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Standing Committee for the Scrutiny of Bills

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TABLE OF CONTENTS

Introduction

Terms of reference

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

(i) trespass unduly on personal rights and liberties;

(ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;

(iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;

(iv) inappropriately delegate legislative powers; or

(v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.

Nature of the committee's scrutiny

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

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

Publications

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

General information

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

Chapter 1

Commentary on Bills

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

Agriculture Legislation Amendment (Streamlining Administration) Bill 2019

Purpose	This bill seeks to amend laws relating to biosecurity and imported food to provide for streamlined administration through automated decision-making, and for related purposes
Portfolio	Agriculture
Introduced	Senate on 2 December 2019

Computerised decision-making

Significant matters in delegated legislation[1]

1.2 The bill seeks to insert proposed section 541A into the *Biosecurity Act 2015* (Biosecurity Act), which would allow the Director of Biosecurity to arrange for the use of computer programs for any purposes for which a biosecurity officer may or must make a decision under the Biosecurity Act, exercise a power or comply with an obligation related to making a decision or do anything else related to making a decision. Proposed subsection 541A(2) provides that the Director of Biosecurity may, by legislative instrument, determine each 'relevant provision' of the Biosecurity Act under which a decision may be made by the operation of a computer program and the classes of persons that may use a computer program. The relevant provisions are listed in proposed subsection 541A(9).

1.3 Proposed subsection 541A(3) provides that the Director of Biosecurity must take reasonable steps to ensure that decisions made by the operation of a computer program under an arrangement made under subsection 541A(1) are consistent with the objects of the Biosecurity Act. Proposed subsection 541A(4) provides that the Director of Biosecurity must take reasonable steps to ensure that an electronic

1 Schedule 1, item 1, proposed section 541A of the *Biosecurity Act 2015* and item 11, proposed subsections 20A(3) and (4) of the *Imported Food Control Act 1992*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii), (iii) and (iv).

decision is based on grounds on the basis of which a biosecurity officer could have made that decision. However, an electronic decision may be made without any state of mind being formed in relation to a matter to which the decision relates.

1.4 The committee notes that administrative law typically requires decision-makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process—for example, where decisions are made by a computer rather than by a person—may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.5 The explanatory memorandum states:

> Under both the Biosecurity Act and the Imported Food Control Act, most decisions – whether made by a person or by application of a computer program – involve the application of detailed business rules where ordinarily the exercise of discretion is not expected by, and is not in the interest of, entities seeking fast and predictable clearance. In this context fettering of discretion is appropriate because:
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> - The kind of decisions that are envisaged to be made by computer programs all involve the identification, and management if necessary, of biosecurity or food safety risks. Such an assessment is a technical and scientific process based on objective data and information, for example, what the relevant goods are, what are the associated diseases or pests of concern, whether there are current outbreaks or prevalence of the disease and their locations.
> - In most cases, it is desirable to stakeholders in this regulatory context that identical information inputs should not lead to different outcomes.
> - The operational environment of high volumes of goods and people entering Australia, and the potential for immensely negative impact on Australia's agriculture, environment and economy if biosecurity risk or food safety is not effectively identified and managed, mean that it is necessary to provide automated decision-making.[2]

1.6 The committee notes this explanation and notes that there are mechanisms in place to ensure that errors made by the operation of a computer program can be

2 Explanatory memorandum, p. 3.

corrected. However, in light of the potential impacts on administrative decision-making outlined above, the committee notes that the 'relevant provisions' listed in proposed subsection 541A(9) are very broad and no information has been provided in the explanatory memorandum to indicate why it is necessary or appropriate to allow for automated decision-making in respect of each listed provision.

1.7 The committee also notes that the explanatory memorandum does not contain a justification for the inclusion of proposed subsections 541A(3) or (4) and no information is provided about whether these provisions will limit or exclude administrative law requirements which condition the formation of a state of mind, for example the flexibility rule regarding policy or the requirements of legal reasonableness.[3]

1.8 Additionally, the committee has scrutiny concerns that the types of decisions contained in the Biosecurity Act that will be appropriate for computerised decision-making will be determined via a legislative instrument rather than being included on the face of the primary legislation. The committee's longstanding scrutiny view is that significant matters, such as the decisions suitable for computerised decision-making, should be included in the primary legislation unless a sound justification is provided. In this instance, the explanatory memorandum states:

> Providing for a determination specifying the decisions subject to automated decision-making provides flexibility to take into account rapid changes in technology and changes in risks, while striking a balance by ensuring that Parliament retains scrutiny of the determination.[4]

1.9 While noting this explanation, the committee does not generally consider administrative flexibility to be a sufficient justification for including significant matters in delegated legislation. Additionally, it is unclear to the committee why the specific decisions made under the Biosecurity Act that are suitable for computerised decision-making cannot be specified in the primary legislation. In this regard, the committee notes that the explanatory memorandum indicates which decisions are intended to be suitable (and not suitable) for computerised decision-making.[5] While the committee acknowledges that the determinations will be subject to parliamentary disallowance, the committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing the proposed changes in the form of an amending bill.

1.10 As the explanatory materials do not appear to adequately address this matter, the committee requests the minister's advice as to:

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3 The committee notes that this issue also arises in relation to item 11, proposed subsections 20A(3) and (4) of the *Imported Food Control Act 1992*.

4 Explanatory memorandum, p. 5.

5 Explanatory memorandum, pp. 5–6.

- **why it is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under each of the provisions listed in proposed paragraphs 541A(9)(a), (e) and (f);**
- **why it is considered necessary and appropriate to permit the Director of Biosecurity to arrange for the use of computer programs for decisions made under most provisions of Chapters 3, 4 and 5 of the Biosecurity Act (see proposed paragraphs 541A(9)(b), (c) and (d));**
- **whether the inclusion of subsections 541A(3) or (4) will limit or exclude administrative law requirements which condition the formation of a state of mind, for example the flexibility rule regarding policy or the requirements of legal reasonableness; and**
- **the appropriateness of amending the bill to limit the use of computerised decision-making to decisions made under specific provisions listed in the primary legislation, rather than by legislative instrument.**

Australian Banks (Government Audit) Bill 2019

Purpose	This bill seeks to provide for the auditing of Australian banks by the Commonwealth Auditor-General and provide better protection of deposits within Australia's banking system
Sponsor	Hon Bob Katter MP
Introduced	House of Representatives on 2 December 2019

Broad delegation of administrative powers[6]

1.11 Clause 6 of the bill provides that the Auditor-General may conduct audits of certain Australian banks. Clause 8 of the bill provides the Auditor-General or an authorised official with broad coercive powers that may be used when conducting an audit, including entering and remaining on premises, and accessing documents and accounts.[7] An authorised official is defined as an official of a non-corporate Commonwealth entity who is authorised in writing by the Auditor-General to exercise powers or perform functions described under clause 8 of the bill.

1.12 The committee has consistently drawn attention to legislation that allows the delegation of coercive or investigatory powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. 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. In this instance, the explanatory memorandum merely repeats the text of the provisions.

1.13 The committee is concerned that authorised officers can therefore be authorised to conduct audits without any requirement for them to possess appropriate qualifications or to have received training in the use of the relevant powers. The committee notes that subclause 12(3) provides that the Auditor-General must be satisfied that a person has relevant skills, experience and abilities where a person has previously worked for a bank or relevant government regulator, but this requirement is not extended to any other persons authorised by the Auditor-General to conduct audits.

1.14 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing authorised officials to exercise potentially coercive or investigatory powers in circumstances where

6 Subclause 8(8). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

7 See subclause 8(1)(a) and (b).

there is no legislative guidance about the appropriate skills and training required of those authorised officials.

Commonwealth Registers Bill 2019

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

Purpose	The Commonwealth Registers Bill 2019 seeks to create a set of core provisions related to the administration of business registers in the *Superannuation Industry (Supervision) Act 1993* and the *A New Tax System (Australian Business Number) Act 1999* The Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 seeks to provide the legislative framework to the Australian Securities and Investments Commission registers and the Australian Business Register; and the legal framework for the introduction of director identification numbers
Portfolio	Treasury
Introduced	House of Representatives on 4 December 2019

Significant matters in delegated legislation

Privacy[8]

1.15 The Commonwealth Registers Bill 2019 (the Registers Bill) and the Treasury Laws Amendment (Registries Modernisation and Other Measures) Bill 2019 (the Amendment Bill) are part of a legislative package to create a new Commonwealth business registry regime.[9]

1.16 Under the registry regime, a Commonwealth body is appointed as the Registrar.[10] The functions and powers of the Registrar are to be governed by two

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

9 Explanatory memorandum, p. 5. The amendments made by Part 1 of Schedule 1 to the Amendment Bill establish the same registry regime as the Registers Bill for the *Business Names Registration Act 2011*, *Corporations Act 2001*, and the *National Consumer Credit Protection Act 2009*.

10 Clause 6 of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed section 62A of the *Business Names Registration Act 2011*; item 10, proposed section 1270 of the *Corporations Act 2001*; item 18, proposed section 212A of the *National Consumer Credit Protection Act 2009*.

disallowable legislative instruments made by the Registrar: the data standards and the disclosure framework.

1.17 The data standards will govern the performance of the Registrar's functions and the exercise of the Registrar's powers. The data standards may provide for the type of information that may be collected by the Registrar, how that information may be given and how it is to be stored.[11] As there are no requirements on the face of the bills regarding the collection, storage and use of information, the data standards will be the only source of such requirements for the proposed registry regime.

1.18 The disclosure framework governs how the Registrar is to disclose protected information,[12] which the statement of compatibility notes could include personal information.[13] The legislative instrument that contains the disclosure framework may set out the circumstances in which protected information may be disclosed or not disclosed, and any conditions that may be imposed on disclosure. The disclosure of protected information by the Registrar is largely dealt with using the disclosure framework. Furthermore, an offence for failing to comply with a confidentiality agreement relating to the disclosure of protected information relies on the disclosure framework providing for the circumstances when such an agreement is required.[14]

1.19 The committee's view is that significant matters, such as the governance of the performance and exercise of the Registrar's functions and powers and the collection and disclosure of personal information, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory memorandum provides no justification for the extent to which the registry regime relies on the data standards and the disclosure framework to govern the performance and exercise of the Registrar's functions and powers. The explanatory memorandum does emphasise the need for flexibility in providing the Registrar to make data standards and the disclosure framework.[15] However, the

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11 Subclause 13(2) of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed subsection 62H(2) of the *Business Names Registration Act 2011*; item 10, proposed subsection 1270G(2) of the *Corporations Act 2001*; item 18, proposed subsection 212H(2) of the *National Consumer Credit Protection Act 2009*.

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

13 Statement of compatibility, p. 70.

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

15 Explanatory memorandum, pp. 16 and 24.

committee does not consider that the need for administrative flexibility adequately justifies leaving how the Registrar is to perform or exercise its functions and powers, and the disclosure of protected information, to delegated legislation to the extent that the proposed registry regime does.

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

1.21 **The committee's view is that significant matters, such as the governance of the performance and exercise of the Registrar's functions and powers and the collection and disclosure of personal information, should be included in primary legislation unless a sound justification is provided. The committee therefore requests the Assistant Treasurer's advice as to why it is considered necessary and appropriate to leave the data standards and disclosure framework to delegated legislation.**

Broad delegation of administrative powers[16]

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

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

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

1.24 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

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

on the categories of people to whom those powers might be delegated. The committee's preference is that delegates be confined to the holders of nominated offices or to members of the Senior Executive Service. Where broad delegations are provided for, the committee considers that an explanation of why these are considered necessary should be included in the explanatory memorandum. The explanatory materials provide no information about why these powers are proposed to be delegated to such a potentially large class of persons.

1.25 The committee requests the Assistant Treasurer's advice as to why it is considered necessary to allow for the delegation of the Registrar's powers to any person that the Registrar, as a Commonwealth body, may delegate its functions to or any person of a kind specified in the rules.

1.26 The committee also requests the Assistant Treasurer's advice as to whether the bill can be amended to provide further legislative guidance as to the scope of powers that might be delegated, or the categories of people to whom those powers might be delegated.

Computerised decision-making

1.27 The registry regime provides that the Registrar may arrange for the use, under the Registrar's control, of processes to assist decision making (such as computer applications and systems) for any purposes for which the Registrar may make decisions in the performance or exercise of the Registrar's functions or powers, other than decisions reviewing other decisions.[17]

1.28 The committee notes that administrative law typically requires decision makers to engage in an active intellectual process in respect of the decisions they are required or empowered to make. A failure to engage in such a process – for example, where decisions are made by a computer rather than by a person – may lead to legal error. In addition, there are risks that the use of an automated decision-making process may operate as a fetter on discretionary power, by inflexibly applying predetermined criteria to decisions that should be made on the merits of the individual case. These matters are particularly relevant to more complex or discretionary decisions and circumstances where the exercise of a statutory power is conditioned on the decision-maker taking specified matters into account or forming a particular state of mind.

1.29 In this instance, the explanatory memorandum states:

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17 Clause 11 of the Registers Bill; Schedule 1 to the Amendment Bill, item 5, proposed section 62F item 10, proposed section 1270E; item 18, proposed section 212F. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(ii) and (iii).

