



Senate Standing

Committee for the Scrutiny of Bills

Scrutiny Digest 16 of 2023

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Membership of the committee

Current members

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Senator Raff Ciccone (Deputy Chair)	ALP, Victoria
Senator Nick McKim	AG, Tasmania
Senator Paul Scarr	LP, Queensland
Senator Tony Sheldon	ALP, New South Wales
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Committee information

Terms of reference

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

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

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Report snapshot¹

Chapter 1: Initial scrutiny	
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¹ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Report snapshot, *Scrutiny Digest 16 of 2023*; [2023] AUSStaCSBSD 243.

Chapter 1

Initial scrutiny

1.1 The committee comments on the following bills and, in some instances, seeks a response or further information from the relevant minister.

Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023²

Purpose	The Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023 (the bill) seeks to amend the <i>Citizenship Act 2007</i> (Citizenship Act) and other Commonwealth Acts to establish a revised citizenship cessation regime that would enable the minister to make an application to request that a court exercise its power to make an order to cease a dual citizen's Australian citizenship, where the person has been convicted of a serious offence or offences.
Portfolio	Home Affairs
Introduced	House of Representatives on 29 November 2023
Bill status	Before the Senate

Procedural fairness

Undue trespass on rights and liberties

Significant penalties³

1.2 The bill seeks to provide that the minister can apply to the courts to assess and make an order as to whether a dual citizen should be stripped of their Australian citizenship on the basis of a criminal conviction.⁴

² This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Australian Citizenship Amendment (Citizenship Repudiation) Bill 2023, *Scrutiny Digest 16 of 2023*; [2023] AUSStaCSBSD 244.

³ The committee draws senators' attention to the bill provision pursuant to Senate Standing Order 24(1)(a)(i).

⁴ Previously, the minister was authorised to revoke citizenship on the basis of amendments inserted into the *Citizenship Act 2007* (Citizenship Act) by the *Australian (Citizenship Cessation) Act 2020*, were found invalid by the High Court of Australia in *Alexander v Minister for Home Affairs* [2022] HCA 19 (*Alexander*) and *Benbrika v Minister for Home Affairs* [2023] HCA 33 (*Benbrika*) respectively.

1.3 Item 4 of schedule 1 to the bill seeks to substitute section 36D of the *Citizenship Act 2007* (Citizenship Act). Proposed subsection 36D(1) would provide the minister with the power to make an application for an order to be made by a court under proposed subsection 36C(1) that a person cease to be an Australian citizen.⁵ Proposed subsection 36D(2) provides that an application by the minister may be made before or after a person is convicted of one or more serious offences⁶ but must be made before sentencing. In making such an order the court must be satisfied that the person is aged 14 years or older, is an Australian citizen, and the person's conduct to which the conviction(s) relate is so serious and significant that it demonstrates that the person has repudiated their allegiance to Australia (proposed subsection 36C(4)).

1.4 An application under proposed subsection 36D(1) by the minister to the court must be made in the jury's absence, must not be referred to in the presence of the jury, and must only be heard after the person is convicted of one or more serious offences, as per proposed subsection 36D(5). Proposed subsection 36D(6) provides that the minister must give the person written notice of the application as soon as practicable after the application is made.

1.5 Item 1 of schedule 1 also seeks to substitute existing section 36C of the Citizenship Act. Proposed subsection 36C(3) sets out the specific offences that allow the minister to apply for the revocation of a person's citizenship. It also provides that an application may only be considered when a person is convicted of one of these offences and sentenced to a period of imprisonment of at least 3 years; or sentenced to periods of imprisonment that total at least three years (as per proposed paragraph 36C(1)(b)).

1.6 The committee notes the above provisions and is concerned that neither the bill nor its explanatory memorandum provides sufficient assurances that procedural fairness has been adequately provided for. In relation to procedural fairness the committee notes the advice provided by the Australian Law Reform Commission:

Procedural fairness traditionally involves two requirements: the fair hearing rule and the rule against bias. The hearing rule requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests. A fair hearing will generally require:

- prior notice that a decision that may affect a person's interests will be made. This has been referred to as a 'fundamental' or 'cardinal' aspect of procedural fairness;
- disclosure of the 'critical issues' to be addressed, and of information that is credible, relevant and significant to the issues; and
- a substantive hearing—oral or written—with a reasonable opportunity to present a case. Whether an oral hearing should be

⁵ Proposed subsection 36C(2) provides that an order to revoke citizenship cannot be made by the court if it would result in the person becoming stateless.

⁶ As defined in proposed subsection 36C(3) of the bill.

provided will depend on the circumstances. The 'crucial question is whether the issues can be presented and decided fairly by written submissions alone'. In some circumstances, there may be a duty to allow a person to be legally represented at a hearing.⁷

1.7 As such, the committee is concerned that there is insufficient guidance in the bill or explanatory memorandum as to the disclosure obligations of the minister. This includes a lack of guidance in relation to the types of information which may be presented during an application, and how the application will be considered by the court including whether the individual will be afforded a substantive hearing to contest the application.

