The Senate

Standing Committee for the Scrutiny of Bills

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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

Comment bills

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

Appropriation Bill (No. 3) 2019-2020

Purpose	This bill provides for additional appropriations from the Consolidated Revenue Fund for the ordinary annual services of the Government in addition to amounts appropriated through the *Appropriation Act (No. 1) 2019-2020* and the *Supply Act (No. 1) 2019-2020*
Portfolio	Finance
Introduced	House of Representatives on 13 February 2020

Parliamentary scrutiny—ordinary annual services of the government[1]

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

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

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

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

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

1.5 The Senate Standing Committee on Appropriations and Staffing[3] has kept the issue of items possibly inappropriately classified as ordinary annual services of the government under active consideration over many years.[4] It has noted that the division of items in appropriation bills since the adoption of accrual budgeting has been based on a mistaken assumption that any expenditure falling within an existing departmental outcome should be classified as ordinary annual services expenditure.[5]

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

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

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

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

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

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

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

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

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

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

1.10 Based on the Senate resolution of 22 June 2010, it appears that the initial expenditure in relation to the following new measures may have been inappropriately classified as 'ordinary annual services' and therefore improperly included in Appropriation Bill (No. 3) 2019-2020:

- Manufacturing Modernisation Fund — establishment ($50 million over three years);[9]
- Mid-Career Checkpoint — establishment ($75 million over four years);[10]
- Product Stewardship Investment Fund — establishment ($20 million over four years).[11]

1.11 The committee has previously written to the Minister for Finance in relation to inappropriate classification of items in other appropriation bills on a number of

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

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

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

9 Mid-Year Economic and Fiscal Outlook 2019-20, p. 254.

10 Mid-Year Economic and Fiscal Outlook 2019-20, p. 210.

11 Mid-Year Economic and Fiscal Outlook 2019-20, p. 217.

occasions;[12] however, the government has consistently advised that it does not intend to reconsider its approach to the classification of items that constitute the ordinary annual services of the government.

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

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

1.14 The committee draws this matter to the attention of senators as it appears that the initial expenditure in relation to certain new measures in the latest set of appropriation bills may have been inappropriately classified as ordinary annual services (and therefore improperly included in Appropriation Bill (No. 3) 2019-2020 which should only contain appropriations that are not amendable by the Senate).

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

Environment Protection and Biodiversity Conservation Amendment (Climate Trigger) Bill 2020

Purpose	This bill seeks to amend the *Environment Protection and Biodiversity Conservation Act 1999* to introduce a climate trigger to ensure Australia fulfils its obligations under the Climate Change Conventions through thorough environmental assessment of emissions-intensive activities
Sponsor	Senator Hanson-Young
Introduced	Senate on 13 February 2020

Reversal of the evidential burden of proof[13]

1.15 The bill seeks to insert proposed section 24H into the *Environment Protection and Biodiversity Conservation Act 1999* to make it an offence to take an 'emissions-intensive' action which has, will have, or is likely to have, a significant impact on the environment. Proposed subsection 24H(2) provides a number of exceptions (offence-specific defences) to this offence. The offence carries a maximum penalty of imprisonment for 7 years or 420 penalty units, or both.

1.16 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.[14]

1.17 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 committee notes that the explanatory materials do not explain why it is proposed to use offence-specific defences (which reverse the evidential burden of proof) in this instance.

1.18 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of using offence-specific defences (which reverse the evidential burden of proof) in this instance.

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

14 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.

Significant matters in delegated legislation[15]

1.19 This bill seeks to insert proposed section 24J into the *Environment Protection and Biodiversity Conservation Act 1999* to define what constitutes an 'emissions-intensive action'. Under proposed section 24J, an action will be an emissions-intensive action if the action involves mining operations, drilling exploration, land clearing, or is specified in the regulations.

1.20 The committee's view is that significant matters, such as definitions relevant to the scope of an offence, should be included on the face of 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 the regulations may specify additional actions as an 'emissions-intensive action' for the purposes of the offence in proposed section 24H.

1.21 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. The committee further notes that the offence to which the definition of 'emissions-intensive action' relates is punishable by up to 7 years imprisonment.

1.22 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 specify additional actions as an 'emissions-intensive action' for the purposes of the offence in proposed section 24H.

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

National Radioactive Waste Management Amendment (Site Specification, Community Fund and Other Measures) Bill 2020

Purpose	This bill seeks to amend the *National Radioactive Waste Management Act 2012* to establish a single, purpose built National Radioactive Waste Management Facility, which will support Australian nuclear science and technology by providing for the permanent disposal of low level waste and temporary storage of intermediate level waste
Portfolio	Industry, Science, Energy and Resources
Introduced	House of Representatives on 13 February 2020

Significant matters in delegated legislation—acquisition of land by the Commonwealth[16]

1.23 The bill seeks to amend the *National Radioactive Waste Management Act 2012* to establish a single, purpose built National Radioactive Waste Management Facility.

1.24 Proposed section 19A provides that the regulations may prescribe additional land that is required to expand the site for the establishment and operation of the facility. In addition, proposed section 19B provides that the minister may, by notifiable instrument, specify additional land that is required to provide all-weather access to the specified site and any rights or interests in the additional land that are not required.

1.25 In relation to proposed section 19B, the committee notes that notifiable instruments, unlike legislative instruments, are not subject to tabling, parliamentary disallowance or scrutiny by the Senate Standing Committee for the Scrutiny of Delegated Legislation. Given the impact on parliamentary scrutiny of not making instruments made under proposed subsection 19B(1) legislative instruments, the committee expects the explanatory materials to provide a justification for the use of a notifiable instrument. The committee notes that no explanation has been provided in the explanatory memorandum in this instance.

1.26 At a general level, the committee's view is that significant matters, including the acquisition of land by the Commonwealth, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided.

16 Schedule 1, item 15, proposed sections 19A and 19B. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(v).

While the committee acknowledges that proposed subsection 19A(2) limits the additional land that may be prescribed under that section, from a scrutiny perspective, the committee considers that it may be appropriate to amend the bill to:

- provide that any regulations prescribing additional land for expansion of the site made under proposed subsection 19A(1) do not commence until after the Parliament has had the opportunity to scrutinise the regulations; and
- provide that any instruments specifying additional land for all-weather access to the site under proposed subsection 19B(1) are legislative instruments or regulations that do not commence until after the Parliament has had the opportunity to scrutinise the instrument or regulations.

1.27 The committee notes that providing an opportunity for the Parliament to consider the above instruments before they commence is particularly important in this case, noting that the subsequent disallowance of regulations prescribing or specifying additional land may be of little practical effect if the relevant land has already been acquired by the Commonwealth while the regulations or instruments were in force prior to being disallowed.

1.28 The committee therefore requests the minister's advice as to:

- **why it is considered necessary and appropriate to allow the minister to specify additional land that is required to provide all-weather access to the site via a notifiable instrument, which is not subject to parliamentary tabling or disallowance; and**
- **whether the bill can be amended to specify that:**
  - **any regulations prescribing additional land for expansion of the site made under proposed subsection 19A(1) do not commence until after the Parliament has had the opportunity to scrutinise the regulations; and**
  - **any instruments specifying additional land for all-weather access to the site under proposed subsection 19B(1) are disallowable legislative instruments or regulations that do not commence until after the Parliament has had the opportunity to scrutinise the instruments or regulations.**

1.29 In this regard, the committee notes that sections 45-20 and 50-20 of the *Australian Charities and Not-for-profits Commission Act 2012* provide a model for provisions which ensure that the Parliament has an opportunity to scrutinise particular legislative instruments before they commence.