> The administration of functions and powers being transferred to the registrar requires it to make a large number of decisions. The use of assisted decision making processes, including computer automated and computer-assisted decision making, will improve the timeliness and accuracy of decision making and enable the registrar to deliver a high standard of service in an effective and efficient manner.[18]

1.30 The committee acknowledges that there is merit in improving the timeliness and accuracy of decision-making, and notes there are mechanisms in place to ensure that errors made by the operation of a computer program can be quickly corrected. However, in light of the potential impacts on administrative decision-making outlined above, the committee expects the explanatory materials to include a more comprehensive justification for allowing *all* of the Registrar's administrative functions to be assisted or automated by computer programs except decisions reviewing other decisions. The committee also considers that it would be useful for the explanatory materials to explain how automated or assisted decision-making will comply with relevant administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power).

1.31 As the explanatory materials do not appear to adequately address this matter, the committee requests the Assistant Treasurer's advice as to:

- **why it is considered necessary and appropriate to permit the Registrar to arrange for computer assisted decision-making for *any* purpose for which the Registrar may make decisions in the performance or exercise of the Registrar's functions or powers, other than decisions reviewing other decisions;**
- **whether consideration has been given to how computer assisted decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and**
- **whether consideration has been given to including guidance on the face of the bill as to the types of administrative actions (for example, complex or discretionary decisions) that must be taken by a person rather than by a computer.**

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18 Explanatory memorandum, p. 28.

Reversal of evidential burden of proof[19]

1.32 The registry regime makes it an offence for a person to make a record of information obtained by the person in the course of the person's official employment, or to disclose such information to another person.[20] The offence carries a maximum penalty of imprisonment for 2 years.

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

- the recording or disclosure of the information is for the purposes of the registry regime or occurs in the performance of the person's official employment;
- the disclosure of the information is to another person for use, in the course of the performance of the duties of the other person's official employment, in relation to the performance or exercise of the functions or powers of a government entity; or
- the disclosure of the information is in accordance with the disclosure framework or each person to whom the information relates consents to the disclosure.[21]

1.34 In addition, the Amendment Bill makes it an offence for an eligible officer not to have a director identification number (DIN), or to apply for an additional DIN knowing that the officer already possesses a DIN. There are also exceptions (offence-specific defences) to these offences if the officer applied before a certain period and the application has not been finally determined; the Commonwealth Registrar

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

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

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

directed the person to make the application; or the person purports to make the application only in relation to Part 9.1A of the *Corporations Act 2001*.[22]

1.35 In raising these offence-specific defences the defendant will bear the evidential burden of proof.[23] At common law, it is ordinarily the duty of the prosecution to prove all elements of an offence. This is an important aspect of the right to be presumed innocent until proven guilty. Provisions that reverse the burden of proof and require a defendant to disprove, or raise evidence to disprove, one or more elements of an offence, interferes with this common law right.

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

1.37 The committee notes that the *Guide to Framing Commonwealth Offences*[24] 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.[25]

1.38 With respect to the reversal of the evidential burden of proof, the explanatory materials state in relation to each that the details of the relevant matters are peculiarly within the knowledge of the defendant and such matters would be significantly more difficult for the prosecution to disprove than for the defendant to establish,[26] without giving any explanation of why this would be the case. It is not apparent that all the circumstances identified as an exception to the offences are peculiarly within the knowledge of the defendant. The circumstances identified in paragraphs 1.33 and 1.34 would not appear to be peculiarly within the knowledge of the defendant, as, for example, whether the disclosure was for the purposes of the registry regime, in accordance with a person's official functions, or

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22 Schedule 2 to the Amendment Bill, item 5, proposed subsections 308-20(2) and 308-40(2) and (3) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; item 11, proposed subsections 1272C(2) and 1272G(2) and (3) of the *Corporations Act 2001*.

23 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.

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

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

26 Statement of compatibility, p. 66.

where a person was directed by the Registrar, would appear to be matters the prosecution could readily ascertain. Furthermore, the explanatory memorandum does not explain why it would be significantly more difficult and costly for the prosecution to disprove the matters than for the defendant to establish.

1.39 The committee requests the Assistant Treasurer's more detailed justification as to the appropriateness of including the specified matters as offence-specific defences.

1.40 In addition, from a scrutiny perspective, the committee suggests that it may be appropriate if the bill were amended so that the offence-specific defences referred to in paragraphs 1.33 and 1.34 are instead framed as elements of the relevant offences. The committee requests the Assistant Treasurer's advice in relation to this matter.

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019

Purpose	This bill seeks to amend various Acts in relation to criminal law and law enforcement to: • amend the offence of bribery of a foreign public official; • introduce a new offence of failure of a body corporate to prevent foreign bribery by association; • make consequential amendments ensuring the continuation of the existing policy of prohibiting a person from claiming a deduction for a loss or outgoing the person incurs that is a bribe to foreign public official; • implement a Commonwealth Deferred Prosecution Agreement scheme; and • insert a new definition of 'dishonest' into the Criminal Code
Portfolio	Attorney-General
Introduced	Senate on 2 December 2019

Comments on earlier bill

1.41 The committee commented on a similar bill in the previous Parliament in *Scrutiny Digest 3 of 2018*.

1.42 The committee draws senators' attention to its comments in relation to the earlier version of this bill.[27]

Broad scope of offence provisions[28]

1.43 Item 6 of Schedule 3 to the bill seeks to insert a new definition of dishonesty into the dictionary of the Criminal Code. Under the proposed new definition dishonest will mean 'dishonest according to the standards of ordinary people'. Currently, where a definition of dishonesty is provided for in the Criminal Code, the definition is: '***dishonest*** means dishonest according to the standards of ordinary

27 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, pp. 93–100.

28 Schedule 3, item 6. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

people and known by the defendant to be dishonest according to the standards of ordinary people'.[29]

1.44 It therefore appears that the proposed new definition will remove the subjective aspect of the definition of dishonesty. The committee considers that a significant shift in the framing of a number of offences in the Criminal Code, that has the potential to unduly trespass on personal rights and liberties, should be thoroughly justified in the explanatory memorandum.

1.45 The explanatory memorandum states that:

> This will align the Criminal Code's definition of 'dishonest' with the single-limb objective test for dishonesty endorsed by Australia's High Court in *Peters v The Queen* (1998) 192 CLR 493 (*Peters*).
>
> In *Peters*, the High Court adopted a new test to determine dishonesty. The new test requires the defendant's knowledge, belief or intent to have been dishonest according to the standards of ordinary, decent people. Under the test adopted in *Peters*, there is no requirement to also prove that the defendant was aware that their knowledge, belief or intent was dishonest in this sense. The new definition in item 6 reflects this jurisprudence.[30]

1.46 The committee notes that the explanatory memorandum does not explain why it is considered necessary or appropriate to now amend the definition of dishonest on the basis of a High Court case from 1998. The explanatory memorandum also provides no information as to the number of offences that the new definition will apply to, both within the Criminal Code and in other Commonwealth legislation; nor has any information been provided as to the potential impact on the personal rights and interests of defendants.

1.47 On the basis of the limited information provided, the committee has scrutiny concerns that the amendments may trespass on personal rights and liberties. However, it is difficult for the committee to accurately assess the impact of the changes when the explanatory materials provide only a limited explanation of the need for, and scope of, the amendments.

1.48 In light of the above, the committee requests the Attorney-General's more detailed advice as to why it is considered necessary and appropriate to amend the definition of dishonesty in the Criminal Code. The committee's consideration of this matter would be assisted by the provision of information relating to the range of offences that will be affected, and how the changes may impact on defendants' personal rights and liberties.

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29 See, for example, section 130.3 of the Criminal Code.

30 Explanatory memorandum, p. 36.

Export Control Bill 2019

Purpose	This bill seeks to implement a new legislative framework for agricultural exports from Australian Territory
Portfolio	Agriculture
Introduced	House of Representatives on 4 December 2019

1.49 The committee commented on a similar bill in the previous Parliament in *Scrutiny Digest 3 of 2018*.

1.50 **The committee draws senators' attention to its comments in relation to the earlier version of this bill.**[31]

1.51 In addition, the committee notes that clauses 273, 281 and 413 have been amended in this version of the bill to include a requirement that the secretary must not appoint a person as an auditor, assessor or analyst unless he or she is satisfied the person satisfies the relevant training and qualification requirements. The committee welcomes these changes, although notes that the determinations specifying the requisite training and qualifications for auditors, assessors and analysts are declared not to be legislative instruments, and would therefore not be subject to parliamentary disallowance.

1.52 The committee reiterates its earlier view that, from a scrutiny perspective, it would be appropriate for the bill to be amended to remove provisions which declare that determinations specifying training and qualification requirements are not legislative instruments.[32]

31 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, pp. 122–189.

32 Subclauses 273(5), 281(5), 291(10), 324(3) and 413(4). For further information in relation to this issue see pp. 144–145 of *Scrutiny Digest 3 of 2018*.

Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019

Purpose	This bill seeks to amend the *Fair Work (Registered Organisations) Act 2009* to: • expand the automatic disqualification regime to prohibit persons that have committed serious criminal offences punishable by five or more years imprisonment from acting as an official of a registered organisation; • allow the Federal Court to disqualify certain officials from holding office who contravene a range of industrial and other relevant laws, are found in contempt of court, repeatedly fail to stop their organisation from breaking the law or are otherwise not a fit and proper person to hold office in a registered organisation; • make it an offence for a person to continue to act as an official or in a way that influences the affairs of an organisation once they have been disqualified; • allow the Federal Court to cancel the registration of an organisation on a range of grounds; • expand the grounds on which the Federal Court may order remedial action to deal with governance issues in an organisation; • introduce a public interest test for amalgamations of registered organisations; • provide that the Fair Work Commissioner must prioritise matters that raise serious or systemic concerns; and • provide that that the Minister causes an independent review of these amendments as soon as practicable two years after they commence
Portfolio	Industrial Relations
Introduced	Senate on 4 December 2019

1.53 The committee previously commented on a similar bill in *Scrutiny Digest 12 of 2017* and reiterates its previous comments in relation to this bill.[33]

33 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2017*, pp. 112–119.

1.54 The committee also commented on a similar bill in *Scrutiny Digest 5 of 2019*[34] in relation to the use of strict liability offences in circumstances where the penalty is above what is recommended in the *Guide to Framing Commonwealth Offences*.[35]

1.55 The committee notes that the strict liability offences have been removed from this bill and welcomes the changes, which appear to address the committee's concerns.

34 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 5 of 2019*, pp. 58–61.

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

Federal Circuit and Family Court of Australia Bill 2019

Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019

Purpose	The Federal Circuit and Family Court of Australia Bill 2019 seeks to bring the Federal Circuit and Family Court of Australia together in an overarching, unified administrative structure to be known as the Federal Circuit and Family Court of Australia The Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Bill 2019 seeks to make the necessary amendments to other Commonwealth Acts and Regulations affected by the passage of the Federal Circuit and Family Court of Australia Bill 2019
Portfolio	Attorney-General
Introduced	House of Representatives on 5 December 2019

1.56 The committee commented on similar bills in the previous Parliament in *Scrutiny Digest 12 of 2018*.

1.57 **The committee draws senators' attention to its comments in relation to the earlier versions of these bills.**[36]

36 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 12 of 2018*, pp. 84–89.

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

Purpose	This bill seeks to amend the *National Consumer Credit Protection Act 2009* and the National Credit Code in relation to small amount credit contracts and consumer leases
Sponsor	Senator Stirling Griff and Senator Jenny McAllister
Introduced	Senate on 2 December 2019

1.58 This bill is identical to bills that were introduced in the House of Representatives on 26 February 2018,[37] 22 October 2018,[38] 18 February 2019[39], and 16 September 2019.[40] The committee commented on the first iteration of this bill in *Scrutiny Digest 3 of 2018*.

1.59 **The committee draws senators' attention to its comments in relation to the earlier version of this bill.**[41]

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

38 The bill was then introduced by the former Member for Indi, Ms Cathy McGowan MP, and lapsed on 11 April 2019 at the dissolution of the 45th Parliament.

39 The bill was also introduced by the Member for Brand, Ms Madeleine King MP, and lapsed on 11 April 2019 at the dissolution of the 45th Parliament.

40 The bill was then introduced by the Member for Mayo, Ms Rebekha Sharkie MP, and is currently before the House of Representatives.

41 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 3 of 2018*, pp. 24–27.

National Vocational Education and Training Regulator Amendment Bill 2019

Purpose	This bill seeks to amend the *National Vocational Education and Training Regulator Act 2011* to improve its efficiency and effectiveness by strengthening the regulatory framework
Portfolio	Employment, Skills, Small and Family Business
Introduced	Senate on 4 December 2019

Significant matters in delegated legislation[42]

1.60 Currently section 17 of the *National Vocational Education and Training Regulator Act 2011* provides that when considering an application for registration or renewal of registration of a registered training organisation, the National VET Regulator may conduct an audit of any matter relating to the application. Proposed section 17A provides that where an audit is conducted, the National VET Regulator must prepare an audit report. Proposed subsections 35(1A) to (1D) similarly provide that the National VET Regulator must prepare a report of a compliance audit. The audit reports must be in a form approved by the minister and comply with the audit report rules. The National VET Regulator must also comply with the requirements of the audit report rules in relation to the publication of the reports. Proposed section 231B provides that the minister may make the audit report rules, which will be a legislative instrument.