1.8 First, it is unclear whether the minister will have any disclosure obligations in relation to matters which may be raised as part of an application under proposed subsection 36D(1). The committee is concerned that evidence or disclosures contrary to the interests of the individual may be disclosed by the minister as part of a subsection 36D(1) application which were not adduced and properly considered as part of the criminal trial. Noting that an application is considered by the court after conviction, it is unclear to the committee whether additional evidence or arguments may be adduced during consideration of the application, and how an individual will be able to contest this information.

1.9 Second, these concerns are heightened by the lack of guidance provided as to how an application under proposed subsection 36(1) will be made. The explanatory memorandum does not provide any guidance in relation to how the minister would identify relevant criminal proceedings and be able to make an application prior to sentencing for relevant criminal convictions of three or more years imprisonment. Nor does the bill make provision to ensure that all adverse information that might be considered in the making of the order be disclosed to the affected individual.

1.10 The committee is also concerned about the proportionality of the an order made under subsection 36D(2) on the personal rights of an Australian citizen. The cessation of an individual's Australian citizenship as a result of their conviction of one or more serious offences may straightforwardly be construed as a penalty applied in addition to their custodial sentence or sentences.

1.11 Three matters call into question the proportionality of the proposed approach to the making of such an order. First, these measures will only affect Australian citizens who hold dual citizenship with another country and therefore appear to be applying differing penalties to such persons, as compared to Australians who do not hold citizenship of another country. Second, the committee is concerned that conduct triggering an aggregate three year term of imprisonment is unlikely to be insufficiently serious to justify the removal of Australian citizenship. Third, the committee also notes

⁷ Australian Law Reform Commission, ['Procedural Fairness: the duty and its content'](#), paras [14.20] – [14.22].

with concern that children as young as 14 may have their citizenship revoked after having been convicted of relevant offences for an aggregate total of three years imprisonment.

1.12 Finally, the committee also notes proposed subsection 36C(11) which provides that Part IB of the *Crimes Act 1914* which deals with sentencing, imprisonment and release of federal offenders does not apply to an order made under section 36C. However, the impact and necessity of this disapplication is not explained in the explanatory memorandum and it is therefore difficult for the committee to assess what impact this may have.

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

- **the nature of the process associated with an application made under subsection 36D(1) and how that process will ensure procedural fairness;**
- **whether the consideration of the minister's application will necessitate a substantive hearing where an individual will be provided an opportunity to respond to any arguments progressed by the minister that their citizenship will be revoked;**
- **why the significant penalty of revocation of citizenship is considered necessary and appropriate, referring in particular to the matters relating to proportionality identified in para 1.11; and**
- **the impact of proposed subsection 36C(11) which provides that Part IB of the *Crimes Act 1914* which deals with sentencing, imprisonment and release of federal offenders does not apply to an order made under section 36C.**

Retrospective application⁸

1.14 Item 18 of schedule 1 to the bill provides that section 36C as inserted into the Citizenship Act applies to a conviction of a person if the conviction occurs after commencement (subitem 18(a)) and to conduct on or after 12 December 2015 engaged in by a person to which the conviction relates (subitem 18(b)).

1.15 In relation to this the explanatory memorandum notes:

This application provision operates so that the discretionary power of the court under new section 36C—to make an order that a person ceases to be an Australian citizen, as part of the sentence following conviction for a specified serious offence—is only available in relation to a conviction that occurs after the Amendment Act commences, and only for conduct engaged in by the person on or after 12 December 2015.

⁸ Item 18. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i)

This application provision makes clear that new section 36C is not retrospective, insofar as the power is only available to the court in relation to a conviction that occurs after this Bill, once enacted, commences. It does, however, cover conduct constituting the offence where the conduct occurs at any time on or after (but not before) 12 December 2015.

This date aligns with the commencement of the Australian Citizenship Amendment (Allegiance to Australia) Act 2015. That Act commenced on 12 December 2015, amending the Citizenship Act to establish powers for the cessation of Australian citizenship in specified circumstances where a dual Australian citizen repudiates their allegiance to Australia by engaging in terrorism-related conduct.