Procedural fairness[17]

1.30 Proposed section 19C sets out the consultation requirements that are to be undertaken prior to the minister acquiring additional land either by regulations under proposed section 19A or by notifiable instrument under proposed section 19B. The minister must invite each person who has a right or interest in the land to comment and must take into account any relevant comments. The consultation period must be at least 30 days. Proposed subsection 19C(4) provides that the consultation requirements set out in proposed section 19C are to be taken to be an exhaustive statement of the requirements of the natural justice hearing rule.

1.31 The committee notes that the natural justice hearing rule, which requires that a person be given an opportunity to present their case, is a fundamental common law principle and if it is to be abrogated or limited this should be thoroughly justified. In this instance, the explanatory memorandum provides no justification for the limitation of the natural justice hearing rule, merely restating the operation of the provision.

1.32 The committee also notes that the courts have consistently interpreted procedural fairness obligations flexibly based on specific circumstances and the statutory context. The explanatory materials do not address why this level of flexibility would not adequate in these circumstances. The committee notes that while the rigid consultation requirements may be designed to secure fairness, it is unclear from the limited information provided that they may do so in all circumstances.

1.33 In light of the lack of information provided, the committee requests the minister's advice regarding why it is necessary and appropriate to limit the operation of the natural justice hearing rule in relation to consultation conducted under proposed section 19C.

Significant matters in delegated legislation—exclusion of State, Territory and Commonwealth laws[18]

1.34 Proposed section 34G provides for the transitional operation of section 11 of the *National Radioactive Waste Management Act 2012* (which will be repealed by this bill) in relation to things done by persons before the site acquisition time.

1.35 Proposed section 34GA provides that certain State or Territory laws cannot apply to regulate, hinder or prevent the doing of a thing under proposed

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17 Schedule 1, item 15, proposed section 19C. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iii).

18 Schedule 1, item 35, proposed sections 34G, 34GA and 34GB. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

section 34G. Proposed subsection 34GA(2) allows the regulations to prescribe additional State or Territory laws, or provision of laws, that have no effect to the extent those laws would regulate, hinder or prevent the doing of a thing under proposed section 34G. In addition, proposed section 34GB overrides the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Environment Protection and Biodiversity Conservation Act 1999*, to the extent those Acts would regulate, hinder or prevent the doing of a thing under proposed section 34G. Proposed subsection 34G(2) allows the regulations to prescribe additional Commonwealth laws that would also have no effect.

1.36 The committee's view is that significant matters, such as the exclusion of the operation of State, Territory or Commonwealth laws, 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 contains no justification as to why all the relevant State, Territory or Commonwealth laws that will not apply in relation to things done under proposed section 34G cannot be contained on the face of the primary legislation.

1.37 The committee notes that the operation of proposed section 34G is designed to be transitional and that while the Act currently contains similar provisions, it does not appear that regulations to exclude the operation of State, Territory or Commonwealth laws have ever been made. As a result, it is unclear to the committee, on the limited information provided, why the regulation making powers are required. The committee also 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.

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

- **why it is considered necessary and appropriate to allow regulations to exclude the operation of prescribed State, Territory or Commonwealth laws; and**
- **the appropriateness of amending the bill to remove proposed subsections 34GA(2)–(4) and 34GB(2) which provide that the regulations may exclude the operation of prescribed State, Territory or Commonwealth laws.**

Significant matters in delegated legislation—establishment of community fund[19]

1.39 Schedule 2 to the bill seeks to repeal the provisions in the *National Radioactive Waste Management Act 2012* relating to the existing National Repository Capital Contribution Fund and insert provisions to establish the NRWMF Community Fund. Proposed section 34AA provides that the NRWMF Community Fund entity will be prescribed by regulations, and proposed section 34AB requires the minister to make a payment of $20 million to the entity. The payment must not be made unless the NRWMF Community Fund entity is party to an agreement with the Commonwealth under proposed section 34AC. Under proposed section 34AC, the terms and conditions for the payment will be set out in a written agreement between the Commonwealth and the NRWMF Community Fund entity. The agreement must include a condition that requires the NRWMF Community Fund entity to use the payment for purposes associated with the economic and social sustainability of the host community for the facility. The regulations may prescribe other terms and conditions that are to be set out in the agreement.

1.40 The committee has consistently raised scrutiny concerns about framework bills, which contain only the broad principles of a legislative scheme and rely heavily on delegated legislation to determine the scope and operation of the 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.

1.41 In this instance, the committee notes that Schedule 2 to the bill leaves the majority of the detail regarding both the establishment of the NRWMF Community Fund entity, including any governance arrangements, as well as any additional terms and conditions on which any payment is to be made, to delegated legislation. The explanatory memorandum provides no justification for the use of delegated legislation. The committee also notes that, as the terms and conditions will form part of a written agreement between the Commonwealth and the NRWMF Community Fund entity, there may never be an opportunity for the Parliament to have oversight of how any payments to the NRWMF Community Fund entity will be managed. The committee notes that this may include significant matters such as reporting by the entity in relation to how the fund is being managed.

1.42 Additionally, the committee notes that the existing National Repository Capital Contribution Fund is a special account, while the NRWMF Community Fund entity is not. The committee notes that this may further decrease parliamentary scrutiny of spending as the new fund will not be subject to the same reporting requirements as the existing special account.

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19 Schedule 2, item 3, proposed sections 34AA, 34AB and 34AC. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv) and (v).

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

- **why it is considered necessary and appropriate to leave the establishment of the NRWMF Community Fund entity, as well as any additional terms and conditions on which any payment is to be made, to either delegated legislation or the provisions of a written agreement of which the Parliament may have no oversight; and**
- **whether the bill can be amended to:**
    - **include at least high level guidance in relation to these matters on the face of the primary legislation, or**
    - **at a minimum, to provide that the regulations *must*, rather than may, prescribe other terms and conditions that are to be set out in the agreement under proposed subsection 34AC(7).**

National Vocational Education and Training Regulator Amendment (Governance and Other Matters) Bill 2020

Purpose	This bill seeks to amend the *National Vocational Education and Training Regulator Act 2011* to strengthen the governance arrangements in relation to the National VET Regulator, support consistent and effective regulation, and enhance stakeholder engagement in Australia's VET sector
Portfolio	Education, Skills and Employment
Introduced	House of Representatives on 13 February 2020

No invalidity clause[20]

1.44 Item 33 of Schedule 1 to the bill seeks to insert proposed subsection 157(5A) into the *National Vocational Education and Training Regulator Act 2011* to provide that, in performing the National VET Regulator's functions, the Regulator must have regard to any advice provided by the Advisory Council. Item 34 seeks to amend existing subsection 157(6) so that a failure to comply with the requirements in proposed subsection 157(5A) will not affect the validity of the performance of the Regulator's functions.

1.45 A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. 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, the committee expects a sound justification for the inclusion of a no-invalidity clause to be provided in the explanatory memorandum.

1.46 The explanatory memorandum in this instance states:

> This amendment is necessary in order to avoid any uncertainty about the decisions made by the National VET Regulator, where for example, due to an oversight by the National VET Regulator, advice from the Advisory

20 Schedule 1, items 33 and 34, proposed subsections 157(5A) and 157(6). The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(iv).