1.61 The committee's view is that significant matters, such as the content and publication requirements for audit reports, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no explanation as to why these matters are left to delegated legislation. It is unclear to the committee why at least high level guidance cannot be included in the primary legislation. This could include publication requirements, the timeframe in which an audit report must be prepared after an audit is commenced, and whether certain information is able to be redacted or omitted from the report.

1.62 In addition, the explanatory memorandum states that this amendment adds an 'additional layer of transparency to the National VET Regulator's audit processes'.[43] While the committee welcomes this additional transparency, the

42 Schedule 1, items 3, 22 and 84, proposed section 17A, proposed subsections 35(1A)–(1D) and proposed section 231B. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

43 Explanatory memorandum, pp. 18 and 24.

committee notes that allowing the content and publication requirements to be determined in delegated legislation means that the effectiveness of the reporting process as a transparency measure is largely dependent on the requirements prescribed by the minister. The committee is concerned that this could significantly limit the transparency of the audit process. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

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

- **why it is considered necessary and appropriate to leave significant matters, such as the content and publication requirements for audit reports, to delegated legislation; and**
- **the appropriateness of amending the bill to include at least high-level guidance regarding the content and publication of audit reports on the face of the primary legislation.**

Reversal of the evidential burden of proof[44]

1.64 Currently, subsections 116(1) and (2) of the *National Vocational Education and Training Regulator Act 2011* provides that it is an offence for a person to provide all or part of a VET course in a referring State or Territory if they are not a registered training organisation or, if registered, to offer to provide a VET course in a non-referring State. Proposed subsections 116(1A) and 116(3) provide exceptions (offence-specific defences) to these offences if the person does so in accordance with a written agreement between the person and a registered training organisation. The offences carry a maximum penalty of 300 penalty units (currently $63,000).

1.65 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.[45]

1.66 The committee notes that the *Guide to Framing Commonwealth Offences* 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

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44 Schedule 1, items 37 and 38, proposed subsections 116(1A) and 116(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

45 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.

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[46]

1.67 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The reversals of the evidential burden of proof in proposed subsections 116(1A) and 116(3) have not been addressed in the explanatory materials.

1.68 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of a provision which reverses the burden of proof is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[47]

Exemption from disallowance[48]

1.69 Currently subsection 160(1) of the *National Vocational Education and Training Regulator Act 2011* provides that the minister may, by legislative instrument, give a direction to the National VET Regulator 'if the Minister considers that the direction is necessary to protect the integrity of the VET sector'. A note to existing subsection 160(1) confirms that section 42 (disallowance) and Part 4 of Chapter 3 (sunsetting) of the *Legislation Act 2003* do not apply to these ministerial directions.

1.70 Item 49 of Schedule 1 to the bill seeks to amend the power to issue a ministerial direction under subsection 160(1) so that the minister may give a direction to the National VET Regulator 'in relation to the performance of its functions and the exercise of its powers'. It therefore appears that this provision expands the scope of non-disallowable ministerial directions that may be given to the National VET Regulator.

1.71 The committee's consistent expectation is that any exemption of delegated legislation from the usual disallowance process should be fully justified in the explanatory memorandum. The fact that a certain matter has previously been within

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

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

48 Schedule 1, item 49, subsection 160(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

executive control or continues current arrangements does not, of itself, provide an adequate justification.

1.72 As the explanatory materials do not address this issue, the committee requests the minister's advice as to:

- **why it is considered necessary and appropriate to continue to exempt ministerial directions made under subsection 160(1) from disallowance in circumstances where it appears the scope of directions that may be given to the National VET Regulator is being expanded; and**
- **the appropriateness of amending the bill to provide that the directions be subject to disallowance to ensure appropriate parliamentary oversight.**

Student Identifiers Amendment (Higher Education) Bill 2019

Purpose	This bill seeks to amend the *Student Identifiers Act 2014* to enable the extension of the unique student identifier from vocational education and training to higher education students, and to enable the Student Identifiers Registrar to assign a student identifier to all higher education students
Portfolio	Education
Introduced	House of Representatives on 4 December 2019

Significant matters in delegated legislation

Privacy[49]

1.73 Proposed subsection 18(3) provides that the Registrar is authorised to use or disclose a student identifier of an individual if the use or disclosure is for the purposes of research that relates (directly or indirectly) to the provision of higher education and that meets the requirements specified in a legislative instrument made by the minister. Proposed subsection 25(3) provides that the use or disclosure by the Registrar of personal information about an individual is taken, for the purposes of the *Privacy Act 1988*, to be authorised if the use or disclosure is for the purposes of research that relates (directly or indirectly) to the provision of higher education and that meets the requirements specified in a legislative instrument made by the minister.

1.74 The committee's view is that significant matters, such as the safeguards to protect an individual's personal information, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum states:

> The legislative instrument will provide appropriate safeguards and parameters around the Registrar's use and disclosure of student identifiers for higher education research purposes. For example, the Education Minister may specify the factors the Registrar should take into account in assessing whether it is appropriate to disclose student identifiers to particular persons for research purposes. In making the instrument, the Education Minister will take into account community expectations surrounding privacy, and will also consider relevant requirements in the

49 Schedule 1, item 12, proposed subsections 18(3) and (4), and item 14, proposed subsections 25(3) and (4). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i) and (iv).

National VET Data Policy and whether they are applicable for higher education. For example, the Education Minister may consider including the following factors in the legislative instrument that the Registrar must take into account when considering requests under new subsection 18(3):

- the purpose for which the information was collected;
- the stated purpose for the use or disclosure;
- the scope of the use or disclosure (e.g. duration of research, data parameters, target population, estimated period of data retention);
- weighing the public interest or benefit of the use or disclosure against data protection considerations; and
- whether the individuals to whom personal information relates consented to the proposed disclosure and use of the information and if not, whether it is impracticable to seek consent from the individuals.[50]

1.75 While noting this explanation, it is unclear to the committee why the relevant factors outlined in the explanatory memorandum, and that are intended to be included in the legislative instrument, cannot be included on the face of the primary legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in including the relevant information in primary legislation.

1.76 The committee's scrutiny concerns in this instance are heightened by the potential impact on individual privacy. As the details of delegated legislation are generally not available when Parliament is considering the bill, this considerably limits the ability of Parliament to have appropriate oversight of whether appropriate safeguards are in place to protect personal information.

1.77 The committee's view is that significant matters, such as when personal information can be disclosed, should be included in primary legislation unless a sound justification is provided. The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate to leave the requirements for when personal information can be disclosed to delegated legislation; and**
- **the appropriateness of amending the bill to set out the requirements on the face of the primary legislation.**

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50 Explanatory memorandum, p. 15.

Significant matters in delegated legislation[51]

1.78 Proposed subsection 53A(1) provides that a registered higher education provider must not confer a regulated higher education award on an individual unless the individual has been assigned a student identifier. Proposed subsection 53A(3) provides that the minister may, by legislative instrument, specify a conferral to which the requirement to have a student identifier does not apply in relation to:

- the registered higher education provider doing the conferring;
- the regulated higher education award being conferred;
- the individual on whom the regulated higher education award is being conferred.

1.79 Additionally, proposed subsection 53A(4) provides that the Registrar may, on the request of an individual, make a determination that subsection 53A(1) does not apply to the individual. In making such a determination, the Registrar must have regard to the matters (if any) set out in a legislative instrument made by the minister under subsection 53A(9).

1.80 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 relation to exemptions by the minister, the explanatory memorandum states:

> It is preferable to provide exemptions by a legislative instrument rather than specifying the exemptions in the primary legislation to enable flexibility regarding the exemptions made by the Education Minister. Further, the legislative instrument is also subject to the Parliamentary disallowance process which provides Parliamentary scrutiny and oversight of any exemptions made by the Minister.[52]

1.81 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility as a sufficient justification for leaving matters to delegated legislation. It is unclear to the committee why at least high level guidance as to the circumstances in which an exemption may be given could not be included in the primary legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill.

1.82 The committee's view is that significant matters, such as exemptions from requirements set out in primary legislation, should be included on the face of the

51 Schedule 1, item 21, proposed section 53A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

52 Explanatory memorandum, p. 20.

primary legislation unless a sound justification is provided. The committee therefore requests the minister's more detailed advice as to:

- **why it is considered necessary and appropriate to leave the ability to exempt providers, awards and individuals from the requirement that an individual must have a student identifier to delegated legislation;**
- **why it is considered necessary and appropriate to leave the matters that must be considered by the Registrar when exempting individuals from the requirement to have a student identifier to delegated legislation; and**
- **the appropriateness of amending the bill to set out at least high-level guidance in relation to the relevant matters on the face of the primary legislation.**

Merits review[53]

1.83 The *Student Identifiers Act 2014* currently provides for certain decisions of the Registrar to be reviewed by the Administrative Appeals Tribunal (AAT); however, the bill does not provide for a determination by the Registrar under proposed subsection 53A(6) to be reviewed by the AAT.

1.84 The committee considers that, generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided. The explanatory memorandum states:

> Currently, the number of individuals seeking an exemption in the VET sector under the Act is negligible in comparison to the number of student identifiers issued by the Registrar each year. The inclusion of merits review would not be an efficient use of Commonwealth resources where the cost of administering a merits review process would be greatly disproportionate to the number of individuals requesting an exemption. Further, external merits review at the Administrative Appeals Tribunal may delay the outcome of the request for an individual, which may impact an individual's ability to be conferred a higher education award.[54]

1.85 The committee appreciates that certain decisions may be unsuitable for merits review – including decisions which have such limited impact that the costs of review cannot be justified. However, the committee considers that this justification is only appropriate in circumstances where the cost of providing merits review would be vastly disproportionate to the significance of the decision under review, not

53 Schedule 1, item 21. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

54 Explanatory memorandum, p.21.

where the number of individuals seeking merits review is likely to be proportionately low in comparison to the number of applicants under the relevant scheme.[55] The committee also notes that a refusal by the Registrar to make a determination under proposed subsection 53A(6) may potentially have a significant impact on an individual as it may prevent a registered higher education provider from issuing that individual with a higher education award.

1.86 Additionally, the committee considers that the fact that external review may delay outcomes for an individual is a factor that may be considered by the individual when considering whether to seek independent merits review. The committee does not consider that this is an appropriate justification for the exclusion of independent merits review in circumstances where the relevant determination will affect the rights or interests of an individual.

1.87 The committee requests the minister's more detailed advice as to why merits review will not be available in relation to determinations by the Registrar under proposed subsection 53A(6). The committee's consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What Decisions Should be Subject to Merits Review*?.

55 See Administrative Review Council, *What Decisions Should be Subject to Merits Review?* (1999) available online at https://www.ag.gov.au/LegalSystem/AdministrativeLaw/Pages/practice-guides/what-decisions-should-be-subject-to-merit-review-1999.aspx .

Tertiary Education Quality and Standards Agency Amendment (Prohibiting Academic Cheating Services) Bill 2019

Purpose	This bill seeks to implement recommendations of the Higher Education Standards Panel to introduce deterrents to third party academic cheating services in higher education
Portfolio	Education
Introduced	House of Representatives on 4 December 2019

Broad discretionary powers

Significant matters in delegated legislation[56]

1.88 The bill seeks to insert proposed section 127A into the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act), which would allow TEQSA to seek an injunction from the Federal Court to require a carriage service provider to take steps to disable access to online locations that provide or advertise academic cheating services.

1.89 Proposed subsection 127A(11) provides that the minister may, by legislative instrument, exempt a particular online search engine provider or an online search engine provider that is in a particular class from applications for an injunction.

1.90 From a scrutiny perspective, the committee is concerned that proposed subsection 127(11) appears to confer on the minister a broad power to exempt online search engine providers from the operation of the legislation in circumstances where there is no guidance on the face of the primary legislation regarding the conditions for the exercise of the power. Additionally the committee's longstanding view is that significant matters should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. The explanatory memorandum does not include any information as to why it is necessary that certain online search engine providers be exempted or why this has been left to delegated legislation.

1.91 It is unclear to the committee why at least high level guidance about when the power to exempt online search engine providers is to be used could not be included on the face of the primary legislation. The committee notes that a legislative instrument, made by the executive, is not subject to the full range of

56 Schedule 1, item 26, proposed section 127A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iv).

parliamentary scrutiny inherent in bringing the proposed changes in the form of an amending bill.

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

- **why it is considered necessary and appropriate to provide the minister with the power to exempt online search engine providers from applications for an injunction under proposed section 127A;**
- **why it is considered necessary and appropriate for the exemptions to be contained in delegated legislation; and**
- **the appropriateness of amending the bill to provide at least high level guidance as to when the minister can grant exemptions under proposed subsection 127A(11).**

Reversal of the evidential burden of proof[57]

1.93 The bill seeks to insert proposed section 197A into the TEQSA Act, which would make it an offence for a person to disclose or use information obtained in their capacity as an entrusted person. Proposed subsection 197A(2) provides that the offence will not apply if the disclosure or use is made for the purposes of the TEQSA Act or the *Education Services for Overseas Students Act 2000*; is otherwise in connection with the performance of the person's duties as an entrusted person; or is authorised by proposed section 197B.