It is appropriate for the court's discretionary power in new subsection 36C(1) to be available in relation to conduct of the kind covered by the 'serious offences' set out in new subsection 36C(3), where the person has engaged in that conduct at any time since the first 'operation of law' citizenship framework for terrorism and other serious conduct and offences was established on 12 December 2015.⁹

1.16 However, the statement of compatibility notes:

Prior to the Australian Citizenship Amendment (Citizenship Cessation) Act 2020, 12 December 2015 was the date on which convictions which resulted in a sentence of six years or more, or convictions in the ten years prior resulted in a sentence of at least ten years imprisonment, could be considered for citizenship cessation. The new measures extend this to sentences of a term of imprisonment of at least three years, or a total of three years, for offences committed since 12 December 2015 where the conviction occurs after the commencement of the measures in this Bill.¹⁰

1.17 The committee notes that the bill would reduce the requirement for a person to be convicted of a relevant offence with a term of imprisonment from six years to three years in order to allow the minister to make application to revoke Australian citizenship. In essence, it appears that a lower threshold is being applied which would now include conduct prior to commencement for which a conviction is handed down after the bill commences, where the conduct may not have met the six year imprisonment threshold but does meet the three year imprisonment threshold.

1.18 The committee is therefore concerned that the retrospective application of item 18 is in practice imposing higher penalties (the penalty being citizenship revocation) on individuals' past conduct as compared to the penalties they were subject to at that time. It is also unclear whether this will affect any proceedings that are on foot with no conviction handed down at the time this bill commences. For this

⁹ Explanatory memorandum, pp. 23–24.

¹⁰ Statement of compatibility, p. 34.

reason the committee does not believe that the case for retrospective application has been adequately justified.

1.19 Further, the committee notes that the legislation previously underpinning these measures as inserted into the Citizenship Act, the *Australian Citizenship Cessation) Act 2020*, was declared invalid by the High Court of Australia.¹¹ The invalidation of the previous legislative basis for these measures also throws into doubt the argument that affected individuals are on notice, and the committee remains concerned that consequences, and sentences consequent on criminal responsibility are being imposed retrospectively.

1.20 The committee draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of the retrospective application of measures in the bill.

¹¹ Previously, the minister was authorised to revoke citizenship on the basis of amendments inserted into the *Citizenship Act 2007* (Citizenship Act) by the *Australian Citizenship Cessation) Act 2020*, were found invalid by the High Court of Australia in *Alexander and Benbrika*.

Private senators' and members' bills that may raise scrutiny concerns¹²

In this Digest, the committee makes no comment on private senators' and members' bills may raise scrutiny concerns under Senate standing order 24.

Bills with no committee comment¹³

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

- Communications Legislation Amendment (Prominence and Anti-siphoning) Bill 2023
- Migration Amendment (Limits on Immigration Detention) Bill 2023
- Online Safety Amendment (Protecting Australian Children from Online Harm) Bill 2023

Commentary on amendments and explanatory materials¹⁴

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

- Fair Work Legislation Amendment (Closing Loopholes) Bill 2023
 - On 28 November 2023 the House of Representatives agreed to 82 Government and 8 Crossbench amendments (Mr Adam Bandt MP) to the bill and the Minister for Employment and Workplace Relations (the Hon Mr Tony Burke MP) circulated a supplementary explanatory memorandum to the bill. On 29 November 2023 the House of Representatives agreed to two Crossbench amendments (Ms Allegra Spender MP) to the bill.

¹² This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Private senators' and members' bills that may raise scrutiny concerns, *Scrutiny Digest 16 of 2023*; [2023] AUSStaCSBSD 245.

¹³ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Bills with no committee comment, *Scrutiny Digest 16 of 2023*; [2023] AUSStaCSBSD 246.

¹⁴ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Commentary on amendments and explanatory materials, *Scrutiny Digest 16 of 2023*; [2023] AUSStaCSBSD 247.

Chapter 2

Commentary on ministerial responses

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

Fair Work Legislation Amendment (Closing Loopholes) Bill 2023¹⁵

Purpose	The bill seeks to make numerous amendments to the <i>Fair Work Act 2009</i> including: <ul style="list-style-type: none"> • by replacing the existing definition of 'casual employee' introducing a new employee choice pathway for eligible employees to change to permanent employment; • introducing a new criminal offence of wage theft; and • allowing the Fair Work Commission to set minimum standards orders for employee-like workers including in the gig economy.
Portfolio	Employment and Workplace Relations
Introduced	House of Representatives on 4 September 2023
Bill status	Before the Senate

Exemption from disallowance¹⁶

2.2 The bill provides that a number of determinations made by the Fair Work Commission (FWC) are legislative instruments which are exempt from disallowance. These are detailed below:

- Schedule 1, item 61, proposed subsection 202(7) - a determination made by the Fair Work Commission (FWC) of the model flexibility term for enterprise agreements made under proposed subsection 202(5);

¹⁵ This entry can be cited as: Senate Standing Committee for the Scrutiny of Bills, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, *Scrutiny Digest 16 of 2023*; [2023] AUSStaCSBSD 248.

¹⁶ Schedule 1, item 61, proposed subsection 202(7); schedule 1, item 62, proposed subsection 205(6); schedule 1, item 64, proposed subsection 737(3); schedule 1, item 70, proposed subsection 768BK(4); and schedule 1, item 308, proposed section 101. The committee draws senators' attention to these provisions pursuant to Senate standing order 24(1)(a)(iv).