> Council has not been considered or there is a lack of certainty about the consideration having occurred.[21]

1.47 While noting this justification, the committee has generally not accepted a desire for administrative certainty, on its own, to be a sufficient justification for the inclusion of no-invalidity clauses.

1.48 The committee therefore requests the minister's more detailed advice as to the rationale for expanding the existing no-invalidity clause in subsection 157(6) so that failure of the National VET Regulator to comply with the requirements in proposed subsection 157(5A) will not affect the validity of the performance of the Regulator's functions.

Significant matters in delegated legislation

Privacy[22]

1.49 Item 2 of Schedule 2 to the bill seeks to insert proposed section 210A into the *National Vocational Education and Training Regulator Act 2011*, which would allow the National Centre for Vocational Education Research (NCVER) to disclose information collected in accordance with the Data Provision Requirements to the department, another Commonwealth Authority, a relevant State or Territory authority, or a VET Regulator. A disclosure may not occur unless both parties satisfy the requirements (if any) prescribed by the information safeguard rules. Proposed section 214A provides that the minister may, by legislative instrument, make information safeguard rules. The explanatory memorandum states that the information safeguard rules will be 'an additional layer of safeguards to protect the disclosure of personal information'.[23] Additionally, proposed section 210B provides that the Secretary of the department may further disclose information that has been disclosed by the NCVER to a Commonwealth authority or a person engaged by the Secretary to carry out an activity on behalf of the department.

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

> The information safeguard rules have been included as subordinate legislation to give the Minister flexibility to address unforeseen privacy

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21 Explanatory memorandum, p. 19.

22 Schedule 2, items 2 and 3, proposed sections 210A, 210B and 214A. The committee draws senators' attention to this provision pursuant to Senate Standing Order 24(1)(a)(i), (iv) and (v).

23 Explanatory memorandum, p. 40.

> related issues that may arise as the information sharing measures in the Bill are implemented.[24]

1.51 While noting this explanation, the committee has generally not accepted a desire for administrative flexibility as a sufficient justification for leaving significant matters to delegated 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. As the detail of delegated legislation is generally not publicly available when Parliament is considering a bill, this considerably limits the ability of the Parliament to have appropriate oversight over whether the appropriate safeguards for the protection of personal information will exist.

1.52 In addition, the committee notes that a person to whom information may be disclosed will not need to satisfy any additional requirements if the minister does not make the information safeguard rules under proposed section 214A. It is unclear to the committee why the minister is not required to make information safeguard rules to ensure that there are appropriate safeguards to protect the disclosure of personal information.

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

- **why it is considered necessary and appropriate to leave the safeguards for the disclosure of information to delegated legislation; and**
- **whether the bill can be amended to:**
  - **include at least high-level guidance regarding the relevant safeguards on the face of the primary legislation; or**
  - **at a minimum, to provide that the minister *must*, rather than may, make information safeguard rules under proposed section 214A (and to remove references to '(if any)' in proposed paragraphs 210A(3)(a) and (b) and subsection 210B(3)).**

24 Explanatory memorandum, p. 40.

Treasury Laws Amendment (2020 Measures No. 1) Bill 2020

Purpose	Schedule 1 of this bill seeks to amend the *Income Tax Assessment Act 1997* in order to expand the definition of significant global entity in the Act, and to align the rules regarding country by country reporting under tax law with Australia's international commitments. Schedule 2 of this bill seeks to amend various Acts to remove impediments to mergers between complying superannuation funds by permitting the roll-over of both revenue gains or losses and capital gains or losses
Portfolio	Treasury
Introduced	House of Representatives on 12 February 2020

Retrospective application[25]

1.54 Schedule 1 to the bill seeks to expand the definition of significant global entity in the tax law to cover additional groups of entities. Item 21 provides that the amendments apply in relation to income years or other periods starting on or after 1 July 2019. However, subitem 21(4) provides that if an entity is a significant global entity due to the amendments made by Schedule 1 to the bill, the entity will not be treated as a significant global entity for the purpose of the penalty provisions in Divisions 284 and 286 of Schedule 1 to the *Taxation Administration Act 1953* until 1 July 2020.

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

1.56 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.

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

1.57 In this instance, the explanatory memorandum states:

> The measure generally applies retrospectively from 1 July 2019. When this measure was announced in the Budget on 8 May 2018, it applied from 1 July 2018. While the application of the measure has subsequently been deferred by one year recognising the delays in the implementation of the measure, the retrospective application of the measure is consistent with the Government's intention to broaden the scope of the significant global entity definition to ensure that Australia's multinational tax integrity rules apply as intended. Retrospectivity is necessary to minimise, to the extent that is reasonable in the circumstances, the period between the announcement of the measure and the application of the improved integrity rules.
>
> However, to ensure that penalty obligations imposed under the law do not apply retrospectively, the amendments include a transitional provision to ensure the penalties that arise from the measure do not apply until 1 July 2020 for entities that were not previously significant global entities.[26]

1.58 In light of the detailed explanation provided in the explanatory memorandum regarding the retrospective application of the amendments proposed by Schedule 1 to 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 Schedule 1 to the bill on a retrospective basis.

26 Explanatory memorandum, p. 21.

Bills with no committee comment

1.59 The committee has no comment in relation to the following bills which were introduced into the Parliament or restored to the Notice Paper between 10 – 13 February 2020:

- Appropriation Bill (No. 4) 2019-2020
- Australian Education Legislation Amendment (Prohibiting the Indoctrination of Children) Bill 2020
- Defence Legislation Amendment (Miscellaneous Measures) Bill 2020
- Farm Household Support Amendment (Relief Measures) (No. 1) Bill 2020
- Galilee Basin (Coal Prohibition) Bill 2018
- Statute Update (Regulations References) Bill 2020
- Superannuation Amendment (PSSAP Membership) Bill 2020

Commentary on amendments and explanatory materials

Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019

1.60 On 10 February 2020, the Assistant Minister for Vocational Education, Training and Apprenticeships (Mr Irons) presented an addendum to the explanatory memorandum, and the bill was read a third time.

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

Trade Support Loans Amendment (Improving Administration) Bill 2019

1.62 On 10 February 2020, the Assistant Minister for Vocational Education, Training and Apprenticeships (Mr Irons) presented an addendum to the explanatory memorandum, and the bill was read a third time.

1.63 The committee thanks the minister for presenting this addendum to the explanatory memorandum which includes key information previously requested by the committee.

Chapter 2

Commentary on ministerial responses

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

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
Bill status	Before the Senate

Significant matters in delegated legislation

Privacy

2.2 In *Scrutiny Digest 1 of 2020* the committee requested 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.[1]

1 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2020*, pp. 7-14.

Assistant Treasurer's response[2]

2.3 The Assistant Treasurer advised:

> In relation to the data standards and disclosure framework, the use of delegated legislation was considered appropriate because of the anticipated highly technical and specialised nature of the rules that will govern the collection and disclosure of information. The use of delegated legislation provides flexibility to ensure that the rules can keep up with developments in technology and maintain technological neutrality. Existing rules for the provision of information to registrars in the primary law have, on some occasions, proven incapable of keeping up with these developments, causing an unnecessary regulatory burden to be imposed on both suppliers of data and users of that data. Further, given the possibility of frequent revisions to the data standards, it would be inappropriate to designate the standards in primary legislation.
>
> Importantly, in making the disclosure framework, the Registrar is appropriately empowered to place limits and controls on the disclosure of information. This includes the circumstances in which information must not be disclosed without consent of the person to whom it relates, and circumstances in which enforceable confidentiality agreements are required for the disclosure of information. As an additional safeguard, the new law also allows a person to apply to the registrar to prevent an inappropriate disclosure of registry information that relates to them.
>
> Both the data standards and disclosure framework are disallowable instruments and will therefore be subject to proper Parliamentary oversight. In addition to Parliamentary oversight, the disclosure framework is subject to a privacy impact assessment under the *Privacy Act 1988* and the consultation requirements contained in the *Legislation Act 2003*.