1.94 At common law, it is ordinarily the duty of the prosecution to prove all the 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.[58]

1.95 The committee notes that the *Guide to Framing Commonwealth Offences* 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

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57 Schedule 1, item 37, proposed section 197A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

58 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.

- it would be significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.[59]

1.96 While in this instance the defendant bears an evidential burden (requiring the defendant to raise evidence about the matter), rather than a legal burden (requiring the defendant to positively prove the matter), the committee expects any such reversal of the evidential burden of proof to be justified. The explanatory materials do not contain any information regarding why it is appropriate to reverse the evidential burden of proof for the offence in proposed section 197A.

1.97 As the explanatory materials do not address this issue, the committee requests the minister's advice as to why it is proposed to use an offence-specific defence (which reverses the evidential burden of proof) in this instance. The committee's consideration of the appropriateness of each provision which reverses the burden of proof is assisted if it explicitly addresses the relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[60]

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

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

Transport Security Amendment (Testing and Training) Bill 2019

Purpose	This bill seeks to amend the *Aviation Transport Security Act 2004* to introduce explicit powers for aviation security inspectors to conduct covert security systems testing to assess compliance of aviation industry participants with their security obligations under the Aviation Act, provide for the implementation of new screening officer training and accreditation, and to expand the testing of security systems used by aviation industry
Portfolio	Home Affairs
Introduced	Senate on 4 December 2019

Significant matters in delegated legislation[61]

1.98 Item 2 of Schedule 1 to the bill seeks to insert proposed paragraph 79(2)(h) into the *Aviation Transport Security Act 2004*. The proposed paragraph would permit an aviation security inspector to test an aviation industry participant's security system, including by using an item, weapon or vehicle to test its detection. Any tests must be in accordance with any requirements prescribed in the regulations.

1.99 The committee's view is that significant matters, such as requirements for aviation security tests, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided. In this instance, the explanatory memorandum provides no justification as to why these requirements are left to delegated legislation.

1.100 Additionally, the committee notes that the explanatory memorandum states that any 'test pieces', such as imitation firearms and simulated improvised explosion devices, are designed to be inert and to not cause harm.[62] However, the committee notes that this requirement does not exist on the face of the primary legislation. Noting the potential risk to safety if real weapons were used for testing, the committee considers that, at a minimum, the requirement that any test pieces used be inert be provided on the face of the primary legislation.

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

61 Schedule 1, item 2, proposed paragraph 79(2)(h). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

62 Explanatory memorandum, pp. 2 and 6.

- **why it is necessary and appropriate to leave the requirements for aviation security tests to delegated legislation; and**
- **the appropriateness of amending the bill to, at a minimum, specify that 'test pieces' used by aviation security inspectors must be inert.**

Adequacy of parliamentary oversight[63]

1.102 The bill seeks to insert proposed section 94A into the *Aviation Transport Security Act 2004* (Aviation Act), which will allow the Secretary to determine training and qualification requirements for screening officers by legislative instrument. Proposed section 94B provides that the Secretary may exempt a class of screening officers from one or more of the requirements determined under section 94A if exceptional circumstances exist. An exemption made by the Secretary will not be a legislative instrument.[64] These provisions are replicated by proposed sections 165A and 165B for the *Maritime Transport and Offshore Facilities Security Act 2003*.

1.103 In relation to the Aviation Act, the explanatory memorandum states:

> These exemptions may be of a sensitive nature, and may indicate a situation that may be subject to exploitation by persons intent on causing an unlawful interference with aviation, or aviation infrastructure, as a consequence it is imperative to restrict details of exemptions.
>
> For example, there may be an exemption in place in relation to training or qualification requirements for a class of screening officer operating from a particular airport. This may expose that airport, or aircraft departing from that airport, to vulnerability to an attack. In order to reduce the risk of information of this type being exploited by an adversary, an exemption made in writing by the Secretary would not be a legislative instrument and therefore would not be published.[65]

1.104 While noting this explanation, the committee notes that the bill provides the Secretary with a broad discretionary power to exempt persons from the operation of the legislation in circumstances where there will be no parliamentary oversight regarding the number of exemptions issued or the operation of the Secretary's power to make exemptions. The committee considers that the bill could be amended to allow for parliamentary oversight of the exemptions without compromising the

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63 Schedule 2, item 8, proposed sections 94A and 94B of the *Aviation Transport Security Act 2004*, and item 18, proposed sections 165A and 165B of the *Maritime Transport and Offshore Facilities Security Act 2003*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(v).

64 See paragraph (a) of item 5 of the table in section 7 of the Legislation (Exemptions and Other Matters) Regulation 2005.

65 Explanatory memorandum, p. 17.

need for operational security. For example, the bill could be amended to include a requirement that the number of exemptions issued under each Act must be included in the department's annual report. This would alert parliamentarians to the details of how the power is being exercised under each Act and provide opportunities for parliamentary debate.

1.105 The committee requests the minister's advice regarding the appropriateness of amending proposed section 94B of the *Aviation Transport Security Act 2004* and proposed section 165B of the *Maritime Transport and Offshore Facilities Security Act 2003* to require that the number of exemptions issued by the Secretary be reported in the department's annual report.

Treasury Laws Amendment (2019 Measures No. 3) Bill 2019

Purpose	Schedule 1 to this bill seeks to amend the *Income Tax Assessment Act 1936* to ensure the tax concessions available to minors in relation to income from a testamentary trust only apply in respect of income generated from assets of the deceased estate (or the proceeds of their disposal or investment) that are transferred to the testamentary trust. Schedule 2 seeks to amend the *Corporations Act 2001* to defer the transitional timeframes for existing providers to comply with the education and training standard requiring completion of an approved degree or equivalent qualification and the standard requiring the passing of an approved exam Schedule 3 seeks to make a number of technical amendments to laws relating to taxation, superannuation, corporations and credit
Portfolio	Treasury
Introduced	House of Representatives on 5 December 2019

Retrospective application[66]

Schedule 1 (testamentary trusts)

1.106 Schedule 1 to the bill seeks to amend Division 6AA of the *Income Tax Assessment Act 1936* to limit the tax concessions available to minors in relation to income from a testamentary trust. In particular, the amendments seek to limit concessional tax treatment to income derived from assets transferred from the deceased estate to the testamentary trust or subsequently accumulated. Item 3 of Schedule 1 provides that the amendments apply in relation to assets acquired by or transferred to the trustee of the testamentary trust estate on or after 1 July 2019.

1.107 The explanatory memorandum does not provide a justification as to why it is necessary that the amendments in Schedule 1 apply retrospectively.

Schedule 3 (miscellaneous amendments)

1.108 Items 2 and 3 of Schedule 3 seek to amend section 12GBCA of the *Australian Securities and Investments Commission Act 2001* to clarify that the maximum

66 Schedule 1, item 3, and Schedule 3, items 9 and 110. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

pecuniary penalty for the contravention of a civil penalty provision is 5,000 penalty units for an individual and 50,000 penalty units for a body corporate. Item 9 provides that the amendments apply from the day Schedule 2 to the *Treasury Laws Amendment Strengthening Corporate and Financial Sector Penalties) Act 2019* commenced, which was 13 March 2019. The statement of compatibility states:

> The retrospective application of the amendments has a rational connection to a legitimate objective. It corrects a technical error as a result of amendments made by the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019*. The amendments apply retrospectively to ensure that a period does not exist where parties could avoid all penalties for contravening civil penalty provisions.[67]

1.109 Items 107 to 109 of Schedule 3 correct cross references in the *Income Tax Assessment Act 1997* in relation to excluding liabilities that give rise to an income tax deduction from the 'allocable cost amount'. The 'allocable cost amount' is one of the elements used to reset the tax costs of the assets of an entity when that entity joins a consolidated group or multiple entry consolidated group. Item 110 of Schedule 3 provides that these amendments will apply in relation to an entity that becomes a subsidiary member of a consolidated group or multiple entry consolidated group under an arrangement that commenced on or after 1 July 2016. The explanatory memorandum states that:

> Retrospective application is appropriate in this instance to ensure that taxpayers who have been applying the law as intended are not disadvantaged and to prevent other taxpayers from obtaining unexpected windfall gains. Further, retrospective application is necessary to maintain symmetry between the entry and exit tax cost setting rules. That is, it prevents unintended consequences from arising for future exit tax cost setting calculations when a subsidiary member subsequently leaves the consolidated group or multiple entry consolidated group.[68]

Committee comment

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

1.111 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.

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67 Statement of compatibility, p. 54.

68 Explanatory memorandum, p. 33.

1.112 In light of the explanations provided in the explanatory memorandum as to the retrospective application of most of the amendments proposed by the bill, 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 in the bill on a retrospective basis.

Treasury Laws Amendment (Research and Development Tax Incentive) Bill 2019

Purpose	This bill seeks to reform the Research and Development Tax Incentive to improve its administrative framework, effectiveness and integrity
Portfolio/Sponsor	Treasury
Introduced	House of Representatives on 5 December 2019

1.113 The committee commented on a similar bill in the previous Parliament in *Scrutiny Digest 13 of 2018*.

1.114 **The committee draws senators' attention to its comments in relation to the earlier version of this bill.**[69]

69 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 13 of 2018*, pp. 28–32 (comments on the Treasury Laws Amendment (Making Sure Multinationals Pay Their Fair Share of Tax in Australia and Other Measures) Bill 2018).

Bills with no committee comment

1.1 The committee has no comment in relation to the following bills which were introduced into the Parliament between 2 December – 5 December 2019:

- Australian Business Growth Fund Bill 2019
- Business Names Registration (Fees) Amendment (Registries Modernisation) Bill 2019
- Climate Change Authority Amendment (Impact of 3 Degrees of Global Warming on Australia) Bill 2019
- Commonwealth Electoral Amendment (Lowering the Donation Disclosure Threshold) Bill 2019
- Corporations (Fees) Amendment (Registries Modernisation) Bill 2019
- Export Charges (Imposition – Customs) Amendment Bill 2019
- Export Charges (Imposition – Excise) Amendment Bill 2019
- Export Charges (Imposition – General) Amendment Bill 2019
- Export Control (Consequential Amendments and Transitional Provisions) Bill 2019
- Live Animal Export Prohibition (Ending Cruelty) Bill 2019
- Marine Safety (Domestic Commercial Vessels) National Law Amendment (Improving Safety) Bill 2019
- National Consumer Credit Protection Amendment (Mandatory Credit Reporting and Other Measures) Bill 2019
- National Consumer Credit Protection (Fees) Amendment (Registries Modernisation) Bill 2019
- Offshore Petroleum and Greenhouse Gas Storage Amendment (Cross-boundary Greenhouse Gas Titles and Other Measures) Bill 2019
- Offshore Petroleum and Greenhouse Gas Storage (Regulatory Levies) Amendment (Miscellaneous Measures) Bill 2019
- Public Governance, Performance and Accountability Amendment (Waiver of Debt and Act of Grace Payments) Bill 2019
- Saving Australian Dairy Bill 2019
- Telecommunications Amendment (Repairing Assistance and Access) Bill 2019
- Wine Australia Amendment (Label Directory) Bill 2019

Commentary on amendments and explanatory materials

Communications Legislation Amendment (Deregulation and Other Measures) Bill 2019

1.1 On 5 December 2019 the Minister for Forestry and Fisheries (Senator Duniam) tabled an addendum to the explanatory memorandum, and the bill was read a third time.

1.2 The committee thanks the minister for tabling this addendum to the explanatory memorandum which includes key information previously requested by the committee.[1]

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

- Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019;[2]
- Higher Education Support (HELP Tuition Protection Levy) Bill 2019;[3]
- Social Services Legislation Amendment (Payment Integrity) Bill 2019;[4]
- Special Recreational Vessels Bill 2019;[5] and

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1 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 9 of 2019*, 27 November 2019, pp 15 – 20.

2 On 4 December 2019 the Senate agreed to one Government request for an amendment, the Minister for Employment, Skills, Small and Family Business (Senator Cash) tabled a supplementary explanatory memorandum, and the bill was read a third time.

3 On 5 December 2019 the Senate agreed to four Government requests for amendments, the Minister for Employment, Skills, Small and Family Business (Senator Cash) tabled a replacement explanatory memorandum and a supplementary explanatory memorandum, and the bill was agreed to subject to requests.

4 On 2 December 2019 the Assistant Minister to the Prime Minister and Cabinet (Mr Morton) presented a correction to the explanatory memorandum, and the bill was read a third time.

5 On 3 December 2019 the House of Representatives agreed to two Government requests for amendments, the Assistant Minister for Waste Reduction and Environmental Management (Mr Evans) presented a supplementary explanatory memorandum, and the bill was read a third time. On 5 December 2019 the Minister for Finance (Senator Cormann) tabled a revised explanatory memorandum, and the bill was read a third time.

