¹ Additionally, a person will not be subject to the income management regime if the contractor has withdrawn or revoked its notice,³² and a person will not be required to pay for a drug test 'if the contractor who carried out the test gives a written notice to the Secretary that the test should not be taken into account'.³³ These provisions appear to give the

29 Explanatory memorandum, p. 76.

30 Schedule 12, item 18, proposed section 64A and item 24, proposed paragraph 123UFAA(1A)(c). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

31 See Schedule, item 18, proposed paragraph 64A(3)(b) and item 24, proposed paragraph 123UFAA(1A)(c).

32 See Schedule, item 24, proposed paragraph 123UFAA(1A)(d), together with item 18, proposed paragraph 64A(3)(c).

33 See Schedule 12, item 11, proposed subsection 1206XA(5).

contractor the power to determine who should be subject to the income management regime.

1.45 The explanatory memorandum states that if a person's drug test result is positive 'the contractor will give a notice to the Secretary that the person should be subject to income management'.³⁴ The circumstances under which such a notice may be given are intended to be provided for in the drug test rules 'for instance, if the drug test result is positive'.³⁵ The explanatory memorandum also notes that the contractor can withdraw or revoke a notice or give notice that a positive drug test should not be taken into account:

For example, if a person requests a second drug test which results in a negative result or if the contractor receives evidence that the person is taking legal medication which could cause a false positive result, the contractor can withdraw or revoke a notice that was previously given a notice under paragraph 123UFAA(1A)(c)

...

For example, if the contractor becomes aware...of a false positive test result such as if the contractor received evidence that the person is taking legal medication which could cause a false positive result, the contractor will be required under the drug testing rules to notify the Secretary that the test should not be taken into account for the purposes of a drug test repayment deduction.³⁶

1.46 The bill states that the criteria for guiding when the contractor would give a written notice may be provided in the drug test rules, but no detail is provided in the bill itself. Additionally, proposed paragraph 64A(3)(a)³⁷ provides that the rules may include provisions noting that any subcontracts should include similar provisions to those set out for contractors, which suggests a subcontractor may also be able to determine if a person is to be subject to income management.

1.47 The explanatory memorandum provides no details as to who is likely to be contracted to perform the task of determining which social security recipients are to be subject to income management, and what their qualifications must be. Contractors will not be subject to the same level of accountability and oversight that apply to members of the public service. For example, the APS Code of Conduct applies only to employees of the Australian Public Service.

1.48 There is also nothing in the primary legislation, nor any indication that it will be in the rules, as to how the contractor is to 'receive evidence', for example that a

34 Explanatory memorandum, p. 73.

35 Explanatory memorandum, p. 76.

36 Explanatory memorandum, p. 74.

37 Schedule 12, item 18.

person is taking legal medication. There is no information in the bill or explanatory materials as to what are the review rights of a person who is made subject to income management based on a contractor's written notice. It appears that a person will be made subject to income management automatically once certain criteria is met, including that a contractor has given written notice to this effect. It is unclear whether the contractor's provision of a notice to the Secretary stating that a person should be subject to income management is a 'decision' that would be reviewable.

1.49 The committee requests the Minister's advice as to:

- **the appropriateness of allowing contractors to make a determination as to who is to be subject to income management;**
- **the qualifications to be required of such contractors;**
- **any accountability or oversight mechanisms that contractors will be subject to (covering matters such as the protection from unauthorised disclosure of personal information obtained by a contractor); and**
- **the availability of review of a contractor's decision to give, vary or revoke a written notice to the Secretary subjecting a person to income management or a refusal to vary or revoke such a notice.**

Restriction on judicial review (Schedule 12)³⁸

1.50 Proposed subsection 123UFAA(1C) provides that the Secretary may determine that a person is not subject to the income management regime if the Secretary is satisfied that being subject to the regime poses a serious risk to the person's mental, physical or emotional wellbeing.

1.51 However, proposed subsection 123UFAA(1D) makes it clear that the Secretary has no duty to even consider whether or not to exercise this power.

1.52 The explanatory memorandum states that the Secretary is not required to actively take steps to assess every trial participant, who is referred to income management, but will consider making this determination once he or she is made aware of facts which indicate that being subject to income management may seriously risk a person's mental, physical or emotional wellbeing.³⁹ However, the committee notes, even if the Secretary has been made aware of such facts, proposed subsection 123UFAA(1D) makes clear there is no duty on the Secretary to consider this.

38 Schedule 12, item 24, proposed subsection 123UFAA(1D). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

39 Explanatory memorandum, p. 77.

1.53 'No-duty-to-consider' clauses do not by their terms oust the High Court or Federal Court's judicial review jurisdiction. However, they do significantly diminish the efficacy of judicial review in circumstances where no decision to consider the exercise of a power has been made. Even where a decision has been made to consider the exercise of the power, some judicial review remedies will not be available.⁴⁰

1.54 The committee notes that the no-duty-to-consider clause has not been thoroughly justified in this case. The explanatory memorandum indicates that once the Secretary is made aware of facts which indicate income management may seriously risk a person's well-being, the Secretary will consider making a determination. The committee considers it may be appropriate to amend the no-duty-to-consider clause to ensure it does not apply where the Secretary is made aware of facts that indicate that income management may risk a person's well-being. The committee requests the Minister's response on this matter and an explanation as to why proposed subsection 123UFAA(1D) is otherwise considered necessary and appropriate.

Broad delegation of legislative power (Schedule 14)⁴¹

1.55 Currently under Division 3A of the *Social Security (Administration) Act 1999* the Secretary is required not to determine that a person has committed a number of specified participation failures⁴² if the person satisfies the Secretary that the person has a reasonable excuse for the failure. Current section 42U provides that the Secretary must make a legislative instrument that determine matters that the Secretary must take into account in deciding whether a person has a reasonable excuse for such failures, but this does not limit the matters the Secretary may take into account in making such a decision. Item 7 proposes to amend section 42U to include a power for the Secretary to, by legislative instrument determine matters that the Secretary must *not* take into account in deciding whether a person has a reasonable excuse.

1.56 The committee notes that there is no limit in the primary legislation on the matters that could be included in such a legislative instrument and is concerned that the matters that the Secretary (and his or her delegates) would be bound *not* to

40 For example, certiorari will be futile given that mandamus could not issue to compel the re-exercise of the power, even if it had been unlawfully exercised.

41 Schedule 14, item 7. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

42 Namely, a 'no show no pay' failure (see paragraph 42C(4)(a)); a connection failure (see paragraph 42E(4)(a)); a reconnection failure (see paragraph 42H(3)(a)); a serious failure (see paragraph 42N(2)(a)); or a non-attendance failure (see subsection 42SC(2)).

consider, could be so broad as to undermine the reasonable excuse provisions as set out in the Act. The explanatory memorandum sets out the intention of this provision as follows:

It is envisaged that the Secretary will exercise the new power provided for in this Schedule to make a legislative instrument determining that where a person's abuse of, or dependency on, drugs or alcohol is used once as a reasonable excuse for a relevant participation failure, such abuse or dependency must not be used in relation to determining whether the person has a reasonable excuse for committing a second or subsequent participation failure if they have previously refused available and appropriate treatment.⁴³

1.57 The committee notes that it would appear that the current requirement that the excuse be 'reasonable' would sufficiently constrain the use of the excuse provision.

1.58 The committee requests the Minister's advice as to:

- **why it is necessary to bind decision-makers via delegated legislation as to what must *not* be considered a 'reasonable excuse' for a participation failure, given the existing requirement that any excuse be 'reasonable'; and**
- **the appropriateness of providing a broad and unfettered power to prescribe *any* matter that must not be considered when determining a reasonable excuse (rather than more specifically limiting this power to provide that drug or alcohol abuse or dependency must not be considered in relation to determining whether a person has a reasonable excuse for committing a second or subsequent participation failure if they have previously refused available and appropriate treatment).**

Significant matters in delegated legislation (Schedule 15)⁴⁴

1.59 Schedule 15 seeks to introduce a new compliance framework for mutual obligation requirements in relation to participation payments. It is intended that job seekers that repeatedly fail to comply with their employment pathway plan requirements will gradually lose income support payments. A number of significant elements of this proposal appears to be included in delegated legislation:

- proposed section 42AC states that a person commits a mutual obligation failure if the person fails to satisfy the Secretary that the person has

43 Explanatory memorandum, p. 85.

44 Schedule 15, item 1, proposed sections 42AC, 42AI, 42AR. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

undertaken adequate job search efforts (the question of whether a person has undertaken adequate search efforts is to be worked out in accordance with a legislative instrument made by the Secretary);⁴⁵

- proposed section 42AI states that the Secretary must, by legislative instrument, determine matters that the Secretary must, or must not, take into account in deciding whether a person has a reasonable excuse for committing a mutual obligation failure or work refusal failure; and
- proposed section 42AR provides that the Minister must, by legislative instrument, determine the circumstances in which the Secretary must, or must not, be satisfied that a person has persistently committed mutual obligation failures and the circumstances in which a determination is to be made regarding reducing a person's instalments or cancelling their payments.

1.60 The committee's view is that significant matters should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum does not explain why matters are to be set out in legislative instruments in relation to proposed sections 42AC or 42AI. In relation to proposed section 42AR, no information is given as to why it is appropriate to include these matters in delegated legislation; however it does state the intention behind the legislative instrument:

The intention is for the legislative instrument to provide, among other things, safeguards (such as the person having committed a number of failures without a reasonable excuse, the existence of checks having been undertaken by the employment service provider and the Department of Human Services ensuring that the person did not have any undisclosed issues that are affecting their ability to comply with their mutual obligations and/or the suitability of the person's employment pathway plan) to be taken into account by the Secretary before a determination that a person has persistently committed mutual obligation failures can be made.

1.61 The committee notes that significant matters such as safeguards and principles guiding whether a person's social security payments are to be reduced or temporarily cancelled are matters that would appear to be more appropriate for inclusion in primary legislation to allow for greater parliamentary scrutiny of the processes and of any future amendments to them.

1.62 The committee requests the Minister's advice as to:

- **why it is considered necessary to leave significant matters of the type referred to above to delegated legislation; and**

45 Schedule 15, item 1, proposed section 42AC(1)(e).

- **the type of consultation that it is envisaged will be conducted prior to the making of rules and determinations and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).**
-

Merits review (Schedule 15)⁴⁶

1.63 Currently, sections 131 and 145 of the *Social Security (Administration) Act 1999* provide that if an adverse decision is made in relation to a social security payment which depends on the exercise of a discretion or the holding of an opinion (or which would result in the application of a compliance penalty period), and a person has applied for merits review of that decision, the Secretary may declare that the payment is to continue pending the determination of the review. In effect this would allow a person to continue to have their social security payments paid to them while awaiting the determination of the review process. Items 25 and 27 seek to amend these sections to provide that this will not apply in relation to adverse decisions made under proposed new Division 3AA relating to compliance with participation payment obligations.

1.64 The effect of these proposed items would be that a person who has sought merits review of a decision made under Division 3AA to suspend or cancel their welfare payments would not be able to have their payments continue while awaiting that review. The committee notes that merits review, particularly review by the Administrative Appeals Tribunal, may take many months to complete. For welfare recipients on limited income the practical operation of these items appears to diminish the effectiveness of the right to seek merits review. The explanatory memorandum provides no justification for the proposed amendments.

1.65 The committee requests that the Minister's advice as to why it is considered necessary and appropriate to remove the Secretary's ability to ensure that certain welfare payments continue to be paid pending the outcome of merits review.

46 Schedule 15, items 25 and 27. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(i) and (iii) of the committee's terms of reference.

Statute Update (Smaller Government) Bill 2017

Purpose	This bill seeks to repeal three Acts and amend ten Acts across the Commonwealth to cease or abolish the: <ul style="list-style-type: none">- Central Trades Committee;- Oil Stewardship Advisory Council;- Product Stewardship Advisory Group;- Australian Sports Anti-Doping Authority Advisory Group;- Plant Breeder's Rights Advisory Committee;- Development Allowance Authority; and- Corporations and Markets Advisory Committee
Portfolio	Finance
Introduced	House of Representatives on 22 June 2017

The committee has no comment on this bill.

Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017

Purpose	This bill seeks to amend various Acts relating to telecommunications to: <ul style="list-style-type: none"> • amend the superfast network rules to make the default structural separation requirement a baseline for industry; • introduce a statutory infrastructure provider regime; and • implement administration arrangements for the Regional Broadband Scheme to fund the net costs of NBN Co Limited's fixed wireless and satellite networks
Portfolio	Communications and the Arts
Introduced	House of Representatives on 22 June 2017
Scrutiny principles	Standing Order 24(1)(a)(i), (iv) and (v)

Modified disallowance procedures⁴⁷

1.66 This bill, along with the Telecommunications (Regional Broadband Scheme) Charge Bill 2017, seeks to establish an ongoing funding arrangement for fixed wireless and satellite broadband infrastructure through a new industry charge to be known as the Regional Broadband Scheme. Schedule 4 to this bill, among other things, seeks to establish the types of broadband services subject to and exempt from the charge, penalties for avoiding the charge, and information gathering and disclosure powers and information reporting obligations.

1.67 Proposed subsection 76AA(2) and proposed section 79A would give the Minister the power to determine, by legislative instrument, that one or more classes of carriage service be excluded from the definition of 'designated broadband service', and to determine whether a location is taken, or not taken, to be 'premises', for the purpose of the Regional Broadband Scheme.

1.68 The explanatory memorandum notes that as ministerial determinations made under these provisions would alter the tax base, it is appropriate to give the Parliament the opportunity to scrutinise and disallow the determinations before they take effect.⁴⁸ To this end, proposed section 102ZFB seeks to modify the usual

47 Schedule 4, item 13, proposed subsection 76AA(2), 79A(1) and 79A(2) and section 102ZFB. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

48 Explanatory memorandum, pp 165 and 196.

commencement and disallowance procedures for these determinations in two ways.⁴⁹

1.69 First, proposed subsection 102ZFB(3) improves parliamentary oversight of these determinations by ensuring that they do not come into effect until 15 sitting days after the disallowance period has expired. The committee welcomes this modified commencement procedure.

1.70 However, proposed subsection 102ZFB(2) seeks to reverse the usual disallowance procedure in subsection 42(2) of the *Legislation Act 2003* to require a House of the Parliament to positively pass a resolution disallowing a determination within the 15 sitting day disallowance period in order for the disallowance to be effective.⁵⁰ Normally, subsection 42(2) of the *Legislation Act 2003* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'* further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.⁵¹

1.71 Under the modified disallowance procedure proposed in subsection 102ZFB(2), if a disallowance motion is lodged, but not brought on for debate before the end of the 15 sitting day disallowance period, the relevant instrument will take effect. In practice, as the executive has considerable control over the conduct of business in the Senate, there may be occasions where no time is made available to consider the disallowance motion within 15 sitting days after the motion is lodged and therefore the instrument would be able to take effect regardless of the attempt to disallow it. As a result, the proposed procedure would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days. The explanatory memorandum provides no justification for this proposed reversal of the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003*.

1.72 Noting the significant practical impact on parliamentary scrutiny of this measure, the committee requests the Minister's detailed justification as to why it is

49 The usual commencement and disallowance procedures are contained in sections 12 and 42 of the *Legislation Act 2003*, respectively.

50 Proposed subsection 102ZFB(4) also states that section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

51 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

proposed to reverse the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003* so that where a motion to disallow an instrument is not resolved by the end of the disallowance period, the instrument will be taken *not* to have been disallowed and would therefore be able to come into effect.

1.73 To address this issue, and also noting that these ministerial determinations relate to important matters which could impact on the tax base under the proposed Regional Broadband Scheme, the committee notes that, from a scrutiny perspective, it may be appropriate for the bill to be amended to further increase parliamentary oversight by requiring the positive approval of each House of the Parliament before a new determination under proposed subsections 76AA(2), 79A(1) and 79A(2) comes into effect. The committee also requests the Minister's response in relation to this matter.⁵²

Strict liability offences⁵³

1.74 Proposed subsections 101(1) and 102ZF(5) provide for strict liability offences for failing to lodge certain reports to the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC). The offences are subject to a maximum penalty of 50 penalty units. A person who contravenes these provisions by failing to lodge the relevant report commits a separate offence in respect of each day during which the contravention continues.⁵⁴ The explanatory memorandum provides no justification as to why this offence is subject to strict liability.⁵⁵

1.75 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

52 See, for example, section 10B of the *Health Insurance Act 1973*.

53 Schedule 4, item 13, proposed section 101 and subsections 102ZF(5)–(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

54 Proposed subsections 101(2) and 102ZF(6).

55 Explanatory memorandum, pp 187 and 195.

liability, including outlining whether the approach is consistent with the *Guide to Framing Commonwealth Offences*.⁵⁶

1.76 The committee requests a detailed justification from the Minister for the proposed imposition of strict liability in this instance, with particular reference to the principles set out in the *Guide to Framing Commonwealth Offences*.⁵⁷

Exemption from disallowance⁵⁸

1.77 Proposed sections 102Z and 102ZA provide the ACMA and ACCC, respectively, with the power to disclose certain information to certain other government bodies if the ACMA or ACCC is satisfied that the information will enable or assist the body to perform or exercise any of the functions or powers of the body. Proposed subsections 102Z(2) and 102ZA(2) provide that the ACMA and ACCC may, by notifiable instrument, declare that other Commonwealth, State or Territory departments or authorities are 'authorised government agencies' thereby allowing the ACMA and ACCC to disclose relevant information to these additional agencies.

1.78 Given that these declarations will allow the ACMA and ACCC to disclose information to further bodies not specified on the face of the primary legislation, it is not clear to the committee why these declarations are to be notifiable instruments (which are not subject to parliamentary disallowance), rather than legislative instruments.

1.79 The committee therefore requests the Minister's advice as to why declarations made under proposed subsections 102Z(2) and 102ZA(2) which authorise further government bodies to receive information from the ACMA and ACCC are to be notifiable, rather than legislative, instruments (and therefore not be subject to disallowance).

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

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

58 Schedule 4, item 13, proposed subsections 102Z(2) and 102ZA(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

Telecommunications (Regional Broadband Scheme) Charge Bill 2017

Purpose	This bill seeks to establish an ongoing funding arrangement for fixed wireless and satellite infrastructure by imposing a monthly charge on carriers, including NBN Co Ltd, in relation to each premises connected to their network that has an active fixed-line superfast broadband service during the month
Portfolio	Communications and the Arts
Introduced	House of Representatives on 22 June 2017
Scrutiny principles	Standing Order 24(1)(a)(iv) and (v)

Significant matters in delegated legislation⁵⁹

1.80 This bill seeks to establish an ongoing funding arrangement for fixed wireless and satellite broadband infrastructure through the imposition of a charge. The funding arrangement is to be known as the Regional Broadband Scheme and the explanatory memorandum notes that the bill is a taxation measure.⁶⁰ The bill operates in conjunction with Schedule 4 to the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 which, among other things, seeks to establish the types of broadband services subject to and exempt from the charge, penalties for avoiding the charge, and information gathering and disclosure powers and information reporting obligations.⁶¹

1.81 The bill sets out default rates of charge which will require all telecommunications carriers to pay a charge of approximately \$7.10 per month, per chargeable premises. Chargeable premises are premises where a carriage service provider (i.e. a provider of retail broadband services) provides a designated broadband service. Under the bill, the initial \$7.10 monthly charge will be comprised of a \$7.09 base component⁶² and a \$0.01266 administrative cost component.⁶³ The base component is indexed annually to the consumer price index (CPI).⁶⁴ The default

59 Clauses 8, 11 and 14. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

60 Explanatory memorandum, p. 2. See also explanatory memorandum for the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017, p. 11.

61 Explanatory memorandum, p. 3.

62 Subclause 12(1).

63 Subclause 16(1).

64 Subclauses 12(2)–(3).

administrative cost component is specified in the bill for each of the first five years,⁶⁵ and then is indexed annually to CPI thereafter.⁶⁶

1.82 Although specific default rates of charge are set out on the face of the bill, the Minister may, by legislative instrument, change the amount of both the base component and the administrative cost component;⁶⁷ however, the sum of the base and administrative cost components for any month cannot exceed \$10, indexed annually to CPI.⁶⁸ In addition, in deciding whether to make such a determination the Minister must have regard to advice provided by the ACCC.⁶⁹

1.83 One of the most fundamental functions of the Parliament is to levy taxation.⁷⁰ The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. In this case, the fact that default rates of the charge and a maximum cap is set in the primary legislation partly addresses the committee's scrutiny concerns. However, any delegation to the executive of legislative power in relation to taxation still represents a significant delegation of the Parliament's legislative powers.

1.84 While the committee welcomes the important limitations in the bill on the proposed ministerial power to alter the rate of taxation, from a scrutiny perspective, the committee considers that it may be appropriate for the bill to be amended to further increase parliamentary oversight by requiring the positive approval of each House of the Parliament before a new determination under subclause 12(4) or 16(8) comes into effect.⁷¹

1.85 The committee requests the Minister's response in relation to this matter.

65 Subclauses 16(1)–(5).

66 Subclauses 16(6)–(7).

67 Subclauses 12(4) and 16(8).

68 Subclause 17A.

69 Paragraph 12(5)(a), clause 13, paragraph 16(9)(a), and clause 17.

70 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

71 See, for example, section 10B of the *Health Insurance Act 1973*.

Modified disallowance procedures⁷²

1.86 In relation to the ministerial determinations altering the base component and administrative cost component made under subclauses 12(4) and 16(8), the bill (as currently drafted) proposes to modify the usual commencement and disallowance procedures for these determinations in two ways.⁷³

1.87 First, subclause 19(3) improves parliamentary oversight of these determinations by ensuring that they do not come into effect until 15 sitting days after the disallowance period has expired. The committee welcomes this modified commencement procedure.

1.88 However, subclause 19(2) seeks to reverse the usual disallowance procedure in subsection 42(2) of the *Legislation Act 2003* to require a House of the Parliament to positively pass a resolution disallowing a determination within the 15 sitting day disallowance period in order for the disallowance to be effective.⁷⁴ Normally, subsection 42(2) of the *Legislation Act 2003* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'* further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.⁷⁵

1.89 Under the modified disallowance procedure proposed in subclause 19(2), if a disallowance motion is lodged, but not brought on for debate before the end of the 15 sitting day disallowance period, the relevant instrument will take effect. In practice, as the executive has considerable control over the conduct of business in the Senate, there may be occasions where no time is made available to consider the disallowance motion within 15 sitting days after the motion is lodged and therefore the instrument would be able to take effect regardless of the attempt to disallow it. As a result, the proposed procedure would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days. The explanatory memorandum provides no

72 Clauses 8 and 13. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

73 See clause 19. The usual commencement and disallowance procedures are contained in sections 12 and 42 of the *Legislation Act 2003*, respectively.

74 Subclause 19(4) also states that section 42 (disallowance) of the *Legislation Act 2003* does not apply to the determination.

75 Rosemary Laing (ed), *Odgers' Australian Senate Practice: As Revised by Harry Evans* (Department of the Senate, 14th ed, 2016), p. 445.

justification for this proposed reversal of the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003*.

1.90 Noting the significant practical impact on parliamentary scrutiny of this measure, the committee requests the Minister's detailed justification as to why it is proposed to reverse the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003* so that where a motion to disallow an instrument is not resolved by the end of the disallowance period, the instrument will be taken *not* to have been disallowed and would therefore be able to come into effect.

1.91 The committee notes that the suggested amendment outlined at paragraph [1.84] above would address the committee's concerns in this regard.

Treasury Laws Amendment (2017 Measures No. 4) Bill 2017

Purpose	This bill seeks to amend the <i>A New Tax System (Wine Equalisation Tax) Act 1999</i> to lower the wine equalisation tax rebate from \$500,000 to \$350,000 on 1 July 2018
Portfolio	Treasury
Introduced	House of Representatives on 21 June 2017

The committee has no comment on this bill.

Vaporised Nicotine Products Bill 2017

Purpose	This bill seeks to exclude e-cigarettes from regulation by the Therapeutic Goods Administration
Sponsor	Senators David Leyonhjelm and Malcolm Roberts
Introduced	Senate on 19 June 2017

The committee has no comment on this bill.

Commentary on amendments and explanatory materials

National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017⁷⁶

[Scrutiny Digest 6 of 2017]

1.92 Noting that one of the most fundamental functions of the Parliament is to levy taxation, the committee had previously sought the Assistant Minister's advice in relation to whether guidance about the method of calculation of the proposed National VET Regulator annual registration charge and a maximum charge could be provided on the face of the primary legislation (rather than the determination of the amount of the charge being left, unfettered, to delegated legislation).⁷⁷

1.93 The committee welcomes these amendments which:

- ensure that the Minister must be satisfied that the amount of the charge will be no more than the Commonwealth's likely costs incurred by the National VET Regulator in performing its functions; and
- provide that the determinations will be subject to parliamentary disallowance.

1.94 The committee takes this opportunity to draw this matter to the attention of the Senate Standing Committee on Regulations and Ordinances for information.

No comments

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

- Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017;⁷⁸
- Export Finance and Insurance Corporation Amendment (Support for Commonwealth Entities) Bill 2017;⁷⁹

76 On 20 June 2017 the House of Representatives agreed to three Government amendments, the Assistant Minister for Vocational Education and Skills (Mrs K L Andrews) presented a supplementary explanatory memorandum and the bill was read a third time.

77 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 6 of 2017*, 14 June 2017, pp 112–115.

78 On 19 June 2017 the Minister for Justice (Mr Keenan) presented an addendum to the explanatory memorandum in the House of Representatives.

- Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017;⁸⁰
- Health Insurance Amendment (National Rural Health Commissioner) Bill 2017;⁸¹
- Interactive Gambling Amendment Bill 2016;⁸² and
- Treasury Laws Amendment (GST Low Value Goods) Bill 2017.⁸³

79 On 22 June 2017 the House of Representatives agreed to three Government amendments, the Minister for Trade, Tourism and Investment (Mr Ciobo) presented a supplementary explanatory memorandum and the bill was read a third time.

80 On 20 June 2017 the House of Representatives agreed to four Government amendments, the Minister for Trade, Tourism and Investment (Mr Ciobo) presented a supplementary explanatory memorandum and the bill was read a third time.

81 On 14 June 2017 the Senate agreed to six Government amendments and the Minister for Regional Development (Senator Nash) tabled a supplementary amendment. On 21 June 2017 the House of Representatives agreed to the Senate amendments and the bill was passed.