Committee comment

2.4 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that, in relation to the data standards and disclosure framework, the use of delegated legislation is considered appropriate because of the anticipated highly technical and specialised nature of the rules that will govern the collection and disclosure of information. The committee notes the Assistant Treasurer's advice that existing rules for the provision of information to registrars in the primary law have, on some occasions, proven incapable of keeping up with these developments, causing an unnecessary regulatory burden to be imposed on both suppliers of data and users of that data and that,

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2 The minister responded to the committee's comments in a letter dated 21 February 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

given the possibility of frequent revisions to the data standards, it would be inappropriate to designate the standards in primary legislation.

2.5 The committee further notes the Assistant Treasurer's advice that in making the disclosure framework, the Registrar is appropriately empowered to place limits and controls on the disclosure of information, including the circumstances in which information must not be disclosed without consent of the person to whom it relates, and circumstances in which enforceable confidentiality agreements are required for the disclosure of information. In addition, the committee notes that the disclosure framework is subject to a privacy impact assessment under the *Privacy Act 1988*.

2.6 The committee requests that the key information provided by the Assistant Treasurer 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*).

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

2.8 In light of the fact that both the data standards and disclosure framework will be subject to parliamentary disallowance, and the disclosure framework will be subject to a privacy impact assessment, the committee makes no further comment on this matter.

Broad delegation of administrative powers

2.9 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to why it is considered necessary to allow for the delegation of the Registrar's powers or functions to any person, and as to whether the bill can be amended to provide further legislative guidance as to the scope or powers that might be delegated, or the categories of people to whom those powers might be delegated.

Assistant Treasurer's response

2.10 The Assistant Treasurer advised:

> A key feature of the new regime is that the Registrar will be a Commonwealth body determined by the Minister. Following on from that, different Commonwealth bodies may be appointed for different registry functions. The delegation powers are designed to support this feature by adopting the existing delegation regimes applicable to the body or bodies appointed as Registrar. This is intended to ensure that the Registrar is able to maintain the existing delegation powers available under the various legislative regimes that the Registrar administers. Allowing the rules made by the Minister is to permit the Registrar to delegate its functions and powers as specified in the rules is to allow for situations where the designated body's delegation arrangements are not sufficient to allow for

> the effective and efficient administration of the regime. However, it is important to note that the Parliament will have the opportunity to assess the validity and appropriateness of the Ministerial rules, as the rules are disallowable instruments and will therefore be subject to proper Parliamentary oversight and the consultation requirements contained in the *Legislation Act 2003*.
>
> Accordingly, I do not consider it necessary to amend the legislation to place additional limitations on the scope of the delegation of the Registrar's powers beyond what is already included in the Bill.

Committee comment

2.11 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the delegation regime is intended to ensure that the Registrar is able to maintain the existing delegation powers available under the various legislative regimes that the Registrar administers. The committee also notes the Assistant Treasurer's advice that allowing the rules made by the Minister to permit the Registrar to delegate its functions and powers as specified in the rules is to allow for situations where the designated body's delegation arrangements are not sufficient to allow for the effective and efficient administration of the regime

2.12 The committee further notes the Assistant Treasurer's advice that the Parliament will have the opportunity to assess the validity and appropriateness of the ministerial rules, as the rules are disallowable instruments and will therefore be subject to parliamentary oversight and the consultation requirements contained in the *Legislation Act 2003*.

2.13 The committee reiterates that it has consistently drawn attention to legislation that allows the delegation of administrative powers to a relatively large class of persons, with little or no specificity as to their qualifications or attributes. Generally, the committee prefers to see a limit set either on the scope of powers that might be delegated, or on the categories of people to whom those powers might be delegated. Noting this, from a scrutiny perspective, the committee does not consider that the Assistant Treasurer's advice has adequately justified the need for such broad powers of delegation; however, the committee acknowledges that there will be some parliamentary oversight of delegations to persons specified in the rules.

2.14 The committee requests that the key information provided by the Assistant Treasurer 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*).

2.15 The committee draws its concerns to the attention of senators and leaves to the Senate as a whole the appropriateness of allowing for the delegation of the

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

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

Computerised decision-making

2.17 In *Scrutiny Digest 1 of 2020* the committee requested the Assistant Treasurer's advice as to why it is necessary and appropriate to permit the Registrar to use computer assisted decision-making for any purpose, whether consideration has been given to how computer assisted decision-making processes with comply with administrative law requirements, and whether due consideration has been given to include 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.

Assistant Treasurer's response

2.18 The Assistant Treasurer advised:

> In recognition of the number of functions being conferred on the Registrar, the ability for the Registrar to arrange for processes to assist in decision making is designed to provide a technology neutral option for the Registrar to manage this workload. The nature of the Registrar's functions are such that automated decision-making is an appropriate approach for many of its decisions. As a Commonwealth body, the Registrar will be required to comply with all applicable laws, including administrative law requirements. The new regime also makes provision for merits review by the Administrative Appeals Tribunal.
>
> The use of these processes, including computer-assisted decision making, will ensure that the Registrar is able to build efficient systems and processes. The Registrar retains control of these decisions and they are subject to any review provisions that exist in the law. In addition to these review provisions, should a situation arise where Registrar is satisfied that the decision from a process is wrong, the Registrar can change the decision without the need for a person to request a review.
>
> The design of the ability of the Registrar to arrange for these processes is necessary and appropriate to ensure that decisions of the Registrar are efficient, timely and responsive. Any process is still limited by the Registrar's functions and powers, the existing review provisions and the need to comply with administrative and other laws. Any decision made by such processes must comply with all of the requirements of the legislative provisions under which the decision was made. Where it is beyond the capability of a process to comply with the broader legislative framework, the administration of the law would not solely rely on one of these processes.

Committee comment

2.19 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that in recognition of the number of functions being conferred on the Registrar, the ability for the Registrar to arrange for processes to assist in decision making is designed to provide a technology neutral option for the Registrar to manage this workload. The committee also notes the Assistant Treasurer's advice that as a Commonwealth body, the Registrar will be required to comply with all applicable laws, including administrative law requirements. The committee further notes the Assistant Treasurer's advice that where it is beyond the capability of a process to comply with the broader legislative framework, the administration of the law would not solely rely on one of these processes.

2.20 The committee reiterates 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 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.

2.21 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, from a scrutiny perspective, the committee does not consider that the Assistant Treasurer's response has provided an adequate justification for allowing *all* of the Registrar's administrative functions to be assisted or automated by computer programs (other than decisions reviewing other decisions).

2.22 In light of the committee's scrutiny concerns, the committee requests the Assistant Treasurer's further advice as to whether the Assistant Treasurer proposes to bring forward amendments to the bill to:

- **limit the types of decisions that can be made by computers; and/or**
- **provide that the Registrar must, before determining that a type of decision can be made by computers, be satisfied by reference to general principles articulated in the legislation that it is appropriate for the type of decision to be made by a computer rather than a person.**

2.23 The committee also requests that the key information provided by the Assistant Treasurer 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*).