- VET Student Loans (VSL Tuition Protection Levy) Bill 2019.[6]

6 On 5 December 2019 the Senate agreed to four Government requests for amendments, the Minister for Employment, Skills, Small and Family Business (Senator Cash) tabled a replacement explanatory memorandum and a supplementary explanatory memorandum to the bill, and the bill was agreed to subject to requests.

Chapter 2

Commentary on ministerial responses

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

Australian Crime Commission Amendment (Special Operations and Special Investigations) Bill 2019

Purpose	This bill seeks to amend the *Australian Crime Commission Act 2002* to confirm the validity of current and former special Australian Crime Commission operations and special and special investigations determinations The bill also seeks to amend the *Australian Crime Commission Act 2002* to amend the process for the Australian Criminal Intelligence Board to make special operations and special investigation determinations
Portfolio	Home Affairs
Introduced	House of Representatives on 27 November 2019
Bill status	Received Royal Assent on 10 December 2019

Broad discretionary power[1] and no-invalidity clause[2]

2.2 In *Scrutiny Digest 10 of 2019* the committee requested the minister's advice as to why the Board had been provided with broad discretionary powers to authorise special operations or special investigations, and why it was necessary and appropriate to include a no-invalidity clause in relation to the actions of the Board in proposed subsection 7C(4C).[3]

Minister's response[4]

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

2 Schedule 1, item 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

3 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 1–5.

4 The minister responded to the committee's comments in a letter dated 10 January 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2020* available at www.aph.gov.au/senate_scrutiny_digest.

2.3 The minister advised:

> Prior to passage of the Bill, the Australian Criminal Intelligence Commission Board could determine that an operation or investigation was a special operation or investigation, where traditional law enforcement methods were unlikely to be or had not been effective. The Bill strengthened this threshold by replacing the existing tests with a public interest test. The new test requires that the Board must consider, on the basis of their collective experience, that it is in the public interest that the special operation or special investigation occur.
>
> The public interest test enables the Australian Criminal Intelligence Commission Board to consider all relevant matters in authorising a determination, rather than solely the utility of traditional law enforcement or criminal information/intelligence collection methods in the circumstances. The Australian Criminal Intelligence Commission Board is comprised of the heads of law enforcement agencies nationally, including all state and territory Police Commissioners, the Australian Federal Police Commissioner, the Commonwealth Director-General of Security, and others. As such, the Board is highly experienced in understanding the law enforcement and intelligence environment, and well-placed to make a public interest assessment.
>
> Further, the use of a 'public interest' test is well-established in the exercise of decision-making authority under Commonwealth and state and territory legislation (for example, under the *Public Interest Disclosure Act 2013* (Cth), *Freedom of Information Act 1982* (Cth) and the *Government Information (Public Access) Act 2009* (NSW)).

Committee comment

2.4 The committee thanks the minister for this response. The committee notes the minister's advice that the public interest test enables the Australian Criminal Intelligence Commission Board to consider all relevant matters in authorising a determination, rather than solely the utility of traditional law enforcement or criminal information/intelligence collection methods in the circumstances.

2.5 The committee also notes the minister's advice that the use of a 'public interest' test is well-established in the exercise of decision-making authority under Commonwealth and state and territory legislation.

2.6 However, the committee reiterates that the changes in the bill significantly expand the discretionary power of the Board to authorise a special operation or special investigation. From a scrutiny perspective, the committee does not consider that the information provided by the minister is sufficient to justify the expansion of such a broad discretionary power, noting the potential for such a power to significantly trespass on individual rights and liberties.

2.7 The committee also notes that the minister's response does not address the appropriateness of including a no-invalidity clause in relation to the actions required

of the Board in subsection 7C(4C). The committee reiterates that there are significant scrutiny concerns with no-invalidity clauses as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. For example, as the conclusion that a decision is not invalid means that the decision-maker had the power (i.e. jurisdiction) to make it, review of the decision on the grounds of jurisdictional error is unlikely to be available. The result is that some of judicial review's standard remedies will not be available. Consequently, from a scrutiny perspective, the committee expects a sound justification for the inclusion of a no-invalidity clause and notes that no explanation has been provided by the minister in this instance.

2.8 Noting the limited explanation provided in the explanatory materials and the minister's response, the committee continues to have scrutiny concerns regarding the provisions of the bill. However, in light of the fact that the bill has already passed both Houses of Parliament, the committee makes no further comment on these matters.

Retrospective validation[5]

2.9 In *Scrutiny Digest 10 of 2019* the committee requested the minister's advice as to why it was necessary and appropriate to retrospectively validate both determinations of the Board and the exercise of powers done in connection with any special operation or investigation; the number of persons who may be affected and whether they would suffer a detriment as a result; and whether there are any current matters before the courts that may be affected, and the extent to which they may be affected.[6]

Minister's response[7]

2.10 The minister advised:

> The ability of the Australian Criminal Intelligence Commission to undertake special operations and special investigations is a key part of its critical role to detect, prevent and disrupt the most serious criminal offending, including emerging organised crime threats, high risk and emerging drug markets, firearms trafficking, and outlaw motorcycle gangs. The Australian Criminal Intelligence Commission Board has been making special operation and special investigation determinations in the same way for at least 10

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5 Schedule 1, items 55 and 56. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

6 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 1–5.

7 The minister responded to the committee's comments in a letter dated 10 January 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2020* available at www.aph.gov.au/senate_scrutiny_digest.

> years, which have been challenged and upheld by intermediate appellate courts on a number of occasions.
>
> While the legality of previous determinations have been upheld, given the critical role of the Australian Criminal Intelligence Commission in combatting serious and organised crime, the Government has a responsibility to provide certainty regarding the status of special operation and special investigation determinations. As such, the Bill contained technical provisions to validate current and former special operation and special investigation determinations, and to provide clarity regarding the validity of future special operation and special investigation determinations.
>
> The validation provisions in the Bill ensure that the Australian public has certainty regarding the status of the activities of the Australian Criminal Intelligence Commission. They also support the Australian Criminal Intelligence Commission to continue to fulfil its important statutory role working towards a safer Australia, and engage with law enforcement and intelligence partners without interruption.

Committee comment

2.11 The committee thanks the minister for this response. The committee notes the minister's advice that while the legality of previous determinations have been upheld, given the critical role of the Australian Criminal Intelligence Commission in combatting serious and organised crime, the Government has a responsibility to provide certainty regarding the status of special operation and special investigation determinations.

2.12 The committee also notes the minister's advice that the validation provisions in the bill ensure that the Australian public has certainty regarding the status of the activities of the Australian Criminal Intelligence Commission.

2.13 The committee reiterates that 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 validation has the potential to undermine these values.

2.14 The committee reiterates its consistent scrutiny view that the fact that a court overturns previous authority (or may in the future overturn previous authority) is not, in itself, a sufficient basis for Parliament to retrospectively reinstate the earlier understanding of the previous legal position. In saying this, when a precedent is overturned this itself necessarily has a retrospective effect and may overturn legitimate expectations about what the law requires. Nevertheless, the committee considers that where Parliament acts to retrospectively validate decisions which are put at risk it is necessary for Parliament to consider:

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

2.15 The committee notes that the minister's response does not address the committee's questions regarding the number of persons who may be affected by this retrospective validation, whether any affected persons would suffer a detriment as a result and whether there are any current matters before the courts that may be affected. The committee therefore continues to have scrutiny concerns regarding the effect of this retrospective validation and notes that its concerns have not been adequately addressed by the minister.

2.16 Noting the limited explanation provided in the explanatory materials and the minister's response, the committee continues to have scrutiny concerns regarding the provisions of the bill. However, in light of the fact that the bill has already passed both Houses of Parliament, the committee makes no further comment on this matter.

Financial Sector Reform (Hayne Royal Commission Response – Protecting Consumers (2019 Measures)) Bill 2019

Purpose	This bill seeks to amends Acts in relation to unfair contract terms and insurance contracts, funeral expenses facilities, funeral benefits, mortgage brokers and mortgage intermediaries Schedule 1 seeks to extend the existing protection of unfair contract terms regime under the *Australian Securities and Investments Commission Act 2001* (ASIC Act) to insurance contracts governed by the *Insurance Contracts Act 1984* Schedule 2 seeks to ensure that the consumer protection provisions of the ASIC Act apply to funeral expenses policies Schedule 3 seeks to amend the *National Consumer Credit Protection Act 2009* to: • require mortgage brokers to act in the best interests of consumers; and • address conflicted remuneration for mortgage brokers
Portfolio/Sponsor	Treasury
Introduced	House of Representatives on 28 November 2019
Bill status	Before House of Representatives

Significant matters in delegated legislation[8]

2.17 In *Scrutiny Digest 10 of 2019* the committee requested the Treasurer's more detailed advice as to why it is considered necessary and appropriate to leave the circumstances in which a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned, to regulations; and whether it is appropriate for the bill to be amended to include at least high-level guidance in relation to these matters on the face of the primary legislation.[9]

8 Schedule 3, item 5, proposed section 158NA of the *National Consumer Credit Protection Act 2009*, and item 6, proposed item 3 of Schedule 10 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*. The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 6-8.

Minister's response[10]

2.18 The Treasurer advised:

Issue 1: Use of Regulations

The Committee raised concerns about the potential for significant matters to be included in regulations.

The regulation-making power, which provides for regulations about when a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned is justified in recognition of the need to account for the variety of and complexity of benefits that may be given to mortgage brokers and mortgage aggregators in relation to credit assistance, and the variety of situations in which such payments may be given. Under these circumstances, the ability that the regulation-making power provides for the regime to respond to changes in industry practice and to ensure that the new regime operates for the benefit of consumers is important.

Further, regulations in relation to the circumstances in which a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned, will only have applicability in relation to a limited class of persons. Specifically, they will only have effect in relation to the giving of benefits to, or the acceptance of benefits by, mortgage brokers and mortgage intermediaries and their representatives.

Given the limited class of persons in relation to which the ban on conflicted remuneration in the Bill would apply, it is appropriate that the detail of these matters is dealt with in regulations, rather than in the primary law. If these matters were to be inserted into the *National Consumer Credit Protection Act 2009* (the Act), they would insert, into an already complex statutory framework, a set of technical and specific provisions that would apply only to a relatively small group of persons. This would result in additional cost and unnecessary complexity for other users of the Act.

While I note the Committee's concerns about the penalties that may be applicable as a consequence of matters described in part in the regulations, only civil penalties are applicable for breaches of the provisions concerned and that the penalties prescribed represent maximum penalties. These penalties would be set in the primary law, and would be consistent with other civil penalty provisions in the Act. A person liable to these penalties would be either a credit licensee or credit representative. This is consistent with the scheme of the Act, which holds these persons to high standards of accountability, in recognition of the

10 The minister responded to the committee's comments in a letter dated 18 December 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

responsibilities that accrue to holding a credit licence or to being authorised as a credit representative.

Issue 2: Amendments to the Bill

The existing provisions in the Bill provide an appropriate level of direction in the exercise of the regulation-making powers. In particular, the Bill contains limitations on the circumstances in which conflicted remuneration may be banned under the regulations. Specifically, the regulations may only prescribe the giving or accepting of conflicted remuneration when a benefit is given to a mortgage broker or mortgage intermediary, or the benefit is accepted by a mortgage broker or mortgage intermediary. As noted above, this is a limited class of persons. The penalties themselves, and the framework of the civil penalty provisions, would be set out in the primary law.

Further, any regulations made under the provisions in the Bill would be subject to parliamentary scrutiny, including the potential for disallowance by either House of Parliament, and would be subject to the consultation requirements set out in the *Legislation Act 2003* before any regulation is made.

Committee comment

2.19 The committee thanks the Treasurer for this response. The committee notes the Treasurer's advice that the regulation-making power, which provides for regulations about when a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned is justified in recognition of the need to account for the variety of and complexity of benefits that may be given to mortgage brokers and mortgage aggregators in relation to credit assistance, and the variety of situations in which such payments may be given. The committee further notes the Treasurer's advice that under these circumstances, the ability that the regulation-making power provides for the regime to respond to changes in industry practice and to ensure that the new regime operates for the benefit of consumers is important.

2.20 The committee further notes the Treasurer's advice that regulations in relation to the circumstances in which a benefit will or will not be conflicted remuneration, as well as the circumstances in which conflicted remuneration is banned, will only have applicability in relation to a limited class of persons. Specifically, they will only have effect in relation to the giving of benefits to, or the acceptance of benefits by, mortgage brokers and mortgage intermediaries and their representatives.

2.21 The committee also notes the Treasurer's advice that given the limited class of persons in relation to which the ban on conflicted remuneration in the bill would apply, it is appropriate that the detail of these matters is dealt with in regulations, rather than in the primary law.

2.22 While noting this advice, the committee reiterates that it has consistently raised scrutiny concerns about bills which rely heavily on delegated legislation to determine the scope and operation of a scheme. As the detail of the delegated legislation is generally not publicly available when Parliament is considering the bill, this considerably limits the ability of the Parliament to have appropriate oversight over new legislative schemes. In this instance, the committee continues to have scrutiny concerns regarding the extent to which the regulations may determine the scope and operation of the conflicted remuneration scheme.