- Schedule 1, item 62, proposed subsection 205(6) - a determination made by the FWC of the model consultation term for enterprise agreements made under proposed subsection 205(3);
- Schedule 1, item 64, proposed subsection 737(3) - a determination made by the FWC of a model term for dealing with disputes for enterprise agreements made under proposed subsection 737(1);
- Schedule 1, item 70, proposed subsection 768BK(4) – a determination made by the FWC of a model term for settling disputes about matters arising under a copied State instrument for a transferring employee made under proposed subsection 768BK(1A); and
- Schedule 1, item 308, proposed section 101 - determinations made by the FWC under new subsections 202(5), 205(3), 737(1) or 768BK(1A) prior to the commencement of part 5 of schedule 1 to the bill.

2.3 In *Scrutiny Digest 13 of 2023*, the committee sought the minister’s advice as to the appropriateness and necessity of the exemptions from disallowance for legislative instruments made under proposed subsections 202(5), 205(3), 737(1) and 768BK(1A).¹⁷

Minister for Employment and Workplace Relations response¹⁸

2.4 The Minister for Employment and Workplace Relations (the minister) responded to the committee in a letter dated 28 November 2023.

2.5 The minister advised that it would create significant commercial uncertainty if these instruments were subject to disallowance as they are model terms determined by the FWC on the basis of enterprise agreements. The minister noted that ‘the model terms determined by the FWC will apply in relation to enterprise agreements where the request for employees to vote to approve the agreement is made on or after commencement, and by that vote the agreement is approved’. This means that any disallowance of a model term instrument would throw into doubt the place of model terms in enterprise agreements.

2.6 The minister further advised that the bill sets out factors that the FWC would be required to consider when making these instruments, and that the FWC is the independent workplace relations tribunal with the expertise and knowledge to best determine model terms.

¹⁷ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 2–4.

¹⁸ The minister responded to the committee's comments in a letter dated 28 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 16 of 2023*).

2.7 The minister also noted that the FWC is already responsible for issuing model terms under other modern awards, and that model terms do not adversely affect individuals.

Committee comment

2.8 The committee thanks the minister for this detailed explanation as to the operation of proposed subsections 202(5), 205(3), 737(1) and 768BK(1A), and the context provided for model terms.

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

Retrospective application¹⁹

2.10 Item 73 of part 6 of schedule 1 to the bill seeks to insert Part 2-7A into the *Fair Work Act 2009* (FW Act). Part 6 of schedule 1 to the bill would commence on the day after the Act receives Royal Assent.

2.11 Proposed part 2-7A would provide for orders to be made regulating various labour hire arrangements. This part also provides for anti-avoidance provisions which attract civil penalties up to 600 penalty units.

2.12 In relation to the anti-avoidance provisions, the explanatory memorandum states:

The anti-avoidance provisions would apply retrospectively, with application from the date the Bill is introduced in the Parliament. This means penalties may apply in relation to conduct engaged in before the Bill commences. This is reasonable and proportionate to prevent businesses from taking steps to avoid obligations under new Part 2-7A. before the Bill commences. Parties will be on notice about their obligations as the legislation will be publicly available when it is introduced.²⁰

2.13 In *Scrutiny Digest 13 of 2023*, the committee sought the minister's advice regarding why it is necessary and appropriate for the anti-avoidance provisions in proposed part 2-7A in schedule 1 to the bill to apply retrospectively.²¹

2.14 The committee noted that consideration of this matter would be assisted if the advice contained information regarding whether there will be a detrimental effect for any individuals, and if so the extent of that detriment and the number of individuals.

¹⁹ Schedule 1, part 6, item 73, proposed Part 2-7A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

²⁰ Explanatory memorandum, pp. 30–31.

²¹ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 5–6.

Minister's response²²

2.15 The minister advised that while this part of the bill would cover conduct from the date of the bill's introduction, contravention of these provisions would only crystallise after they come into effect.

2.16 The minister provided a detailed explanation of each of the anti-avoidance provisions in part 2-7A of schedule 1. The minister advised that it is necessary and appropriate for these provisions to apply to conduct prior to the bill's commencement to avoid businesses being able to change their practices after being aware of the anti-avoidance penalties as introduced. The minister advised that '[i]f the provisions did not apply from the date of introduction, there is a real risk that businesses who are intent on avoiding part 2-7A could arrange their affairs in order to undermine the policy intent of this measure'.

Committee comment

2.17 The committee thanks the minister for this detailed advice, and notes that the anti-avoidance provisions are intended to apply to businesses who seek to thwart the protections for employees as introduced by the bill.