Reversal of evidential burden of proof

2.24 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to the appropriateness of including the specified matters as offence-specific defences, and in relation to a suggestion that it may be appropriate to amend the bill so that offence-specific defences are instead framed as elements of the relevant offences.

Assistant Treasurer's response

2.25 The Assistant Treasurer advised:

> The reverse burden of proof is appropriate in the circumstances of these provisions. The requirement to have a Director Identification Number is fundamental to the new regulatory regime. Director Identification Numbers will ensure that the identity of directors can be confirmed and their directorships can be centrally recorded, without the risk of mis-identification. This will be used to assist regulators better detect, deter and disrupt phoenixing and improve the integrity of corporate data maintained by the Registrar.
>
> The defences to the offence of failing to apply for a Director Identification Number are that the person applied for a Director Identification Number within the required period, or that the person was an eligible officer without their knowledge. Both of these defences require knowledge that is particularly within the knowledge of the defendant and it would be more difficult and costly for the prosecution to disprove than for the defendant to establish.
>
> The second offence relates to applying for an additional Director Identification Number. A key role for Director Identification Numbers is to enable officers, regulators and others to keep track of an individual's directorships and identify where phoenix activities are occurring. The integrity of the Director Identification Number register is paramount to the effectiveness of this regulatory regime. The defences available reference information that is particularly within the knowledge of a defendant and would be more difficult for the prosecution to establish.
>
> Directors would generally be expected to keep records of their compliance with applicable law and so the satisfying of the offence-specific defences, should not place a significant burden on them.
>
> I consider that the current framing of these offences is appropriate given the importance of compliance with these particular aspects of the Director Identification Number requirements.

Committee comment

2.26 The committee thanks the Assistant Treasurer for this response. The committee notes the Assistant Treasurer's advice that the defences to the offence of failing to apply for a Director Identification Number are that the person applied for a Director Identification Number within the required period, or that the person was an eligible officer without their knowledge, and that both of these defences require knowledge that is particularly within the knowledge of the defendant and it would be more difficult and costly for the prosecution to disprove than for the defendant to establish.

2.27 The committee also notes the Assistant Treasurer's advice that, in relation to the offence of applying for a Director Identification Number where a person already possesses one, the defences available reference information that is particularly within the knowledge of a defendant and would be more difficult for the prosecution to establish.

2.28 While noting the Assistant Treasurer's advice, the committee considers that the response does not include detailed information as to how the relevant information is *peculiarly* within the knowledge of the defendant. It is therefore not apparent that all the circumstances identified as an exception to the offences are peculiarly within the knowledge of the defendant.

2.29 Additionally, the committee notes that no information has been provided regarding the use of offence-specific defences in relation to the provisions that make 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.[3]

2.30 The committee therefore requests the Assistant Treasurer's further advice as to the appropriateness of including each of the matters specified in subclause 17(3) of the Registers Bill (and equivalent provisions in the Amendment Bill) as offence-specific defences.

3 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*.

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
Bill status	Before the Senate

Broad scope of offence provisions

2.31 In *Scrutiny Digest 1 of 2020* the committee requested the Attorney-General's advice as to why it is necessary and appropriate to amend the definition of dishonesty in the Criminal Code. The committee noted that it would also be assisted by the provision of information relating to the range of offences that would be affected, and how the changes may impact on defendants' personal rights and liberties.[4]

Attorney-General's response[5]

2.32 The Attorney-General advised:

> The Bill amends the definition of dishonesty in the Criminal Code to align with the approach taken by High Court jurisprudence, provide consistency with 2019 amendments to dishonesty offences in the *Corporations Act*

4 Senate Scrutiny of Bills Committee, *Scrutiny Digest 3 of 2020*, pp. 15-16.

5 The minister responded to the committee's comments in a letter dated 25 February 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

2001 (Corporations Act) and respond to operational agencies' concerns about the practical difficulties with the current test.

The current definition of dishonesty in the Criminal Code requires a defendant to have been dishonest according to the standards of ordinary people, and to have *known* that their conduct was dishonest according to the standards of ordinary people (see, for example, the definition in section 130.3 of the Criminal Code). This approach is drawn from the approach in the English case of *R v Ghosh* (1982) EWCA Crim 2 (Ghosh).

In *Peters v The Queen* (1998) 192 CLR 493 (Peters), the High Court endorsed a definition of dishonesty for the purposes of the common law that requires the defendant to have been dishonest according to the standards of ordinary, decent people, but does not require the defendant to have known that their conduct was dishonest according to the standards of ordinary people. The majority judgment observed that there is a degree of incongruity in requiring dishonesty to be determined by reference to whether the accused must have known that their conduct was dishonest according to the standards of ordinary, decent people. As part of the *Peters* decision, a majority of the High Court considered but did not follow the two-limb test in *Ghosh*. The *Peters* test was later affirmed by the High Court in *Macleod v The Queen* [2003] 214 CLR 230.

The Government considers the *Peters* test to be the preferred test for determining dishonesty under the Criminal Code and that it is no longer appropriate or desirable to apply the *Ghosh* test when determining whether conduct is dishonest under the Criminal Code. The question of whether a defendant subjectively knew their conduct was dishonest according to the standards of ordinary people is an irrelevant consideration in determining whether behaviour was dishonest or in establishing the relevant intention.

I am advised that law enforcement and prosecutorial experience has shown that it can be difficult to obtain sufficient admissible evidence to establish that the defendant was aware or knew that they were dishonest according to the standards of ordinary people. This means that even if a person was aware their conduct fell short of community standards, practical difficulties in finding and adducing evidence means a person may too readily escape liability.

While the new definition would define dishonesty by reference to a single objective standard, the application of the test by a court necessarily involves an assessment of the defendant's *subjective* state of mind against this standard. In other words, a prosecution would still need to prove a 'guilty mind'—that the defendant had the subjective knowledge, belief or intention that rendered the relevant conduct dishonest. A finder of fact, usually a jury, would then assess whether that knowledge, belief or intention was dishonest, against the standards of ordinary, decent people. It is also important to note the defence for mistake or ignorance of fact in section 9.1 of the Criminal Code will continue to apply to protect

defendants who are under a mistaken belief about, or ignorant of, facts that would negate their culpability. For example, a person accused of dishonestly appropriating property from the Commonwealth under section 131.1 of the Criminal Code could avail themselves of this defence if they were under a genuine but mistaken belief that the property belonged to them.

The decision to revisit this issue has been taken in light of the 2019 amendments to the Corporations Act to apply the *Peters* test to all dishonesty offences under that Act. As the Criminal Code and the Corporations Act currently provide different definitions of dishonesty, I am concerned this has the potential to jeopardise prosecutions where offences under both the Corporations Act and the Criminal Code are brought together. There is a high risk of confusion where juries are required to apply two different tests of dishonesty, which can lead to severance of indictments or charges being dropped altogether. I consider this would be an unacceptable and unfortunate obstacle in holding white collar criminals to account. I am also advised that recent jurisprudence in the United Kingdom has seen a move away from the two-limb test in *Ghosh*.

I note the new definition to be inserted in the Criminal Code would apply not only to offences in the Criminal Code but also to Commonwealth offences that directly import the Criminal Code definition. There are currently 56 offences in the Criminal Code that rely on this definition of dishonesty (set out at **Attachment A**).[6] These include the general dishonesty offences (sections 135.1 and 474.2), offences for the bribery of a Commonwealth public officials (section 141.1) and for dishonestly obtaining or dealing in personal financial information (section 480.4).