2.23 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:

- **define the circumstances in which a benefit is or is not conflicted remuneration;[11] and**
- **prescribe circumstances in which the ban on conflicted remuneration applies, or does not apply, to a benefit.[12]**

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

11 Schedule 3, item 5, proposed section 158NA of the *National Consumer Credit Protection Act 2009*.

12 Schedule 3, item 6, proposed item 3 of Schedule 10 to the *National Consumer Credit Protection (Transitional and Consequential Provisions) Act 2009*.

Interactive Gambling Amendment (National Self-exclusion Register) Bill 2019

Purpose	This bill seeks to amend *Interactive Gambling Act 2001* to establish a Nation Self-exclusion Register
Portfolio/Sponsor	Social Services
Introduced	House of Representatives on 27 November 2019
Bill status	Received Royal Assent on 12 December 2019

Reversal of the evidential burden of proof[13]

2.25 In *Scrutiny Digest 10 of 2019* the committee requested the minister's advice as to why it is proposed to use offence-specific defences (which reverse the evidential burden of proof). The committee noted that it's consideration of the appropriateness of each provision which reverses the burden of proof is assisted if the advice explicitly addresses the relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[14]

Minister's response[15]

2.26 The minister advised:

> The Committee has raised concerns regarding the reversal of evidential burden of proof for the offence-specific defences set out in the Interactive Gambling Amendment (National Self-exclusion Register) Bill 2019 (Bill).
>
> As noted by the Committee, the *Australian Government Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* states that placing the burden of proof on the defendant should be limited to where the matter is peculiarly within the knowledge of the defendant, and where it is significantly more difficult and costly for the prosecution to disprove than for the defendant to establish the matter.
>
> It is appropriate in the context of the National Self-Exclusion Register scheme (Register) that the defendant, that is, a licensed interactive

13 Schedule 1, item 9, proposed subsections 61JP(7), 61KA(5), 61LA(6), 61LB(3), 61LC(3), 61LD(3), 61MA(3), 61MB(4), 61MC(4), 61NB(3). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(i).

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 9–13.

15 The minister responded to the committee's comments in a letter dated 20 December 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2020* available at www.aph.gov.au/senate_scrutiny_digest.

wagering service provider (IWSP), bears the evidential burden for these defences.

In regards to these offences, it remains the responsibility of the prosecution to discharge the evidential and legal burden of proof in respect of each of the elements of an offence, including the required fault element. The offence-specific defences would only require that the defendant discharge the evidential burden in regards to that defence. The legal burden of proving the defence would remain on the prosecution.

The offence-specific defences in the Bill fall into three classes:

- that the IWSP took reasonable precautions, and exercised due diligence, to avoid the contravention (found in subsections 61KA(5), 61LA(6), 61LB(3), 61LC(3), 61LD(3), 61MA(3), 61MB(3) and 61MC(4));
- that the IWSP's disclosure was authorised under specified laws (subsection 61NB(3)); and
- that the contravention occurred in circumstances prescribed by the register rules (subsection 61JP(7)).

Defences of reasonable precautions and due diligence

The form of reasonable precautions and due diligence that need to be taken in relation to an offence is not set out in the statute, and will vary with each IWSP. The Australian Communications and Media Authority (the ACMA), or the Register operator themselves, would not be privy to the business practices of the IWSP, or have access to their internal systems or databases. As such, the nature of those precautions and due diligence taken by an IWSP is knowledge that is peculiarly within the knowledge of the lWSP.

Evidence relevant to this defence would be held by the IWSP in question, and it would be complex for the prosecution to provide evidence that the IWSP does not have a defence. As such it would be significantly more difficult and costly for the ACMA to disprove that an IWSP had exercised due diligence and had taken reasonable precautions to avoid a contravention than it would be for the IWSP to prove.

Defence of authorised under specified laws

The exception under subsection 61NB(3) provides a defence where a disclosure is authorised under a law listed in the paragraphs to that subsection. This is a limited restatement of the general defence of lawful authority found in section 10.5 of the Criminal Code. Under subsection 13.3(2) of the Criminal Code, a defendant who wishes to deny criminal responsibility by way of the defence in section 10.5 bears the evidential burden in relation to that defence.

As the defence in subsection 61NB(3) is simply a limited restatement of the existing general defence in subsection 13.3(2) of the Criminal Code, and is not intended to provide additional protections beyond the general defence it is appropriate that the same evidential burden apply.

Defence that prescribed circumstances apply

The exception under subsection 61JP(7) provides a defence where the contravention occurred in certain prescribed circumstances. Under the prosecution policy of the Commonwealth the Commonwealth Director of Public Prosecutions (the CDPP) would consider any defences available to the alleged offender in determining whether to commence a prosecution, and so if the CDPP is aware a prescribed circumstance exists, they would be unlikely to commence a prosecution. It would only be when the details of the mitigating circumstance are peculiarly within the knowledge of the defendant that the matter would go to trial.

Committee comment

2.27 The committee thanks the minister for this response. The committee notes the minister's advice that, in relation to the defences of reasonable precautions and due diligence, evidence relevant to this defence would be held by the licensed interactive wagering service provider (IWSP) in question, and it would be complex for the prosecution to provide evidence that the IWSP does not have a defence.

2.28 The committee also notes the minister's advice that the exception under subsection 61NB(3) provides a defence where a disclosure is authorised under a law listed in the paragraphs to that subsection and that this is a limited restatement of the general defence of lawful authority found in section 10.5 of the Criminal Code. The committee further notes the minister's advice that as it is not intended to provide additional protections beyond the general defence it is appropriate that the same evidential burden apply.

2.29 The committee further notes the minister's advice that, in relation to subsection 61JP(7), under the prosecution policy of the Commonwealth the Commonwealth Director of Public Prosecutions (the CDPP) would consider any defences available to the alleged offender in determining whether to commence a prosecution, and so if the CDPP is aware a prescribed circumstance exists, they would be unlikely to commence a prosecution. The committee takes this opportunity to reiterate its longstanding scrutiny view that it does not consider non-legislative policy guidance to be a sufficient justification for the use of offence-specific defences, noting there is no parliamentary oversight of changes to such policy guidance. From a scrutiny perspective, the committee therefore does not consider that the use of an offence-specific defence in this instance has been appropriately justified.

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

Computerised decision-making[16]

2.31 In *Scrutiny Digest 10 of 2019* the committee requested the minister's more detailed advice as to why it is considered necessary and appropriate to permit the Register operator to arrange for the use of computer programs for any purpose for which the Register operator may or must take administrative action; whether consideration has been given to how automated decision-making processes will comply with administrative law requirements (for example, the requirement to consider relevant matters and the rule against fettering of discretionary power); and whether consideration has been given to including guidance on the face of the bill as to the types of administrative actions (for example, complex or discretionary decisions) that must be taken by a person rather than by a computer.[17]

Minister's response

2.32 The minister advised:

> The Committee has raised concerns regarding computerised decision-making, and requested further justification as to why it is appropriate to permit the Register operator to arrange for the use of computer programs.
>
> As mentioned in the Explanatory Memorandum of the Bill, the reasoning for applying section 61QA broadly across the proposed part 7B of the *Interactive Gambling Act 2001* (IGA) is to ensure that aspects of the Register scheme are able to be automated where suitable (for example registration). This is particularly relevant, given the Register is an online scheme. Allowing for computerised decision-making will also support future developments in technology, preventing the need for legislation to be continuously amended.
>
> This is expected to streamline the exclusion process for individuals wishing to ban themselves from interactive wagering services, reduce the administrative work for the Register operator, and critically, assist in achieving privacy outcomes for consumers (as personal information would mostly be handled by automated processes). This is also consistent with the intent of the National Policy Statement (Statement) for the National Consumer Protection Framework (National Framework), as agreed by all Australian Governments. Specifically, the Statement sets out that the Register must be quick and simple for a consumer to apply to, and take immediate effect upon registration.
>
> It should be noted that the Bill does not prescribe a particular set of activities for which computerised-decision making would be allowed. Once the Register operator is engaged and during the design of the system,

16 Schedule 1, item 9, proposed section 61QA. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii) and (iii).

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 9-13.

> consideration will be given to what decisions are suitable for automation, in line with administrative law requirements. The ACMA, and the body corporate that it procures to be the Register operator, would be the most appropriately placed to determine which of its decisions could be automated, guided by best practice administrative principles and relevant legislation. Only decisions which are by their nature suitable for automation, will be automated.
>
> In general, it is recognised that these will be decisions where particular facts are reliable, and do not require complex assessment. For example, this may include assessment of the information a consumer provides, and whether the required criteria has been met for the purpose of adequate verification. It is expected that complex administrative decisions would not be covered by automated decision making.
>
> How these processes will work in-practice will be further informed through the ACMA's processes to implement the Register. Ensuring the Register operator has integrity, and has the capability to meet both the legislative framework and consumer protection outcomes, will be a key consideration when implementing the Register. The Register scheme will also be extensively trialled and tested, prior to it becoming operational for consumers.

Committee comment

2.33 The committee thanks the minister for this response. The committee notes the minister's advice that the use of computerised decision-making is expected to streamline the exclusion process for individuals wishing to ban themselves from interactive wagering services, reduce the administrative work for the Register operator, and assist in achieving privacy outcomes for consumers (as personal information would mostly be handled by automated processes).

2.34 The committee further notes the minister's advice that the ACMA, and the body corporate that it procures to be the Register operator, would be the most appropriately placed to determine which of its decisions could be automated, guided by best practice administrative principles and relevant legislation and that only decisions which are by their nature suitable for automation, will be automated.

2.35 While noting the minister's advice, from a scrutiny perspective, the committee does not consider that it adequately justifies why it is necessary and appropriate for the bill to permit the Register operator to arrange for the use of computer programs for *any purpose* for which the Register operator may or must take administrative action, noting the lack of guidance on the face of the bill as to the types of administrative actions that must be taken by a person rather than a computer.

2.36 The committee notes that the bill has already passed both Houses of the Parliament. The committee considers that when future changes to the *Interactive Gambling Act 2001* are being formulated consideration should be given to limiting

the types of decisions that will be subject to computerised decision-making on the face of the Act.

Significant matters in delegated legislation

Adequacy of review rights[18]

2.37 In *Scrutiny Digest 10 of 2019* the committee requested the minister's advice as to why it is necessary and appropriate to leave significant matters, such as how a complaints process will operate, to delegated legislation; whether it would be appropriate for the bill to be amended to include at least high-level guidance regarding the complaints process on the face of the primary legislation, and provide that the Register rules must, rather than may, set out procedures that must be followed by the Register operator for dealing with complaints; and whether judicial review and independent merits review of decisions made by the Register operator will be available.[19]

Minister's response

2.38 The minister advised:

> The Committee has raised concerns regarding the appropriateness of leaving the details of the complaints process to delegated legislation, and whether judicial review and independent merits review of decisions made by the Register operator will be available.
>
> Section 61QB of the Bill specifically deals with making complaints to the Register operator about the administration or operation of the Register, rather than complaints more broadly. These processes have been delegated to the Register Rules, in order to allow the ACMA to prescribe requirements once the Register operator has been procured and the system has been designed, to provide flexibility regarding operational aspects of the scheme (including complaints made directly to the Register operator). If this was prescribed by legislation, there is a risk that the process would not prove sufficiently flexible as the scheme is developed.
>
> On this basis, the use of delegated legislation is necessary. Further, the Register Rules are subject to scrutiny by Parliament, and may be disallowed.
>
> An independent merit review process is not generally required for decisions created under the Bill, as decisions the Register operator may make are of the nature of automatic or mandatory decisions, where there

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18 Schedule 1, item 9, proposed section 61QB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii) and (iv).

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 9-13.

> is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances. This leaves nothing on which merits review can operate.
>
> There will be a limited degree of discretion for the ACMA to make a decision to remit the whole or a part of an amount of late payment penalty in section 61PB, for which there is a right to seek review by the Administrative Appeals Tribunal.
>
> Affected individuals will also be able to pursue further action through other mechanisms if necessary, including through the ACMA and Office of the Australian Information Commissioner (OAIC). Specifically, Part 3 of the IGA sets out procedures for making complaints to the ACMA regarding contravention of the IGA, whereas the OAIC has processes already in place for making complaints regarding how personal information has been handled. I also note that a judicial review would also be available to consumers if necessary due to operation of the *Administrative Decisions (Judicial Review) Act 1977*, section 75(v) of the Constitution or section 39B of the *Judiciary Act 1903*.

Committee comment

2.39 The committee thanks the minister for this response. The committee notes the minister's advice that the details of the complaints process has been delegated to the Register Rules, in order to allow the ACMA to prescribe requirements once the Register operator has been procured and the system has been designed, to provide flexibility regarding operational aspects of the scheme (including complaints made directly to the Register operator).

2.40 While noting the minister's advice, the committee has generally not accepted a desire for administrative flexibility as a sufficient justification for leaving significant elements of a legislative scheme to delegated legislation.

2.41 The committee also notes the minister's advice that an independent merits review process is not generally required for decisions created under the bill, as decisions the Register operator may make are of the nature of automatic or mandatory decisions, where there is a statutory obligation to act in a certain way upon the occurrence of a specified set of circumstances. The committee further notes the minister's advice that this leaves nothing on which merits review can operate.