2.18 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable. The committee notes the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Significant penalties**Strict liability offence****Absolute liability offence²³**

2.19 Schedule 1, item 220, proposed subsection 327A(1) prescribes that an employer commits an offence if:

- they are required to pay an amount to, or on behalf of, or for the benefit of, an employee under the FW Act, fair work instruments, or transitional instrument (proposed paragraph 327A(1)(a)); and

²² The minister responded to the committee's comments in a letter dated 28 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 16 of 2023*).

²³ Schedule 1, item 220, proposed section 327A; Schedule 4, item 1, proposed section 30A. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

- the amount is not a superannuation contribution or an amount covered by subsection 327A(2) (327A(1)(b)); and
- the employer engages in conduct (proposed paragraph 327(1)(c)) which results in a failure to pay the required amount on or before the day it is due for payment (proposed paragraph 327(1)(d)).

2.20 Proposed subsection 327A(3) prescribes that the fault element of absolute liability applies to paragraphs 327(1)(a) and (b). Proposed subsection 327A(5) prescribes a criminal penalty of up to 10 years imprisonment.

2.21 Schedule 4, item 1, proposed subsection 30A(1) inserts a new offence into the *Work Health and Safety Act 2011* (WHS Act) which provides that a person commits an offence if:

- the person is conducting a business or undertaking, or is an officer of a person conducting a business or undertaking (30A(1)(a)); and
- the person has a health and safety duty (30A(1)(b)); and
- the person intentionally engages in conduct (30A(1)(c)); and
- the conduct breaches the health and safety duty (30A(1)(d)); and
- the conduct causes the death of an individual (30A(1)(e)); and
- the person was reckless, or negligent, as to whether the conduct would cause the death of an individual (30A(1)(f)).

2.22 The explanatory memorandum notes that due to the operation of subsection 12F(2) of the *Work Health and Safety Act 2011* (WHS Act), strict liability applies to the elements of the offence set out in proposed paragraphs 30A(1)(a),(b) and (d). The offence carries a penalty of up to 25 years imprisonment, or, for a body corporate, \$18,000,000.

2.23 In addition, the committee notes that the effect of part 6 of schedule 4 to the bill is to increase penalties for all Commonwealth work health and safety (WHS) offences. The explanatory memorandum explains that this includes a 'general 39.03 per cent increase in monetary penalties' which 'represents the average increase in penalty units for non-WHS offences across all jurisdictions since 2011'.²⁴

2.24 In *Scrutiny Digest 13 of 2023*²⁵, the committee requested the minister's advice as to:

- why it is necessary and appropriate to impose absolute liability on the offence of wage theft in proposed subsection 327A(1) of the *Fair Work Act 2009* noting that the offence carries a criminal penalty of up to 10 years imprisonment; and

²⁴ Explanatory memorandum, p. 298.

²⁵ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 6–10.

- why it is necessary and appropriate to impose strict liability on the offence of industrial manslaughter in proposed subsection 30A(1) of the *Work Health and Safety Act 2011* noting that the offence carries a criminal penalty of up to 25 years imprisonment.
- The committee's consideration of this information would be assisted if the response made reference to the Attorney-General's Department's *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.²⁶

Minister's response²⁷

2.25 The minister advised that absolute liability does not apply to the offence of wage theft in proposed subsection 327A(1), as it only applies to two of the four elements of the offence. These include:

- that the employer is required to pay an amount to, or on behalf of, or for the benefit of an employee under the FW Act, fair work instrument or transitional instrument;²⁸ and
- that the requirement amount is not a superannuation contribution or an amount covered by proposed subsection 327A(2).²⁹

2.26 As absolute liability does not apply to the two other elements of the offence of wage theft, the minister advised that it would be necessary to prove intention in relation to these elements beyond reasonable doubt.

2.27 The minister advised that it is necessary and appropriate to impose absolute liability on the elements in proposed paragraphs 327A(1)(a) and (b) as these refer to objective facts that are preconditions of the offence and which do not relate to the defendant's state of mind or culpability. Further, proposed paragraph 327A(1)(b) refers to a jurisdictional fact.

2.28 In relation to the offence of industrial manslaughter, the minister advised that strict liability would not be imposed on the offence as a whole, but rather, only in relation to three elements of the offence.

2.29 The minister advised that the elements in paragraphs 30A(1)(a) and 30A(1)(b) are threshold elements requiring a factual assessment to determine whether the offence applies to a person, and do not go to the substance of the offence. The

²⁶ Attorney-General's Department, [A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers](#) (September 2011) pp. 22–24.

²⁷ The minister responded to the committee's comments in a letter dated 28 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 16 of 2023*).

²⁸ Proposed paragraph 327A(1)(a).

²⁹ Proposed paragraph 327A(1)(b).

minister advised that in this sense, they are analogous to jurisdictional elements and are intended to operate to ensure the offence only captures persons subject to the Commonwealth work health and safety jurisdiction, linking the offences to the Commonwealth jurisdiction.