A transitional provision has also been included in the Bill to facilitate prosecution of cases involving ongoing criminal conduct that takes place before, or begins before and continues after, the commencement of the proposed amendments. This provision will ensure that defendants who are prosecuted for conduct pre-dating the commencement of Schedule 3 would be prosecuted by reference to the relevant test at the time of their offending.

Committee comment

2.33 The committee thanks the Attorney-General for this response. The committee notes the Attorney-General's advice that in *Peters v The Queen* (1998) 192 CLR 493, the High Court endorsed a definition of dishonesty for the purposes of the common law that requires the defendant to have been dishonest according to

6 A copy of the Attorney-General's letter (including Attachment A) is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

the standards of ordinary, decent people, but does not require the defendant to have known that their conduct was dishonest according to the standards of ordinary people.

2.34 The committee also notes the Attorney-General's advice that law enforcement and prosecutorial experience has shown that it can be difficult to obtain sufficient admissible evidence to establish that the defendant was aware or knew that they were dishonest according to the standards of ordinary people and that this means that even if a person was aware their conduct fell short of community standards, practical difficulties in finding and adducing evidence means a person may too readily escape liability. The committee further notes the Attorney-General's advice that while the new definition would define dishonesty by reference to a single objective standard, the application of the test by a court necessarily involves an assessment of the defendant's *subjective* state of mind against this standard.

2.35 The committee also notes the Attorney-General's advice that there are currently 56 offences in the Criminal Code that rely on this definition of dishonesty, including the general dishonesty offences (sections 135.1 and 474.2), offences for the bribery of Commonwealth public officials (section 141.1) and for dishonestly obtaining or dealing in personal financial information (section 480.4).

2.36 The committee requests that the key information provided by the Attorney-General 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*).

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

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
Bill status	Passed both Houses on 13 February 2020

Significant matters in delegated legislation

2.38 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to why it is necessary and appropriate to leave significant matters 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.[7]

Minister's response[8]

2.39 The minister advised:

> Under new section 17A, where an audit is conducted under section 17 of the *National Vocational Education and Training Regulator Act 2011* (NVETR Act), the National VET Regulator will be required to prepare an audit report. The report will need to be in a form (if any) approved by the Minister and must also comply with the audit report rules (if any are made – see item 81, Schedule 1). A similar provision is made in new subsection 35(1B) in relation to the preparation of a compliance audit.
>
> The legislation does circumscribe and provide high-level guidance on the possible content of the audit reports.
>
> First, the audit report will be about audits authorised under section 17 or section 35 of the NVETR Act. Under section 17, the National VET Regulator may conduct an audit of any matter relating to an application for registration under the NVETR Act. Under section 35, the National VET Regulator may conduct an audit to assess whether an NVR registered

7 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2020*, pp. 22-25.

8 The minister responded to the committee's comments in a letter dated 11 February 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

training organisation's (NVR RTO) operations continue to comply with the NVETR Act or the VET Quality Framework. Audits, and therefore audit reports, are not able to go beyond the parameters of those two sections.

Second, the Bill makes clear that an audit report must not contain personal information unless it is the name of the applicant for registration or the NVR RTO to which the report relates (for example where the organisation is a sole trader).

The Bill does not provide any more detail about the content of the audit reports as the Government intends to consult, in coming months, with the National VET Regulator, and other stakeholders on what content would be of greatest assistance to stakeholders and vocational education and training (VET) students. The Government also intends to avoid publication of reports which are unfair to NVR RTOs and which might damage their businesses. Consultations with stakeholders (including NVR RTOs) will provide guidance on this. Including any more detail on the content of the audit reports in the Bill may unnecessarily constrain this consultation process and its outcomes.

It is vital that the content of the audit reports be capable of rapid change in the event that the published audit reports are not meeting their objectives. Best practice requires that the Government respond quickly to the evolving needs of industry and of the VET sector generally. Including content requirements in the audit report rules allows the Government to make changes to the content of audit reports in a timely fashion.

In relation to publication requirements, it is proposed that they be included in the audit report rules to allow for necessary flexibility. The date that the National VET Regulator will be required to start publishing audit reports will be a key publication requirement that will be set out in the audit report rules. It is proposed to include this requirement in the audit report rules rather than in the Bill so that the start date for this requirement is flexible and can be aligned to other key VET sector governance reforms currently being developed by Government. Aligning these different measures will ensure that officers within the National VET Regulator who are responsible for writing the audit reports will have time to receive adequate training in drafting audit reports for publication.

Committee comment

2.40 The committee thanks the minister for this response. With regard to the content of the audit reports, the committee notes the minister's advice that there is already high-level guidance as the content of the audit reports is limited by the parameters of sections 17 and 35 of the *National Vocational Education and Training Regulator Act 2011*. The committee also notes the minister's advice that the bill does not provide any further information as to the scope of the audit reports as the government intends to consult with the National VET Regulator and other stakeholders and affected individuals in the coming months to establish the content,

and that providing any more detail on the content on the face of the bill may inhibit this process. In this regard, the committee notes the minister's advice that the use of delegated legislation provides for greater flexibility to adjust the content of the audit reports rapidly to meet the needs of industry.

2.41 With regard to the publication of the audit reports, the committee notes the minister's advice that establishing the publication requirements of the audit reports in delegated legislation also provides for greater flexibility. The committee notes the advice that the date that the National VET Regulator will be required to start publishing audit reports will be a key publication requirement that must remain flexible so it can be aligned to other key VET sector governance reforms currently being developed. The committee further notes the advice that aligning these measures will ensure that there is time to provide adequate training for National VET Regulator officials.

2.42 While noting this advice, the committee reiterates its scrutiny concerns that significant matters, such as the content and publication requirements for audit reports, should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. From a scrutiny perspective, the committee does not generally consider flexibility, on its own, to be sufficient justification for including significant matters in delegated legislation.

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

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

Reversal of the evidential burden of proof

2.45 In *Scrutiny Digest 1 of 2020* 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) in this instance.

Minister's response

2.46 The minister advised:

> The NVETR Act currently provides, under subsections 116(1) and 116(2) that it is an offence to provide or offer to provide all or part of a VET course unless a person is an NVR RTO. Under section 3 of the NVETR Act, an NVR RTO is a training organisation that is registered by the National VET Regulator under the Act. The onus is on the prosecution to prove the elements in subsections 116(1) and 116(2).
>
> New subsection 116(1A) and (3) of the NVETR Act establish a defence against action under subsections 116(1) and (2) for a person who is not an NVR RTO who provides or offers to provide all or part of a VET course. If that person has a written agreement in place with an NVR RTO which

permits them to provide or offer to provide a VET course on behalf of the NVR RTO, they will not be in breach of subsections 116(1) or (2).

As noted, the defendant (that is the unregistered person) has the evidentiary burden in relation to new subsections 116(1A) and 116(3) of the NVETR Act. However, the evidentiary burden is merely to produce a copy of the written agreement with the NVR RTO for the provision of all or part of a VET course. It is reasonable to expect that an unregistered person that enters into an arrangement with an NVR RTO to provide or offer to provide a VET course will retain a copy of that agreement in their business records. It should neither be difficult nor costly for the unregistered person to locate a copy of this written agreement for the purposes of meeting the evidentiary burden, particularly in comparison to the difficulty the prosecution would face in proving that such a written agreement does not exist.