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

Parliamentary scrutiny: tabling of documents in Parliament[20]

2.43 In *Scrutiny Digest 10 of 2019* the committee requested the minister's advice as to whether proposed section 61QG of the bill can be amended to provide that the evaluation report be tabled in each House of the Parliament (as is currently provided for in proposed subsection 61QF(4) in relation the 12-month review report).[21]

Minister's response

2.44 The minister advised:

> The Committee has raised concerns regarding the impact on parliamentary scrutiny of not providing for the evaluation report, which will be undertaken three years following the Register being operational, to be tabled in Parliament.
>
> Regarding section 61QG, it was considered that the report being made publicly available through the Department of Social Services website would provide for sufficient transparency regarding the effectiveness of the Register scheme.
>
> Further it is anticipated that the evaluation forms part of broader evaluation of the National Framework, of which the Register comprises one of 10 measures. The National Framework as a whole aims to reduce the harm that can be caused by online wagering. This means that the evaluation report will not be limited to measures that are being implemented by the Commonwealth, such as the Register. Rather, the evaluation report will assess the effectiveness of all 10 measures under the National Framework in achieving outcomes for consumers as a package, while also assessing that the measures are effective. This includes to inform ongoing refinements identify unintended consequences, and identify potential weaknesses in the regulatory framework.
>
> Given the scope of this evaluation, and the fact that the National Framework is a joint initiative with state and territory governments, it is intended that the reports would be provided to all governments before being made publicly available.

Committee comment

2.45 The committee thanks the minister for this response. The committee notes the minister's advice that it was considered that the report being made publicly available through the Department of Social Services website would provide for sufficient transparency regarding the effectiveness of the Register scheme. The

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20 Schedule 1, item 9, proposed section 61QG. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

21 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 9-13.

committee also notes the minister's advice that the evaluation will form part of a broader evaluation as part of a joint initiative with state and territory governments.

2.46 The committee reiterates that not providing for the evaluation report to be tabled in Parliament reduces the scope for parliamentary scrutiny, including appropriate parliamentary scrutiny of the national framework. The process of tabling documents in Parliament alerts parliamentarians to their existence and provides opportunities for debate that are not available where documents are only published online. As such, the committee expects there to be appropriate justification for not including a requirement for review reports to be tabled in Parliament. While noting the minister's advice, from a scrutiny perspective, the committee does not consider that the minister's response has provided a sufficient justification in this instance.

2.47 The committee notes that the bill has already passed both Houses of the Parliament. The committee considers that when future changes to the *Interactive Gambling Act 2001* are being formulated consideration should be given to amending section 61QG of the Act to provide that the evaluation report must be tabled in each House of the Parliament.

Migration Amendment (Regulation of Migration Agents) Bill 2019

Purpose	This bill seeks to amend *Migration Act 1958* (Migration Act) to: • remove unrestricted legal practitioners from the regulatory scheme that governs migration agents; • allow eligible restricted legal practitioners to be both registered migration agents and restricted legal practitioners for a period of up to two years; • ensure 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 rather than on the face of the Migration Act, and remove the 12 month time limit within which a person must apply for registration following completion of a prescribed course; • repeal various provisions that reference regulatory arrangements that are no longer in place; • allow the Migration Agents Registration Authority (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 by making a statutory declaration or appearing before the MARA; • require registered migration agents to notify the MARA if they have paid the non-commercial application charge in relation to their current period of registration but give immigration assistance otherwise than on a non-commercial basis; and • ensure that the definitions of 'immigration assistance' and 'makes immigration representations' include assisting a person in relation to a request to the Minister to exercise his or her power under section 501C or 501CA of the Migration Act to revoke a character-related visa refusal or cancellation decision
Portfolio/Sponsor	Home Affairs
Introduced	House of Representatives on 27 November 2019
Bill status	Before the House of Representatives

Strict liability[22]

2.48 In *Scrutiny Digest 10 of 2019* the committee requested the minister's advice as to the necessity and appropriateness of the offence in proposed subsection 312(4) to be one of strict liability with a penalty of 100 penalty units. The committee noted that its consideration of this is assisted if it explicitly addresses relevant principles as set out in the *Guide to Framing Commonwealth Offences*.[23]

Minister's response[24]

2.49 The minister advised:

> Under new subsection 312(4) of the *Migration Act 1958* (the Act), inserted by item 25 of Schedule 1 to the Bill, a migration agent is required to notify the Migration Agents Registration Authority (MARA) in writing within 28 days after the agent becomes a restricted legal practitioner or an unrestricted legal practitioner. It is further provided under new subsection 312(5) that failure to comply with subsection 312(4) is a strict liability offence with a maximum penalty of 100 penalty units.
>
> This information is required for MARA to determine whether a registered migration agent is an eligible restricted legal practitioner or an unrestricted legal practitioner. If they are a restricted legal practitioner who is not eligible or an unrestricted legal practitioner, then their registration must be cancelled by the MARA in accordance with new section 302A.
>
> The definition of strict liability is subject to the definition contained in the Criminal Code, which allows the defence of honest and reasonable mistake of fact. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that 'a defendant must turn his or her mind to the existence of the facts, and be under a mistaken but reasonable belief about those facts.' Therefore, although the offence is one of strict liability, a migration agent has a defence if he or she can demonstrate making a reasonable mistake of fact to notify the MARA of their change in circumstances as a legal practitioner.
>
> The application of strict liability to this offence significantly enhances the ability of the MARA to effectively regulate the migration agent industry. Requiring the MARA to prove guilt to a higher standard would undermine deterrence by the MARA.

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22 Schedule 1, item 25. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i).

23 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 14-17.

24 The minister responded to the committee's comments in a letter dated 10 January 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2020* available at www.aph.gov.au/senate_scrutiny_digest.

The 100 penalty units for failing to comply with new subsection 312(4) is consistent with other notification provisions within the Act. Other parts of subsection 312(1), which have not been repealed and replaced, provide that a registered migration agent must notify the MARA in writing within 14 days of the following events, failure of which to do so are offences of strict liability, incurring the penalty of 100 penalty units:

(a) he or she becomes bankrupt;

(b) he or she applies to take the benefit of any law for the relief of bankrupt or insolvent debtors;

(c) he or she compounds with his or her creditors;

(d) he or she makes an assignment of remuneration for the benefit of his or her creditors;

(e) he or she is convicted of an offence under a law of the Commonwealth or of a State or Territory;

(f) he or she becomes an employee, or becomes the employee of a new employer, and will give immigration assistance in that capacity;

(fa) he or she becomes a member of a partnership and will give immigration assistance in that capacity;

(g) if he or she is a member or an employee of a partnership and gives immigration assistance in that capacity — a member of the partnership becomes bankrupt;

(h) if he or she is an executive officer or an employee of a corporation and gives immigration assistance in that capacity:

- *a receiver of its property or part of its property is appointed; or*
- *it begins to be wound up.*

Committee comment

2.50 The committee thanks the minister for this response. The committee notes the minister's advice that the application of strict liability to this offence significantly enhances the ability of the Migration Agents Registration Authority (MARA) to effectively regulate the migration agent industry and that requiring the MARA to prove guilt to a higher standard would undermine deterrence by the MARA.

2.51 The committee also notes the minister's advice that the 100 penalty units for failing to comply with new subsection 312(4) is consistent with other notification provisions within the Act.

2.52 While noting the explanation provided by the minister, from a scrutiny perspective, the committee remains concerned about the application of strict liability to an offence carrying a penalty of 100 penalty units. In this regard, the committee reiterates that the *Guide to Framing Commonwealth Offences* states that the

application of strict liability is only considered appropriate where the relevant offence is only punishable by up to 60 penalty units.[25]

2.53 Making an offence one of strict liability removes the requirement for the prosecution to prove the defendant's fault. This undermines the fundamental criminal law principle that 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). From a scrutiny perspective, the committee does not consider consistency with existing penalties to be sufficient justification for applying strict liability in circumstances in which the penalty is inconsistent with the recommendations of the *Guide to Framing Commonwealth Offences*.

2.54 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of imposing strict liability for an offence attracting a penalty of 100 penalty units.

Broad delegation of administrative powers[26]

2.55 In *Scrutiny Digest 10 of 2019* the committee requested the minister's advice as to:

- why it is considered necessary to allow for the minister to delegate *any* of the powers or functions given to the Migration Agents Registration Authority to APS employees at any level; and
- whether the bill can be amended to provide 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

2.56 The minister advised:

> The delegation of power at proposed subsection 320(1) is appropriate and consistent with the current framework of the Act.
>
> It is currently the case that powers and functions of the MARA under Part 3 of the Act are delegated to a person in the Department who is appointed or engaged under the *Public Service Act 1999*. The committee may note that the proposed amendment to subsection 320(1) does not extend the delegation of administrative powers; rather it provides that the Minister may delegate the MARA's powers and functions under Part 3 of

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

26 Schedule 3, item 16, proposed subsection 320(1). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(ii).

> the Act more specifically to an APS employee in the Department. The use of the term "APS employee" is consistent with the *Acts Interpretation Act 1901*.
>
> Any attempt to restrict the level of delegation to SES or Executive level employees in the Act would create an unnecessary administrative and legislative burden, as it may require a change to the Act each time there was a restructure to the administrative arrangements of the MARA. Further, the Committee may not be aware that, while the MARA reports to a SES Band 1, there are currently no SES level positions within the MARA itself. Delegation to the SES level would therefore be impractical in this instance.
>
> Further, the existing powers and functions under Part 3 of the Act have been delegated by the Minister and have been working effectively, with no findings of inappropriate use or abuse of powers having been made against the MARA under these arrangements.

Committee comment

2.57 The committee thanks the minister for this response. The committee notes the minister's advice that any attempt to restrict the level of delegation to SES or Executive level employees in the Act would create an unnecessary administrative and legislative burden, as it may require a change to the Act each time there was a restructure to the administrative arrangements of the MARA.

2.58 The committee also notes that while the MARA reports to a SES Band 1, there are currently no SES level positions within the MARA itself and that delegation to the SES level would therefore be impractical in this instance.

2.59 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, that a limit is set on the scope and type of powers that may be delegated. While the committee notes the minister's advice as to the effective working of the current arrangements, the committee will continue to have scrutiny concerns where broad delegations of administrative power may be made to APS employees at any level.

2.60 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of allowing the minister to delegate *any* of the powers or functions given to the Migration Agents Registration Authority to APS employees at any level.

Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019

Purpose	This bill seeks to amend the *Student Identifiers Act 2014* to: • expand the range of entities that may request access to an individual's authenticated vocational education and training transcript; • create a civil penalty and infringement notice regime; • allow the Student Identifiers Registrar's to grant exemption to the requirement to hold a Unique Student Identifier; and • make minor technical changes in relation to funds held in the Student Identifiers Special Account
Portfolio/Sponsor	Employment, Skills, Small and Family Business
Introduced	House of Representatives on 28 November 2019
Bill status	Before the House of Representatives

Significant matters in delegated legislation[27]

2.61 In *Scrutiny Digest 10 of 2019* the committee requested the minister's more detailed advice as to why it is considered necessary and appropriate to leave the matters to be considered when making a determination under proposed subsection 53(6) to delegated legislation; and whether it would be appropriate for the bill to be amended to set out at least high-level guidance in relation to the relevant matters on the face of the primary legislation.[28]

Minister's response[29]

2.62 The minister advised:

> The Committee sought advice on why matters that the Registrar is to have regard to when permitting a student an exemption from the requirement to hold a unique student identifier (USI) are to be prescribed in a

27 Schedule 1, item 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

28 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 18-20.

29 The minister responded to the committee's comments in a letter dated 19 December 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2020* available at www.aph.gov.au/senate_scrutiny_digest.

legislative instrument, and why guidance could not be included on the face of the primary legislation.

The amendments proposed by the Bill in this respect do not significantly alter existing arrangements under section 53 of the Student Identifiers Act 2014 (the Act). Rather, the amendments propose to clarify that there is an express power and process to seek an exemption and to clarify the Registrar's powers to grant an exemption. That is, the amendments to section 53 of the Act observed by the Committee primarily propose to clarify the procedural aspects of seeking and granting an exemption. As is the case for the current law, the amendments will require the Registrar, before granting an exemption, to have regard to any matters set out in a legislative instrument made by the Minister.

Prior to the amendments proposed by the Bill, section 53 of the Act relevantly provides that a registered training organisation (RTO) must not issue a vocational education and training (VET) qualification or VET statement of attainment to an individual if the individual has not been assigned a USI, unless an "issue" applies. Currently, I have the power to, with the agreement of the Ministerial Council, make a legislative instrument that specifies such "issues". The effect of the existing provision is to allow the legislative instrument to outline cases where an exemption to the requirement to hold a USI applies.

Whether or not a student is actually issued their VET qualification or VET statement of attainment is not strictly determined by whether an exemption applies. An exemption decision simply dictates whether an RTO can issue a VET qualification or VET statement of attainment where the student does not have a USI. Under the current law, I have made the Student Identifiers (Exemptions) Instrument 2018 (the Exemptions Instrument) setting out a number of circumstances in which an exemption currently applies.