82 On 21 June 2017 the House of Representatives disagreed with the Senate amendments and made amendments in place thereof and the Assistant Minister to the Treasurer (Mr Sukkar) presented a supplementary explanatory memorandum.

83 On 19 June 2017 the Senate agreed to four Opposition amendments. On 21 June 2017 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.

2.2 Correspondence relating to these matters is included at **Appendix 2**.

Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017

<p>Purpose</p>	<p>This bill seeks to amend the <i>Australian Citizenship Act 2007</i> (the Citizenship Act) and the <i>Migration Act 1958</i> (the Migration Act) to:</p> <ul style="list-style-type: none"> • increase the general residence requirement for conferral applicants to four years of residence in Australia as permanent residents before being eligible for citizenship; • require conferral applicants to provide evidence of competent level of English language skills prior to applying for citizenship; • modify provisions relating to the automatic acquisition of Australian citizenship under certain circumstances; • require applicants to sign an Australian Values Statement in order to make a valid application for citizenship; • allow for the Australian Citizenship Regulations 2016 or an instrument made under the Citizenship Act to determine the information or documents that must be provided with an application in order for it to be a valid application; • extend the bar on approval to all applicants for citizenship where there are related criminal offences; • extend the good character requirement to include applicants under 18 years of age; • allow for the regulations or an instrument made under the Citizenship Act to introduce a two year bar on a person making an application for citizenship where the Minister has refused to approve the person becoming an Australian citizen on grounds other than failure to meet the residence requirement; • amend key provisions concerning the residence requirements for Australian citizenship, to clarify when it
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	<p>commences;</p> <ul style="list-style-type: none"> • provide the Minister with the discretion to revoke a person's Australian citizenship under certain circumstances; • enable the Minister to make a legislative instrument under certain circumstances in relation to acquiring Australian citizenship; • modify provisions relating to the scope of the Minister's discretion for residence requirements for spouses and de facto partners of Australian citizens, and spouses or de facto partners of deceased Australian citizens; • provide for the discretionary cancellation of approval of Australian citizenship under certain circumstances • provide the Minister with the power to set aside decisions of the Administrative Appeals Tribunal concerning character and identity; • modify provisions relating to access to merits review for conferral applicants under 18 years of age; • provide that certain personal decisions made by the Minister are not subject to merits review; • allow the Minister, the Secretary or an officer to use and disclose personal information obtained under the Citizenship Act; and • make certain consequential amendments
Portfolio	Immigration and Border Protection
Introduced	House of Representatives on 15 June 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (ii), (iii) and (iv)

2.3 The committee dealt with this bill in *Scrutiny Digest No. 7 of 2017*. The Minister responded to the committee's comments in a letter dated 21 July 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.¹

1 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

Broad discretionary power and broad delegation of legislative power²

Initial scrutiny – extract

2.4 Proposed paragraph 21(2)(fa) adds a criterion to the general eligibility criteria for Australian citizenship by conferral. The new criterion is that the Minister must be satisfied that the person 'has integrated into the Australian community'. Item 53 would introduce a power for the Minister to determine, by legislative instrument, the matters to which the Minister may or must have regard to when determining whether a person has integrated into the Australian community.³

2.5 The explanatory memorandum provides examples of the type of matters the Minister may determine that regard may be had to, including:

a person's employment status, study being undertaken by the person, the person's involvement with community groups, the school participation of the person's children, or, adversely, the person's criminality or conduct that is inconsistent with the Australian values to which they committed throughout their application process.⁴

2.6 The question of whether a person has integrated into the Australian community is a matter about which there may reasonable disagreement. The concept of integration in this context is imprecise and matters relevant to understanding integration (even if these are agreed) will inevitably raise questions of degree. The combined effect of these provisions is to delegate to the Minister a large discretionary power to determine whether or not the proposed new criterion has been met by an applicant.

2.7 The committee also notes that there is no requirement that a legislative instrument must be made to guide the exercise of the Minister's judgment in reaching a conclusion about whether an applicant has sufficiently integrated into the Australian community.

2.8 From a scrutiny perspective, the committee considers that the matters relevant to determining whether a person has integrated into the Australian community is a substantive policy question and not technical detail, and as such, are not appropriate for broad delegation to the executive branch of government. The committee therefore suggests that, if the addition of this new eligibility criterion is deemed necessary, it may be appropriate for the bill to be amended to provide guidance in the primary legislation as to what is meant by the phrase 'has integrated into the Australian community' and how this criterion should be applied. At a minimum, it is suggested that it may be appropriate that there be a requirement in

2 Schedule 1, items 43 and 53. The committee draws Senators' attention to these provisions pursuant to principles 1(a)(ii) and (iv) of the committee's terms of reference.

3 See item 53, proposed paragraph 21(9)(e).

4 Explanatory memorandum, p. 27.

the bill that the Minister *must* make a disallowable legislative instrument to guide the exercise of this power prior to it being exercised. The committee requests the Minister's response in relation to these matters.

Minister's response

2.9 The Minister advised:

The Committee suggested the Bill may require amendment to detail how an applicant for Australian citizenship demonstrates they have integrated into the Australian community, and how this criterion should be applied.

The Government considers it appropriate to set out integration factors in a legislative instrument. The instrument will provide opportunities to address particular details of how an applicant may meet the integration requirement. This instrument is disallowable. The Parliament can scrutinise and disallow the instrument when it is tabled in Parliament.

Examples of an applicant's demonstrated integration have been detailed in the Government's announcements as well as in the Explanatory Memorandum. These include evidence of maintaining competent English, sending children to school, seeking employment rather than relying on welfare, earning income and paying tax, and contributing to the Australian community.

The Department of Immigration and Border Protection (the Department) will also assess applicants' criminal records, adherence to social security laws, conduct inconsistent with Australian values such as domestic or family violence, involvement in gangs and organised crime.

The Department is currently preparing the legislative instrument which will outline these relevant factors to consider in assessing an applicant's integration.

Committee comment

2.10 The committee thanks the Minister for this response. The committee notes the Minister's advice that the government considers it is appropriate to set out integration factors in a legislative instrument as the Parliament can scrutinise and disallow the instrument when it is tabled in Parliament. The committee notes the examples provided of the types of matters it is intended will be assessed in determining whether an applicant has integrated into the Australian community.

2.11 The committee's scrutiny view is that significant matters should generally be included in primary legislation to ensure it is subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill (noting that legislative instruments are not subject to amendment). The committee reiterates that it considers that matters relevant to determining whether a person has integrated into the Australian community is a substantive policy question and not technical detail, and as such, are not appropriate for broad delegation to the executive branch of government.

2.12 From a scrutiny perspective, the committee considers that it would be appropriate for the bill to be amended to provide guidance in the primary legislation as to what is meant by the phrase 'has integrated into the Australian community' and how this criterion should be applied. At a minimum, the committee considers it would be appropriate that there be a requirement in the bill that the Minister *must* make a disallowable legislative instrument to guide the exercise of this power prior to it being exercised.

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

2.14 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of this broad delegation of legislative power.

Broad delegation of legislative power⁵

Initial scrutiny – extract

2.15 Item 41 seeks to amend the *Australian Citizenship Act 2007* (Citizenship Act) so that instead of the Minister being satisfied that an applicant for citizenship 'possesses a basic knowledge of the English language' it would require that the Minister be satisfied that the person 'has competent English'. Item 53, proposed paragraph 21(9)(a), provides that the Minister may make a legislative instrument that determines the circumstances in which a person has 'competent English'.

2.16 While the question of whether a person possesses 'competent English' may appear to be a matter of technical detail, from a scrutiny perspective, the committee considers it is difficult to separate the technical issues from broader policy questions that should more appropriately be determined by Parliament than by ministerial determination. Competence in a particular skill is a question that can only be judged by reference to the purpose for which the skill is required. Whereas determination of English language competency, for example, for university studies may be based on evidence and clear requirements intrinsic to particular studies, the same cannot be said in relation to citizenship. Put differently, the level of English language ability a new member of the Australian community who wishes to become an Australian citizen should possess, is affected by subjective values rather than an assessment of technical requirements.

2.17 The explanatory memorandum does not provide any detail as to the level of English that will be considered to constitute 'competent' English. It states that the

5 Schedule 1, items 41 and 53 (proposed paragraph 21(9)(a)). The committee draws Senators' attention to these provisions pursuant to principles 1(a)(iv) of the committee's terms of reference

determination will enable the Minister to determine, for example, 'that a person has competent English where the person has sat an examination administered by a particular entity and the person achieved at least a particular score'.⁶ It also states that this amendment:

reflects the Government's position that English language proficiency is essential for economic participation and promotes integration into the Australian community. It is an important creator of social cohesion and is essential to experiencing economic and social success in Australia.⁷

2.18 Noting that regulation making powers can be used to fine tune and supplement legislatively set schemes, the committee requests the Minister's detailed justification as to why the primary legislation should not contain more detail about what constitutes 'competent English', and requests the Minister's advice as to the level of English it is anticipated an applicant will be required to demonstrate that their English is 'competent'.

Minister's response

2.19 The Minister advised:

The Committee requested the Minister clarify why 'competent English' is not defined in the Bill, and requested more information as to what level of English language an applicant needs to meet this requirement.

The Government announced that applicants must provide results of an approved English language test at competent level in listening, speaking, reading, and writing skills. This is comparable to an International English Language Testing System score of 6 or the equivalent score from a test accepted by the Department. This is consistent with the current 'competent English' test score requirement in the *Migration Regulations 1994* (the Migration Regulations).

The Government considers it appropriate to set out the technical details of the level of English language required in a legislative instrument. This gives the Minister the opportunity to determine particular circumstances such as the approved test providers and test scores. It also provides the Minister flexibility to update the instrument in instances where, for example, there is a change in the approved test providers, without going through the legislative amendment process.

This instrument that will be made to set out the detail of the English language requirement will be subject to scrutiny and disallowance when it is tabled in the Parliament. This approach mirrors the definition of 'competent English' in regulation 1.15C and the 'Language Tests, Score and Passports 2015' instrument in the Migration Regulations.

6 Explanatory memorandum, p. 26.

7 Explanatory memorandum, p. 27.

The Bill provides certain applicants exemptions from the English language requirement for example, due to their age, impairment, or incapacity.

Limited exemptions will be available to holders of valid passports of the United Kingdom, the Republic of Ireland, Canada, the United States of America or New Zealand. This is consistent with the 'competent English' requirement for skilled migrants under the Migration Regulations. There will also be exemptions available to applicants who have undertaken specified English language studies at a recognised Australian education provider. All of these exemptions will be detailed in the instrument.

Committee comment

2.20 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is the intention that competent level English will be comparable to an International English Language Testing System score of six or an equivalent score accepted by the Department. The committee also notes the Minister's advice that setting out the technical details of the level of English in a legislative instrument gives the Minister the opportunity to determine particular circumstances such as the approved test providers and test scores and to update the instrument where, for example, there is a change in the approved test providers. The committee also notes that the bill provides certain applicants exemptions from the testing requirement, with further exemptions to be detailed in the instrument, and that the instrument will be subject to disallowance.

2.21 Although the committee accepts that some of the details about the process for testing competency may be appropriate for a legislative instrument, from a scrutiny perspective, it remains concerned that the primary legislation contains no guidance about how the 'competent English' requirement will be understood or applied. As the committee previously noted, significant policy questions are raised by how such a requirement is understood and applied.

2.22 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

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

2.24 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving the circumstances in which a person will be deemed to have 'competent English' to delegated (rather than primary) legislation.

Restriction on judicial review⁸

Initial scrutiny – extract

2.25 Proposed section 22AA seeks to confer a new personal, non-compellable power on the Minister to waive the general residence requirement where the Minister is satisfied either that:

- (a) an administrative error made by or on behalf of the Commonwealth causes an applicant to believe that he or she was an Australian citizen, and the error contributed to the applicant not being able to satisfy the residence requirement; or
- (b) that it is in the public interest to do so.

2.26 However, proposed subsection 22AA(4) makes it clear that the Minister has no duty to even consider whether or not to exercise this power, in any circumstance.

2.27 'No-duty-to-consider clauses' do not by their terms oust the High Court or Federal Court's judicial review jurisdiction. However, they do significantly diminish the efficacy of judicial review in circumstances where no decision to consider the exercise of a power has been made. Even where a decision has been made to consider the exercise of the power, some judicial review remedies will not be available.⁹

2.28 The explanatory memorandum does not explain why subsection 22AA(4) has been included, other than to say that it makes it clear that subsection 22AA(1) does not impose a duty on the Minister and the power is purely discretionary.

2.29 The committee considers that provisions that provide that a Minister has no duty to exercise a statutory power should be thoroughly justified. Noting that the appropriateness of this clause may differ depending on the purpose for which the power may be exercised (that is, administrative error or the public interest), the committee requests the Minister's explanation as to why proposed subsection 22AA(4) is considered necessary and appropriate.

Minister's response

2.30 The Minister advised:

The Committee requested an explanation as to why the Minister does not have a duty to consider exercising the new personal, non-compellable power to waive the general residence requirement.

The Minister may exercise this power where he is satisfied that either:

8 Schedule 1, item 68, proposed subsection 22AA(4). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

9 For example, certiorari will be futile given that mandamus could not issue to compel the re-exercise of the power, even if it had been unlawfully exercised.

- an administrative error made by or on behalf of the Commonwealth causes an applicant to believe that he or she was an Australian citizen, and the error contributed to the applicant not being able to satisfy the general residence requirement; or
- it is in the public interest to do so.

Further, the Minister has no duty to consider whether or not to exercise this power, which is consistent with the Ministerial intervention power in the *Migration Act 1958*.

The Government considers this provision appropriate because the power is discretionary in nature. It would place an undue burden for the Minister to consider exercising this power in every circumstance, particularly where applicants may seek to abuse this provision with frivolous claims.

It is anticipated that there will be minimal cases that will be referred to the Minister to consider exercising this power, and that the power will not be exercised regularly.

Under the current special residence requirements in subsections 22A(1A) and 22B(1A) of the *Australian Citizenship Act 2007* the Minister does not have a duty to consider exercising these personal powers. Therefore, the proposed measure is consistent with the current personal and non-compellable powers.

Further, where the Minister exercises this power to waive an applicant's general residence requirement, he must table it in each House of Parliament. This means that the Parliament can supervise the Minister's exercise of this power adequately.

Committee comment

2.31 The committee thanks the Minister for this response. The committee notes the Minister's advice that the power is considered appropriate because the power is discretionary and it would place an undue burden for the Minister to consider exercising this power in every circumstance, particularly where applicants may seek to abuse this provision with frivolous claims.

2.32 The committee accepts the Minister's advice that Parliament can supervise the Minister's exercise of this power, but notes also that no mechanism is provided to supervise any failure to exercise the power in appropriate circumstances.

2.33 The committee appreciates the burden that may be placed on the Minister to consider exercising this power in all instances, however, considers there may be circumstances where the Minister is made aware of facts that indicate a relevant administrative error has been made or there are circumstances that would justify the exercise of this power. The risk of frivolous claims needs to be balanced against legitimate claims being properly assessed where applicants can point to evidence or arguments on which this power may be exercised.

2.34 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of providing that the Minister has no obligation to consider the exercise of this power even in circumstances where the Minister is made aware of facts relevant to its exercise.

Exemption from disallowance—Australian Values Statement¹⁰

Initial scrutiny – extract

2.35 Proposed subsections 46(5) and 46(6) provides that the Minister may determine an Australian Values Statement and any requirements relating to that statement, but that such a determination is not subject to disallowance under the *Legislation Act 2003*. The committee has consistently taken the view that removing parliamentary oversight is a serious matter and any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum.

2.36 In this instance, the explanatory memorandum states:

Like the Australian Values Statement made for the Migration Regulations, the instrument made under new subsection 46(5) to determine the Australian Values Statement is exempt from disallowance because it concerns matters which should be under Executive control. The instrument provides the wording of the Australian Values Statement that an applicant must sign to make a valid application for citizenship. This aligns with the process for a visa application under the Migration Act which many applicants will have already signed as part of their visa application process. Australian citizenship is core Government policy and aligns with national identity and as such matters going directly to the substance of citizenship policy such as Australian Values should be under Executive control, to provide certainty for applicants and to ensure that the Government's intended policy is upheld in its application.¹¹

2.37 The committee also notes that item 42 seeks to amend section 21 of the Citizenship Act to make it an eligibility requirement that the applicant has 'adequate knowledge of Australia's values'. It is unclear whether the Australian Values Statement, to be determined by a non-disallowable legislative instrument, will be considered as part of the determination as to what constitutes 'Australia's values'.

2.38 The committee notes that the explanatory memorandum states that Australian values are matters that go 'directly to the substance of citizenship policy'.

10 Schedule 1, item 119, proposed subsections 46(5) and 46(6). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

11 Explanatory memorandum, p. 53.

The committee considers that matters that go directly to the substance of a policy would appear to be matters that are appropriate for parliamentary oversight.

2.39 The committee also notes that the explanatory memorandum states that putting the determination of the Australian Values Statement under Executive control provides certainty to applicants. The committee notes that certainty could be provided as to what constitutes Australian values by increasing parliamentary oversight of this matter, rather than including this in a legislative instrument and exempting it from disallowance altogether. The committee observes that it would be possible to provide for such increased scrutiny in ways that would ensure the definition was not subject to unexpected change, for example by:

- including at least core 'Australian values' in the primary legislation;
- requiring the positive approval of each House of the Parliament before the instrument comes into effect;¹²
- providing that the instrument does not come into effect until the relevant disallowance period has expired;¹³ or
- a combination of these processes.¹⁴

2.40 Noting the importance of appropriate parliamentary scrutiny, the committee requests the Minister's further justification for exempting from disallowance a determination setting out an Australian Values Statement, and the Minister's response to the committee's suggestions set out above at paragraph [2.37].

Minister's response

2.41 The Minister advised:

The Committee asked for further justification for exempting a determination setting out an Australian values statement from disallowance.

The determination will be a registered legislative instrument, which will be publicly available on the Federal Register of Legislation. There will also be an explanatory statement accompanying the determination to demonstrate the purpose and necessity of the Australian Values Statement as well as to justify the inclusion of values considered as

12 See, for example, section 10B of the *Health Insurance Act 1973*.

13 See, for example, section 79 of the *Public Governance, Performance and Accountability Act 2013*.

14 See, for example, section 198AB of the *Migration Act 1958* and sections 45-20 and 50-20 of the *Australian Charities and Not-for-profits Commission Act 2012*. However, the committee considers that any modified disallowance procedures should still retain the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003*—that is, that instruments are taken to be disallowed if a disallowance motion remains unresolved at the end of the disallowance period.

Australian values. Therefore the determination will be subject to Parliamentary and public scrutiny. The Parliament can scrutinise the Minister's determination and provide comment on this instrument through other mechanisms. The Committee made the suggestions below to ensure that the Australian Values Statement is not subject to unexpected change:

- including at least core 'Australian values' in the primary legislation;
- requiring the positive approval of each House of the Parliament before the instrument comes into effect;
- providing that the instrument does not come into effect until the relevant disallowance period has expired; or
- a combination of these processes.

The Government notes the suggestions. Currently, provisional, permanent and a small number of temporary visa applicants are already required to sign the Australian values statement as stated in clause 4019 of Schedule 4 to the Migration Regulations. The 'Australian values statement for Public Criterion 4019 - 2016/113' instrument, which is not disallowable, outlines two different Australian Values Statements in visa application forms. These applicants are also asked to understand what may be required of them if they later apply for Australian citizenship.

Aspiring citizens are currently required to sign the long form of the Australian values statement in the declaration in their citizenship application forms. The new Australian values statement will be incorporated into the citizenship application forms.

This provision is consistent with the requirement to sign the Australian values statement in the Migration Regulations.

Applicants can access the *Life in Australia* book to understand more about life in Australia, including values that are important to Australian society. Further, the public has been made aware of Australia values through the discussion paper - *Strengthening the test for Australian Citizenship* as well as public announcements made by the Government. In brief, Australian values include, but are not limited to, democratic beliefs, freedom of speech, freedom of expression, and equality of women and men. Conduct that is inconsistent with Australian values includes criminality and domestic and family violence.

Committee comment

2.42 The committee thanks the Minister for this response. The committee notes the Minister's advice that the determination will be publicly available and will be accompanied by an explanatory statement, and as such, will be subject to parliamentary and public scrutiny. The committee notes the Minister's statement that the Parliament can scrutinise the determination and provide comment on the instrument 'through other mechanisms'. The committee also notes the Minister's

advice that applicants can access a book to understand more about life in Australia and that the public has been made aware of what 'Australian values' are through a discussion paper.

2.43 The committee reiterates that it has consistently taken the view that removing or limiting parliamentary oversight is a significant matter and any exemption of delegated legislation from the usual disallowance process should be fully justified. In relation to other mechanisms available to the Parliament to properly scrutinise non-disallowable instruments, the committee notes that the Regulations and Ordinances Committee does not examine non-disallowable instruments and the nature of non-disallowance means that the Senate would have no power to set aside any ministerial determination that it considers to be inappropriate. The committee also notes that matters set out in a book or a discussion paper is not analogous to setting matters out in legislation over which the Parliament retains some control.

2.44 From a scrutiny perspective, the committee considers it would be appropriate for the bill to be amended to include at least core 'Australian values' in the primary legislation and if matters are to be included in delegated legislation, that such an instrument be subject to disallowance.

2.45 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of exempting from disallowance a determination setting out an Australian Values Statement.

Retrospective application—applications made on or after 20 April 2017¹⁵

2.46 Items 136, 137 and 139 provide that various provisions of the Citizenship Act, as amended by this bill, are to apply to applications made on or after 20 April 2017. This includes amendments made to introduce requirements for taking a pledge of allegiance, integrating into the Australian community, having competent (rather than basic) levels of English and changes to application requirements (particularly around the Australian Values Statement). This has the effect of applying these amendments retrospectively.

2.47 The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively,¹⁶ as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

15 Schedule 1, subitems 136(1), 136(2), 137(6) and item 139. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

16 Including provisions that back-date commencement to the date of the announcement of the bill or measure (i.e. 'legislation by press release').

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

2.49 In this case, the explanatory memorandum provides no detail as to why elements of items 136 and 137 are to apply retrospectively. In relation to item 139 the explanatory memorandum states:

The effect of this application provision is that applications made on or after 20 April 2017 which may have been made in reliance on the requirements of section 46 as it was before being amended by the Bill will not meet the application requirements set out in section 46 as amended by the Bill on and after the commencement of this item. This application provision reflects the changes to citizenship requirements that were announced by the Prime Minister and the Minister on 20 April 2017.¹⁷

2.50 Thus, the only justification given is that announcements were made on 20 April 2017 by the Executive that it was intended that legislation would be introduced into Parliament to seek to amend the citizenship laws. No detail is provided as to the number of persons likely to be adversely affected and the extent to which their interests are likely to be affected.

2.51 The committee requests the Minister's detailed advice as to the number of persons likely to be affected by the proposals in items 136, 137 and 139 to apply certain amendments made by the bill retrospectively, and whether it is likely that applications may have been made on or after 20 April 2017, but before any passage of the bill, that would not meet the criteria for eligibility for citizenship as a result of the retrospective application of these amendments.

Minister's response

2.52 The Minister advised:

The Committee asked for detailed advice as to the number of persons likely to be affected by the retrospective application of the following amendments:

- requirement to make a pledge of allegiance (extended to applicants over 16 years of age in all streams of citizenship by application);
- requirement to demonstrate integration;
- requirement to demonstrate competent level of English language;
- new general residence requirement; and
- new requirements for a valid application.

17 Explanatory memorandum, p. 68.

As of 16 July 2017, the Department has received 39,081 applications for citizenship by conferral (for 47,328 primary and dependent applicants) which had been lodged on or after 20 April 2017.

Of these applications, the Department provides the following estimates:

- General residence requirement:
 - 21,540 (46%) will meet;
 - 25,788 (54%) will not meet;
 - The Department notes that there are other residence requirements and Ministerial discretions that these applicants may be eligible for to meet this requirement. These enable reduced residency periods under the 4 years.
- Competent English:
 - a number of these applicants will be exempt from the English language requirement on the grounds of:
 - age (under 16 or 60 or over); or
 - incapacity; or
 - speech, hearing or sight impairment; or
 - applied under born to a former citizen, born in Papua or stateless provisions; or
 - valid passport holder of United Kingdom, Canada, United States, New Zealand or Republic of Ireland
 - The potential failure rate for an upfront English language test cannot be determined as the Department does not hold information on citizenship applicants' English language proficiency.
- Integration requirement:
 - a number of these applicants will be exempt from the integration requirement including on the grounds of:
 - age (under 16 or 60 or over); or
 - incapacity; or
 - having applied under born to a former citizen, born in Papua or stateless provisions.
 - This is a new requirement. The potential failure rate for a new integration test thus cannot be determined as the Department does not hold information that supports this requirement.

Requirement to make the pledge

An additional 429 applicants¹⁸ who have applied for citizenship by application (conferral, descent, adoption and resumption) on or after 20 April 2017 over 16 years of age will be required to make the pledge of allegiance who would not have been required to under the previous arrangements.

Whilst the additional requirement may increase the time it takes these applicants to acquire citizenship it is not known how many of these applicants would fail to make the pledge and therefore not meet the eligibility requirements to become a citizen.

Committee comment

2.53 The committee thanks the Minister for this response. The committee notes the Minister's advice that as at 16 July 2017 there are 47,328 people who would be affected by the proposed changes to the citizenship laws, and in relation to residence requirements over half of the applicants would not meet the new requirements as set out in this bill. The committee also notes that in relation to the new requirements for possessing 'competent English', the integration requirement and the requirement to take a pledge of allegiance, the Minister is not able to determine the number of people who would be affected by this change.

2.54 The committee reiterates its long-standing scrutiny concern about provisions that have the effect of applying retrospectively,¹⁹ as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

2.55 The committee notes that if the changes proposed to be made in this bill were to apply retrospectively to 20 April 2017, over 25,000 people (and possibly many more) would be adversely affected. As such, there would be thousands of people who made their applications for citizenship on the basis of the law as it currently stands who would be refused citizenship despite meeting the criteria that applied at the date that they made their application. The committee considers that the retrospective application of these provisions would have a detrimental effect on a large number of individuals which has not been adequately justified.