Committee comment

2.47 The committee thanks the minister for this response. The committee notes the minister's advice that it is reasonable to expect that an unregistered person that enters into an arrangement with an NVR RTO to provide or offer to provide a VET course will retain a copy of that agreement in their business records and that therefore it should not be difficult or costly for the unregistered person to locate a copy of this written agreement for the purposes of meeting the evidentiary burden, particularly in comparison to the difficulty the prosecution would face in proving that such a written agreement does not exist.

2.48 While the committee acknowledges that it may be more difficult for the prosecution to establish that such a written agreement does not exist, the committee emphasises that the *Guide to Framing Commonwealth Offences* states that it is only appropriate to include a matter in an offence-specific defence when:

- 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.

2.49 In this instance, it is unclear how a written agreement between an unregistered person and an NVR registered training organisation could be peculiarly within the knowledge of the defendant when two parties have entered into the agreement. As the minister's response does not explain how the matters in the offence-specific defence are peculiarly within the knowledge of the defendant, from a scrutiny perspective, the committee remains of the view that it does not appear to be appropriate to reverse the evidential burden of proof.

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

Exemption from disallowance

2.51 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to why it is necessary and appropriate to continue exempting 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.

Minister's response

2.52 The minister advised:

> The Minister's power to issue a direction to the Australian Skills Quality Authority (ASQA) under section 160 of the NVETR Act is amended to remove the uncertainty and lack of clarity surrounding the existing requirement that the Minister may issue a direction if 'the Minister considers that the direction is necessary to protect the integrity of the VET sector'.
>
> Under the proposed amendments, the Minister may issue a direction to ASQA in regard to the performance of its functions and the exercise of its powers. This power will align with similar powers of the responsible Minister under the Tertiary Education Quality and Standards Agency Act 2011. ASQA's independence will be maintained, as subsection 160(2) of the NVETR Act prevents the Minister directing ASQA with regard to a regulatory decision in respect of individual cases, specifically the registration of a person or body as an NVR RTO, the accreditation of a particular course as a VET accredited course, a particular NVR RTO, or a person in respect of whom a particular VET accredited course is accredited.
>
> Directions by a Minister fall under exemptions found under section 9 of Legislation (Exceptions and Other Matters) Regulation 2015 - Classes of legislative instruments that are not subject to disallowance. Item 2 of section 9 states that a legislative instrument that is a direction by a Minister to any person of body is not subject to disallowance.
>
> I also draw the Committee's attention to section 44(1) of the *Legislation Act 2003* which states that a legislative instrument is not subject to disallowance if the enabling legislation for the instrument facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more states or territories. ASQA was established pursuant to the Intergovernmental Agreement for Regulatory Reform in Vocational Education and Training. It is not therefore appropriate for the Bill to be amended.

Committee comment

2.53 The committee thanks the minister for this response. The committee notes the minister's advice that the ministerial directions to a person of body are exempt

from disallowance under section 9 of the Legislation (Exemptions and Other Matters) Regulations 2015. The committee further notes the minister's advice that subsection 44(1) of the *Legislation Act 2003* provides that a legislative instrument is not subject to disallowance if the enabling legislation for the instrument facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more states or territories.

2.54 At a general level, the committee does not consider the fact than an instrument falls within a class of legislative instruments that is exempt from disallowance under section 9 of the Legislation (Exemptions and Other Matters) Regulations 2015 (the Exemption Regulations) is, of itself, a sufficient justification for excluding parliamentary disallowance. The committee expects that the explanatory memorandum to a bill that authorises the making of a legislative instrument that is exempt from disallowance under the provisions of the Exemption Regulations should still specify why the exemption is appropriate in the particular circumstances.

2.55 In relation to subsection 44(1) of the *Legislation Act 2003*, the committee notes that this provision provides that an instrument is not subject to disallowance, only if the enabling legislation for the instrument:

- facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States or Territories; *and*
- authorises the instrument to be made by the body or for the purposes of the body or scheme.

2.56 In this instance, the committee notes that the relevant instruments are to be made by the minister, rather than the Australian Skills Quality Authority.

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

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
Bill status	Before the Senate

Significant matters in delegated legislation

Privacy

2.58 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to why it is 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.[9]

Minister's response[10]

2.59 The minister advised:

> The Committee requested advice as to why it is considered necessary and appropriate to leave the requirements for when personal information can be disclosed under proposed subsections 18(3) and 25(3) to delegated legislation, and the appropriateness of amending the bill to set out these requirements on the face of the primary legislation.
>
> Proposed subsections 18(3) and 25(3) provide that the disclosure of a student identifier or other personal information of a student by the Student Identifiers Registrar (Registrar) may be authorised if the use or disclosure of said information is for the purposes of research that relates, directly or indirectly, to the provision of higher education and meets the requirements I will specify in a legislative instrument made under proposed subsection 18(4) or 25(4).

9 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2020*, pp. 26-30.

10 The minister responded to the committee's comments in a letter dated 20 February 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

> The amendments proposed in the Bill mirror the current requirements of subsection 18(2) of the Student Identifiers Act 2014 (Act). This subsection allows the Registrar to use or disclose a student identifier of an individual for the purposes of research that relates (directly or indirectly) to education or training, or requires the use of student identifiers or information about education or training, and that meets the requirements specified by the Ministerial Council.
>
> The Ministerial Council does not deal with higher education matters, and so the requirements they set out regarding the use and/or disclosure of a student identifier for research purposes are not appropriate for higher education students. In place of the Ministerial Council, new subsections 18(4) and 25(4) allow the Minister for Education to specify, by legislative instrument, requirements that must be met for the Registrar to disclose a student identifier (or other personal information) for purposes relating to research.
>
> It is considered necessary and appropriate to include these requirements in delegated legislation to be consistent with existing practice in relation to the disclosure of student identifiers for research purposes, and to ensure sufficient flexibility in the development of these requirements.
>
> It is important to note that the legislative instruments I make under these proposed provisions are legislative instruments for the purposes of the *Legislation Act 2003* and, as such, are subject to the Parliamentary disallowance process. The disallowance process provides Parliamentary oversight and scrutiny over any legislative instrument made. I will also undertake appropriate consultation in making any legislative instrument.
>
> Further, the Registrar cannot use or disclose student identifiers, or other personal information of students, under new subsections 18(3) and 25(3) unless I have made legislative instruments under new subsections 18(4) and 25(4). These legislative instruments will provide safeguards for students to ensure the use and disclosure of their student identifiers and other personal information for research purposes does not unnecessarily or unreasonably limit their right to privacy.

Committee comment

2.60 The committee thanks the minister for this response. The committee notes the minister's advice that it is considered necessary and appropriate to include the requirements that must be met for the Registrar to disclose a student identifier (or other personal information) in delegated legislation rather than primary legislation in order to be consistent with existing practice, and to ensure sufficient flexibility in the development of these requirements. The committee also notes the minister's advice that legislative instruments setting out the requirements for disclosure must be made before a student identifier or other personal information can be disclosed

2.61 While the committee notes this advice, the committee's consistent scrutiny view is that the desire for flexibility and consistency with existing practice alone is

generally not a sufficient justification for including significant matters, such as the safeguards to protect an individual's personal information, in delegated legislation.