The Committee's view is that 'significant matters, such as the matters to be considered when making a determination to exempt a student from the requirement to have a USI, should be included in the primary legislation unless a sound justification for the use of delegated legislation is provided.'

Including the matters in a legislative instrument that the Registrar is required to take into account when granting an exemption ensures the USI regime continues to be able to adapt to the changing circumstances of students. This is important, since new and genuine reasons may emerge, justifying a student's exemption from the requirement to be issued a USI. The legislative instrument making power is proposed to give the Commonwealth Minister the flexibility to be able to respond to those new circumstances in a manner that is beneficial for students, while ensuring the ongoing integrity of the USI regime. For example, the Exemptions Instrument was remade in 2018 to remove the short course exemption so that more students could receive the benefits of a USI and an authenticated VET transcript.

> The Act is a relatively new piece of legislation and its application to individuals' circumstances is evolving. There are also other amendments to the Act proposed by a Bill recently introduced by the Hon Dan Tehan MP, Minister for Education, seeking to expand the coverage of the USI regime into higher education.
>
> Currently, the Exemptions Instrument provides that an exemption can apply to individuals. For example, in the case where an individual has completed, and provided to the Registrar, a statutory declaration stating that they have a genuine personal objection to being assigned a USI, and they understand the consequences of not being assigned a USI. It is important to keep the matters for the Registrar to have regard to when making a decision about an exemption application, together with the administrative processes for that decision, in one document. This supports understanding by all stakeholders, particularly students.
>
> It is notable that in 2018, whilst more than four million individuals studied VET, only 24 students applied for a personal exemption. Even though the number is small, the USI regime has been drafted in such a way as to ensure the needs and unique circumstances of individual students and RTOs can continue to be met. The small instances of requests for exemptions to date also means there are generally no known cases where a theme has emerged for cohorts seeking an exemption. Therefore, it was not considered suitable or possible to include high-level guidance limiting the cases in which exemptions may apply in the primary legislation.
>
> The making of legislative instruments by the Commonwealth Minister under the Act must be agreed to by the Council of Australian Governments (COAG) Skills Council Ministers as well as undergoing Parliamentary scrutiny.

Committee comment

2.63 The committee thanks the minister for this response. The committee notes the minister's advice that the amendments proposed by the Bill do not significantly alter existing arrangements under section 53 of the *Student Identifiers Act 2014*. The committee also notes that the amendments propose to clarify the Registrar's powers to grant an exemption and that this will clarify the procedural aspects of seeking and granting an exemption.

2.64 The committee notes the minister's advice that including the matters that the Registrar is required to take into account when granting an exemption in a legislative instrument, rather than the primary legislation, ensures the unique student identifier (USI) regime continues to be able to adapt to the changing circumstances of students. The minister stated that this is important, since new and genuine reasons may emerge, justifying a student's exemption from the requirement to be issued a USI.

2.65 The committee further notes the minister's advice that the making of legislative instruments by the Commonwealth Minister under the Act must be agreed to by the Council of Australian Governments (COAG) Skills Council Minister, as well as undergoing parliamentary scrutiny.

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

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

Merits review[30]

2.1 In *Scrutiny Digest 10 of 2019* the committee requested the minister's more detailed advice as to why merits review will not be available in relation to determinations by the Registrar under proposed subsection 53(6). The committee noted that it's consideration of this matter would be assisted if the minister's response identified established grounds for excluding merits review, as set out in the Administrative Review Council's guidance document, *What decisions should be subject to merit review?*.[31]

Minister's response

2.68 The minister advised:

> The Committee noted that generally, administrative decisions that will, or are likely to, affect the interests of a person should be subject to independent merits review unless a sound justification is provided.
>
> There are a number of reasons why it is considered that merits review ought not to be available to students seeking an exemption.
>
> Firstly, as discussed above, section 53 of the Act operates primarily as a restriction imposed on RTOs in respect of when they can and cannot issue a VET qualification or VET statement of attainment. Importantly, the ultimate determinative issue from an RTO's or student's point of view is whether or not the qualification or statement of attainment can be issued. If a student seeking an exemption to the requirement to hold a USI is not granted an exemption, rather than seeking costly and potentially elongated review through the Administrative Appeals Tribunal (AAT) in

30 Schedule 1, item 15. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

31 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 18-20.

relation to the exemption decision alone, the student will, as now, be able to achieve their objective of receiving their qualification or statement of attainment by progressing through the simple process of applying for a USI. In this context, an exemption from the requirement to hold a USI is simply a procedural step along the way to an ultimate outcome of receiving a qualification or statement of attainment. It is notable, in this context, that one of the factors accepted in the Administrative Review Council's guidance document helpfully referred to by the Committee (*What decisions should be subject to merit review?*) for when merits review may not be suitable, is where the decision involves a preliminary or procedural decision (as discussed at paragraph 4.3-4.7 of the guidance document). As a step along the way to receiving a qualification or statement of attainment, a USI exemption decision is in substance a preliminary or procedural step.

Secondly, it is important to ensure the limited resources of the AAT are reserved for matters where genuine issues that turn on merits are in dispute. It is anticipated the matters that will be included in the legislative instrument will be matters that will not lend themselves to factual dispute. For instance, if, as now, the legislative instrument specifies circumstances where a person has expressed a genuine personal objection as a case where an exemption would apply, the facts in respect of that objection are not likely to be meaningfully in dispute before a merits review tribunal. Of course, judicial review, including under the *Administrative Decisions (Judicial Review) Act 1977*, will remain available to students or affected RTOs where the exemption decision has been made involving an error of law.

A merits review process also appears disproportionate to the nature of the decision and the instances of exemption requests. The number of individuals seeking an exemption in the VET sector under the Act is negligible in comparison to the number of USIs issued by the Registrar. The number of USIs issued in 2018 was approximately 1.5 million whilst only 24 applications for exemptions were received in the same year. No applications for exemptions were denied. Making decisions of the Registrar subject to merits review would not be an efficient use of Commonwealth resources, as the cost of administering a merits review process would be greatly disproportionate to the number of individuals requesting an exemption.

Further, external merits review at AA T may delay the outcome of the request for an individual by a number of years, therefore delaying their award conferral and impacting their prospects of obtaining meaningful employment and greater career aspirations.

As the Registrar is obliged to make decisions based on fair and accountable reasoning, the decision to deny or allow an exemption would be carefully considered and denied only on appropriate grounds. As such, it would be time-consuming and costly to engage in *de novo* review of these decisions,

and not highly beneficial or protective for the individual/s requesting an exemption.

The USI is a product and system designed with the benefits to students considered at every stage of the application process, to support their personal choices and help Australians maintain their lifelong learning in order to pursue a meaningful and purposeful career.

Committee comment

2.69 The committee thanks the minister for this response. The committee notes the minister's advice that the ultimate determinative issue from an RTO's or student's point of view is whether or not the qualification or statement of attainment can be issued. The committee also notes the minister's advice that if a student seeking an exemption to the requirement to hold a unique student identifier (USI) is not granted an exemption, rather than seeking costly and potentially elongated review through the Administrative Appeals Tribunal (AAT) in relation to the exemption decision alone, the student will, as now, be able to achieve their objective of receiving their qualification or statement of attainment by progressing through the simple process of applying for a USI.

2.70 The committee also notes the minister's advice that it is important to ensure the limited resources of the AAT are reserved for matters where genuine issues that turn on merits are in dispute and that it is anticipated the matters that will be included in the legislative instrument will be matters that will not lend themselves to factual dispute.

2.71 The committee further notes the minister's advice that a merits review process also appears disproportionate to the nature of the decision and the instances of exemption requests and that the number of individuals seeking an exemption in the VET sector under the Act is negligible in comparison to the number of USIs issued by the Registrar. The committee notes the minister's advice that the number of USIs issued in 2018 was approximately 1.5 million whilst only 24 applications for exemptions were received in the same year and no applications for exemptions were denied.

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

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

Trade Support Loans Amendment (Improving Administration) Bill

Purpose	This bill seeks to amend the *Trade Support Loans Act 2014* to empower the Secretary to: • make a determination to offset a payment of a trade support loan that a person is required to pay through the tax system once their income reaches the minimum repayment income threshold; and • prescribe the circumstances in which later instalments can be reduced in rules
Portfolio/Sponsor	Employment, Skills, Small and Family Business
Introduced	House of Representatives on 28 November 2019
Bill status	Before the House of Representatives

Significant matters in delegated legislation[32]

2.74 In *Scrutiny Digest 10 of 2019* the committee requested the minister's advice as to why it is considered necessary and appropriate to leave significant matters, such as the circumstances in which the amounts of later Trade Support Loans (TSL) instalments may be reduced, to delegated legislation; and whether it would be appropriate for the bill to be amended to set out at least high level guidance regarding the relevant circumstances on the face of the primary legislation.[33]

Minister's response[34]

2.75 The minister advised:

> Noting the Committee's concerns about whether it is necessary and appropriate to leave significant matters, such as the circumstances in which the amounts of later Trade Support Loans (TSL) instalments may be reduced to delegated legislation, the following justification is provided.

32 Schedule 1, item 6. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

33 Senate Scrutiny of Bills Committee, *Scrutiny Digest 10 of 2019*, pp. 26-27.

34 The minister responded to the committee's comments in a letter dated 18 December 2019. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 1 of 2020* available at www.aph.gov.au/senate_scrutiny_digest.

The purpose of the amendments proposed by the Trade Support Loans Amendment (Improving Administration) Bill 2019 ('the Bill') is to simplify and improve the administration of the TSL program. The key measure involves an ability to effectively offset overpayments of TSL, allowing an overpaid amount to be recovered through the tax system, as if it was properly paid, and to allow for the Secretary to reduce a future TSL payment. The discretion to reduce future payments addresses the fact that the TSL recipient will have retained a TSL payment that would otherwise be an overpayment debt.

All of the circumstances, that are consistent with the scope and purpose of the TSL legislation, in which it may become appropriate to reduce the amounts of later TSL instalments are not certain and cannot necessarily be foreseen. For instance, it may be that certain cohorts of Australian Apprentices are specifically affected by the measure in the future and allowing scope for a legislative instrument to adapt to the impact of the measure ensures the TSL program will remain adaptive to the needs of Australian Apprentices. Specifying the detail of the only circumstances in which payments may be reduced in primary legislation could have the potential to either prevent the Secretary from reducing future payments of TSL where it would be appropriate to do so, or may have led to the Secretary being required to reduce a payment of TSL where it may not continue to be appropriate.

TSL payments are made to assist Australian Apprentices with the cost of undertaking their training. Where a TSL payment is made in circumstances where a recipient is not eligible and the recipient benefits from the 'special case payability' introduced by this measure, in most circumstances where future TSL becomes payable, the usual expectation would be that the Australian Apprentice should use the overpaid amount for their future support needs, and that future TSL payments would be reduced accordingly.

However, when considering the relevant and unique circumstances of a particular Australian Apprentice or a group of Australian Apprentices in similar circumstances, the measure has been drafted to ensure that the Secretary has flexibility to determine which repayment method(s) are appropriate to be offered in particular situations, consistent with the purposes of TSL. This will ensure the possibility of debts being recovered in appropriate circumstances, while ensuring that no undue financial pressure is applied to Australian Apprentices which may have the potential to negatively impact their ability to successfully complete their apprenticeship.

The ability to determine, by legislative instrument, circumstances in which the amounts of later TSL instalments may be reduced, will allow the Minister to address identified emerging patterns in a timely manner, and as circumstances change, as the implementation of the measure is monitored. Importantly, any amendments to TSL rules, prescribing

> circumstances for the purposes of new subsection 11(4), would be subject to Parliamentary scrutiny and possible disallowance by either House of Parliament, should either House consider that the rules are unfair or otherwise inappropriate.
>
> With regard to the question of the appropriateness of amending the Bill to provide guidance on circumstances in which the amounts of later TSL instalments may be reduced, for the reasons outlined above, it is impractical and restrictive to anticipate the factors that the Secretary may take into account when considering whether to make a determination, and therefore, it is not appropriate to amend the Bill.

Committee comment

2.76 The committee thanks the minister for this response. The committee notes the minister's advice that it is necessary to leave circumstances in which the amounts of later TSL instalments may be reduced to delegated legislation as it provides the Secretary with greater flexibility to determine which repayment methods are appropriate to be offered in particular situations. In this regard, the committee notes that all of the circumstances in which it may become appropriate to reduce the amounts of later TSL instalments cannot necessarily be foreseen. The committee also notes the minister's advice that that the instruments of delegated legislation would be subject to disallowance by either House of the Parliament.

2.77 The committee further notes the minister's advice that it would be inappropriate to amend the bill to provide guidance on circumstances in which the amounts of later TSL instalments may be reduced as it is impractical and restrictive the factors that the Secretary may take into account when considering whether to make a determination.

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

2.79 In light of the detailed information provided and the fact that any amendments to the TSL rules will be disallowable, 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 bills to the attention of Senators:

- **Australian Business Growth Fund Bill 2019** — clause 18; and
- **Federal Circuit and Family Court of Australia Bill 2019** — clauses 18 and 128.

Senator Helen Polley
Chair

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

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