18 As at 25 June 2017. This includes number of people aged 16 years and over at time of lodgement with citizenship applications lodged from 20 April 2017, which were still on-hand at 25 June 2017. This includes the Citizenship by Conferral (born in Papua. born to a former Australian citizen. statelessness streams), Descent and Resumption caseloads. Data was not available for the on-hand adoption cases. Note: the figures in this statement are based on finalisation data and are indicative only. Unable to determine exact figures due to insufficient information stored in data.

19 Including provisions that back-date commencement to the date of the announcement of the bill or measure (i.e. 'legislation by press release').

2.56 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the retrospective application of these amendments.

Education Legislation Amendment (Provider Integrity and Other Measures) Bill 2017

<p>Purpose</p>	<p>This bill seeks to amend a number of Acts relating to higher education and education services for overseas students to:</p> <ul style="list-style-type: none"> • amend the fit and proper provisions relating to the assessment of providers seeking registration to educate international students; • expand notifiable event requirements that a provider must report to Education Services for Overseas Students (ESOS) agencies; • extend information sharing provisions by allowing the Secretary of a department to share information with the Overseas Students Ombudsman; • allow the Secretary and ESOS agencies to share and publish information about the exercise of functions of education agents; • amend late payment penalties; • introduce a requirement that all registered higher education providers must be fit and proper persons; • amend the definition of 'qualified auditor'; • clarify that the Tertiary Education Quality and Standards Agency may delegate its functions or powers to the Chief Executive Officer; • clarify the definition of 'vocational training and education course'; • increase financial viability and transparency requirements including enhancing audit requirements for providers; • introduce more stringent provider application requirements; and • provide additional student protection mechanisms to FEE-HELP students
<p>Portfolio</p>	<p>Education and Training</p>
<p>Introduced</p>	<p>House of Representatives on 1 June 2017</p>
<p>Bill status</p>	<p>Before House of Representatives</p>
<p>Scrutiny principles</p>	<p>Standing Order 24(1)(a)(ii) and (iv)</p>

2.57 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's comments in a letter dated 4 August 2017.

Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.²⁰

Significant matters in delegated legislation²¹

Initial scrutiny – extract

2.58 Items 1 and 2 of Schedule 1 provide that the Minister may specify, in a legislative instrument, additional matters to which an Education Services for Overseas Students (ESOS) agency or designated State authority must have regard to in determining whether providers registered or applying to be registered are 'fit and proper persons'. The committee's view is that significant matters, such as the criteria for determining whether providers are fit and proper persons, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory memorandum suggests that this delegation of legislative power is justified:

Including this content in a legislative instrument provides the Minister with the flexibility to supplement and refine the considerations that relevant regulatory agencies must take into account when making decisions about the suitability of persons to provide education services students. This flexibility is important to ensure that the fit and proper person requirements remain responsive to market developments and are sufficiently detailed to properly articulate the circumstances which may be relevant to such determinations. This will ensure that the individuals governing education providers are fit to deliver high quality services, preserve the integrity of the international education sector and protect students' interests.²²

2.59 Although the importance of enabling regulators to operate with flexibility may be a legitimate reason in general for delegating legislative power, reasons why this is so in a particular instance requires detailed justification.

2.60 The committee requests the Minister's advice as to why flexibility is necessary in relation to setting the criteria as to whether providers are fit and proper persons, and seeks examples as to why 'market developments' mean that it is difficult to detail the relevant matters and circumstances in primary legislation.

2.61 In addition, item 4 of Schedule 2 proposes a new fit and proper person requirement for the purposes of the *Tertiary Education Quality and Standards*

20 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest.

21 Schedule 1, items 1 and 2 and Schedule 2, item 4. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

22 Explanatory memorandum, p. 26.

Agency Act 2011. It provides that in determining whether a person is a fit and proper person for the purposes of that Act, regard may be had to any matters specified by the Tertiary Education Quality and Standards Agency (TEQSA) in a legislative instrument. The explanatory memorandum states that regulatory determinations around whether a provider is a fit and proper person to be an approved provider 'is properly a matter for TEQSA'.²³ However, no reasons are provided as to why these matters are more appropriate to be determined by TEQSA in a legislative instrument, rather than provided for in primary legislation.

2.62 The committee therefore also requests the Minister's advice as to why it is more appropriate that the matters to be considered in determining whether a person is a fit and proper person are to be determined by TEQSA in a legislative instrument, rather than set out in primary legislation.

Minister's response

2.63 The Minister advised:

The Committee has requested my advice on why flexibility is needed in determining whether a person is 'fit and proper' for the purposes of the ESOS Act, and why it is more appropriate that the matters to be considered in relation to 'fit and proper' person requirements under the TEQSA Act are determined in a legislative instrument rather than set out in primary legislation. As has been shown in other sectors, such as family day care and vocational education and training (VET), unscrupulous operators are very nimble in developing business models which exploit vulnerable people and systems. Given this, both the Department of Education and Training and Tertiary Education Quality and Standards Agency (TEQSA) need the ability to act flexibly and swiftly to ensure such operators and their business practices are not able to engage with higher education or international education.

A number of developments in the higher education and international education sectors highlight the need for an effective and flexible regime to ensure that providers and their key personnel are 'fit and proper' persons. These include:

- a significant number of prospective entrants to the higher education and international education sectors, particularly from entities currently operating in the VET sector
- increasing challenges to established patterns of higher education delivery, accreditation and credentialing posed by applications of online and technology-led learning
- widespread interest in the acquisition of existing registered providers by private equity firms and other companies.

23 Explanatory memorandum, p. 37.

These developments are further amplified as a result of recent measures taken to eliminate the exploitation of VET FEE-HELP as some providers are seeking opportunities in other sectors, including higher education and international education.

Departmental data has shown that there are a number of VET-FEE HELP providers currently operating under the Commonwealth Register of Institutions and Courses for Overseas Students, with some being recent entrants having engaged with the scheme subsequent to 2015. TEQSA has also recently experienced a significant increase in expressions of interest related to gaining accreditation as a higher education provider, many from organisations who are currently, or have previously been, active in the VET sector. Where these providers, or associated staff, have previously been engaged in unscrupulous practices in the VET sector, this raises the risk of seeing the same practices emerge within the higher education and international education sectors.

Given the above, the flexibility built in to the proposed ESOS Act 'fit and proper' person requirements will provide an additional regulatory tool for the Australian Government to respond to unscrupulous business models. This will allow the Government to maintain a high entry barrier and ensure only appropriate providers participate in the international education sector; protecting overseas students studying in Australia and maintaining Australia's excellent reputation for international education.

Further, I note that the proposed section 7A of the TEQSA Act does not affect the substantive requirements, introduced in the Bill, that providers and their key personnel must be 'fit and proper' persons. Instead, the proposed section 7A provides the capacity for further clarification as to the matters which may be taken into account by TEQSA in making decisions in relation to the 'fit and proper' person requirements. This approach is consistent with other legislative schemes dealing with the regulation of education, including section 186 of the *National Vocational Education and Training Regulator Act 2011* and subsection 16-25(4) of the HESA.

In addition, TEQSA undertakes extensive consultation prior to making legislative instruments, consistent with the requirements of the *Legislation Act 2003* and the *Australian Government Guide to Regulation*. My decision about whether to give approval to any such proposed instrument will take account of the extent to which TEQSA has undertaken appropriate consultation, while any instrument put forward would also be subject to disallowance by Parliament.

The proposed section 7A of the TEQSA Act therefore provides the necessary flexibility to respond to these developments in the higher education sector, while maintaining appropriate parliamentary and ministerial oversight of TEQSA's approach.

Committee comment

2.64 The committee thanks the Minister for this response. The committee notes the Minister's advice that both the Department of Education and Training and the Tertiary Education Quality and Standards Agency need the ability to act flexibly and swiftly in relation to the 'fit and proper' person requirements to ensure that unscrupulous operators (particularly those who had previously operated in the VET sector) are not able to engage with the higher education or international education sectors. The committee also notes the Minister's advice that the relevant instruments will be subject to parliamentary disallowance.

2.65 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

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

2.67 In light of the detailed information provided explaining the need for flexibility in relation to the 'fit and proper' person requirements, and the fact that the relevant instruments will be subject to parliamentary disallowance, the committee makes no further comment on this matter.

Broad delegation of administrative power²⁴***Initial scrutiny – extract***

2.68 Proposed section 215-10 triggers the investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions of the *Higher Education Support Act 2003*. Proposed subsection 215-10(3) provides that an authorised person may be assisted 'by other persons' in exercising most powers or performing functions or duties in relation to investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

2.69 The committee therefore requests the Minister's advice as to why it is necessary to confer investigatory powers on any 'other person' to assist an authorised person and whether it would be appropriate to amend the bill to require that any person assisting an authorised person have specified skills, training or experience.

24 Schedule 3, item 37, proposed subsection 215-10(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

Minister's response

2.70 The Minister advised:

In relation to the HESA amendments, the Committee has queried why it is necessary to confer investigatory powers under the *Regulatory Powers (Standard Provisions) Act 2014* to 'other persons' without specifying who those persons may be or that they have a specified level of training and experience. This has been done so as not to unnecessarily limit the range of expertise and advice available to the department in undertaking assessments of a provider's compliance with HELP program requirements. The range of issues which may need to be considered when conducting an investigation is significant and will vary from one provider to another in line with their tuition, business and compliance practices. By not limiting the range of external expertise the department is able to engage, this provision ensures that relevant subject matter or investigatory experts can be appointed, where necessary, to adequately ascertain compliance with program requirements.

The investigatory powers and related matters in the *Education Legislation Amendment (Provider Integrity) Bill* have been modelled from the *VET Student Loans Act 2016* - Sections 82 to 90. This was done to ensure consistency for the department and providers as a large number of providers operate both as VSL and FEE-HELP providers.

Committee comment

2.71 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is proposed to confer investigatory powers to 'other persons' without specifying who those persons may be, or that they have a specified level of training and experience, so as not to unnecessarily limit the range of expertise available to the department in undertaking assessments of a provider's compliance with HELP program requirements. The Minister advised that the range of issues which may need to be considered when conducting an investigation is significant and will vary from one provider to another in line with their tuition, business and compliance practices. The committee also notes the Minister's advice that these powers have been modelled on provisions relating to the VET sector to ensure consistency for the department and providers given that a large number of providers operate both as VET Student Loans and FEE-HELP providers.

2.72 The committee's consistent scrutiny position in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have received appropriate training. The committee understands the need for flexibility in determining who may be appropriate 'other persons' in the particular circumstances of an investigation, however the committee remains concerned that 'other persons' will be authorised to assist in the investigation without any requirement for them to have received training in the use of the relevant investigatory powers.

2.73 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing 'other persons' to assist authorised officers in exercising potentially coercive or investigatory powers²⁵ in circumstances where there is no legislative guidance about the appropriate skills and training required of those 'other persons'.

²⁵ See Part 3 of the *Regulatory Powers (Standard Provisions) Act 2014*.

Government Procurement (Judicial Review) Bill 2017

Purpose	This bill seeks to designate the Federal Circuit Court with jurisdiction to receive and review local and international supplier complaints in relation to a breach of the Commonwealth Procurement Rules
Portfolio	Finance
Introduced	House of Representatives on 25 May 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(iii) and (iv)

2.74 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's comments in a letter received 19 July 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.²⁶

Broad instrument-making power²⁷

Initial scrutiny – extract

2.75 The bill seeks to establish an independent complaints mechanism for procurement processes. The bill would enable the Federal Court or Federal Circuit Court to grant an injunction in relation to a contravention of the relevant Commonwealth Procurement Rules (CPRs), so far as those rules relate to a 'covered procurement'. Clause 5 of the bill sets out the definition of a covered procurement. It defines a procurement as a covered procurement if the relevant CPRs apply to the procurement and the procurement is not in a class of procurements specified in a determination. Subclause (2) empowers the Minister to make, by legislative instrument, a determination that additional procurements may be exempted from the definition of a covered procurement. The clause does not specify any criteria by which such a determination is to be made.

2.76 The explanatory memorandum states that this ensures that 'additional procurements may be exempted from the CPRs if there are such provisions in

26 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest.

27 Subclause 5(2). The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

Australia's free trade agreements'.²⁸ However, subclause 5(2) does not, by its terms, appear to be limited to determinations reflecting this purpose.

2.77 The committee requests the Minister's advice as to why it is necessary to provide a broad power for the Minister to make a determination exempting classes of procurements from the definition of a 'covered procurement' and whether it is appropriate for the bill to be amended to ensure that additional procurements could only be exempted from the definition if there are such provisions in Australia's free trade agreements (if this is the intention of the provision).

Minister's response

2.78 The Minister advised:

Australia is a party to several free trade agreements (FTA) with procurement obligations. These obligations can vary between FTAs. For example, there are differences in the government entities covered, the financial thresholds that apply and the exemptions that may be used.

The Commonwealth Procurement Rules (CPRs) incorporate relevant obligations from Australia's FTAs. The CPRs also reflect Government policies, such as the application of the CPRs to all non-corporate Commonwealth entities and the reporting of contracts valued at or above \$10,000. The CPRs set a 'watermark' which incorporates FTA obligations and Government policies. This 'watermark' can be equal to or higher than the obligations of a single FTA when viewed on its own.

Government functions and entities change from time to time. The intention of this provision of the Bill is to allow the Government of the day flexibility to exempt additional procurements from the definition of 'covered procurements', if needed, and to do so in a manner that reflects the Government's particular circumstances and requirements. It is not envisaged that it would be used regularly.

The Government seeks to uphold its obligations under FTAs, and any exemption of procurements from the definition of 'covered procurements' in the Bill would be exercised in a manner that is consistent with Australia's FTAs. However, for the reasons discussed above, a specific reference to Australia's FTAs should not be included in this provision.

Committee comment

2.79 The committee thanks the Minister for this response. The committee notes the Minister's advice that the CPRs incorporate relevant obligations from Australia's free trade agreements as well as government policies. The committee also notes the advice that the intention of the provision is to give flexibility to exempt additional procurements if needed to reflect the government's particular circumstances and requirements, but that it is not envisaged that this would be used regularly.

28 Explanatory memorandum, p. 5.

2.80 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.81 In light of the information provided, and the fact that any exemption would be subject to the disallowance process, the committee makes no further comment on this matter.

Review rights²⁹

Initial scrutiny – extract

2.82 Subclause 23(1) of the bill provides that a contravention of the Commonwealth Procurement Rules (CPRs) does not affect the validity of a contract, and subclause 23(2) provides that it is immaterial whether the contravention occurred before, at or after the commencement of this Act. The explanatory memorandum merely restates the terms of the provision without providing any explanation of the purpose or effect of the provision.³⁰

2.83 It is unclear whether or not this provision might work to extinguish rights that an affected person might otherwise have to challenge the validity of a contract in circumstances where the CPRs are contravened.

2.84 Clause 14 of the bill provides that the powers conferred on the courts under the bill are in addition to, and not instead of, any other powers. However, the relationship between clauses 14 and 23 is not explained in the explanatory materials.

2.85 The committee requests the Minister's advice as to whether clause 23 could operate to extinguish existing legal rights relating to impugning the validity of a contract by way of proceedings not brought under this legislation, or whether the provision is intended to operate only in relation to proceedings brought under this bill.

Minister's response

2.86 The Minister advised:

The intention of the clause is to provide certainty to both suppliers and the officials of relevant entities on the validity of contracts awarded following a procurement process. It allows contracted suppliers to proceed with their work without concern that a breach of the CPRs by a relevant entity

29 Clause 23. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

30 See explanatory memorandum, p. 10.

could render their contract invalid. It also reaffirms earlier clauses in the Bill which provide that the remedies available to suppliers under the Bill are injunctions and compensation.

Compliance with the CPRs is not a condition for entering into a contract under section 23 of the *Public Governance, Performance and Accountability Act 2013*, and I am advised that, currently, a breach of the CPRs is unlikely to be viewed by the courts as affecting the validity of a contract.

The provision has not been limited to proceedings brought under the Bill.

Committee comment

2.87 The committee thanks the Minister for this response. The committee notes the Minister's advice that the intent of the clause is to provide certainty and allow contracted suppliers to not be concerned that a breach of the CPRs could render a contract invalid. The committee also notes the advice that currently, a breach of the CPRs is unlikely to be viewed by the courts as affecting the validity of a contract and that the provision has not been limited to proceedings brought under the bill.

2.88 The committee notes that the response does not specifically address the committee's question as to whether clause 23 (which states that it is immaterial whether the contravention occurred before the commencement of the Act) could operate to extinguish existing legal rights relating to impugning the validity of a contract by way of proceedings brought under this legislation. As the response states that the provision is not limited to proceedings brought under the bill it would appear that the bill could extinguish existing legal rights, notwithstanding that it is considered 'unlikely' that the courts would view breach of the CPRs as affecting the validity of a contract.

2.89 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.90 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of restricting review rights in this manner.

Imported Food Control Amendment Bill 2017

Purpose	<p>This bill seeks to amend the <i>Imported Food Control Act 1992</i> to:</p> <ul style="list-style-type: none"> • require documentary evidence from importers to demonstrate that they have effective internationally recognised food safety controls in place throughout the supply chain for certain types of food; • amend Australia's emergency powers to allow food to be held at the border where there is uncertainty about the safety of a particular food and where the scientific approach to verify its safety is not established; • provide additional powers to monitor and manage new and emerging risks; • recognise an entire foreign country's food safety regulatory system where it is equivalent to Australia's food safety system; • align the definition of 'food' with other Commonwealth legislation; • establish differentiated enforcement provisions to enable a graduated approach to non-compliance; • require all importers of food to be able to trace food one step forward and one step backward; and • make minor technical amendments
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 1 June 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(ii), (iv) and (v)

2.91 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's comments in a letter dated 13 July 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.³¹

31 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

Significant matters in delegated legislation³²

Initial scrutiny – extract

2.93 Proposed subsection 18A will enable the Secretary to determine, in writing, that for food of a specified kind, a specified certificate issued by a specified person or body is a recognised food safety management certificate. Proposed subsection 18A(2) provides that the Secretary must make guidelines that the Secretary must have regard to before making a determination under proposed subsection 18A(1). Proposed subsection 18A(4) provides that determinations made under subsection 18A(1) and guidelines made under 18A(2) are not legislative instruments for the purposes of the *Legislation Act 2003*. The explanatory memorandum justifies this provision on the basis that neither of these instruments would fall within the substantive definition of legislative instruments under the *Legislation Act 2003*, as the determination and guidelines:

merely determine the particular cases or particular circumstances in which the law, as set out by the Act and the regulations, is or is not to apply; those instruments do not determine or alter the content of the law itself.³³

2.94 Although it may be accepted that a determination that a specified certificate is a recognised food safety management certificate is one of an administrative rather than a legislative character, it is less clear why guidelines made under subsection 18A(2) should not be considered to be decisions of a legislative character and therefore subject to parliamentary oversight and accountability.

2.95 Insofar as the guidelines operate as mandatory relevant considerations, i.e. considerations that must be taken into account when the Secretary makes determinations under subsection 18A(1), the guidelines do appear to alter the content of the law and have general application.

2.96 Given the important role that the guidelines have in the making of determinations about recognised food safety management certificates, the committee requests the Minister's advice as to why the guidelines are not to be included in a disallowable legislative instrument (and therefore subject to parliamentary scrutiny).

Minister's response

2.97 The Minister advised:

Item 4 of the Bill proposes to insert section 18A into the *Imported Food Control Act 1992* (the Act). This proposed section will provide for matters in relation to food safety management certificates and includes proposed

32 Item 4, proposed subsection 18A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

33 Explanatory memorandum, pp 39–40.

subsection 18A(2) of the Act, which provides that the Secretary of the Department must, in writing, make guidelines that the Secretary must have regard to before making a determination under proposed subsection 18A(1) of the Act. Proposed subsection 18A(4) of the Act provides that guidelines made under proposed subsection 18A(2) of the Act are not legislative instruments.

Subsection 8(4) of the *Legislation Act 2003* provides for the definition of 'legislative instrument'. If a proposed instrument satisfies the definition in that subsection, it will have legislative character and will be subject to the requirements of the Legislation Act.

The guidelines proposed by subsection 18A(2) of the Act do not have legislative character because the material in the guidelines will not determine or alter the content of the law or create or affect a privilege, interest or right. This is due to the fact that the proposed guidelines will be program specific operational guidance material, which is designed to assist the Secretary, or his or her delegate, to make decisions in relation to the presentation of recognised food safety management certificates by food importers (for example, does the certificate relate to the food described in the consignment; is the certificate bona fide or a forgery).

Further, it is the intention that the guidelines will list what food safety management schemes will be recognised and provide the framework on which these decisions were made. This will enable stakeholders to understand how the Department has made decisions, and will enable other food safety management schemes to approach the Department for recognition. The rationale for providing this information in an administrative instrument is two-fold:

- the decision making parameters are based on food science and risk management approaches and are of a technical and complex nature, and
- recognised food safety management schemes will be selected on the basis of the supporting food science and risk management approach.

Accordingly, as the guidelines proposed by subsection 18A(2) of the Act will not be legislative instruments, those guidelines will not attract the application of the disallowance provisions of the Legislation Act. Further, it would be inappropriate to subject these types of instruments to disallowance, as the decisions underpinning the listed recognised food safety management schemes will be made in reliance on established international initiatives that independently assess schemes against an established criteria (for example, the Global Food Safety Initiative).

Further, as proposed subsection 18A(5) of the Act will require the Secretary to publish any guidelines made under proposed subsection 18A(2) of the Act on the Department's website, importers will be able to access these guidance documents.

Committee comment

2.98 The committee thanks the Minister for this response. The committee notes the Minister's advice that it would not be appropriate for the guidelines made by the Secretary under proposed subsection 18A(2) to be subject to disallowance because:

- (a) the relevant decision making parameters are based on food science and risk management approaches and are of a technical and complex nature;
- (b) recognised food safety management schemes will be selected on the basis of the supporting food science and risk management approach; and
- (c) the decisions underpinning the listed recognised food safety management schemes will be made in reliance on established international initiatives that independently assess schemes against an established criteria (for example, the Global Food Safety Initiative).

2.99 The committee also notes the Minister's advice that proposed subsection 18A(5) will require the Secretary to publish any guidelines made under proposed subsection 18A(2) on the Department's website and therefore importers will be able to access these guidance documents.

2.100 Generally, the committee will be concerned where any instrument of a legislative character is not subject to the parliamentary tabling and disallowance processes. In this case, the committee notes the Minister's advice that the guidelines made under proposed subsection 18A(2) would be of an administrative character; however, it remains unclear to the committee whether the guidelines will in fact be of an administrative or a legislative character as the guidelines determine matters which must be considered in exercising a statutory power and to that extent appear to alter the content of the law.

2.101 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

1.3 In this case, in light of the detailed information provided by the Minister relating to the technical and complex nature of the guidelines and the fact that there is a legislative requirement that the guidelines be published on the Department's website, the committee makes no further comment on this matter.

Broad discretionary power³⁴

Initial scrutiny – extract

2.102 Item 10 of the bill proposes making amendments to enable the Secretary to make a holding order that states certain food imported into Australia is to be held in an approved place, on the basis that the Secretary is satisfied there are reasonable grounds for believing food of that kind may pose a risk to human health. The order can last for up to 28 days and may be extended more than once. There is no provision for merits review of the decision but the explanatory memorandum provides a detailed explanation as to why access to merits review would be inappropriate in the circumstances.³⁵

2.103 The explanatory memorandum states that the requirement in proposed subsection 15(4) to enable the Secretary to extend the 28 day period by a further period of up to 28 days (with no limits on the number of extensions) 'has been inserted to enable continued protection of human health until the appropriate testing regime on the food for the particular hazard and/or adequate risk management strategies can be implemented in relation to the food'. It continues:

To provide a safeguard against arbitrary discretion, it is intended that the decision maker for an order under new subsection 15(3) of the Act will not be the same decision maker for, if applicable, a decision to extend the order under new subsection 15(4) of the Act.³⁶

2.104 The committee notes that this safeguard will presumably be facilitated through delegating the relevant powers reposed in the Secretary to different or multiple decision-makers. However, there appears nothing on the face of the legislation to require that a different decision-maker exercise the power to extend an order.

2.105 The committee suggests that it may be appropriate for the bill to be amended to ensure that it is a legislative requirement that the decision to extend the period of a holding order is made by a different decision-maker to that who made the original holding order, and seeks the Minister's response in relation to this.

Minister's response

2.106 The Minister advised:

Item 10 of the Bill proposes to insert subsections 15(3) to (9) into the Act. These proposed subsections will provide for matters in relation to temporary holding orders where food poses a serious risk to human

34 Schedule 1, item 10. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

35 Explanatory memorandum, p. 42.

36 Explanatory memorandum, p. 10.

health. The proposed temporary holding orders will initially be issued for a period of 28 days, but proposed subsection 15(4) of the Act will enable the Secretary of the Department to extend that period for a further 28 days. The Secretary is not prohibited from making more than one extension of that period. However, under proposed subsection 15(5) of the Act, the Secretary must review the appropriateness of the order before making any further extension.

It is anticipated that the extension power in proposed subsection 15(4) of the Act will be exercised where, within the initial 28 day period of the order:

- appropriate testing regimes are unable to be identified or established in relation to the food; or
- where adequate risk management strategies are unable to be implemented in relation to the food.

Further, proposed subsections 15(5) and (6) of the Act seek to provide safeguards against the exercise of arbitrary discretion in the making of an order under proposed subsection 15(3) of the Act or the extension of any such order under proposed subsection 15(4) of the Act. Proposed subsection 15(5) of the Act requires the decision-maker to review the appropriateness of an order before making an extension to that order under proposed subsection 15(4) of the Act. Proposed subsection 15(6) of the Act requires the Secretary to immediately revoke an order when the circumstances specified for its revocation have occurred.

Proposed subsections 15(3), (4), (5) and (6) of the Act include powers and functions that are vested in the Secretary. Under section 41 of the Act, the Secretary may delegate any or all of his or her powers under the Act to:

- a Senior Executive Service (SES) employee, or acting SES employee in the Department; or
- an Australian Public Service (APS) employee who holds or performs the duties of an Executive Level 1 or 2 position, or an equivalent position, in the Department.

The Secretary is not required to delegate his or her powers and functions, and any such delegation may be limited to particular powers and functions or particular persons. For example, the Secretary is able to delegate his or her powers and functions in:

- proposed subsection 15(3) of the Act to appropriate Executive Level 1 employees in the Department; and
- proposed subsections 15(4), (5) and (6) to appropriate Executive Level 2 employees in the Department.