2.30 The minister further advised that strict liability is applied to the element in paragraph 30A(1)(d) as the application of fault would undermine deterrence. This paragraph requires the defendant's conduct to breach their health and safety duty. The minister advised that work health and safety duties are breached when a duty holder falls short of the requisite standard of care, and in this instance, the industrial manslaughter offence would apply where a duty holder has failed to ensure the safety of workers so far as is reasonably practicable. The duty holder would have an awareness of their obligations to their workers and the wider public and given the seriousness of the industrial manslaughter offence, the minister advised it would not be appropriate to allow for the acquittal of an accused on the basis that they did not appreciate that the conduct constituted a breach of the relevant duty.

Committee comment

2.31 The committee thanks the minister for this detailed advice.

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

Abrogation of the privilege against self-incrimination³⁰

2.33 Section 713 of the FW Act abrogates the privilege against self-incrimination by providing that a person is not excused from giving information, producing a record or document, or answering a question, under paragraph 709(d) or subsection 712(1), or under a Fair Work Ombudsman (FWO) notice, on the ground that to do so might tend to incriminate the person or otherwise expose the person to a penalty or other liability. Subsections 713(2) and (3), and section 713A, provide for circumstances in which use and derivative use immunity applies.

2.34 Item 228 of schedule 1 to the bill seeks to add proposed subsection 713(4) to the FW Act. This would remove the use immunity provided for in subsections 713(2) and (3) of the FW Act in relation to an employee record that is made under section 535 (proposed paragraph 713(3)(a)), or a copy of a pay slip created in relation to an employee (proposed paragraph 713(4)(b)). Item 230 would insert proposed subsection 713A(2) into the FW Act with the effect of removing the derivative use immunity for the same documents.

2.35 In *Scrutiny Digest 13 of 2023*, the committee requested the minister's advice as to why it is necessary and appropriate for proposed subsection 713(4) to remove

³⁰ Schedule 1, items 228 and 230, proposed subsections 713(4) and 713A(2). The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(i).

use immunity, and for proposed subsection 713A(2) to remove derivative use immunity in relation to employee payslips and records.³¹

Minister's response³²

2.36 The minister advised that proposed subsections 713(4) and 713A(2) would provide that the use and derivative used immunities conferred under subsections 713(2) and 713(3) of the FW Act do not apply to two specific classes of documents, and that the scope of the disapplication is narrow. These documents include:

- employee records that are required to be made and kept under section 535 of the FW Act; and
- pay slips that have been created in relation to an employee under section 536 of the FW Act.

2.37 The minister advised that it is necessary, appropriate and proportionate to disapply use and derivative use immunities in relation to these documents for a number of reasons. As they are required to be kept or produced under the FW Act, the minister advised that it is not reasonable to prevent their use in evidence. Further, these records are often central to establishing that an underpayment has occurred in civil proceedings and the minister advised that it is expected they would have similar value in proceedings for the new wage theft offence.

2.38 Finally, the minister advised that because of the particular difficulties of corporate regulation, full use and derivative use immunity would unacceptably fetter investigations and prosecutions of corporate misconduct offences. The minister advised that full use and derivative use immunity would also seriously undermine the effectiveness of the FW regulatory scheme and fetter the investigation and prosecution of wage theft offences.

Committee comment

2.39 The committee thanks the minister for this detailed advice.

2.40 In light of the information provided, the committee makes no further comment on this issue.

³¹ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 10–11.

³² The minister responded to the committee's comments in a letter dated 28 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 16 of 2023*).

Incorporation of external materials as existing from time to time³³

2.41 Schedule 1, item 248, proposed subsection 15S(2) provides that regulations prescribing the meaning of the road transport industry may prescribe an industry by applying, adopting or incorporating any matter contained in a modern award as in force or existing from time to time.

2.42 In *Scrutiny Digest 13 of 2023*, the committee requested the minister's advice as to:

- the type of documents that it is envisaged may be applied, adopted or incorporated by reference under proposed subsection 15S(2);
- whether these documents will be made freely available to all persons interested in the law; and
- why it is necessary to apply the documents as in force or existing from time to time, rather than when the instrument is first made.³⁴

Minister's response³⁵

2.43 The minister advised that any additional industry that is prescribed by proposed subsection 15S(2) would be prescribed by applying, adapting or incorporating provisions within a modern award or awards in respect of the road transport industry. The minister advised that there are a confined number of modern awards which relate to the road transport industry and are freely and publicly available to access online on the FWC and Fair Work Ombudsman websites.

2.44 The minister also advised that the documents would apply as existing from time to time as this would enable the legislation to adapt and extend to technological and commercial changes within the road transport industry.

Committee comment

2.45 The committee thanks the minister for this advice.

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

³³ Schedule 1, item 248, proposed subsection 15S(2). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

³⁴ Senate Scrutiny of Bills Committee, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 11–12.