The inclusion of a legislative requirement that the decision to extend the period of a holding order under proposed subsection 15(4) of the Act must be made by a different decision-maker to that who made the original holding order would necessarily require the Secretary to delegate his or

her power in order for proposed subsections 15(3) and (4) to be operational.

I consider that amending the Bill in the manner suggested by the Committee would be inconsistent with the general principles of delegation. In particular, the Secretary's discretion to delegate his or her powers and functions under section 41 of the Act would be fettered. It is appropriate that the Secretary retains the ability to determine the relevant delegate or delegates (if appropriate) for the purposes of proposed subsections 15(3) to (9) of the Act.

Committee comment

2.107 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is anticipated that the extension power in proposed subsection 15(4) will be exercised where, within the initial 28 day period of the holding order, appropriate testing regimes are unable to be identified or established in relation to the food, or where adequate risk management strategies are unable to be implemented in relation to the food. The committee also notes the Minister's advice that proposed subsections 15(5) and (6) seek to provide safeguards against the exercise of arbitrary discretion in the making of a holding order or the extension of any such order.³⁷

2.108 The Minister also stated that amending the bill to include a legislative requirement that the decision to extend the period of a holding order must be made by a different decision-maker to that who made the original holding order would fetter the Secretary's discretion to delegate his or her powers and functions and that therefore it is appropriate that the Secretary retains the ability to determine the relevant delegate or delegates (if appropriate) for the purposes of proposed subsections 15(3) to (9).

2.109 As the explanatory memorandum notes, an important safeguard against arbitrary discretion in relation to extending the 28 day holding period by further periods of up to 28 days would be to ensure that the decision-maker for an initial order under proposed subsection 15(3) is not the same decision-maker for a decision to extend the order under proposed subsection 15(4).

2.110 The committee remains of the view that it is appropriate for the bill to amended to ensure that it is a legislative requirement that the decision to extend the period of a holding order is made by a different decision-maker to that who made the original holding order. The committee considers that such an amendment would

37 Proposed subsection 15(5) requires the decision-maker to review the appropriateness of an order before making an extension to that order and proposed subsection 15(6) requires the Secretary to immediately revoke an order when the circumstances specified for its revocation have occurred.

not unduly inhibit the Secretary's discretion to delegate his or her powers as such an amendment would only constrain the Secretary's discretion in a very narrow way.

2.111 In relation to the Secretary's power to extend a holding order, in order to provide some guidance on the face of the primary legislation, the committee considers that it may be appropriate to amend proposed subsection 15(5) to ensure that before making an extension, the Secretary is satisfied that, within the initial (or preceding) 28 day period of the order:

- appropriate testing regimes were unable to be identified or established in relation to the food; or
- adequate risk management strategies were unable to be implemented in relation to the food.

2.112 Noting the significant impact that a holding order may have on importers of food, the committee considers it would be appropriate for the bill to be amended to ensure that it is a legislative requirement that the decision to extend the period of a holding order is made by a different decision-maker to that who made the original holding order. The committee draws its scrutiny concerns in relation to this to the attention of Senators and leaves to the Senate as a whole the appropriateness of this broad discretionary power.

2.113 In addition, the committee requests the Minister's further advice as to the appropriateness of amending the bill to provide further statutory guidance on the exercise of the Secretary's power to extend a holding order (see paragraph [2.21] above).

Broad delegation of administrative power³⁸

Initial scrutiny – extract

2.114 Proposed sections 22 and 23 trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to provisions of the *Imported Food Control Act 1992*. Proposed subsections 22(14) and 23(11) provide that an authorised officer may be assisted 'by other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation. The explanatory memorandum does not explain the categories of 'other persons' who may be granted such powers, other than to explain that this 'preserves the effect of current section 32 of the Act' (which is being repealed).³⁹

38 Schedule 1, item 25, proposed subsections 22(14) and 23(11). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

39 Explanatory memorandum, pp 57 and 59.

2.115 However, current section 32 of the *Imported Food Control Act 1992* provides that an authorised officer may request the occupier of any premises entered to provide reasonable assistance to the officer. As such, the current provision is limited to the occupier of the premises providing assistance to the authorised officer. Whereas the proposed new provisions apply to any 'other persons' providing assistance. The powers granted to 'other persons' could be coercive, including entering premises, inspecting documents, operating electronic equipment, etc.⁴⁰ The bill also proposes to grant such 'other persons' the power to use such force against things as is necessary and reasonable in the circumstances.⁴¹

2.116 There is no explanation in the explanatory memorandum of the need to confer these powers on 'other persons' and the bill does not confine who may exercise the powers by reference to any particular expertise or training.

2.117 The committee therefore requests the Minister's advice as to why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised officer and whether it would be appropriate to amend the bill to require that any person assisting an authorised officer be confined to the occupier of the relevant premises (as is currently required by the *Imported Food Control Act 1992*) or require the person assisting have specified skills, training or experience.

Minister's response

2.118 The Minister advised:

Item 25 of the Bill proposes to amend the Act to trigger the standard provisions in Parts 2 (monitoring powers), 3 (investigation powers), 4 (civil penalty provisions), 5 (infringement notices) and 6 (enforceable undertakings) of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act).

Proposed subsections 22(14) and 23(11) will be inserted into the Act by item 25 of the Bill. Those proposed subsections seek to enable an authorised officer (as defined by section 3 of the Act) to be assisted by other persons in exercising powers or performing functions or duties under Parts 2 or 3 of the Regulatory Powers Act.

Drafting Direction Series Number 3.5A (Drafting Direction 3.5A) published by the Office of Parliamentary Counsel (OPC) sets out matters to be included in an Act when it is amended to trigger the standard provisions of the Regulatory Powers Act. For example, where an authorised person exercising monitoring or investigation powers under Parts 2 or 3 of the Regulatory Powers Act is able to be assisted by another person in exercising those powers, a specific provision allowing this should be included in the amended Act. Attachment A to Drafting Direction 3.5A

40 See Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014*.

41 See Schedule 1, item 25, proposed new subsections 22(15) and 23(12).

provides drafting examples of provisions that seek to trigger Parts 2 and 3 of the Regulatory Powers Act, including the following:

[Person assisting

(x) An authorised person may be assisted by other persons in exercising powers or performing functions or duties under Part 2 of the Regulatory Powers Act in relation to [the provisions of this Act/the provisions mentioned in subsection (1)/information mentioned in subsection (2)].]

It is necessary and appropriate that an authorised person can be assisted by other persons when exercising their powers or performing their functions or duties under Parts 2 or 3 of the Regulatory Powers Act because:

- no other authorised person may be available to assist;
- the premises to be subject to monitoring or investigation may be large;
- there may be a large number of documents or material that needs to be reviewed;
- the other person may be more familiar with the relevant premises or hold a particular set of skills that would enable the authorised person to effectively exercise their powers and perform their functions or duties;
- things may be heavy or difficult to move without assistance.

Sections 23 and 53 of the Regulatory Powers Act provide for matters in relation to other persons assisting authorised persons, and will apply to the Act by virtue of proposed sections 22 and 23 of the Act, which seek to trigger Parts 2 and 3 of the Regulatory Powers Act. In particular, sections 23 and 53 of the Regulatory Powers Act state that an authorised person may only be assisted by other persons if that assistance is necessary and reasonable, and that assistance is empowered by the particular Act seeking to trigger Parts 2 and 3 of the Regulatory Powers Act.

When determining whether it is necessary and reasonable for an authorised officer to be assisted by other persons in relation to the Act, it is intended that regard will be had to any skills, training or relevant experience of that other person, including whether other appropriate training is required.

Further, proposed subsections 22(14) and 23(11) of the Act are consistent with other comparable provisions across the Commonwealth statute book, for example:

- subsections 481(4) and 484(3) of the *Biosecurity Act 2015*;
- subsections 39FB(2) and 39FD(2) of the *Higher Education Support Act 2003*;

- subsections 13K(4) and 13M(3) of the *Narcotic Drugs Act 1987*; and
- subsections 82(4) and 83(3) of the *VET Student Loans Act 2016*.

The explanatory memorandum to the Bill states that proposed subsections 22(14) and 23(11) of the Act preserve the effect of current section 32 of the Act. However, the effect of current section 32 of the Act is in fact preserved by sections 31 (in relation to monitoring powers) and 63 (in relation to investigation powers) of the Regulatory Powers Act.

Sections 31 and 63 of the Regulatory Powers Act will apply to the Act by virtue of proposed sections 22 and 23 of the Act, which seek to trigger Parts 2 and 3 of the Regulatory Powers Act. Sections 31 and 63 of the Regulatory Powers Act provide that the occupier of premises to which a monitoring or investigation warrant relates (or another person who apparently represents the occupier) must provide an authorised person executing the warrant, or any other person assisting that authorised person, with all reasonable facilities and assistance required for the effective exercise of their powers.

Paragraphs 24(4)(a) and 26(4)(a) of the Act currently provide that a monitoring or investigation warrant must authorise any authorised officer (as defined by section 3 of the Act) named in the warrant with such assistance and by such force as is necessary and reasonable to enter the premises and exercise monitoring or investigation powers. Accordingly, proposed subsections 22(14) and (15) and 23(11) and (12) of the Act preserve the effect of current paragraphs 24(4)(a) and 26(4)(a) of the Act.

Committee comment

2.119 The committee thanks the Minister for this response. The committee notes the Minister's advice in relation to circumstances where it may be considered necessary and appropriate for an authorised person to be assisted by other persons when exercising their powers or performing their functions or duties. The committee also notes the Minister's advice that sections 23 and 53 of the *Regulatory Powers (Standard Provisions) Act 2014* (the Regulatory Powers Act) state that an authorised person may only be assisted by other persons if that assistance is necessary and reasonable.

2.120 The committee welcomes the Minister's indication that when determining whether it is necessary and reasonable for an authorised officer to be assisted by other persons it is intended that regard will be had to any skills, training or relevant experience of that other person, including whether other appropriate training is required. However, the committee notes that consideration as to whether an 'other person' has appropriate skills and training will not be required by the legislation.

2.121 The committee's consistent scrutiny position in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have received appropriate training. The committee understands the need for flexibility in determining who may be appropriate 'other persons' in the particular

circumstances of an investigation, however the committee remains concerned that 'other persons' will be authorised to assist in the monitoring and investigation without any requirement for them to have received training in the use of the relevant monitoring or investigatory powers.

2.122 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.123 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing 'other persons' to assist authorised officers in exercising potentially coercive or investigatory powers⁴² in circumstances where there is no legislative guidance about the appropriate skills and training required of those 'other persons'.

Adequacy of parliamentary oversight⁴³

Initial scrutiny – extract

2.124 Proposed section 42A provides that the Secretary may disclose information, including personal information, obtained under the *Imported Food Control Act 1992*, to a wide range of Commonwealth, State, Territory, local and foreign government departments and agencies. Subsection 42A(5) provides that the Secretary must, in writing, make guidelines that the Secretary must have regard to before disclosing information to foreign countries. Subsection 42A(6) provides that before making such guidelines the Secretary must consult with the Information Commissioner and subsection 42A(7) provides the guidelines are not a legislative instrument. The explanatory memorandum states the guidelines will be made in consultation with the Australian Information Commissioner, will be published on the Department's website and when developing the guidelines 'consideration will be given to principles and guidelines established by Codex Alimentarius Commission' (which appears to be a Food Code).⁴⁴

2.125 However, it is unclear to the committee why the guidelines, which become a mandatory consideration for exercising a power that affects the right to privacy, should not be a legislative instrument and, therefore, subject to parliamentary scrutiny and disallowance. It is also unclear why the development of the guidelines is

42 See Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014*.

43 Schedule 1, item 43. The committee draws Senators' attention to this provision pursuant to principle 1(a)(v) of the committee's terms of reference.

44 Explanatory memorandum, p. 71.

limited to the exercise of the Secretary's power in disclosing information to a foreign country, and not in relation to disclosing information to other Commonwealth agencies and State, Territory or local governments.

2.126 The committee requests the Minister's advice as to:

- why the guidelines to be made by the Secretary in guiding the exercise of the power to disclose personal information to a wide range of bodies will not be subject to parliamentary disallowance;
- why the guidelines are confined to the exercise of the power under subsection 42A(3) (foreign governments) and not in relation to subsection 42A(2) (Commonwealth, State, Territory and local governments); and
- whether it would be appropriate to amend the bill to require that the Secretary must have regard to any submissions made by the Information Commissioner arising from the consultation required by subsection 42A(6).⁴⁵

Minister's response

2.127 The Minister advised:

Item 43 of the Bill proposes to insert section 42A into the Act, which will provide for the use and disclosure of information obtained under the Act. Proposed section 42A of the Act will ensure that Australia can meet ongoing domestic and international obligations in relation to food safety management, including in relation to the protection of human health.

The proposed guidelines are not subject to disallowance because they are not legislative instruments

Proposed subsection 42A(5) of the Act provides that the Secretary must make written guidelines that the Secretary must have regard to before disclosing information under proposed subsection 42A(3) of the Act. Proposed subsection 42A(7) of the Act provides that guidelines made under proposed subsection 42A(5) of the Act are not legislative instruments.

Subsection 8(4) of the Legislation Act provides for the definition of 'legislative instrument'. If a proposed instrument satisfies the definition in that subsection, it will have legislative character and will be subject to the requirements of the Legislation Act.

The guidelines proposed by subsection 42A(5) of the Act do not have legislative character because the material in the guidelines will not determine or alter the content of the law or create or affect a privilege, interest or right. This is due to the fact that the proposed guidelines will be program specific operational guidance material, which will be designed to

45 For an example of such a provision, see subsection 28(1A) of the *National Cancer Screening Register Act 2016*.

assist the Secretary, or his or her delegate, to make decisions in relation to the use and disclosure of information, including for the purposes of consistency and compliance with any applicable obligations under the *Privacy Act 1988*.

It is intended that information will only be shared internationally where:

- there is an existing information-sharing arrangement in place with the relevant foreign government; or
- there are applicable international agreements and treaties to which Australia is a signatory; or
- there is a significant and serious risk posed to human health in that particular country.

It is intended that the guidelines will provide consistent guidance on information-sharing, particularly where there are no existing arrangements with foreign countries. It is also important to note that proposed section 42A of the Act will enable Australia to share information with source countries of food that fails at Australia's border. This will result in safer food being imported into Australia, and will also assist our trading partners to address food safety concerns in their domestic markets.

As any guidelines proposed by subsection 42A(5) of the Act will not be legislative instruments, those guidelines will not attract the application of the disallowance provisions of the Legislation Act.

Further, as proposed subsection 42A(7) of the Act will require the Secretary to publish any guidelines made under proposed subsection 42A(5) of the Act on the Department's website, importers will be able to access these guidance documents.

It is appropriate that the proposed guidelines are confined to the exercise of power under proposed subsection 42A(3) of the Act

Proposed subsection 42A(3) of the Act provides that the Secretary may disclose information (including personal information) obtained under the Act to listed international parties where that disclosure is necessary for that international party to perform or exercise any of its functions, duties or powers. Proposed subsection 42A(2) of the Act provides for a similar power in relation to Commonwealth, state and territory, and local government bodies.

The powers and functions in proposed section 42A of the Act must be exercised in compliance with the Privacy Act, which provides for protections on the collection, storage, use, disclosure or publication of personal information. The Privacy Act also establishes the Australian Privacy Principles (APP). In particular, APP 6 and 8 will be relevant to proposed subsections 42A(2) and (3) of the Act, as those proposed subsections may relate to the use or disclosure of personal information (APP 6) and cross-border disclosure of personal information (APP 8).

It is important to note that most information to which proposed subsections 42A(2) and (3) of the Act apply will in fact be commercial information.

The guidelines proposed by subsection 42A(5) of the Act are confined to the exercise of power under proposed subsection 42A(3) of the Act, and do not apply in relation to proposed subsection 42A(2) of the Act, because the Privacy Act, particularly Australian Privacy Principle 6, already provides appropriate requirements, safeguards and guidance in relation to disclosure of personal information to bodies in Australia. Further, guidance on the APPs is publicly available on the Australian Information Commissioner's website.

Proposed subsection 42A(3) of the Act will authorise the disclosure of information to overseas recipients by law, which falls within the exception to APP 8 at clause 8.2(c) of Schedule 1 to the Privacy Act. The consideration of guidelines prior to the disclosure of personal information to an overseas recipient ensures that the disclosure is appropriate in the circumstances. Proposed subsection 42A(5) of the Act is in line with guidance issued by the Australian Information Commissioner in relation to exceptions to APP 8.

The consultation requirements in proposed section 42A of the Act are appropriate in their current form

Finally, proposed subsection 42A(6) of the Act requires the Secretary to consult the Australian Information Commissioner before making guidelines under proposed subsection 42A(5) of the Act.

It is appropriate that the Secretary is required to consult the Australian Information Commissioner before making guidelines under proposed subsection 46A(5) of the Act to ensure that the guidelines remain contemporary and accurate. The proposed guidelines will also contemplate any guidance material in relation to APP 8 that is publicly issued by the Australian Information Commissioner on the Commissioner's website.

The Committee provided subsection 28(1A) of the *National Cancer Screening Register Act 2016* as an example of a provision that requires that the relevant person must have regard to submissions made by the Australian Information Commissioner.

Subsection 28(1A) of the National Cancer Screening Register Act can be differentiated from proposed subsection 42A(6) of the Act because:

- subsection 28(1A) of the National Cancer Screening Register Act relates to the power of the relevant Minister to make, by legislative instrument, rules relating to that Act; and
- the **key information** referred to in the National Cancer Screening Register Act is personal and sensitive information.

The guidelines under proposed subsection 42A(5) of the Act are not legislative instruments, and a disclosure under proposed subsection 42A(3) of the Act will not relate to sensitive information and will predominantly relate to commercial information.

Committee comment

2.128 The committee thanks the Minister for this response.

2.129 In relation to the committee's question regarding why the guidelines to be made by the Secretary under proposed subsection 42A(5) guiding the exercise of the power to disclose personal information to foreign governments and agencies will not be subject to parliamentary disallowance, the committee notes the Minister's advice that the guidelines would be of an administrative character. However, it remains unclear to the committee whether the guidelines will in fact be of an administrative or a legislative character as the guidelines determine matters which must be considered in exercising a statutory power and to that extent appear to alter the content of the law. Generally, the committee will be concerned where any instrument of a legislative character is not subject to the parliamentary tabling and disallowance processes.

2.130 In relation to the committee's question regarding why the guidelines are confined to the exercise of the power under subsection 42A(3) (relating to disclosure to foreign governments) and not in relation to subsection 42A(2) (relating to disclosure to Commonwealth, State, Territory and local governments), the committee notes the Minister's advice that the *Privacy Act 1988* already provides appropriate requirements, safeguards and guidance in relation to disclosure of personal information to bodies in Australia.

2.131 In relation to the committee's question regarding the appropriateness of amending the bill to require that the Secretary must have regard to any submissions made by the Information Commissioner arising from the consultation required by subsection 42A(6), the committee notes the Minister's advice that disclosure under proposed subsection 42A(3) of the Act will not relate to sensitive information and will predominantly relate to commercial information.

2.132 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

1.3 In this case, in light of the detailed information provided by the Minister and the fact that information which may be disclosed under these provisions will not relate to sensitive information, the committee makes no further comment on this matter.

Industrial Chemicals Bill 2017

Purpose	This bill seeks to establish the legislative framework for the Australian Industrial Chemical Introduction Scheme, a new risk-based regulatory scheme for the Commonwealth to continue to regulate the introduction of industrial chemicals in Australia
Portfolio	Health
Introduced	House of Representatives on 1 June 2017
Bill status	Before House of Representatives
Scrutiny principles	Standing Order 24(1)(a)(i), (iii), (iv) and (v)

2.133 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Assistant Minister responded to the committee's comments in a letter dated 28 June 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Assistant Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁴⁶

Merits Review⁴⁷

Initial scrutiny – extract

2.134 Clause 166 sets out a table listing all of the decisions made by the Executive Director that will be considered to be a 'reviewable decision'. A 'reviewable decision' is one which sets out a process for reconsideration by the Executive Director and review by the Administrative Appeals Tribunal (AAT).

2.135 The explanatory memorandum does not explain whether there are decisions that may be made under the Act that may not be described as a 'reviewable decision'. It is therefore difficult to assess what decisions that may be made under the Act are not be subject to the internal review and AAT review process. It is also unclear why certain decisions have been included but others have been excluded. For example, it is unclear why a decision relating to cancellation of a person's registration is reviewable, yet the decision relating to the initial registration is not included as a reviewable decision.⁴⁸

46 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

47 Clause 166. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

48 See paragraph 19(6)(a) and clause 17.

2.136 The committee therefore requests the Minister's advice as to each of the decisions that could be made under the bill that are not listed as being a 'reviewable decision', and if decisions are excluded that might have an adverse impact on an individual, the justification for not including these in the list of 'reviewable decisions'.

Assistant Minister's response

2.137 The Assistant Minister advised:

Certain decisions that could be made under the Industrial Chemicals Bill 2017, which are not included in the list of 'reviewable' decisions in clause 166, have intentionally been excluded from the clause. This is because, for example, the decision will have no adverse impact on the applicant, will not change the status quo or is automatic. All decisions that could adversely affect the interests of an applicant are reviewable. The tables below list the non-reviewable decisions included in the bill and the reasons why, due to their nature, they will not be reviewable.

Table 1: Decisions which are in favour of the applicant or do not change the status quo

Provision	Decision	Reason for not including in clause 166
17(2)(a)	To grant an application for registration	These are decision that: <ul style="list-style-type: none"> • are in favour of the applicant, such that there is no adverse impact on a person (i.e. the Executive Director grants an application), or • do not change the status quo and as such do not result in an adverse outcome for the person affected by the decision. For example, an assessment certificate holder makes submissions as to why the terms of the assessment certificate should not be varied at the Executive Director's initiative, and the Executive Director subsequently decides not to vary the terms.
19(6)(b)	Not to cancel a person's registration (on Executive Director's initiative)	
37(1)(a)	To issue an assessment certificate	
42(5)(b)	Not to remove a person from an assessment certificate (on Executive Director's initiative)	
49(1)(a)	To vary the terms of an assessment certificate (on application)	
50(5)(b)	Not to vary the terms of an assessment certificate (on application)	
52(5)(b)	Not to cancel an assessment certificate (on Executive Director's initiative)	
58(1)(a)	To issue a commercial evaluation authorisation	

61(5)(b)	To not remove a person from a commercial evaluation authorisation (On Executive Director's initiative)	
63(4)(a)	To vary the terms of a commercial evaluation authorisation (on application)	
64(5)(b)	Not to vary the terms of a commercial evaluation authorisation (on Executive Director's initiative)	
66(5)(b)	Not to cancel a commercial evaluation authorisation (on Executive Director's initiative)	
93(1)(a)	To vary the terms of an Inventory listing (on application)	
108(1)(a)	To approve an application for protected information	
111(8)(b)	To approve an application for protected information on review	
114(2)(a)	To approve an application for protected information	

Table 2: Decisions that are automatic or mandatory

Provision	Decision	Reason for not including in clause 166
40(2)	Add person covered by an assessment certificate (at certificate holder's request)	These decisions are automatic or mandatory decisions in that they arise where there is a statutory obligation on the Executive Director to act in a certain way upon the occurrence of a specified set of circumstances. These decisions are therefore made on the basis of objective matters (i.e. the application complies with requirements for an application and
40(5)	Remove a person covered by an assessment certificate (at person's request)	
41(2)	Add person to an assessment certificate	

	(at person's request)	the appropriate person's consent to the application). These provisions support the applicant to initiate certain limited changes to their authorisation to introduce industrial chemicals into Australia. The process is initiated by the applicant and there are no subjective considerations to which the Executive Director must turn their mind. It is proposed that these decisions will be automated through an electronic process to minimise regulatory burden.
41(5)	Remove a person from an assessment certificate (at person's request)	
51(2)	Cancel an assessment certificate (at person's request)	
60(2)	Add person to a commercial evaluation authorisation (at person's request)	
60(5)	Remove a person from commercial evaluation authorisation (at person's request)	
65(2)	Cancel commercial evaluation authorisation (at person's request)	

Table 3: Decision made at the initiative of the Minister

Provision	Decision	Reason for not including in clause 166
67(1)	Enables the Minister to issue an exceptional circumstances authorisation for the introduction of an industrial chemical	This decision is made at the initiative of the Minister, and not on application. It is exercised by the Minister personally, in the public interest, in order to address significant risks to human health or the environment. It is essentially an emergency power (in the public interest).

Committee comment

2.138 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice that certain decisions that could be made under the Industrial Chemicals Bill 2017 are not included in the list of 'reviewable' decisions in clause 166 because, for example, the decision will have no adverse impact on the applicant, will not change the status quo or is automatic. The Assistant Minister advised that all decisions that could adversely affect the interests of an applicant are reviewable.

2.139 The committee requests that the key information provided by the Assistant Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.140 In light of the detailed information provided and, in particular, the Assistant Minister's advice that all decisions that could adversely affect the interests of an applicant will be subject to merits review, the committee makes no further comment on this matter.

Privilege against self-incrimination⁴⁹

Initial scrutiny – extract

2.141 Clause 175 provides that a person is not excused from giving information or producing a document under section 161 on the ground that the giving of the information or the production of the document would tend to incriminate the person or expose the person to a penalty. This provision therefore 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.⁵⁰

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

2.143 A use and derivative use immunity is included in clause 175(2) as it provides that the information or documents produced, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings. Although the committee welcomes the inclusion of the use and derivative use immunity, the explanatory memorandum does not provide a justification for removing the privilege against self-incrimination.

2.144 The committee requests the Minister's advice as to why it is proposed to abrogate the privilege against self-incrimination, particularly by reference to the matters outlined in the *Guide to Framing Commonwealth Offences*.⁵¹

49 Clause 175. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

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

51 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, September 2011, pp 94-99.

Assistant Minister's response

2.145 The Assistant Minister advised:

The abrogation of the privilege against self-incrimination is limited in two important ways:

- The self-incrimination provision in clause 175 is limited to the circumstances described in clause 161. Clause 161 relates to information or a document requested by the Executive Director that is reasonably necessary to be obtained in order for Australia to comply with its obligations under the Rotterdam Convention.
- Any information given or document produced is not admissible in evidence against the individual in criminal or civil proceedings (other than in very limited circumstances described in the provision).

The provision relating to self-incrimination (in these very limited circumstances) was first included in the *Industrial Chemicals (Notification and Assessment) Act 1989* (the ICNA Act) in 2004, in order to ensure Australia meets its obligations (refer section 100H of the ICNA Act).

The provision has been included in the Industrial Chemicals Bill 2017 (and limited to clause 161) so that there is no change or disruption in the arrangements described in the new law, as they relate to Australia's international obligations.

Committee comment

2.146 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice that the abrogation of the privilege against self-incrimination is limited to circumstances where information or a document is requested by the Executive Director that is reasonably necessary to be obtained in order for Australia to comply with its obligations under the Rotterdam Convention. The committee also notes the advice that a use and derivative use immunity is included so that the information or documents produced, or anything obtained as a direct or indirect consequence of the production of the information or documents, is not admissible in evidence in most proceedings. The committee also notes the Assistant Minister's advice that the provision relating to self-incrimination was first included in the *Industrial Chemicals (Notification and Assessment) Act 1989* in 2004 in order to ensure Australia met its international obligations and that the provision has been included in this bill so that there is no change or disruption in the existing arrangements.

2.147 The committee requests that the key information provided by the Assistant Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.148 Generally the committee does not consider the fact that a provision continues in existence current legislative arrangements is, of itself, a sufficient justification for abrogating the privilege against self-incrimination. However, in this instance, given the explanation provided and the inclusion of a use and derivative use immunity, the committee makes no further comment in relation to this provision.

Incorporation of external materials existing from time to time⁵²

Initial scrutiny – extract

2.149 Clause 180 provides that rules may be made prescribing a number of matters, and subclause 180(3) provides that despite subsection 14(2) of the *Legislation Act 2003*, the rules may make provision in relation to a matter by applying, adopting or incorporating any matter contained in any other instrument or other writing as in force or existing from time to time.

2.150 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).

2.151 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.

2.152 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

52 Subclause 180(3). The committee draws Senators' attention to this provision pursuant to principles 1(a)(iv) and (v) of the committee's terms of reference.

Parliament has published a detailed report on this issue.⁵³ 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.

2.153 The explanatory memorandum states that it is anticipated that the rules will prescribe certain international lists of chemicals that an introducer must consult, and as these lists may be regularly updated it is not meaningful to reference them as published on a certain date.⁵⁴

2.154 Noting the above comments, the committee requests the Minister's advice as to whether the type of international lists that it is envisaged may be applied, adopted or incorporated by reference will be made freely available to all persons interested in the law.

Assistant Minister's response

2.155 The Assistant Minister advised:

The type of international lists that it is envisaged may be applied, adopted or incorporated by reference include:

- European Chemicals Agency (ECHA) Harmonised Classification and Labelling of Hazardous Substances (Annex VI to the CLP Regulation);
- European Union Substances of Very High Concern (EU SVHC);
- United States National Toxicology Program (US NTP) Report on Carcinogens; and
- International Agency for Research on Cancer (IARC) Monographs.

Any materials to be incorporated by reference are readily accessible (at no cost) and links to the materials will be made available on the AICIS website.

Committee comment

2.156 The committee thanks the Assistant Minister for this response. The committee notes the Assistant Minister's advice providing examples of the type of international lists that it is envisaged may be applied, adopted or incorporated by reference. The committee welcomes the Assistant Minister's advice that any materials to be incorporated by reference are readily accessible (at no cost) and links to the materials will be made available on the Australian Industrial Chemicals Introduction Scheme (AICIS) website.

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

54 Explanatory memorandum, p. 99.

2.157 The committee takes this opportunity to highlight the expectations of the Senate Standing Committee on Regulations and Ordinances that delegated legislation which applies, adopts or incorporates any matter contained in an instrument or other writing should:

- clearly state the manner in which the documents are incorporated—that is, whether the material is being incorporated as in force or existing from time to time or as in force or existing at a particular time. This enables persons interested in or affected by the instrument to understand its operation without the need to rely on specialist legal knowledge or advice, or consult extrinsic material (see also section 14 of the *Legislation Act 2003*); and
- contain a description of the documents and indicate how they may be obtained (see paragraph 15J(2)(c) of the *Legislation Act 2003*).

2.158 The committee requests that the key information provided by the Assistant Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

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

2.160 Noting that the materials to be incorporated by reference will be freely available and links to incorporated material will be provided on the AICIS website, the committee makes no further comment in relation to this matter.

Industrial Chemicals Charges (General) Bill 2017

Industrial Chemicals Charges (Customs) Bill 2017

Industrial Chemicals Charges (Excise) Bill 2017

Purpose	These bills seek to allow for the imposition of a charge on a person introducing chemicals under the Industrial Chemicals Bill 2017
Portfolio	Health
Introduced	House of Representatives on 1 June 2017
Bills status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.161 The committee dealt with these bills in *Scrutiny Digest No. 6 of 2017*. The Assistant Minister responded to the committee's comments in a letter dated 28 June 2017. Set out below are extracts from the committee's initial scrutiny of the bills and the Assistant Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁵⁵

Charges in delegated legislation⁵⁶

Initial scrutiny – extract

2.162 These bills provide for the imposition of an annual registration charge on persons introducing chemicals into Australia (by import or manufacture) in accordance with the Industrial Chemical Bill 2017. The bills enable regulations to describe the methods of working out the annual registration charge applicable to each introducer of industrial chemicals.

2.163 Subclause 7(1) states that the amount of charge payable by a person is the amount:

- (a) prescribed by the regulations; or
- (b) worked out in accordance with a method prescribed by the regulations.

2.164 Subclause 7(2) provides that the regulations may also prescribe different charges or methods depending on the value of industrial chemicals.

55 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

56 Clause 7. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

2.165 Where charges are able to be prescribed by regulation the committee generally considers that some guidance in relation to the method of calculation of the charge and/or a maximum charge should be provided on the face of the primary legislation, to enable greater parliamentary scrutiny.

2.166 The explanatory memorandum suggests that the charges are to be imposed for the purposes of cost recovery:

It is anticipated that the amount of the charge will be determined having regard to the value of the industrial chemicals introduced by the introducer in the registration year. Prior to the introduction of any regulations prescribing the charge, the proposed approach will be documented in a cost recovery implementation statement (consistent with the Australian Government Cost Recovery Guidelines) and subject to public consultation.⁵⁷

2.167 However, no guidance is provided on the face of the bill as to the method of calculation (for example, there is no provision limiting the charge to cost recovery) nor is a maximum charge specified.

2.168 The committee requests the Assistant Minister's advice as to why there are no limits on the charge specified in primary legislation and whether guidance in relation to the method of calculation of the charge and a maximum charge can be specifically included in each of the proposed Industrial Chemical Charges bills.

Assistant Minister's response

2.169 The Minister advised:

Specifying the amount of a charge or the method for calculating the amount of a charge in regulations, as opposed to the Act itself, ensures that there is appropriate flexibility to change the amount of a charge or the method for calculating the amount of a charge over time. This helps to avoid over or under recovery and will eliminate the need to amend primary legislation as necessary changes to cost recovery arrangements evolve because the efficient administrative costs of the new scheme become more evident.

AICIS will undertake a detailed annual consultation process (in accordance with the *Public Governance and Accountability Act 2013*, the Australian Government Charging Framework and the Australian Government Cost Recovery Guidelines), in order to inform the value of the charge included in the regulations for each registration class.

Consistent with current practice, AICIS will publish an annual Cost Recovery Implementation Statement (CRIS) that will detail AICIS activities that are cost recovered, the cost recovery model (outputs and business processes, costs of the activity and design of the cost recovery charges), as

57 Explanatory memorandum, p. 4.

well as options for cost recovery. The CRIS will include detailed information about financial estimates and performance, and the rationale for the proposed fees and charges for the coming year.

This approach is compliant with the Australian Government Cost Recovery Guidelines which also provide that, where a cost recovery levy is being imposed (via a Taxation Act), the relationship between the charges and the costs should reflect the efficient overall costs of the activity where revenue generated for the activity approximates the expenses incurred in providing the activity (and this is also reflected in the annual CRIS).

There are two additional controls that govern the extent of cost recovery from the regulated industry:

- Fees and charges are set by regulation, which requires them to be proposed to the Executive Council by the responsible Minister. The Minister would therefore need to be satisfied that the fees and charges are not excessive prior to proposing the regulations.
- Regulations must be tabled in the Senate, and are subject to motions of disallowance. This Parliamentary scrutiny of fees and charges provides another safeguard against over-recovery.

This provides a high degree of accountability and transparency to stakeholders regarding the annual registration charge, such that the need to include a maximum charge in the bills is reduced.

Further, an arbitrary maximum has not been included in the bills because:

- any maximum described in the bills would necessarily be higher than the maximum amount charged (misrepresenting the amount payable by any registrant). This would be confusing for stakeholders and is likely to lead to criticism;
- it would misrepresent the amount likely to be payable by most registrants. Under current arrangements, the amount of registration charge payable by a registrant varies between \$138 and \$24,800 per year, based on the value of the chemical introduced by the registrant in a registration year. In 2016-17, only around 5% of registrants are expected to pay the highest amount. Under the new legislation, the registration charges will also be tiered (based on brackets of introduction values). If the bills were to set a maximum charge, it would misrepresent the magnitude of charge likely to be payable by most registrants (reducing transparency); and
- there is minimal risk that the charge would be characterised as a general taxation (increasing the necessity for a maximum to be set in the bills). Rather, the charge is clearly a cost recovery levy, earmarked to fund activity that relates to the group of persons being charged (namely registrants introducing industrial chemicals into Australia in a registration year). As detailed in the Australian Government Cost

Recovery Guidelines, this is an appropriate circumstance in which to apply the guidelines to determine the relevant charge.

For these reasons, the bills do not set an upper limit for the charge and instead rely on the general cost recovery rules to provide the necessary assurances and transparency to stakeholders.

Committee comment

2.170 The committee thanks the Assistant Minister for this detailed response. The committee notes the Assistant Minister's advice that specifying the amount of a charge or the method for calculating the amount of a charge in regulations, as opposed to the Act itself, ensures that there is appropriate flexibility to change the amount of a charge or the method for calculating the amount of a charge over time. The committee also notes the Assistant Minister's advice that the Australian Industrial Chemicals Introduction Scheme (AICIS) will undertake a detailed annual consultation process, in order to inform the value of the charge included in the regulations for each registration class. The committee further notes the Assistant Minister's advice that the extent of cost recovery from the regulated industry will be subject to executive and parliamentary scrutiny through the Executive Council and the parliamentary disallowance process. Finally, the committee notes the Assistant Minister's advice that a maximum level of charge has not been included in the bills because 'any maximum described in the bills would necessarily be higher than the maximum amount charged (misrepresenting the amount payable by any registrant)' and 'there is minimal risk that the charge would be characterised as a general taxation (increasing the necessity for a maximum to be set in the bills)'.

2.171 The committee welcomes the Assistant Minister's indication that AICIS will undertake a detailed annual consultation process in relation to the value of the charge and the fact that the regulations setting the amount of charge payable will be subject to executive and parliamentary scrutiny.

2.172 However, the committee takes this opportunity to reiterate that one of the most fundamental functions of the Parliament is to levy taxation.⁵⁸ The committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax. Therefore, where there is any possibility that a charge could be characterised as general taxation, the committee considers that guidance in relation to the level of a charge should be included on the face of the primary legislation. The committee does not consider that including a maximum limit on the face of the bill would cause confusion as to the amount of charge payable as it would be clear that such a limit would simply represent an upper limit

58 This principle has been a foundational element of our system of governance for centuries: see, for example, article 4 of the *Bill of Rights 1688*: 'That levying money for or to the use of the Crown by pretence of prerogative without grant of Parliament for longer time or in other manner than the same is or shall be granted is illegal'.

on the amount of the charge that could be levied without amendment of the primary legislation. In addition, if setting a maximum limit is not considered appropriate, guidance as to the method of calculation of the charge (for example, a provision explicitly limiting the charge to cost recovery) could still be provided on the face of the primary legislation.

2.173 The committee requests that the key information provided by the Assistant Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

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

2.175 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing regulations to determine the amount of a charge payable without any guidance being provided on the face of the bill as to the method of calculation or the maximum amount of the charge.

Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017

Purpose	This bill seeks to repeal the <i>Industrial Chemicals (Notification and Assessment) Act 1989</i> together with three related Industrial Chemicals Charges Acts when new arrangements come into effect on 1 July 2018. The bill also seeks to make consequential amendments to a range of other Commonwealth legislation to reflect these changes
Portfolio	Health
Introduced	House of Representatives on 1 June 2017
Bill status	Before House of Representatives
Scrutiny principle	Standing Order 24(1)(a)(i)

2.176 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's comments in a letter dated 28 June 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁵⁹

Retrospective application⁶⁰

Initial scrutiny – extract

2.177 Item 50 enables rules of a transitional nature to be made. Subitem 50(3) provides that rules made before 1 July 2020 may provide that 'this Act or any other Act or instrument' has effect with any modification prescribed by the rules.

2.178 A provision that enables delegated legislation to amend primary legislation is known as a Henry VIII clause. There are significant scrutiny concerns with enabling delegated legislation to override the operation of legislation which has been passed by Parliament as such clauses impact on the level of parliamentary scrutiny and may subvert the appropriate relationship between the Parliament and the Executive. As

59 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

60 Subitems 50(3) and (4). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

such, the committee expects a sound justification for the use of a Henry VIII clause to be provided in the explanatory memorandum.

2.179 In this instance, the explanatory memorandum provides a detailed justification as to the need for this power, particularly in light of the complexity of transitioning from the old to the new law (with over 45,000 industrial chemicals authorised for introduction) and the significant consequences for not having the right transitional arrangements in place.⁶¹ The committee accepts that it may be appropriate for the limited use of a Henry VIII clause in such circumstances.

2.180 However, in addition, subitem 50(4) provides that subsection 12(2) of the *Legislation Act 2003* does not apply to rules made before 1 July 2020. Subsection 12(2) of the *Legislation Act 2003* provides that a provision of a legislative instrument does not apply in relation to a person if the provision applies retrospectively and, as a result, the person's rights would be disadvantageously affected or liabilities would be retrospectively imposed on a person. The committee has a long-standing scrutiny concern about provisions that have the effect of applying retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively (not retrospectively). The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals. The committee therefore expects any disapplication of section 12(2) of the *Legislation Act 2003* to be fully justified. However, the explanatory memorandum does not address this issue.

2.181 The committee requests the Minister's advice as to why it is necessary, in relation to the making of transitional rules, to disapply the application of section 12(2) of the *Legislation Act 2003* (which prohibits the retrospective application of legislative instruments which have a detrimental effect on a person or impose retrospective liability on a person).

Minister's response

2.182 The Minister advised:

The Industrial Chemicals Bill 2017 will replace legislation (the ICNA Act) that is over 25 years old and has been progressively and repeatedly amended to cater for changes relating to the introduction and use of industrial chemicals. This has created a piece of legislation that is complex to interpret and contains overlapping provisions and powers.

The Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017 deals with the transition from the existing industrial chemicals legislation to the new scheme. A significant amount of detail will also be included in the rules to be made under this Bill to ensure that the transition from the existing scheme to the reformed scheme is as smooth as possible for stakeholders.

61 Explanatory memorandum, p. 23.

Given the complexity of the current ICNA Act and that the regulatory system under the Industrial Chemicals Bill 2017 will be significantly different; it is possible that the transitional arrangements at commencement may not cover every potential circumstance of necessary transition between the two Acts.

In these circumstances, there may be unintentional and unforeseen adverse consequences that may require additional transitional arrangements being put in place to avoid adversely impacting on international trade or placing unnecessary additional costs on individuals and businesses. Additionally, risks associated with the introduction of industrial chemicals could go unmanaged, or the response to risks may be delayed due to uncertainty over how regulatory powers transition. Managing these risks is important, not only for the wellbeing of Australia's population and environment but also for the viability of the industrial chemicals sector.

The limited period of disapplication of subsection 12(2) of the Legislation Act has been included in the Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill to enable any issues that may arise at the time of transition (i.e. at the proposed commencement time of 1 July 2018) to be dealt with effectively through rules.

It is not intended or anticipated that persons would be disadvantaged through retrospective application of the rules (should they be required). Rather, the ability for the transitional rules to apply retrospectively means that any unintended consequences of transitioning the scheme can apply from the date of commencement. This flexibility allows for any errors or unintended consequences to be remedied at the point at which the issue arises. It also enables the law to clarify the correct and intended outcome for stakeholders, thereby avoiding the need for complex administrative 'fixes'.

While the Bill enables rules to be made, they must only be transitional in nature (creating a direct link with the transition from the existing industrial chemicals law to the new law). To ensure that there is continued parliamentary oversight, the rules will be subject to disallowance.

Committee comment

2.183 The committee thanks the Minister for this response. The committee notes the Minister's advice that as a result of the complexity of the current legislative framework and the fact that the proposed regulatory system under this bill will be significantly different, it is possible that the transitional arrangements at commencement may not cover every potential circumstance of the necessary transition between the two legislative regimes. The committee also notes the Minister's advice that it is not intended or anticipated that persons would be disadvantaged through retrospective application of the rules (should they be required), that the rules must only be transitional in nature and will be subject to parliamentary disallowance.

2.184 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

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

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

National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017

Purpose	This bill seeks to amend the <i>National Disability Insurance Scheme Act 2013</i> to establish an independent national NDIS Quality and Safeguards Commission
Portfolio	Social Services
Introduced	House of Representatives on 31 May 2017
Bill status	Before Senate
Scrutiny principles	Standing Order 24(1)(a)(ii), (iii) and (iv)

2.187 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's comments in a letter dated 27 June 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁶²

Broad discretionary power⁶³

Initial scrutiny – extract

2.188 Proposed paragraph 67E(1)(a) provides that the NDIS Quality and Safeguards Commissioner may, if he or she considers it to be in the public interest to do so, disclose information acquired pursuant to the Act 'to such persons and for such purposes as the Commissioner determines'. Subsection 67E(2) provides that in disclosing such information the Commissioner must act in accordance with the National Disability Insurance Scheme rules made for the purposes of section 67F. However, proposed section 67F provides that the rules 'may' make provision for and in relation to the exercise of the Commissioner's power to disclose such information, but there is no requirement that such rules be made.

2.189 The explanatory memorandum gives an example of when it might be necessary to disclose such information as 'for the protection of persons with

62 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest

63 Schedule 1, item 45, proposed sections 67E and 67F. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

disability or the investigation of a criminal offence'.⁶⁴ It also explains why matters are to be set out in the rules rather than the primary legislation:

It is necessary to provide for the parameters of this discretion in the NDIS rules as the Commissioner will be operating within the context of complex mainstream systems and services. The purposes for disclosure, the bodies to whom disclosure can be made and the type of information which may be disclosed is likely to change over time as States and Territories withdraw from the regulation of disability services under the NDIS and establish new arrangements for the protection of vulnerable people under mainstream service systems.

2.190 The committee notes that the information that may be disclosed under this power may be extremely sensitive, relating as it does to a person's disability, and the provision as drafted is extremely broad. There is no requirement that rules be made in relation to the Commissioner's power to disclose the information and no information on the face of the primary legislation as to the circumstances in which the power can be exercised (other than that the Commissioner must be satisfied that it is in the public interest to make the disclosure). There is also no requirement that before disclosing personal information about a person, the Commissioner must notify the person, give the person a reasonable opportunity to make written comments on the proposed disclosure and consider any written comments made by the person.

2.191 The committee therefore requests the Minister's advice as to:

- why (at least high-level) rules or guidance about the exercise of the Commissioner's disclosure power cannot be included in the primary legislation; and
- why there is no positive requirement that rules must be made regulating the exercise of the Commissioner's power (i.e. the committee requests advice as to why the proposed subsections have been drafted to provide that the rules *may* make provision for such matters, rather than requiring that the rules *must* make provision to guide the exercise of this significant power).

Minister's response

2.192 The Minister advised:

As noted by the committee, the explanatory memorandum explains that the rationale for matters being set out in the rules rather than the primary legislation is that:

It is necessary to provide for the parameters of this discretion in the NDIS rules as the Commissioner will be operating within the context of complex mainstream systems and services. The

64 Explanatory memorandum, p. 12.

purposes for disclosure, the bodies to whom disclosure can be made and the type of information which may be disclosed is likely to change over time as States and Territories withdraw from the regulation of disability services under the NDIS and establish new arrangements for the protection of vulnerable people under mainstream service systems.⁶⁵

States and Territories will remain responsible for quality and safeguards arrangements for mainstream services to people with disability such as health, education and child protection. It is therefore necessary to adapt guidance about the exercise of the Commissioner's disclosure power to the arrangements in each State and Territory during transition to the Commission's regulatory arrangements for NDIS providers.

In relation to the requirement that rules be made to regulate the exercise of the Commissioner's powers, the intention of the reference in subsection 67E(2) to 'the NDIS rules' rather than 'any NDIS rules', is that the Commissioner can only make disclosures under the relevant provisions if there are rules in place. In other words, the existence of the rules is a condition precedent, the satisfaction of which is necessary before a disclosure can be made.

A draft of the *NDIS (Protection and Disclosure of Information - Commission) Rules* is attached.⁶⁶ The Department is currently consulting with the Office of the Australian Information Commission and States and Territories about these draft rules before consulting with peak bodies representing people with disability and providers. It is the intention that these rules be made to commence at the same time as Schedule 1 of the Bill establishing the Commission.

The Bill provides, at paragraph 181D(4)(a), for the Commissioner to use his or her best endeavours to provide opportunities for people with disability to participate in matters that relate to them and to take into consideration the wishes and views of people with disability in relation to those matters. This will guide the Commissioner in the disclosure of information.

Careful consideration has been given to ensuring any personal information held by the Commission is given due and proper protection. There are, however, concerns about including a requirement along the line suggested by the committee for the Commissioner to notify and receive submissions from a person, as a condition precedent to any disclosure on the basis that this would compromise situations of urgency such as where a child is at risk of harm or there are serious allegations of neglect, abuse or

65 Explanatory memorandum. Page 12.

66 Note, the Minister's covering letter states: 'These draft rules are subject to ongoing consultation with states, territories, peak bodies representing people with disability and providers. As such, I would request they not be published'. As such, the committee has not published the draft rules.

exploitation. The protections in relation to personal information contained in the Bill essentially cover the field and override State and Territory laws requiring mandatory reporting for example, section 27 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Provision for the facilitation of urgent disclosures by the Commissioner is consistent with the *NDIS (Protection and Disclosure of Information) Rules* and operational policy which govern the disclosure of information by the CEO of the NDIA.

Committee comment

2.193 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is necessary to adapt guidance about the exercise of the Commissioner's disclosure power to the arrangements in each State and Territory during a transition period. The committee also notes that it is intended that the Commissioner can only make disclosures under the relevant provisions if there are rules in place, and it is intended that these rules will commence at the same time as Schedule 1 to the bill commences. The committee also notes the advice that the bill provides that the Commissioner must use his or her best endeavours to provide opportunities for people with disability to participate in matters relating to them and take into account their views and wishes, and that this will guide the Commissioner in the disclosure of personal information. The committee further notes the Minister's advice that there are concerns about including a requirement in the bill that the Commissioner should notify and receive submissions from a person before disclosing personal information, as this would compromise situations of urgency.

2.194 The committee understands that there is a need to adapt guidance about the exercise of the Commissioner's disclosure powers during the transition to the Commission's regulatory arrangements. However, the committee reiterates that the information that may be disclosed by the Commissioner may be extremely sensitive information (relating to a person's disability) and there are limited restrictions in the primary legislation as to when that information may be disclosed.

2.195 The committee notes that the draft rules provided to the committee in confidence include a provision stating that the Commissioner is to use his or her best endeavours to provide opportunities for people with disability affected by a proposed disclosure to comment on the disclosure and take those comments into account; seek informed consent for disclosure; or provide de-identified information. This is subject to a qualification that the Commissioner is not required to do so if there is an immediate danger to the health, safety or wellbeing of a person with a disability. The committee considers this to be an important safeguard, however, it is unclear why such a safeguard cannot be included in the primary legislation, which would allow for greater parliamentary oversight. Including an exception for urgent situations (as is currently provided for in the draft rules) would appear to address the Minister's stated concern regarding situations of urgency.

2.196 From a scrutiny perspective, the committee considers it would be appropriate that the bill provide at least high-level guidance about the exercise of

the Commissioner's disclosure powers, including that affected persons be consulted before personal information is disclosed, except in specified urgent circumstances.

2.197 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.198 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the Commissioner's broad discretionary power to disclose personal information.

Significant matters in delegated legislation⁶⁷

Initial scrutiny – extract

2.199 The bill enables a number of significant matters to be included in delegated legislation rather than set out in primary legislation. This includes enabling the National Disability Insurance Scheme rules to make provision for matters such as:

- conditions of registration of NDIS providers;
- prescribed circumstances as to when registration of a registered NDIS provider may be suspended or revoked;
- standards concerning the quality of support or services to be provided by registered NDIS providers;
- the establishment of an NDIS Code of Conduct for NDIS providers and their employees;
- requirements for complaints management and resolution regarding registered NDIS providers; and
- arrangements relating to the notification and management of reportable incidents in connection with support or services by registered NDIS providers.⁶⁸

2.200 In relation to the NDIS Code of Conduct which is to be established by the rules, proposed section 73V provides that a person who fails to comply with a requirement under the NDIS Code of Conduct is subject to a civil penalty of up to 250 penalty units (which for an individual could be up to \$45,000 and for a body

67 Schedule 1, items 48, proposed section 73H, 73N(1)(f), 73P(1)(f), 73T, 73V, 73X and 73Z. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(iv) of the committee's terms of reference.

68 See Schedule 1, items 48, proposed section 73H, 73N(1)(f), 73P(1)(f), 73T, 73V, 73X and 73Z.

corporate could be up to \$225,000).⁶⁹ The explanatory memorandum explains that in addition to civil penalties, the full range of enforcement action and sanctions available to the Commissioner applies in relation to determining the regulatory response to non-compliance with the Code of Conduct.⁷⁰

2.201 No explanation is provided in the explanatory memorandum as to why it is necessary to include so much detail about the scheme in the rules and not in the primary legislation.