³⁵ The minister responded to the committee's comments in a letter dated 28 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 16 of 2023*).

Availability of merits review³⁶

2.47 Schedule 1, item 249, proposed section 536JY provides that the FWC may make a minimum standards order for employee-like workers performing digital platform work or for regulated road transport contractors. Minimum standards orders may determine the standards and conditions in relation to, for example, payment terms, working hours, and insurance, as set out in proposed subsection 536KL of the bill.

2.48 Proposed subsection 536LA(1) provides that regulations may make provisions for internal merits review by the FWC of decisions to make or vary minimum standards orders. Proposed subsection 536LA(4) sets out matters that the regulations could prescribe, including, for example, application circumstances, who is eligible for review, time frames, and enforcement of decisions.

2.49 In *Scrutiny Digest 13 of 2023*, the committee requested the minister's advice as to:

- the circumstances in which internal merits review of road transport minimum standards orders may not be considered appropriate; and
- whether consideration was given to the bill providing that internal merits review must be provided for these decisions.³⁷

Minister's response³⁸

2.50 The minister advised that the bill would confer an entirely new jurisdiction on the FWC, including the power to make a range of decisions relating to minimum standards orders. Further, the regulation-making approach would enable a thorough assessment and appropriate targeting of the decisions that are suitable for review (and what shape such review should take). The minister further advised that there is no current precedent for internal review of the decisions of an Expert Panel or Full Bench under the FW Act.

2.51 Nevertheless, the minister acknowledged the committee's concerns and undertook to consider amending the bill to include a failsafe or internal review mechanism on the face of the legislation.

³⁶ Schedule 1, item 249, proposed section 536LA. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

³⁷ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 12–14.

³⁸ The minister responded to the committee's comments in a letter dated 28 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 16 of 2023*).

Committee comment

2.52 In light of the information provided the committee makes no further comment on this matter. The committee notes the minister's undertaking to consider amending the bill to include a failsafe or internal review mechanism on the face of the legislation.

Significant matters in delegated legislation³⁹

2.53 Proposed subsection 536LJ(1) requires the minister to make a digital labour platform deactivation code by legislative instrument. Proposed subsection 536LJ(2) prescribes matters that the code must provide for, including the circumstances in which work is performed on a regular basis (proposed paragraph 536LJ(2)(a)) and the reasons for deactivation (proposed paragraph 536LJ(2)(b)). In addition, proposed subsection 536LN(1) provides that the minister may make a road transport industry termination code by legislative instrument, with proposed subsection 536LN(2) setting out the matters which must be dealt with by the code.

2.54 In *Scrutiny Digest 13 of 2023*, the committee requested the minister's detailed advice as to why it is considered necessary and appropriate to leave the digital labour platform deactivation code, and the road transport industry termination code to delegated legislation, rather than primary legislation.⁴⁰

Minister's response⁴¹

2.55 The minister advised that the codes are intended to assist regulated businesses and regulated workers in understanding their rights and obligations in respect of any actual or proposed deactivation or termination and would likely contain detailed and specific guidance. Given the very detailed and process-related issues which may be subject to regular review and amendment, the minister advised the codes are appropriate to be included in delegated legislation.

2.56 The minister further advised that the codes would relate to industries where the technological and commercial change is frequent (i.e. the gig economy and the road transport industry) which may require immediate or prompt changes to legislation. By including both codes in delegated legislation, the minister advised that they would be able to quickly respond and adapt to any changing industry circumstances.

³⁹ Schedule 1, item, 249, proposed sections 536LJ and 536LN. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

⁴⁰ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2023* (8 November 2023) p. 14.

⁴¹ The minister responded to the committee's comments in a letter dated 28 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 16 of 2023*).

2.57 Further, the minister advised both codes would be similar to the pre-existing Small Business Fair Dismissal Code made under subsection 388(1) of the FW Act in respect of the unfair dismissal regime for employees.

Committee comment

2.58 The committee thanks the minister for this detailed advice.

2.59 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable. The committee notes the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

Fees in delegated legislation⁴²

2.60 Proposed subsection 536LV(1) provides that an application to the FWC under division 5 of part 16 of the bill must be accompanied by any fee prescribed by the regulations. Proposed subsection 536LV(2) provides that the regulations may prescribe the application fee, a method for indexation, and the circumstances in which all or part of the fee may be waived or refunded.

2.61 Proposed subsection 536NE provides that an application to the FWC under division 3 of part 16 must be accompanied by any fee prescribed by the regulations. Proposed subsection 536NE(2) provides that the regulations may prescribe the application fee, a method for indexation, and the circumstances in which all or part of the fee may be waived or refunded.

2.62 Proposed subsection 306R(1) provides that an application under proposed subsection 306P(4) (relating to an application to the FWC to resolve a workplace dispute) must be accompanied by any fee prescribed by the regulations. Proposed subsection 306R(2) provides that the regulations may prescribe the application fee, a method for indexation, and the circumstances in which all or part of the fee may be waived or refunded.