2.202 The committee's view is that significant matters, such as the provisions listed at paragraph [2.8] above, in particular the establishment of a Code of Conduct, breach of which could be subject to significant penalties, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this regard, the committee requests the Minister's advice as to:

- why it is considered necessary, in each instance, to leave the details set out in paragraph [2.8] to delegated legislation; and
- the type of consultation that it is envisaged will be conducted prior to the making of regulations establishing the NDIS rules and whether specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) can be included in the legislation (with compliance with such obligations a condition of the validity of the legislative instrument).

Minister's response

2.203 The Minister advised:

The Bill sets out the core functions and framework for the Commission, and the NDIS rules provide the detail necessary for supporting the Commission's regulatory activities. The Commission will be established in jurisdictions over time and some flexibility will be needed to allow adjustments for the lessons learnt from the Commission's operations in participating jurisdictions.

Separating the rules from the Bill provides appropriate flexibility and enables the Commission to be responsive in circumstances where the NDIS market environment is uncertain and rapidly changing. The NDIS is still in transition and it is growing and evolving rapidly. Currently the NDIS involves almost 7,000 providers with about 73,000 workers, supporting about 75,000 participants with approved plans, and in full scheme this is expected to grow to 13,500-40,000 providers with perhaps 160,000 workers, supporting over 460,000 participants. These providers and workers will include current disability service providers and new entrants, including a number of emerging new "digital disrupter" models with

69 See section 4AA of the *Crimes Act 1914*.

70 Explanatory memorandum, p. 29.

"Uber" type service provision. The rapid change in scale and complexity of the NDIS market means that unpredictable risks may emerge in the medium term. The Commission will need to deal promptly with new and emerging areas of risk in the effective regulation of NDIS providers, both now and into the future. It is therefore appropriate that these aspects of the scheme be covered by rules that can be adapted and modified in a timely manner.

The following draft rules are attached for the Committee's consideration:⁷¹

- NDIS (Protection and Disclosure of Information - Commission) Rules
- NDIS (Incident Management and Reportable Incidents) Rules
- NDIS (Complaints Management and Resolution) Rules
- NDIS Practice Standards Rules⁷²
- NDIS Code of Conduct Rules⁷³

These rules are subject to ongoing consultation with States and Territories and peak bodies representing people with disability and providers.

The Bill codifies a list for conditions of registration at proposed section 73F and outlines the circumstances in which the registration of a registered NDIS provider may be suspended or revoked (at sections 73N and 73P).

All of the rules are subject to consultation with States and Territories (item 79) with rules relating to behaviour support and worker screening subject to agreement with host jurisdictions as they interact with State and Territory laws and policies (item 78).

The draft NDIS Code of Conduct was developed in consultation with States and Territories and peak bodies and is currently the subject of public consultation, accompanied by a discussion paper which can be found at the following link: www.engage.dss.gov.au/ndis-code-of-conduct-consultation/

The NDIS Code of Conduct will cover a diverse range of NDIS providers (both registered and unregistered), from lawn mowing services through to providers of residential accommodation for people with disability. It is the mechanism through which participants, including self-managing participants will be empowered to enforce standards of conduct and service to which an appropriate and escalating range of sanctions will apply. The NDIS Code of Conduct will need to be subject to regular review and consultation to ensure that it is responsive to the needs and

71 Note, the Minister's covering letter states: 'These draft rules are subject to ongoing consultation with states, territories, peak bodies representing people with disability and providers. As such, I would request they not be published'. As such, the committee has not published the draft rules.

72 Not attached and subsequent advice stated these draft rules were not available.

73 Not attached and subsequent advice stated these draft rules were not available.

expectations of people with disability, providers and the community in terms of the appropriate standards and quality and safety of NDIS funded supports and services.

In addition to the consultation obligations in section 17 of the *Legislation Act 2003*, the Bill provides for the Commissioner to consult and cooperate with persons, organisations and governments on matters relating to his or her functions including in the course of making legislative instruments should the power to make rules be delegated to the Commissioner.

The consultation approach that has been adopted throughout the development of the NDIS Quality and Safeguarding Framework, the Bill and continuing development of the rules has proven to be effective and appropriate.

Committee comment

2.204 The committee thanks the Minister for this response. The committee notes the Minister's advice that the Commission will be established in jurisdictions over time and some flexibility is needed to allow for adjustments for lessons learnt from participating jurisdictions, so separating the rules from the bill provides appropriate flexibility and allows for responsiveness with rules that can be adapted and modified in a timely manner. The committee also notes the advice that the rules are currently subject to ongoing consultation and will need to be subject to regular review and consultation to ensure it is responsive to the needs and expectations of people with disability, providers and the community. The committee also notes the Minister's advice that in addition to the consultation obligations in section 17 of the *Legislation Act 2003*, the bill provides for the Commissioner to consult relating to his or her functions, including the making of legislative instruments 'should the power to make rules be delegated to the Commissioner'. However, the committee notes that the power under section 209 of the *National Disability Insurance Scheme Act 2013* is for the Minister to make the rules.

2.205 The committee appreciates the importance of flexibility and responsiveness in this area, however, reiterates that the bill proposes enabling a number of significant matters to be included in delegated legislation. The committee considers that, in general, significant matters should be included in primary legislation in order to be subject to the full range of parliamentary scrutiny, and not left to subordinate legislation. In particular, the committee remains concerned that the bill establishes that a person who fails to comply with a requirement under the NDIS Code of Conduct is subject to a civil penalty of up to 250 penalty units⁷⁴ and subject to the full range of enforcement action and sanctions available to the Commissioner, yet no detail is provided in the bill as to what type of failure to comply will be subject to this sanction.

74 Which for an individual could be up to \$45,000 and for a body corporate could be up to \$225,000, see section 4AA of the *Crimes Act 1914*.

2.206 In addition, while the committee welcomes the Minister's commitment to consultation, there is nothing on the face of the bill that requires the Minister to undertake such consultation (other than an existing requirement that rules only be made when a host jurisdiction has agreed to the making of those rules).⁷⁵ The committee takes this opportunity to reiterate its general view that where the Parliament delegates its legislative power in relation to significant regulatory schemes it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument.

2.207 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.208 The committee reiterates its scrutiny view that significant matters, particularly the establishment of a Code of Conduct (breach of which could be subject to significant penalties), are more appropriate for primary legislation and it would be appropriate for specific consultation obligations to be included in the bill. It draws these scrutiny concerns to the attention of Senators and leaves this issue to the Senate as a whole.

Broad delegation of administrative powers⁷⁶

Initial scrutiny – extract

2.209 Proposed sections 73ZE and 73ZF trigger the monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014* in relation to new Part 3A of the *National Disability Insurance Scheme Act 2013*. Proposed subsections 73ZE(4) and 73ZF(3) provide that an authorised officer may be assisted 'by other persons' in exercising powers or performing functions or duties in relation to monitoring and investigation.

2.210 The proposed new provisions apply to any 'other persons' providing assistance. The powers granted to 'other persons' could be coercive, including entering premises, inspecting documents, operating electronic equipment, etc.⁷⁷ There is no explanation in the explanatory memorandum of the need to confer such

75 See section 209 of the *National Disability Insurance Scheme Act 2013*.

76 Schedule 1, item 48, proposed subsections 73ZE(4) and 73ZF(3). The committee draws Senators' attention to these provisions pursuant to principle 1(a)(ii) of the committee's terms of reference.

77 See Part 2 of the *Regulatory Powers (Standard Provisions) Act 2014*.

powers on 'other persons' and the bill does not confine who may exercise such powers by reference to any particular expertise or training.

2.211 The committee therefore requests the Minister's advice as to why it is necessary to confer monitoring and investigatory powers on any 'other person' to assist an authorised officer and whether it would be appropriate to amend the bill to require that any person assisting an authorised officer have specified skills, training or experience.

Minister's response

2.212 The Minister advised:

Within the limited resources of the Commission, it is not possible to employ experts across the diverse ranges of supports who are appropriately qualified to investigate complex and often technical matters arising in connection with NDIS supports.

The disability support market is diverse and geographically dispersed and includes specialised supports such as aids and equipment. The investigation of a complaint or incident can be extremely complex for particular groups of NDIS providers including those providing supports to participants:

- with complex, specialised or high intensity needs, or very challenging behaviours
- from culturally and linguistically diverse backgrounds
- who are Aboriginal and Torres Strait Islander Australians
- who have an acute and immediate need (crisis care or accommodation).

It is therefore necessary to engage other persons who have specialist skills, training or expertise to assist an investigation including experts currently involved in regulating disability services.

Proposed section 73ZR provides for the appointment of inspectors, investigators and persons assisting under proposed section 181W and provides that the Commissioner may only make such an appointment if he or she is satisfied that:

- the person has suitable training or experience to properly exercise the powers for which the person will be authorised to use; and
- the person is otherwise an appropriate person to be appointed as an inspector, investigator or both (as the case requires).

A person appointed must also comply with any directions of the Commissioner in exercising powers (73ZR(3)).

The Bill triggers the *Regulatory Powers Act (Standard Provisions) Act 2014* (Regulatory Powers Act) which creates a consistent Commonwealth framework for investigations, compliance and enforcement powers.

Proposed section 73ZE of the Bill provides that new Part 3A is subject to monitoring under Part 2 of the Regulatory Powers Act. Section 23 of the Regulatory Powers Act provides that an authorised person may be assisted by other persons if that assistance is reasonable and necessary. Any use of powers is subject to the direction of an authorised person who will be an inspector.

Proposed section 73ZF of the Bill provides that Part 3A is subject to investigation under Part 3 of the Regulatory Powers Act. Similar to section 23 of the Regulatory Powers Act, section 53 provides that an authorised person may be assisted by other persons if that assistance is necessary and reasonable and any use of powers is subject to the direction of an authorised person (an investigator).

The Bill provides for persons who may assist the Commissioner under proposed section 181W to be employees of agencies (within the meaning of the *Public Service Act 1999*), officers or employees of a State or Territory, or officers or employees of authorities of the Commonwealth, a State or a Territory. A person who is engaged to assist the Commissioner under section 181W may also assist an authorised officer in the course of an investigation if they have suitable training or experience or they may be appointed as an inspector, investigator or both.

The approach taken in the Bill is comparable to other Commonwealth regulators such as for work health and safety and consistent with the Regulatory Powers Act which applies uniform regulatory powers and arrangements for Commonwealth bodies.

Committee comment

2.213 The committee thanks the Minister for this response. The committee notes the Minister's advice that it is not possible to employ experts across the diverse range of supports that are appropriately qualified to investigate complex and often technical matters. The advice notes that as the investigation of a complaint or incident can be extremely complex it is necessary to engage other persons who have specialist skills, training or expertise to assist an investigation. The committee also notes the Minister's advice that other persons assisting an authorised person must act subject to the direction of an inspector, and that a person appointed under a different power (proposed section 181W) may be used to assist an authorised officer in the course of an investigation.

2.214 The committee notes it has not raised concerns regarding the appointment of inspectors or investigators under proposed section 73ZR. It notes that proposed section 73ZR, which requires that a person only be appointed if they have suitable training or experience and is otherwise an appropriate person, does not relate to the appointment of 'persons assisting' in relation to proposed sections 73ZE and 73ZF. Proposed subsections 73ZE(4) and 73ZF(3) provide that inspectors and investigators may be assisted by 'other persons' in exercising powers or performing functions or duties. No detail is provided as to who these 'other persons' may be. While the

Minister's response noted that these other persons may be the same as those appointed under the separate power in proposed section 181W, there is nothing in the bill limiting it to such persons (and nothing in proposed section 181W requires that such persons have appropriate training or experience).

2.215 The committee's consistent scrutiny position in relation to the exercise of coercive or investigatory powers is that persons authorised to use such powers should have received appropriate training. The committee understands the need for flexibility in determining who may be appropriate 'other persons' in the particular circumstances of an investigation, however the committee remains concerned that 'other persons' will be authorised to assist in monitoring and investigation without any requirement for them to have received training in the use of the relevant monitoring or investigatory powers.

2.216 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing 'other persons' to assist authorised officers in exercising potentially coercive or investigatory powers⁷⁸ in circumstances where there is no legislative guidance about the appropriate skills and training required of those 'other persons'.

Fair hearing rights⁷⁹

Initial scrutiny – extract

2.217 Proposed section 73ZN provides that the Commissioner may, by written notice, make a banning order that prohibits or restricts specified activities by an NDIS provider in certain circumstances. Subsection 73ZN(7) provides that the Commissioner may only make a banning order against a person after giving the person an opportunity to make submissions to the Commissioner on the matter. However, subsection 73ZN(8) provides that subsection 73ZN(7) does not apply if the Commissioner's grounds for making the banning order include that there is an immediate danger to the health, safety or wellbeing of a person with a disability or where the Commissioner has revoked the registration of the person as a registered NDIS provider. This would appear to remove fair hearing requirements in these specified circumstances. The explanatory memorandum does not give a justification for limiting the right to a fair hearing in this way. The committee notes that it would be possible to reconcile the need for urgent action and the right to a fair hearing by providing for the banning order to have immediate effect but only making it permanent after a hearing has been provided.

⁷⁸ See Parts 2 and 3 of the *Regulatory Powers (Standard Provisions) Act 2014*.

⁷⁹ Schedule 1, item 48, proposed section 73ZN. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

2.218 The committee requests the Minister's advice as to the justification for removing the right of a person to make submissions to the Commissioner before a banning order is made in certain listed circumstances. The committee also requests the Minister's advice as to the appropriateness of amending the bill to provide that the banning order could have a temporary immediate effect in specified circumstances but that it would only become a permanent order after the affected person has been given an opportunity to make submissions to the Commissioner on the matter.

Minister's response

2.219 The Minister advised:

Proposed section 73ZN provides that the Commissioner may, by written notice, make a banning order that prohibits or restricts specified activities by an NDIS provider in certain circumstances. Under proposed section 73ZN(3), a ban order may apply generally or be of limited application, it may also be permanent or for a specified period. Subsection 73ZN(7) provides that the Commissioner may only make a banning order against a person after giving the person an opportunity to make submissions to the Commissioner on the matter. However, subsection 73ZN(8) provides that subsection 73ZN(7) does not apply if the Commissioner's grounds for making the banning order include that there is an immediate danger to the health, safety or wellbeing of a person with a disability or where the Commissioner has revoked the registration of the person as a registered NDIS provider.

The committee notes that the exercise of this power could remove fair hearing requirements in these specified circumstances and notes the explanatory memorandum does not give a justification for limiting the right to a fair hearing in this way.

The approach taken in relation to banning orders in the Bill is that it represents the highest level of enforcement action that can be taken in the most serious cases in which a NDIS provider, or person employed (or otherwise engaged) by an NDIS provider poses an unacceptable risk to people with disability in the NDIS. This is in response to a series of recent inquiries and reports which have documented the weaknesses of current safeguarding arrangements and failures to respond to abuse, neglect and exploitation of people with disability.

In the case of a registered provider, prior to the application of a ban order, even in cases where there is an immediate danger to the health, safety or wellbeing of a person with disability, the provider's registration must first be revoked under proposed section 73P which includes the right of a person to make submissions before registration is revoked (paragraph 73P(4)). In practice, if a registered NDIS provider poses an immediate danger to a person with disability, the Commissioner may suspend the registration of the provider pending consideration of whether the provider's registration should be revoked. While the Commissioner is

considering whether a provider's registration should be revoked, the Commissioner may also issue a compliance notice preventing the provider from providing any NDIS supports or services.

In the case of an unregistered provider, there is a series of compliance and enforcement action available to the Commissioner prior to issuing a ban order, ranging from compliance notices through to requiring a provider to undergo quality assurance checks. If, in the most serious of cases, the Commissioner has grounds to believe that there is an immediate danger to the health, safety or wellbeing of a person with disability, he or she may issue a ban order under proposed section 73ZN(7) for a specified period to allow for submissions to be made by the provider about the ongoing nature of the ban order. A ban order is also a reviewable decision and a person may apply under proposed section 73ZO(2) for the revocation or variation of a ban order.

The committee also notes that it would be possible to reconcile the need for urgent action and the right to a fair hearing by providing for the banning order to have immediate effect but only making it permanent after a hearing has been provided. The discretion for the Commissioner to apply a banning order for a limited period is intended to enable the Commissioner to act quickly if the circumstances indicate that it is appropriate to do so pending any further consideration of the matter.

On the basis that a ban order can be applied for a limited period and that a person may apply for revocation or review, the approach taken is considered to be the most appropriate to protect people with disability from unsafe NDIS providers or workers.

Committee comment

2.220 The committee thanks the Minister for this response. The committee notes the Minister's advice that the approach to ban orders is that it represents the highest level of enforcement action that can be taken where an NDIS provider or person employed or engaged by a provider poses an unacceptable risk to people with disability. The Minister advised that in the case of registered providers, prior to the application of a ban order, the provider's registration must first be revoked, at which time submissions can be made, and in relation to unregistered providers the Commissioner has the discretion to apply for a ban order for a specified period to allow for submissions to be made. The Minister also noted that a ban order is subject to review.

2.221 The committee notes that the Commissioner's ability to apply for a ban order for a specified time, rather than a permanent order, is discretionary and non-compellable. While registered providers would have had an opportunity to make submissions in relation to revocation or registration, unregistered providers could (on the face of the bill) be subject to a permanent ban without having been given an opportunity to make submissions on that decision. From a scrutiny perspective, the committee considers it would be more appropriate for the bill to be amended

to provide that if a ban order is to be made in circumstances where a person is not given an opportunity to make submissions, such an order can only be made for a limited period and made permanent only after an opportunity for submissions is provided.

2.222 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of limiting fair hearing rights in this manner.

Merits review⁸⁰

Initial scrutiny – extract

2.223 Proposed section 99 sets out a table that lists all of the 'reviewable decisions' under the *National Disability Insurance Scheme Act 2013*. Under that Act, section 100 (as amended by the bill)⁸¹ provides that the decision-maker must notify a person directly affected by a reviewable decision of the right to request a review of the decision (or that there will be automatic review in certain circumstances), and section 103 provides that applications may be made to the Administrative Appeals Tribunal (AAT) for review of such decisions. The explanatory memorandum does not explain whether there are decisions that may be made under the Act that may not be described as a 'reviewable decision'. It is therefore difficult to assess whether there are any decisions that may be made under the Act that may not be subject to internal review and AAT review processes.

2.224 The committee requests the Minister's advice as to whether there are any decisions that could be made under the *National Disability Insurance Scheme Act 2013* that are not listed as being a 'reviewable decision', and if any decisions are excluded that might have an adverse impact on an individual, the justification for not including these in the list of 'reviewable decisions'.

Minister's response

2.225 The Minister advised:

Proposed section 99 of the Bill includes all of the decisions which might have an adverse impact on an individual and which are reviewable internally and externally by the Administrative Appeals Tribunal.

The following table lists decisions that are not a reviewable decision and the circumstances around which they are made. The decisions are not reviewable because they are subject to separate review processes and/or guidelines not administered by the Commissioner.

80 Schedule 1, item 50, proposed section 99. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iii) of the committee's terms of reference.

81 See Schedule 1, items 51 to 56.

Decision	Proposed section	Subject to
A decision to grant (or not to grant) financial assistance to a person or entity in relation to applications for registration/variations of registration.	73S	Commonwealth Grants Guidelines ⁸²
A decision to approve (nor not to approve) a quality auditor	73U	Based on accreditation through a third party accreditation body
Monitoring & Investigations warrants, civil penalties and injunctions – must be issued by a court under the Regulatory Powers Act		Appeal to Relevant Court
A decision to issue an infringement notice (Regulatory Powers Act)	73ZL	Appeal to Relevant Court

Committee comment

2.226 The committee thanks the Minister for this response. The committee notes the Minister's advice listing the decisions that are not reviewable, and the explanation given that these are not reviewable because they are subject to separate review processes and/or guidelines not administered by the Commissioner.

2.227 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

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

Broad delegation of administrative powers⁸³

Initial scrutiny – extract

2.229 Proposed section 202A provides that the Commissioner may delegate to 'a Commission officer' any or all of his or her power or functions under the NDIS

82 <https://www.finance.gov.au/sites/default/files/commonwealth-grants-rules-and-guidelinesJuly2014.pdf>

83 Schedule 1, item 71, proposed section 202A. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

(except in relation to privacy powers, which may only be delegated to an SES employee in the Commission).

2.230 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 officers 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.

2.231 The explanatory materials provide no information about why these powers are proposed to be delegated to any Commission officer at any level.

2.232 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.

2.233 The committee requests the Minister's advice as to why it is necessary to allow most of the Commissioner's powers and functions to be delegated to any Commission officer at any level and also requests the Minister's advice as to the appropriateness of amending the bill to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

Minister's response

2.234 The Minister advised:

A broad delegation is necessary to enable the Commission to regulate the national NDIS market in an efficient manner which is responsive to the rapidly emerging and changing NDIS market.

Consistent with the NDIS Quality and Safeguarding Framework released by the Disability Reform Council, the core functions of the Commission outlined in proposed section 181E, will be undertaken by the Commissioner of the NDIS Quality and Safeguards Commission to be appointed under proposed 181L.

The explanatory memorandum (at pages 50 to 60) indicates that the Commissioner's registration and reportable incidents functions will be undertaken by a Registrar; the Commissioner's complaints functions will be undertaken by a Complaints Commissioner; and the Commissioner's behaviour support function will be undertaken by a Senior Practitioner.

The draft organisational chart below indicates how those functions are intended to operate.⁸⁴

The organisational chart was provided to stakeholders during the development of the Bill and is intended to illustrate the scope of powers to be delegated and the categories of people to whom specific powers will be delegated.

Committee comment

2.235 The committee thanks the Minister for this response. The committee notes the Minister's advice that a broad delegation is necessary to enable the Commission to regulate the NDIS market in an efficient and responsive manner. The committee also notes the Minister's advice that it is intended that certain powers will be granted to specified officers.

2.236 The committee reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or members of the Senior Executive Service or, alternatively, a limit is set on the scope and type of powers that might be delegated. While the committee notes the Minister's advice as to how it is intended this power will be exercised, there is nothing on the face of the bill to limit it in the way set out in the response.

2.237 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.238 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of the broad delegation of administrative power.

84 Note, the organisational chart is published together with the ministerial correspondence, available on the committee's website. See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest

Parliamentary Business Resources Bill 2017

Purpose	This bill seeks to establish new rules governing parliamentary work expenses
Portfolio	Finance
Introduced	House of Representatives on 30 March 2017
Bill status	Received the Royal Assent on 19 May 2017
Scrutiny principle	Standing Order 24(1)(a)(iv)

2.239 The committee dealt with this bill in *Scrutiny Digest No. 5 of 2017*. The Minister responded to the committee's comments in a letter dated 26 June 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁸⁵

Significant matters in non-disallowable delegated legislation⁸⁶

Initial scrutiny – extract

2.240 This bill seeks to replace the current parliamentary work expenses framework based on recommendations from the Independent Parliamentary Entitlements System review⁸⁷ (the Review).

2.241 Much of the proposed new framework is not set out in the bill and is instead left to delegated legislation. While some of the matters left to delegated legislation are subject to disallowance, others are exempt from disallowance. Subclause 6(6) provides that ministerial determinations in relation to specific activities that fall within, and those that fall outside, the meaning of 'parliamentary business' of a member are not subject to disallowance.⁸⁸ As a result, much of the definition of what will (and will not) constitute 'parliamentary business' (and therefore be claimable as a parliamentary expense) is left to be determined by non-disallowable legislative instruments.

85 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest

86 Clause 6. The committee draws Senators' attention to this provision pursuant to principle 1(a)(iv) of the committee's terms of reference.

87 February 2016.

88 Paragraph 6(2)(b) and subclauses 6(3), 6(5) and 6(6).

2.242 The explanatory memorandum notes that one of the objectives of the Review was that the new work expenses framework would define the concept of 'parliamentary business' by which members could access certain work expenses, allowances and other public resources:

The concept of parliamentary business is therefore central to the new work expenses framework and the operation of many of the provisions in the Bill is dependent on the definition.⁸⁹

2.243 The explanatory memorandum suggests that it is appropriate to delegate much of the definition of 'parliamentary business' to the Minister so 'the definition has the necessary flexibility to account for the changing and future nature needs of members' roles'.⁹⁰

2.244 The explanatory memorandum further suggests that 'as a central concept to the Bill, it is also appropriate that such an instrument is not subject to disallowance so as to provide members with certainty about what activities are covered at any particular time'.⁹¹

2.245 The committee notes this explanation, however, the committee's consistent position is that central concepts relating to a legislative scheme should be defined in primary legislation unless a sound justification for the use of delegated legislation is provided.

2.246 Noting the importance of appropriate parliamentary scrutiny, the committee requests the Minister's justification as to why the detail of what constitutes 'parliamentary business' is to be included in delegated legislation rather than on the face of the bill, noting that its meaning is a central concept of the bill.

2.247 The committee also seeks the Minister's advice as to whether, if such matters are to remain in delegated legislation, the bill could be amended to provide that any relevant ministerial determinations are subject to parliamentary disallowance. The committee notes that certainty could be provided in relation to what activities are covered at any particular time by increasing parliamentary oversight of the determinations, rather than exempting them from disallowance altogether. The committee notes that it would be possible to provide for such increased scrutiny in ways that would ensure the definition was not subject to unexpected change, for example by:

- requiring the positive approval of each House of the Parliament before new determinations come into effect;⁹²

89 Explanatory memorandum, p. 12.

90 Explanatory memorandum, p. 12.

91 Explanatory memorandum, p. 12.

92 See, for example, section 10B of the *Health Insurance Act 1973*.

- providing that the determinations do not come into effect until the relevant disallowance period has expired;⁹³ or
- a combination of these processes.⁹⁴

Minister's response

2.248 The Minister advised:

Significant matters in non-disallowable delegated legislation

I note the Committee's position that central concepts relating to a legislative scheme should be defined in primary legislation unless a sound justification for the use of delegated legislation is provided.

However, the definition of 'parliamentary business' in the PBR Bill is not wholly left to be determined in the Instrument. Rather, clause 6 of the PBR Bill sets out the definition of parliamentary business and leaves it for the Instrument to determine the types of activities that fall within the meaning defined in the PBR Bill.

Consequently, it would not be possible for the Instrument to determine activities inconsistent with the meaning as set out in clause 6 of the PBR Bill. This ensures that the power that is delegated to the Instrument to specify activities is appropriately limited.