2.63 In *Scrutiny Digest 13 of 2023*, the committee requested the minister's advice as to whether consideration has been given to providing greater legislative guidance as to how the fee amount (and the method of indexation, if any) is to be determined

⁴² Schedule 1, item, 249, proposed section 536NE; schedule 1, item 73, proposed section 306R; schedule 1, item 249, proposed section 536LV. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iv).

for fees prescribed as a result of proposed subsections 536LV(1), 536NE(1), and 306R(1).⁴³

Minister's response⁴⁴

2.64 The minister advised that proposed subsections 536LV(1), 536NE(1) and 306R(1) are modelled off existing and well-established provisions in the FW Act, and that this approach would ensure consistency and clarity within the Fair Work framework. In addition, they would provide flexibility to ensure fee amounts would remain relevant and appropriate over time (see e.g. sections 367, 373, 395, 527H, 775 and 789FC of the Fair Work Act).

Committee comment

2.65 The committee thanks the minister for this response.

2.66 While the committee acknowledges the utility of flexibility, nevertheless the committee considers that further guidance on how the fee amount or method of indexation, if any, is to be determined would be helpful.

2.67 The committee draws its scrutiny concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of proposed subsections 536LV(1), 536NE(1) and 306R(1) leaving the fee amount and method for indexation to delegated legislation.

Procedural fairness⁴⁵

2.68 Proposed subsection 536MC(2) permits the FWC to make an order for costs against a representative of a person who is a party to an application for an unfair deactivation or unfair termination remedy made under proposed section 536LU. This would be for costs incurred by the other party to the matter if the FWC is satisfied that the representative caused those costs to be incurred, either because:

- they encouraged a person to start, continue or respond to the matter and it should have been reasonably apparent that the person had no reasonable prospect of success; or
- of an unreasonable act or omission by the representative in connection with the conduct or continuation of the matter.

⁴³ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 15–16.

⁴⁴ The minister responded to the committee's comments in a letter dated 28 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 16 of 2023*).

⁴⁵ Schedule 1, item 249, proposed section 536MC. The committee draws senators' attention to this provision pursuant to Senate standing order 24(1)(a)(iii).

2.69 In *Scrutiny Digest 13 of 2023*, the committee requested the minister's advice as to why it is necessary and appropriate for proposed section 536MC to provide that costs orders can be made against representatives who encouraged claims for unfair deactivation or termination which had no reasonable prospects of success.⁴⁶

Minister's response⁴⁷

2.70 The minister advised that proposed section 536MC is modelled off existing and well-established provisions in the FW Act. This approach would ensure consistency and clarity within the Fair Work framework and would prevent unscrupulous lawyers or paid agents from escaping the possibility of a costs order if they have acted unreasonably. It would not prevent lawyers or paid agents from fully pursuing a genuine claim on behalf of a client.

2.71 The minister further advised that given the high threshold the FWC is required to be satisfied of in order to make an order for costs, this provision should not have a chilling effect on representatives and their willingness to represent parties in unfair deactivation or unfair termination matters. The minister provided case law to support this conclusion.⁴⁸

Committee comment

2.72 The committee thanks the minister for this advice.

2.73 The committee requests that an addendum to the explanatory memorandum containing the key information provided by the minister be tabled in the Parliament as soon as practicable. The committee notes the importance of these explanatory materials as a point of access to understanding the law and, if needed, as extrinsic material to assist with interpretation (see section 15AB of the *Acts Interpretation Act 1901*).

2.74 The committee also draws this matter to the attention of senators and leaves to the Senate as a whole the appropriateness of providing that costs orders can be made against representatives.

⁴⁶ Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2023* (8 November 2023) pp. 16–17.

⁴⁷ The minister responded to the committee's comments in a letter dated 28 November 2023. A copy of the letter is available on the committee's [webpage](#) (see correspondence relating to *Scrutiny Digest 16 of 2023*).

⁴⁸ *Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Cafe* [2011] FWA 651 at [22]; *A Baker v Salva Resources Pty Ltd* [2011] FWAFB 4014 at [10] and *Stephen Baskin v Friends Resilience Pty Ltd T/A Friends Resilience* [2018] FWC 1536 at [60].

Chapter 3

Scrutiny of standing appropriations⁴⁹

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.⁵⁰ 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.⁵¹

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

Senator Dean Smith

Chair

⁴⁹ This report can be cited as: Senate Standing Committee for the Scrutiny of Bills, Chapter 3: Scrutiny of standing appropriations, *Scrutiny Digest 16 of 2023*; [2023] AUSStaCSBSD 249.

⁵⁰ 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*.

⁵¹ For further detail, see Senate Standing Committee for the Scrutiny of Bills [Fourteenth Report of 2005](#).