The Committee's suggestions for further parliamentary oversight

As the Explanatory Memorandum to the PBR Bill identifies, the types of activities that would fall within the meaning of parliamentary business are diverse as all parliamentarians exercise the freedom to determine how they conduct their business. Any attempt to express these activities in primary legislation would severely limit the flexibility of the legislation to address each member's individual requirements as they arise. Rather, a non-disallowable legislative instrument provides both flexibility and certainty in responding to the changing and future needs of members' roles.

I note the Committee's view that certainty could be provided in relation to what activities are covered at any particular time by increasing parliamentary oversight of the determinations, rather than exempting them from disallowance. I understand the Committee's suggestions to achieve this include:

- requiring the positive approval of each House of the Parliament before new determinations come into effect;

93 See, for example, section 79 of the *Public Governance, Performance and Accountability Act 2013*.

94 See, for example, section 198AB of the *Migration Act 1958* and sections 45-20 and 50-20 of the *Australian Charities and Not-for-profits Commission Act 2012*.

- providing that the determinations do not come into effect until the relevant disallowance period has expired; or
- a combination of these processes.

I thank the Committee for providing references to examples of these approaches in existing legislative schemes. While I acknowledge that these approaches would increase parliamentary oversight, they would do so at the expense of the flexibility of the scheme given either approach necessitates a parliamentary sitting period. Noting the parliamentary sittings calendar, under either approach, several weeks may elapse before the Instrument or any amendments to the Instrument could come into effect. Such an outcome would limit the ability to be responsive to changes or requests for clarity around the nature of parliamentary work. Therefore, I do not support amendments in this regard.

Committee comment

2.249 The committee thanks the Minister for this response. The committee notes the Minister's advice that clause 6 of the bill sets out the definition of parliamentary business and leaves it to delegated legislation to determine the types of activities that fall within this meaning and, as a result, it would not be possible for the delegated legislation to determine activities inconsistent with the meaning as set out in the bill. The committee also notes the Minister's advice that a non-disallowable legislative instrument provides both flexibility and certainty in responding to the changing and future needs of parliamentarians' roles and that it would not be appropriate to increase parliamentary oversight of these instruments because this would limit the ability to be responsive to changes or requests for clarity around the nature of parliamentary work.

2.250 While the committee notes these points, it remains the case that the delegation of legislative power in this bill is significant in that the Minister will be able to determine specific activities that fall within, and those that fall outside, the meaning of 'parliamentary business', subject only to the relatively broad definition in subclause 6(1). While it could be considered that this type of detail may be appropriate for inclusion in *disallowable* delegated legislation, the committee still retains scrutiny concerns in relation to this delegation of legislative power as the relevant delegated legislation in this instance will not be subject to parliamentary disallowance. The committee notes that it would be possible for any ministerial determinations in relation to activities falling within, or to be excluded from, the definition of 'parliamentary business' to be subject to disallowance and to come into effect very quickly (i.e. at the start of the day after the day the instrument is registered in accordance with the usual procedures relating to disallowable delegated legislation in the *Legislation Act 2003*).

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

Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017

Purpose	This bill amends various Acts relating to passports and criminal law to: <ul style="list-style-type: none"> • require the Minister to deny a passport to a reportable offender when requested by a 'competent authority'; and • create a new Commonwealth offence for reportable offenders to travel overseas, or attempt to travel overseas, without permission from a 'competent authority'
Portfolio	Foreign Affairs and Trade
Introduced	House of Representatives on 14 June 2017
Bill status	Received the Royal Assent on 26 June 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

2.252 The committee dealt with this bill in *Scrutiny Digest No. 7 of 2017*. The Minister responded to the committee's comments in a letter received 19 July 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.⁹⁵

Trespass on personal rights and liberties—general comment⁹⁶

Initial scrutiny – extract

2.253 The bill provides that a passport must not be issued and must be cancelled where a competent authority makes a refusal or cancellation request. A request may be made in relation to a reportable offender, which means an Australian citizen whose name is entered on a child protection register of a State or Territory and who has reporting obligations in connection with that entry on the register. A 'competent authority' is defined in the *Australian Passports Act 2005* as a person with responsibility for, or powers, functions or duties in relation to, reportable offenders or a person specified in a Minister's determination as a competent authority.⁹⁷ The

95 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest.

96 Schedule 1. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(i) of the committee's terms of reference.

97 Subsection 12(3) of the *Australian Passports Act 2005*.

explanatory memorandum states this 'will generally be a State and/or Territory's court, sex offender registry, or police'.⁹⁸ The explanatory memorandum states that the purpose of the bill is to ensure reportable offenders are prevented from travelling overseas 'to sexually exploit or sexually abuse vulnerable children in overseas countries where the law enforcement framework is weaker and their activities are not monitored'.⁹⁹

2.254 While there is no question that the protection of children is vitally important, a number of scrutiny questions—separate to the overarching policy considerations underpinning this bill—arise around the practical exercise of this proposed power and whether the bill provides appropriate safeguards to ensure it does not unduly trespass on personal rights and liberties.¹⁰⁰

2.255 In particular, it appears that a competent authority will not make a case-by-case assessment of each reportable offender before requesting that their passport be cancelled or not issued. The explanatory memorandum states that Commonwealth legislation already provides that a child sex offender's passport may be refused, cancelled or surrendered on the basis of a competent authority's assessment of the offender's likelihood to cause harm.¹⁰¹ However, it goes on to say:

This process is resource intensive, being done on a case-by-case basis, and is subject to review by the Administrative Appeals Tribunal. As a result, States and Territories do not use these provisions at all. The measures in the Bill address these constraints to protect vulnerable overseas children.¹⁰²

2.256 The explanatory memorandum also states that following the changes introduced by this bill the number of competent authority requests 'will rise substantially to capture the existing 20,000 registered child sex offenders and additional 2,500 offenders added to the registers each year'.¹⁰³ It therefore appears that it is anticipated that the competent authorities will make requests in relation to all reportable offenders without any consideration of the risk each individual poses or their individual circumstances or whether it is necessary to restrict travel entirely rather than to specific countries 'where the law enforcement framework is weaker'.¹⁰⁴

98 Explanatory memorandum, p. 10.

99 Explanatory memorandum, p. 2.

100 See Standing Order 24(1)(a)(i).

101 This would appear to be provided for in existing section 14 of the *Australian Passports Act 2005*.

102 Explanatory memorandum, p. 2.

103 Explanatory memorandum, p. 12.

104 Explanatory memorandum, p. 2.

2.257 It is also unclear what, if any, review processes are available to a person whose passport is cancelled or not issued. The bill provides that there is no merits review of a decision made by the Minister to cancel or refuse to issue a passport, as once a competent authority makes a request the Minister's decision is mandatory.¹⁰⁵ The explanatory memorandum states that where 'there are good reasons for making an exception, a competent authority will be able to permit a reportable offender to travel on a case by case basis'.¹⁰⁶ It goes on to say that a competent authority 'will be able to withdraw or amend their competent authority request' where there are good reasons, such as to visit a dying family member,¹⁰⁷ and the offender 'may still seek permission from the relevant competent authority to travel overseas'.¹⁰⁸ However, no information is provided as to the processes by which a person could apply to the competent authority to seek permission to be able to travel overseas or whether there is any process for merits review of any decision that the competent authority makes.

2.258 It is also unclear from the bill and explanatory memorandum which offenders will be included as subject to having their passport cancelled or not issued. The explanatory memorandum provides no detail of which offenders are put on a State or Territory child protection register, other than to say that the bill applies to 'registered child sex offenders'.¹⁰⁹ However, the bill provides a reportable offender is one whose name is entered on a State or Territory 'child protection offender register', however described. It appears that this may include those who have been convicted of harmful, but not sexual, offences against children and offences not involving children. For example, it appears that in the Northern Territory, Queensland, Tasmania and Victoria, a person convicted of incest (which could apply in relation to adults) could be included on a child protection register.¹¹⁰ It therefore appears that the range of offences for which a person could be included on a child protection offender register may be wider than child sex offences.

2.259 The committee emphasises that the scrutiny questions raised by the committee are separate to the overarching policy considerations underpinning this

105 See explanatory memorandum, p. 12.

106 Explanatory memorandum, p. 9.

107 Explanatory memorandum, p. 10.

108 Explanatory memorandum, p. 12.

109 Explanatory memorandum, p. 2.

110 See *Child Protection (Offender Reporting and Registration) Act 2004* (Northern Territory); *Child Protection (Offender Reporting) Act 2004* (Queensland); *Community Protection (Offender Reporting) Act 2005* (Tasmania); *Sex Offenders Registration Act 2004* (Victoria). For a summary of offender registration legislation in each Australia state or territory, see: <https://aifs.gov.au/cfca/offender-registration-legislation-each-australian-state-and-territory> (accessed 15 June 2017).

bill. Rather, the questions relate to how this power will be exercised in practice and whether the bill provides appropriate safeguards to ensure it does not unduly trespass on personal rights and liberties.¹¹¹

2.260 Despite the bill having passed both Houses of Parliament, the committee requests the Minister's advice as to:

- the process a competent authority will undertake in deciding to make a refusal/cancellation request in relation to each reportable offender, and whether the competent authority will consider individual risk factors before making a request;
- the process by which a reportable offender could seek internal review by a competent authority of their decision to make a refusal/cancellation request in relation to the reportable offender (or to refuse a reportable offender's case-by-case request to travel 'for good reasons') and the availability of external merits review;
- whether a person whose name is entered on a child protection offender register could include offenders who have not committed sexual offences against children and, if so, what is the justification for doing so; and
- further detail as to why existing section 14 of the *Australian Passports Act 2005*, which provides that a travel document may be refused if a competent authority reasonably suspects a person would engage in harmful conduct, is not sufficient to deal with the stated concerns, noting that the committee has not generally considered resource constraints and the availability of merits review to be a sufficient justification for provisions that may unduly trespass on personal rights and liberties.

Minister's response

2.261 The Minister advised:

The process a competent authority will undertake in deciding to make a refusal/cancellation request in relation to each reportable offender, and whether the competent authority will consider individual risk factors before making a request

Competent authorities in each State and Territory will determine their own processes for making these decisions.

The process by which a reportable offender could seek internal review by a competent authority of their decision to make a refusal/cancellation request in relation to the reportable offender (or to refuse a reportable offender's case-by-case request to travel 'for good reasons') and the availability of external merits review

111 See Standing Order 24(1)(a)(i).

Any processes for internal review of decisions by competent authorities will be a matter for each State and Territory.

The Act makes clear that the Minister's denial of a passport to a reportable registered child sex offender upon request by a competent authority will not be subject to external merits review by the Administrative Appeals Tribunal. However, it will be subject to judicial review.

In the unlikely event that a person had a passport cancelled or refused in error, then either the cancelled passport would be reissued free of charge for the same period of validity or the refused passport application would be processed as normal.

Whether a person whose name is entered on a child protection offender register could include offenders who have not committed sexual offences against children and, if so, what is the justification for doing so

Each State and Territory is responsible for managing its own child sex offender register and for the legislation which determines the types of offences for which someone will be placed on the register. While this legislation was originally intended to be uniform, implementation by jurisdictions at different times has meant that there are small differences between States and Territories.

The question of whether the name of a person who has committed an offence against a child that is not a sexual offence (such as kidnapping or assault) can be entered on a child sex offender register is more appropriately directed towards States and Territories that include such offences in their legislation. State and Territory competent authorities will have the discretion to provide exemptions where there are compelling reasons to do so.

Under Australia's federal system child sex offender registers are maintained by each State and Territory. Whilst, being a federal system, there will inevitably be differences in how each State and Territory frames particular offences each register is designed to capture those child sex offenders assessed to be an ongoing risk of sexual harm to children.

Further detail as to why existing section 14 of the Australian Passports Act 2005, which provides that a travel document may be refused if a competent authority reasonably suspects a person would engage in harmful conduct, is not sufficient to deal with the stated concerns, noting that the committee has not generally considered resource constraints and the availability of merits review to be a sufficient justification for provisions that may unduly trespass on personal rights and liberties

The provision in Section 14 of the *Australian Passports Act 2005* to deny a child sex offender a passport if a competent authority assesses the offender is likely to cause harm has had no impact in practice. The figures tell a clear story. In 2016, more than 770 Australian registered child sex offenders travelled overseas. Half of these were registered by State and

Territory police as being medium to high risk offenders. And a third violated an obligation to notify police of their intended travel.

Since 1 January 2011, only 63 requests to deny passports to child sex offenders have been made; 57 of these were based on parole conditions and only six were based on the offender's likelihood to cause harm. Only two requests were made in 2016; both were from the AFP and none from States and Territories.

Committee comment

2.262 The committee thanks the Minister for this response. The committee notes the Minister's advice that competent authorities in each State and Territory will determine their own processes for deciding to make a refusal/cancellation request and all processes for internal review will be a matter for each State or Territory, with no external merits review available. The committee also notes the Minister's advice that there are differences in how each State and Territory frames particular offences and whether a person can be entered on a sex offender register if they have not committed sexual offences against children is a question 'more appropriately directed towards States and Territories that include such offences in their legislation'. The committee also notes the advice that the current power to refuse a travel document based on reasonable suspicion 'has had no impact in practice' with only 63 requests to deny passports to child sex offenders made since 1 January 2011 under these existing powers.

2.263 The committee retains scrutiny concerns about provisions that automatically cancel, or ensure that an Australian citizen is not entitled to, a passport or other travel document if the person's name is entered on a register, in circumstances where the process for including names on the register or any review of that process, remains unclear and where merits review is unavailable.

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

Reversal of evidential burden of proof¹¹²

Initial scrutiny – extract

2.265 Subsection 271A.1(1) makes it an offence for an Australian citizen, if their name is entered on a child protection offender register and the person has reporting obligations in connection with that entry on the register, to leave Australia. Proposed subsection 271A.1(3) provides an exception (an offence-specific defence) to this offence, stating that the offence does not apply if a competent authority has given

112 Schedule 1, item 13, proposed subsection 271A.1(3). The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

permission for the person to leave Australia or the reporting obligations of the person are suspended at the time the person leaves Australia. The offence carries a maximum penalty of five years imprisonment.

2.266 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.

2.267 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. The committee expects any reversal of the burden of proof to be justified in the explanatory memorandum.

2.268 The explanatory memorandum states that it is reasonable that the burden of proving relevant circumstances (such as whether the defendant has permission to travel or their reporting requirements have been suspended) falls to the defendant because these circumstances 'will be within the knowledge of, and easily evidenced by, a registered child sex offender' and the circumstances 'are particularly within the knowledge of the person concerned'.¹¹³ The statement of compatibility repeats these comments and states that 'it is clearly more practical for the defendant to prove that they satisfy the requirements of the defence'.¹¹⁴

2.269 The committee notes that the *Guide to Framing Commonwealth Offences*¹¹⁵ 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.¹¹⁶

2.270 In this case, it is not apparent that matters such as whether a competent authority has given permission for the person to leave Australia or the reporting obligations being suspended at the time the person leaves Australia, are matters *peculiarly* within the defendant's knowledge, or that it would be difficult or costly for the prosecution to establish the matters. These matters appear to be matters more appropriate to be included as an element of the offence.

113 Explanatory memorandum, p. 14.

114 Statement of compatibility, p. 6.

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

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

2.271 Despite the bill having passed both Houses of Parliament, the committee requests the Minister's detailed justification as to the appropriateness of including the specified matters as an offence-specific defence. The committee suggests that it may have been appropriate if proposed subsection 271A.1(1) had been amended to provide that the offence will be committed if the person has reporting obligations that have not been suspended at the time the person leaves Australia and a competent authority has not given permission for the person to leave Australia. The committee requests the Minister's advice in relation to this matter.

Minister's response

2.272 The Minister advised:

An evidential burden is only placed on the defendant who wishes to deny criminal responsibility under two particular circumstances: showing that the competent authority has given permission for the person to leave, or where the reporting obligations were suspended at the time the person leaves Australia. The Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers (the Guide) states at page 51 that the Scrutiny of Bills Committee may find that offence-specific defences are appropriate where an element of the offence is peculiarly within the knowledge of the defendant, or the element would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.

The Guide (at p. 50) provides that creating a defence is more readily justified if the conduct proscribed by the offence poses a grave danger to public health or safety, which is the case for registered child sex offenders travelling overseas. A defendant can readily and cheaply point to a specific instance in which a competent authority has granted permission to travel overseas, while it would be far more difficult and costly for the prosecution to prove beyond reasonable doubt that a competent authority had not given permission for a person to leave Australia (see 13.2(1) of the Criminal Code).

Committee comment

2.273 The committee thanks the Minister for this response. The committee notes the Minister's advice that a defendant can 'readily and cheaply' point to a specific instance in which a competent authority has granted permission to travel overseas and that 'it would be far more difficult and costly for the prosecution' to prove beyond reasonable doubt that a competent authority had not given permission.

2.274 The committee reiterates that 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. The committee expects any reversal of the burden of proof to be well justified and in general a

matter should only be included in an offence-specific defence where the matter is peculiarly within the knowledge of the defendant and it would be significantly more difficult and costly for the prosecution to disprove the matter.

2.275 In this instance, it is not clear that the question of whether a competent authority, which is generally a State or Territory court, sex offender registry or police, has given permission to travel would be *peculiarly* within the defendant's knowledge. Rather, it appears to be something that both the prosecution and defendant would have knowledge of. It is also not clear why it would be 'far more difficult and costly' for the prosecution to prove that a competent authority had not given permission to travel (given it would appear to be something the relevant competent authority could give evidence in relation to).

2.276 It therefore does not appear that these matters are ones that are appropriate to include as offence-specific defences, thereby reversing the evidential burden of proof.

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

Regional Investment Corporation Bill 2017

Purpose	This bill seeks to establish a Regional Investment Corporation
Portfolio	Agriculture and Water Resources
Introduced	House of Representatives on 14 June 2017
Scrutiny principles	Standing Order 24(1)(a)(ii), (iv) and (v)

2.278 The committee dealt with this bill in *Scrutiny Digest No. 7 of 2017*. The Minister responded to the committee's comments in a letter dated 14 July 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.¹¹⁷

Parliamentary scrutiny—section 96 grants to the States¹¹⁸

Initial scrutiny – extract

2.279 This bill seeks to establish a Regional Investment Corporation. One of the functions of the Corporation will be to administer, on behalf of the Commonwealth, financial assistance to States and Territories in relation to water infrastructure projects.¹¹⁹ As part of this role the Corporation will:

- liaise, negotiate and cooperate with States and Territories and other parties on possible water infrastructure projects;¹²⁰
- provide advice to ministers on water infrastructure projects¹²¹ (for example, on matters such as feasibility, alignment of the project with government objectives for water infrastructure, as well as suitable terms and conditions for any financial assistance);¹²²

117 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.apf.gov.au/senate_scrutiny_digest.

118 Paragraphs 8(1)(b) and 8(1)(c), subclause 12(3), paragraph 15(1)(c), and clause 46. The committee draws Senators' attention to these provisions pursuant to principle 1(a)(v) of the committee's terms of reference.

119 Paragraphs 8(1)(b) and 8(1)(c).

120 Subparagraph 8(1)(c)(i).

121 Subparagraph 8(1)(c)(ii).

122 Explanatory memorandum, p. 7.

- on direction from the relevant ministers, enter into agreements to grant financial assistance to States and Territories in relation to water infrastructure projects;¹²³ and
- review these grants periodically, including the terms and conditions on which such financial assistance is granted.¹²⁴

2.280 If the Corporation is established it will be the administrator of the National Water Infrastructure Loan Facility, although the legislative provisions do not limit the Corporation's functions to the administration of this particular Facility. As a result, the Corporation may administer other programs of financial assistance to States and Territories in relation to water infrastructure projects in the future.

2.281 As the explanatory memorandum notes, grants of financial assistance to the States are made under section 96 of the Constitution. The explanatory memorandum further suggests that the Corporation will undertake the administration of these financial assistance programs *on behalf of the Commonwealth* because 'the decision on whether to provide the financial assistance remains with the government, not the Corporation'.¹²⁵

2.282 The committee takes this opportunity to highlight that the power to make grants to the States and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution.¹²⁶ Where the Parliament delegates this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 of the Constitution and the role of Senators in representing the people of their State or Territory.

2.283 Noting this, and the fact that the terms and conditions of financial assistance may be of significance to water infrastructure policy generally, the committee suggests it may be appropriate for the bill to be amended to:

- include at least some high-level guidance as to the types of terms and conditions that States and Territories will be required to comply with in order to receive payments of financial assistance for water infrastructure projects;
- include a legislative requirement that any directions made by the responsible ministers under subclause 12(3) and any agreements with the States and Territories about these grants of financial assistance are:

123 Subparagraph 8(1)(c)(iii).

124 Subparagraph 8(1)(c)(iv).

125 Explanatory memorandum, pp 6–7.

126 Section 96 of the Constitution provides that: '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

- tabled in the Parliament within 15 sitting days after being made, and
- published on the internet within 30 days after being made.

2.284 The committee requests the Minister's response in relation to this matter.

Minister's response

2.285 The Minister advised:

Clause 8 of the Bill sets out the functions of the Regional Investment Corporation (the Corporation), including to administer on behalf of the Commonwealth, financial assistance to States and Territories in relation to water infrastructure projects. Subparagraph 8(1)(c)(iii) of the Bill links the function of entering into an agreement for the grant of financial assistance with a direction from responsible Ministers under subclause 12(3) of the Bill.

The Parliament will have an appropriate degree of visibility in relation to grants of financial assistance for water infrastructure projects. This visibility will be achieved via the Operating Mandate issued to the Corporation by the responsible Ministers under clause 11 of the Bill, and reporting requirements for corporate Commonwealth entities under the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act).

The Operating Mandate provides the key vehicle for the government to set out its expectations for the Corporation. It is expected to include high-level programme requirements associated with financial assistance under the National Water Infrastructure Loan Facility, including eligibility criteria and key loan specifications. Parliament will have visibility of these matters as the Operating Mandate is a legislative instrument (refer to subclause 11(1) of the Bill) and will be subject to tabling requirements of the *Legislation Act 2003*.

Subclause 12(3) of the Bill provides for the responsible Ministers to direct the Corporation to enter into an agreement, on behalf of the Commonwealth, for the grant of financial assistance to a State or Territory for a water infrastructure project. The direction may specify terms and conditions to be included in the agreement. These directions will not be legislative instruments (refer to later discussion); however, the Corporation will be required to publish details on any directions it receives from responsible Ministers in its annual reports, including those made under subclause 12(3) of the Bill.

This requirement arises because of section 46 of the PGPA Act, under which corporate Commonwealth entities must prepare, and present to Parliament, annual reports that comply with any requirements prescribed by the rules. Paragraph 17BE(d) of the *Public Governance, Performance and Accountability Rule 2014* (the PGPA Rule) requires details on any directions received by the entity to be published in its annual reports.

Section 16F of the PGPA Rule also requires annual reports to detail the performance of the entity, which, for the Corporation, will include reporting on its administration of grants of financial assistance to States and Territories for water infrastructure projects. Other applicable reporting requirements for corporate Commonwealth entities are set out in Part 2-3 of Chapter 2 of the PGPA Act.

Committee comment

2.286 The committee thanks the Minister for this response. The committee notes the Minister's advice that the Regional Investment Corporation's Operating Mandate will be the key vehicle for the government to set out its expectations for the Corporation and that it is expected to include high-level programme requirements associated with financial assistance under the National Water Infrastructure Loan Facility, including eligibility criteria and key loan specifications. The Minister advised that Parliament will have visibility of these matters as the Operating Mandate will be tabled in the Parliament. The committee also notes the Minister's advice that any directions to enter into an agreement for the grant of financial assistance to a State or Territory made under subclause 12(3) of the bill may specify terms and conditions to be included in the agreement and the directions will be required to be published in the Corporation's annual report as a result of the provisions of paragraph 17BE(d) of the *Public Governance, Performance and Accountability Rule 2014* (the PGPA Rule).

2.287 The committee reiterates that the power to make grants to the States and to determine terms and conditions attaching to them is conferred *on the Parliament* by section 96 of the Constitution.¹²⁷ Where the Parliament delegates this power to the executive, the committee considers that it is appropriate that the exercise of this power be subject to at least some level of parliamentary scrutiny, particularly noting the terms of section 96 of the Constitution and the role of Senators in representing the people of their State or Territory.

2.288 The committee thanks the Minister for advising it of the requirements in the PGPA Rule which mean that the Corporation's annual report will include details about any ministerial directions given to the Corporation, including directions to enter into an agreement for the grant of financial assistance to a State or Territory. However, it is not clear that the annual reports will include details about all of the relevant terms and conditions imposed on States and Territories, nor is there any legislative requirement to publish on the internet or table in the Parliament the relevant agreements in their entirety. In addition, the committee notes that the response does not directly provide any detail as to why it would not be appropriate to include at least some high-level guidance as to the types of terms and conditions that States and Territories will be required to comply with on the face of the bill.

127 Section 96 of the Constitution provides that: '...the Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit'.

2.289 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of delegating to the executive government and the proposed Regional Investment Corporation the Parliament's power under section 96 of the Constitution to make grants to the States and to determine terms and conditions attaching to them, without any statutory guidance as to the types of terms and conditions that States and Territories will be required to comply with or a statutory requirement that the relevant agreements with the States and Territories be published on the internet or tabled in the Parliament.

Exemption from disallowance and sunseting¹²⁸

2.290 Clauses 11 and 12 of the bill would allow the responsible ministers to give directions, by legislative instrument, to the Regional Investment Corporation. Clause 11 relates to directions making up the Corporation's 'Operating Mandate' and clause 12 relates to 'other directions'.

2.291 In relation to the Operating Mandate,¹²⁹ the explanatory memorandum states that:

The Operating Mandate has been specified in the Act to be a legislative instrument. This is because it will specify matters which are legislative in character. As a legislative instrument, the Operating Mandate is required to be registered on the Federal Register of Legislation and tabled in Parliament. This approach will also provide for transparency and accountability when the government issues directions via the Operating Mandate.

2.292 However, as the Operating Mandate is made up of directions given by a Minister to a corporate Commonwealth entity it will be a non-disallowable instrument, and will not be subject to sunseting, as it falls within relevant exemptions in the Legislation (Exemptions and Other Matters) Regulation 2015. The explanatory memorandum states that this approach 'reflects that the mandate will be the mechanism in which the government sets its expectations for the Corporation' and that it 'ensures a mandate is in force at all times'.¹³⁰

2.293 In relation to 'other directions' to the Corporation,¹³¹ the explanatory memorandum states that these directions are not legislative instruments (and therefore will not be subject to disallowance, sunseting or a requirement to table them in Parliament) because they are:

128 Clauses 11 and 12. The committee draws Senators' attention to this provision pursuant to principles 1(a)(ii) and (iv) of the committee's terms of reference.

129 Clause 11.

130 Explanatory memorandum, p. 9.

131 Clause 12.

subject to the exclusion in item 3 of the table in subsection 6(1) of the Legislation (Exemptions and Other Matters) Regulation 2015. This provides that a direction given by a Minister to a corporate Commonwealth entity ... is not a legislative instrument.¹³²

2.294 Some of the matters to be determined in these non-disallowable directions are relatively significant. For example, the directions may include directions relating to:

- eligibility criteria for loans or financial assistance;¹³³
- a class of farm business loans;¹³⁴
- terms and conditions attaching to agreements with the States and Territories in relation to water infrastructure projects;¹³⁵ and
- where the Corporation is to be located.¹³⁶

2.295 In relation to the 'other directions' provided for in clause 12, the responsible ministers must seek the Board's advice in relation to directions about farm business loans and water infrastructure projects, but they are not required to seek the Board's advice in relation to directions about where the Corporation is to be located.

2.296 Other than noting that these directions fall within relevant exemptions from disallowance and sunseting contained in the Legislation (Exemptions and Other Matters) Regulation 2015, the explanatory memorandum does not explain why it is necessary for all of these directions to be exempt from disallowance and sunseting (and in the case of 'other directions' also why there is no requirement to table the directions in Parliament).¹³⁷ The committee's consistent position is that significant concepts relating to a legislative scheme should be defined in primary legislation (or at least in legislative instruments subject to parliamentary disallowance, sunseting and tabling) unless a sound justification for using non-disallowable delegated legislation is provided.

2.297 The committee requests the Minister's advice as to why it is appropriate for all of the ministerial directions under clauses 11 and 12 not to be subject to disallowance and sunseting, and why it is appropriate that there is no requirement to table 'other directions' made under clause 12 in the Parliament.

132 Explanatory memorandum, p. 10.

133 Paragraph 11(2)(c).

134 Subclause 12(1).

135 Subclause 12(3).

136 Subclause 12(5).

137 Explanatory memorandum, p. 12.

2.298 The committee also requests the Minister's advice as to why there is no requirement to seek the Board's advice prior to the making of a direction about where the Corporation is to be located under subclause 12(5).

Minister's response

2.299 The Minister advised:

The approach taken to the tabling, disallowance and sunseting of the directions given by responsible Ministers under clauses 11 and 12 of the Bill reflects the character of the directions, the level of executive control considered appropriate, and the need for directions to remain in force until revoked.

As detailed in the explanatory memorandum to the Bill, the approach taken is also in line with the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Regulation). The Regulation exempts directions from ministers to corporate Commonwealth entities from being legislative instruments. It also exempts legislative instruments that are directions from a minister to a person or body from disallowance and sunseting.

To assist the Committee's consideration of the Bill, further detail on the specific directions is provided below.

Operating Mandate (clause 11 of the Bill)

Section 6 of the Regulation exempts classes of instruments from being legislative instruments. This exemption includes a direction given by a minister to a corporate Commonwealth entity within the meaning of the PGPA Act (refer to item 3 of the table in section 6 of the Regulation). The explanatory statement to the Regulation states that the exemption is appropriate because these types of instruments are administrative in character, as they do not determine the law or alter the content of the law; rather, they determine how the law does or does not apply in particular cases or circumstances.

Despite this express exemption, the Bill provides for the Operating Mandate to be treated as a legislative instrument. This approach has been taken because the Operating Mandate relates to matters that are considered to be legislative in character. Given this, and due to subsection 8(2) of the Legislation Act, the tabling requirements of the Legislation Act will apply.

However, the Operating Mandate will not be subject to disallowance and sunseting. Section 9 of the Regulation exempts classes of legislative instruments from being subject to disallowance. Item 2 of the table in that section is relevant in this case. The explanatory statement to the Regulation states that this exemption appropriately recognises that executive control is intended for these types of instruments.

Section 11 of the Regulation exempts classes of legislative instruments from being subject to sunseting. Item 3 of the table in that section applies in this case. The explanatory statement to the Regulation states that

sunsetting is not appropriate for these types of instruments because they are intended to remain in place until revoked by the relevant Minister.

Other directions

The 'other directions' given to the Corporation under clause 12 of the Bill will be administrative in nature and will not determine or alter the law. For example, directions made under subclause 12(3) of the Bill will relate only to a particular State or Territory in relation to a particular water infrastructure project. As a result, the approach taken for 'other directions' in the Bill is different from the approach to the Operating Mandate.

Section 6 of the Regulation exempts classes of instruments from being legislative instruments. Item 3 of the table in that section is applicable in this case. Due to this express exemption, the provisions of the Legislation Act, including in relation to disallowance and sunsetting, will not apply to the 'other directions' in clause 12 of the Bill.

However, as noted above, under paragraph 17BE(d) of the PGPA Rule, the Corporation will be required to publish details on any directions it receives from responsible Ministers in its annual reports. This requirement ensures there will be appropriate transparency on ministerial directions to the Corporation.

Consultation on the location of Corporation

It is not appropriate for the Bill to require the Board to be consulted on the location of the Corporation prior to a direction being made under subclause 12(5). The decision to establish the Corporation in Orange, NSW, has already been made by the government. This decision, combined with subclause 12(5) of the Bill, will provide certainty to the Board about the location of the entity and allows it to focus on having the Corporation fully operational in Orange, NSW, by July 2018.

Committee comment

2.300 The committee thanks the Minister for this response. The committee notes the Minister's advice that the exemption from disallowance and sunsetting of the Operating Mandate and the other directions given by responsible ministers under clause 12 of the bill reflects the character of the directions, the level of executive control considered appropriate, and the need for directions to remain in force until revoked. The Minister also advises that the approach taken is in line with the *Legislation (Exemptions and Other Matters) Regulation 2015* (the Exemption Regulation). The committee also notes the Minister's advice that the Operating Mandate relates to matters that are considered to be legislative in character and it is suggested that other directions given by responsible ministers under clause 12 of the bill will be administrative in nature and will not determine or alter the law. The committee notes the Minister's advice that it is not appropriate for the bill to require the Board to be consulted on the location of the Corporation prior to a direction being made under subclause 12(5) because the decision to establish the Corporation

in Orange, NSW, has already been made by the government. The Minister also advised that this decision, combined with subclause 12(5) of the bill, will provide certainty to the Board about the location of the entity and allows it to focus on having the Corporation fully operational in Orange, NSW, by July 2018.

2.301 The committee also notes the Minister's advice above that the Operating Mandate will be the key vehicle for the government to set out its expectations for the Corporation. As the committee noted in its original comments, the committee's consistent position is that significant concepts relating to a legislative scheme should be defined in primary legislation (or at least in legislative instruments subject to parliamentary disallowance, sunseting and tabling) unless a sound justification for using non-disallowable delegated legislation is provided. In this case, other than noting the general reasons for exempting certain classes of legislation from disallowance and sunseting provided in the explanatory statement to the Exemption Regulation, no specific justification is provided as to why all of these ministerial directions should be exempt from disallowance and sunseting in these particular circumstances.

2.302 Noting many of the matters to be determined in these non-disallowable ministerial directions could have a significant impact on the Corporation's operation, in the absence of a more specific justification in each instance, the committee considers that these directions should be subject to parliamentary disallowance and sunseting.

2.303 It is also the committee's consistent scrutiny position that where the Parliament delegates its legislative power in relation to significant matters it is appropriate that specific consultation obligations (beyond those in section 17 of the *Legislation Act 2003*) are included in the bill and that compliance with these obligations is a condition of the validity of the legislative instrument. Therefore, in relation to the Operating Mandate, the committee considers that it would be appropriate for consideration to be given to including specific consultation requirements on the face of the bill.

2.304 In relation to directions relating to the location of the Corporation, the committee notes the Minister's advice that a decision has already been made by government in relation to where the Corporation is to be located. However, noting the broad discretion granted to the responsible ministers to determine the location of the Corporation, it remains unclear why there should not be a requirement for the responsible ministers to seek the Board's advice prior to making a direction about the location of the Corporation. The committee notes in particular that the ability for the responsible ministers to give a direction relating to the location of the Corporation is an ongoing one (i.e. it is not limited to specifying the initial location of the Corporation).

2.305 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of exempting ministerial directions relating to the operation of the Regional Investment Corporation from

disallowance and sunseting and the failure to include specific consultation requirements in the bill.

Broad delegation of administrative powers¹³⁸

2.306 Clauses 49 to 51 of the bill would allow all or any of the powers or functions of the Corporation,¹³⁹ Board¹⁴⁰ and CEO¹⁴¹ to be delegated or subdelegated to any member of the staff of the Corporation. Some of these powers and functions are significant including, for example, the power to sign an agreement, on behalf of the Commonwealth, with a State or Territory for the grant of financial assistance in relation to a water infrastructure project, and the power to sign loan agreements to be administered by the Corporation.

2.307 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 officers or to senior executive members. 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.

2.308 In this case, the explanatory memorandum states that these provisions have 'been included to provide flexibility to the operation of the Corporation' and that:

Allowing the CEO to delegate or subdelegate their powers or functions to a staff member of the Corporation (who would then undertake the task concerned) facilitates the efficient and effective performance of the Corporation's functions. It is envisaged the CEO would carefully consider the skills and experience of the relevant staff member before making the delegation or subdelegation. It is also envisaged the CEO would be held accountable by the Board for monitoring and managing the activities of staff who perform activities that have been delegated or subdelegated by the CEO.¹⁴²

138 Clauses 8, 15, 35 and 49–51. The committee draws Senators' attention to this provision pursuant to principle 1(a)(ii) of the committee's terms of reference.

139 Clause 8.

140 Clause 15.

141 Clause 35.

142 Explanatory memorandum, p. 20.

2.309 The committee notes this explanation, however, there is no guidance on the face of the bill as to the relevant skills or experience that would be required to undertake delegated functions. Nor is there any limitation on the level to which significant powers or functions could be delegated. 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.

2.310 The committee requests the Minister's advice as to why it is necessary to allow *all* of the powers and functions of the Corporation, Board and CEO to be delegated or subdelegated to *any* member of the staff of the Corporation and requests the Minister's advice as to the appropriateness of amending the bill to provide some legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

Minister's response

2.311 The Minister advised:

Clauses 49, 50 and 51 of the Bill relate to the delegation and subdelegation of the powers and functions of the Corporation (clause 8 of the Bill), the Board of the Corporation (clause 15 of the Bill) and Chief Executive Officer (CEO) of the Corporation (clause 35 of the Bill). As noted in the explanatory memorandum to the Bill, the ability of the Corporation, the Board and the CEO to delegate, or subdelegate, any or all of their powers or functions under the Act, or prescribed in any rules made under the Act, will provide operational flexibility for the Corporation.

The general principle is that delegations of power should only be as wide as necessary. However, this does not prohibit a wide delegation of power if such a delegation is necessary and appropriate in the circumstances. The approach proposed by the Bill is appropriate for a corporate Commonwealth entity that will be overseen by an independent Board, which is ultimately responsible for the proper, efficient and effective performance of the Corporation's functions.

It is also important to note that clauses 49, 50 and 51 of the Bill are not unlimited in scope:

- clause 49 of the Bill enables the Corporation to delegate any or all of its powers and functions to a Board member or the CEO;
- clause 50 of the Bill enables the Board to delegate any or all of its powers and functions to a Board member or the CEO; and
- clause 51 of the Bill enables the CEO to delegate, or subdelegate, any or all of his or her powers and functions to a member of the staff of the Corporation (see clause 44 of the Bill).

Accordingly, any delegation, or subdelegation, of power cannot occur beyond staff of the Corporation. On establishment of the Corporation, it is anticipated that there will be around 30 persons employed as staff of the

Corporation. These people will have been selected for their expertise and skills in relation to the functions of the Corporation.

There are also relevant safeguards proposed by the Bill in relation to the powers of delegation. For example, a delegate exercising the power to enter into agreements with States and Territories for grants of financial assistance for water infrastructure projects (see subclause 12(3) of the Bill) must take all reasonable steps to comply with written directions from the responsible Ministers (as defined by clause 4 of the Bill).

Finally, the Corporation, the Board and the CEO are not required to delegate their powers and functions, and any such delegation may be limited to particular powers and functions or to particular persons. It is appropriate that the Corporation, the Board and the CEO are able to exercise their discretion in this decision, having regard to the relevant power or function, and an assessment of the skills, training and expertise needed for any particular decision.

Committee comment

2.312 The committee thanks the Minister for this response. The committee notes the Minister's advice that the ability of the Corporation, the Board and the CEO to delegate, or subdelegate, any or all of their powers or functions under the Act is appropriate as it will provide operational flexibility for the Corporation. The Minister also advised that the approach to delegation and subdelegation proposed in the bill is appropriate for a corporate Commonwealth entity that will be overseen by an independent Board, which is ultimately responsible for the proper, efficient and effective performance of the Corporation's functions. The committee also notes the Minister's advice that on establishment of the Corporation, it is anticipated that there will be around 30 persons employed as staff of the Corporation and that these people will have been selected for their expertise and skills in relation to the functions of the Corporation.

2.313 As the committee noted in its original comments, 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. The committee therefore reiterates its preference that delegations of administrative power be confined to the holders of nominated offices or to senior officials or, alternatively, a limit is set on the scope and type of powers that might be delegated. However, the committee also notes that the independent Board is responsible for the performance of the Commission's functions and the small number of people to whom the powers may be delegated in this instance.

2.314 The committee requests that the key information provided by the Minister be included in the explanatory memorandum, noting the importance of these documents 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*).

2.315 In this instance, given the information provided, the committee makes no further comment on this matter.

No requirement to table report in Parliament¹⁴³

2.316 Clause 53 requires the Agriculture Minister to arrange for a review of the operation of the Act. The review must be finalised on or before 1 July 2024 and must consider the scope of the Corporation's activities after 30 June 2026 and the appropriate governance arrangements after that date.

2.317 In explaining the reason for this statutory review, the explanatory memorandum states that 'it is likely the role of the Corporation will change in line with the time-limited nature of the activities it currently has authority to administer' and 'this provision will enable the operation of the legislation to be reviewed, with consideration given to the scope of the Corporation's activities and appropriate governance arrangements going forward'.¹⁴⁴

2.318 While subclause 53(3) provides that a written report of the review must be given to the Agriculture Minister, there is no requirement for the report to be made public or to be tabled in the Parliament.

2.319 In order to facilitate appropriate parliamentary scrutiny of the operation of this Act (and the new Corporation), the committee suggests it may be appropriate for clause 53 of the bill to be amended to include a legislative requirement that any report of the review be:

- tabled in the Parliament within 15 sitting days after it is received by the Agriculture Minister, and
- published on the internet within 30 days after it is received by the Agriculture Minister.

2.320 The committee requests the Minister's response in relation to this matter.

Minister's response

2.321 The Minister advised:

Clause 53 of the Bill requires the Agriculture Minister (defined by clause 4 of the Bill) to arrange for a review of the operation of the Act to be undertaken and finalised before 1 July 2024. The review must consider the scope of the activities of the Corporation after 30 June 2026 and the appropriate governance arrangements for the Corporation after that date.

143 Clause 53. The committee draws Senators' attention to this provision pursuant to principle 1(a)(v) of the committee's terms of reference.

144 Explanatory memorandum, p. 21.

The persons who undertake the review must give the Agriculture Minister a written report of the review.

It is intended that the review, and the corresponding written report, will inform the government in its consideration of future arrangements for the Corporation. Accordingly, it is appropriate that the government is able to decide if and when the timing and method of release for the report.

Committee comment

2.322 The committee thanks the Minister for this response. The committee notes the Minister's advice that the review, and the corresponding written report, will inform the government in its consideration of future arrangements for the Corporation and that therefore it is appropriate that the government is able to decide if the report is to be released and the timing and method of release for the report.

2.323 While the committee notes this advice, from a scrutiny perspective the committee considers that as the review relates to the operation of an Act of Parliament establishing the Corporation, there should be a statutory requirement that the report of the review be tabled in the Parliament within 15 sitting days after it is received by the Agriculture Minister so that the Parliament is appropriately informed about the operation of the Corporation that it has established.

2.324 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of not including a legislative requirement for the report of the review of the operation of the Act to be tabled in the Parliament.

Treasury Laws Amendment (2017 Measures No. 2) Bill 2017

Purpose	<p>This bill seeks to amend various Acts relating to taxation, superannuation, personal insolvency and corporate insolvency</p> <p>Schedule 1 includes amendments relating the superannuation reform package, including amendments to:</p> <ul style="list-style-type: none"> - the transfer balance cap; - concessional and non-concessional contribution rules; - the objective of superannuation; - the transition to retirement income stream rules; - capital gains tax relief for superannuation funds; and - administrative processes <p>Schedule 2 includes amendments relating to insolvency</p>
Portfolio	Treasury
Introduced	House of Representatives on 25 May 2017
Bill status	Received the Royal Assent on 22 June 2017
Scrutiny principle	Standing Order 24(1)(a)(i)

2.325 The committee dealt with this bill in *Scrutiny Digest No. 6 of 2017*. The Minister responded to the committee's comments in a letter dated 27 June 2017. Set out below are extracts from the committee's initial scrutiny of the bill and the Minister's response followed by the committee's comments on the response. A copy of the letter is available on the committee's website.¹⁴⁵

Retrospective application¹⁴⁶

Initial scrutiny – extract

2.326 Item 27 of Schedule 1 is an application provision that provides that the amendment made by item 5 of Schedule 1 (relating to assumptions about income streams in relation to superannuation) applies in relation to non-concessional contributions for the 2013-2014 financial year and later years.

145 See correspondence relating to *Scrutiny Digest No. 8 of 2017* available at: www.aph.gov.au/senate_scrutiny_digest.

146 Schedule 1, item 27. The committee draws Senators' attention to this provision pursuant to principle 1(a)(i) of the committee's terms of reference.

2.327 The explanatory memorandum explains that this 'change aligns the application of the updated review rules with that for the review rights for the discretion for concessional contributions, which applies from the 2013-2014 financial year'.¹⁴⁷

2.328 No further explanation is given and it is unclear why these amendments are intended to apply retrospectively. The committee has a long-standing scrutiny concern about provisions that apply retrospectively, as it challenges a basic value of the rule of law that, in general, laws should only operate prospectively. The committee has a particular concern if the legislation will, or might, have a detrimental effect on individuals.

2.329 Generally, where proposed legislation will have a retrospective effect the committee expects the explanatory materials should clearly set out the reasons why retrospectivity is sought, and whether any persons are likely to be adversely affected and the extent to which their interests are likely to be affected.

2.330 The committee requests the Minister's advice as to why this measure is intended to apply retrospectively from the 2013-2014 financial year and whether this will cause any detriment to any individual.

Minister's response

2.331 The Minister advised:

By way of summary, the amendment addresses an application issue associated with earlier changes to certain objection rights available to individuals. The amendment will not cause any detriment to any individual because the associated changes expand the matters that can be objected to where an individual is dissatisfied with certain decisions of the Commissioner of Taxation.

I note that the amendment does not relate to item 5 of Schedule 1 to the Bill itself (which is about assumptions relating to income streams). Rather, the amendment relates to item 9 of Schedule 3 to the *Treasury Laws Amendment (Fair and Sustainable Superannuation) Act 2016* (the 'Fair and Sustainable Super Act'), which legislated the Government's superannuation reform package announced in the 2016-17 Budget.

Item 9 of Schedule 3 to the Fair and Sustainable Super Act is the application rule (the 'original application rule') for item 5 of Schedule 3 to that Act. Item 5 clarified the objection rights available to individuals for certain decisions about non-concessional contributions by making it clear that individuals can object to a decision of the Commissioner *not* to make a determination to disregard or reallocate a contribution to another financial year. Individuals request such determinations to prevent or reduce breaches of their non-concessional contributions cap.

147 Explanatory memorandum, p. 25.

Prior to the changes made by item 5, the objection rights available to individuals only covered objections to determinations that the Commissioner had actually made.

However, the original application rule for those changes was ineffective because it referred to 'working out the non-concessional contributions cap', whereas the changes to objection rights applied in respect of non-concessional contributions (which are different to the cap).

Item 27 of Schedule 1 to the Bill addresses this issue by amending the original application rule to ensure that the changes to objection rights apply in respect of non-concessional contributions. Applying the changes from the 2013-2014 financial year also aligns them with equivalent changes that were made for concessional contributions.

As noted above, the expansion of these objection rights is wholly beneficial to individuals as it ensures that individuals are able to formally object to a wider range of decisions than may have previously been the case.

Committee comment

2.332 The committee thanks the Minister for this response. The committee notes the Minister's advice that the retrospective application of this amendment will not cause any detriment to any individual because the associated changes expand the matters that can be objected to where an individual is dissatisfied with certain decisions of the Commissioner of Taxation. The Minister advised that the expansion of these objection rights is wholly beneficial to individuals as it ensures that individuals are able to formally object to a wider range of decisions than may have previously been the case.

2.333 The committee notes that it would have been useful had this information been included in the explanatory memorandum.

2.334 In light of the explanation provided that the retrospective application of these amendments will not cause any detriment to any individual, and the fact that the bill has already passed both Houses of Parliament, 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:

- **Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017** — Schedule 4, item 13, section 89 (**SPECIAL ACCOUNT:** CRF appropriated by virtue of section 80 of the *Public Governance, Performance and Accountability Act 2013*)

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, *Accountability and Standing Appropriations*, [Fourteenth Report of 2005](#), 30 November 2005.

Appendix 1

Ministerial responsiveness

Responsiveness to requests for further information

The committee has resolved that it will report regularly to the Senate about responsiveness to its requests for information. This is consistent with recommendation 2 of the committee's final report on its *Inquiry into the future role and direction of the Senate Scrutiny of Bills Committee* (May 2012).

The issue of responsiveness is relevant to the committee's scrutiny process as the committee frequently writes to the minister, senator or member who proposed a bill requesting information in order to complete its assessment of the bill against the committee's scrutiny principles (outlined in standing order 24(1)(a)).

The committee reports on the responsiveness to its requests in relation to (1) bills introduced with the authority of the government (requests to ministers) and (2) non-government bills.

Ministerial responsiveness from 1 April 2017

Bill	Portfolio	Correspondence	
		Due	Received
Appropriation Bill (No. 1) 2017-2018	Finance	28/06/17	<i>preliminary response received+</i>
Appropriation Bill (No. 2) 2017-2018	Finance	28/06/17	<i>preliminary response received+</i>
ASIC Supervisory Cost Recovery Levy Bill 2017	Treasury	31/05/17*	30/05/17
Australian Citizenship Legislation Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017	Immigration and Border Protection	21/07/17*	21/07/17
Australian Education Amendment Bill 2017	Education and Training	28/06/17	<i>Not yet received</i>
Commercial Broadcasting (Tax) Bill 2017	Communications and the Arts	06/07/17	<i>Not yet received</i>
Communications Legislation Amendment (Deregulation and Other Measures) Bill 2017	Communications and the Arts	25/05/17	14/06/17
Competition and Consumer Amendment (Competition Policy Review) Bill 2017	Treasury	02/06/17	01/06/17

Bill	Portfolio	Correspondence	
		Due	Received
Defence Legislation Amendment (2017 Measures No. 1) Bill 2017 <i>Further response</i>	Defence Personnel	28/06/17	<i>Not yet received</i>
Education Legislation Amendment (Provider Integrity and Other Measures) Bill 2017	Education and Training	28/06/17	07/08/17
Electoral and Other Legislation Amendment Bill 2017	Special Minister of State	01/06/17	31/05/17
Government Procurement (Judicial Review) Bill 2017	Finance	14/07/17*	19/07/17
Imported Food Control Amendment Bill 2017	Agriculture and Water Resources	07/07/17*	13/07/17
Industrial Chemicals Bill 2017	Health	28/06/17	28/07/17
Industrial Chemicals (Consequential Amendments and Transitional Provisions) Bill 2017	Health	28/06/17	28/07/17
Industrial Chemicals Charges (Customs) Bill 2017	Health	28/06/17	28/07/17
Industrial Chemicals Charges (Excise) Bill 2017	Health	28/06/17	28/07/17
Industrial Chemicals Charges (General) Bill 2017	Health	28/06/17	28/07/17
Major Bank Levy Bill 2017	Treasury	28/06/17	19/06/17
National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017	Social Services	28/06/17	27/07/17
National Vocational Education and Training Regulator (Charges) Amendment (Annual Registration Charge) Bill 2017	Education and Training	25/05/17	23/05/17
Ozone Protection and Synthetic Greenhouse Gas Management Legislation Amendment Bill 2017	Environment and Energy	25/05/17	26/05/17

Bill	Portfolio	Correspondence	
		Due	Received
Parliamentary Business Resources Bill 2017	Special Minister of State	25/05/17	26/6/17+
Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Bill 2017	Foreign Affairs and Trade	06/07/17	19/07/17+
Petroleum and Other Fuels Reporting Bill 2017	Environment and Energy	25/05/17	26/05/17
Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017	Indigenous Affairs	31/05/17*	30/05/17
Regional Investment Corporation Bill 2017	Agriculture and Water Resources	06/07/17	14/07/17
Transport Security Amendment (Serious Crime) Bill 2016	Infrastructure and Transport	25/05/17	23/05/17
Treasury Laws Amendment (2017 Measures No. 2) Bill 2017	Treasury	28/06/17	27/06/17+
Treasury Laws Amendment (Major Bank Levy) Bill 2017	Treasury	28/06/17	19/06/17
Veterans' Affairs Legislation Amendment (Omnibus) Bill 2017	Veterans' Affairs	25/05/17	24/05/17

* *Revised due date*

+ *Response received after the bill had passed*

Members/Senators responsiveness from 1 January 2017

Bill	Member or Senator	Correspondence
		Received
Competition and Consumer Amendment (Exploitation of Indigenous Culture) Bill 2017	The Hon Bob Katter MP	5/05/17
Fair Work Amendment (Pay Protection) Bill 2017	Senator Lee Rhiannon	23/05/17
Live Animal Export Prohibition (Ending Cruelty) Bill 2017	Mr Andrew Wilkie MP	31/03/17