2.62 The committee draws its scrutiny concerns to the attention of Senators and leaves to the Senate as a whole the appropriateness of leaving the safeguards to protect an individual's personal information to be set out in delegated legislation, rather than on the face of the primary legislation.

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

Significant matters in delegated legislation

2.64 In *Scrutiny Digest 1 of 2020* the committee requested the minister's 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.

Minister's response

2.65 The minister advised:

> Under the current law, section 53 of the Act provides that a registered training organisation 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 student identifier, unless an "issue" applies. Currently, the Minister for Employment, Skills, Small and Family Business has the power to, with the agreement of the Ministerial Council, make a legislative instrument that specifies such "issues". The effect of this existing provision is to allow a legislative instrument to outline cases where an exemption to the requirement to hold a student identifier applies.
>
> The Minister for Employment, Skills, Small and Family Business has made the Student Identifiers (Exemptions) Instrument 2018 (Exemptions Instrument) which sets out the circumstances in which an exemption may currently apply.
>
> However, I note that section 53 of the Act, and any exemptions set out in the Exemptions Instrument, applies to the VET sector, and, as such, is not

relevant to higher education students. It is proposed that the Act be amended to include new section 53A which will set out the exemptions application procedure for students in higher education. This provision will largely mirror the current arrangements for VET and the new arrangements being proposed in the Student Identifiers Amendment (Enhanced Student Permissions) Bill 2019. It is necessary and appropriate to include these matters in delegated legislation to be consistent with existing practice.

Further, allowing the matters that the Registrar must take into account when making an exemption decision to be included in a legislative instrument will ensure that the development and progression of the student identifier is adaptable to the evolving needs of students. This is important as new and genuine reasons justifying a student's exemption may emerge over time. As the cohort of students applying for student identifiers expands, it is essential that the reasons an exemption may be applied are adaptable and I have flexibility to respond to changing circumstances.

It is also important to note that in 2019, less than 20 students applied for an exemption to the requirement to hold a student identifier. As the subset of students who request an exemption is so small, the matters considered by the Registrar in granting an exemption have been varied and unique. In order to respond to the changing needs of students, it is not practical to broadly govern these matters in primary legislation.

Committee comment

2.66 The committee thanks the minister for this response. The committee notes the minister's advice that proposed section 53A will largely mirror the current arrangements that apply in the VET sector in relation to exemptions from the requirement to hold a student identifier. The committee also notes the minister's advice that allowing the matters that the Registrar must take into account when making an exemption decision to be included in a legislative instrument is necessary to ensure that the reasons an exemption may be applied are adaptable and flexible to respond to changing circumstances.

2.67 While the committee notes this advice, the committee's consistent scrutiny view is that the desire for flexibility and consistency with existing practice alone is generally not a sufficient justification for including significant matters in delegated legislation rather than primary legislation.

2.68 However, in this instance, the committee also notes the minister's advice that in 2019 less than 20 students applied for an exemption to the requirement to hold a student identifier. The minister further advised that because the subset of students who request an exemption is so small the matters considered by the Registrar in granting an exemption have been varied and unique, and it is therefore not practical to broadly govern these matters in primary legislation.

2.69 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*).

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

Merits review

2.71 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to why merits review will not be available in relation to determinations by the Registrar under proposed subsection 53A(6). The committee noted that it would be assisted if the minister's response identified established grounds for excluding merits review.

Minister's response

2.72 The minister advised:

> The Committee has also asked for more detailed advice on why merits review will not be available in relation to determinations made by the Registrar under proposed subsection 53(A)6. Those determinations relate to applications from students for an exemption from the requirement to have a student identifier. There are a number of reasons why it is not considered appropriate for merits review to be available for students seeking an exemption.
>
> Firstly, section 53A will operate primarily as a restriction imposed on higher education providers in respect of when they can and cannot issue a higher education award. Importantly, the ultimate determinative issue from a provider's or student's point of view is whether or not the award can be issued. If a student seeking an exemption is not granted one, rather than seeking a review of the decision through the Administrative Appeals Tribunal (AAT), the student can simply apply for a student identifier in order to receive their award. In this context, an exemption from the requirement to hold a student identifier is simply a procedural step along the way to an ultimate outcome of receiving an award.
>
> It is notable, in this context, that one of the factors 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, an exemption decision under section 53A is in substance a preliminary or procedural step.

Secondly, it is important to ensure that the limited resources of the AAT are reserved for matters where genuine issues that turn on merits are in dispute. This is consistent with another factor referred to in the Administrative Review Council's guidance document, concerning decisions which have such limited impact that the costs of review cannot be justified. It is anticipated that 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 currently exists for VET, 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 providers 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 student identifiers issued by the Registrar. The number of student identifiers issued in 2018 was 1,464,862 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 the AAT may delay the outcome of the request for an individual by a number of years, 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 nova review of these decisions, and not highly beneficial or protective for the individual/s requesting an exemption.

The unique student identifiers application is a product and system designed solely to support the user's education journey, helping to maintain lifelong learning and pursue meaningful careers. An exemption to the requirement to have a student identifier would limit the individual's interaction and engagement with their tertiary study, and hinder their admissions processes to VET and higher education courses.

Committee comment

2.73 The committee thanks the minister for this response. The committee notes the minister's advice that the ultimate determinative issue from a provider's or student's point of view is whether or not a higher education award can be issued and that if a student seeking an exemption is not granted one, rather than seeking a review of the decision through the Administrative Appeals Tribunal (AAT), the student can simply apply for a student identifier in order to receive their award. The committee also notes the minister's advice that an exemption from the requirement to hold a student identifier is simply a procedural step along the way to an ultimate outcome of receiving an award.

2.74 The committee also notes the minister's advice that it is important to ensure that the limited resources of the AAT are reserved for matters where genuine issues that turn on merits are in dispute and that this is consistent with factors referred to in the Administrative Review Council's guidance document. The committee further notes that it is anticipated that the matters that will be included in the legislative instrument will be matters that will not lend themselves to factual dispute.

2.75 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*).

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

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
Bill status	Before the House of Representatives

Broad discretionary powers
Significant matters in delegated legislation

2.77 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to why it is necessary and appropriate to provide the minister with the power to exempt online search engine providers from applications for an injunction, and for the exemptions to be contained in delegated legislation, and advice as to the appropriateness of amending the bill to provide at least high level guidance regarding when the minister can grant exemptions.[11]

Minister's response[12]

2.78 The minister advised:

> Considering the serious and prohibitory nature of this remedy, it is necessary and appropriate that certain online search engine providers are exempted from the application of injunctions for the following reasons. The intent of injunctions is to target major on line search engine providers that index search results on the World Wide Web and are likely conduits to on line locations that host information about cheating services. It is not intended to capture: smaller search engines providers that do not have the same reach; entities that offer third-party internal (e.g. intra net) search functions; entities that provide search services to employees, members or clients that are confined to discrete sites (such as educational and cultural institutions, not-for-profit organisations); or entities that provide search functionality that is limited to their own sites or to particular content or

11 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2020*, pp. 31-33.

12 The minister responded to the committee's comments in a letter dated 20 February 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

material (such as real estate or employment websites or the National Library of Australia's Trove search). As such, exemptions, where necessary, will provide a 'safety net' to ensure that applications for injunctions do not unfairly target smaller search engine providers that do not have the same reach or entities that provide only internal (intra net) or limited search functions.

It is unlikely that the power to grant exemptions will be used. This is because proposed subsection 127A(7) states that in determining whether to grant an injunction, the Court may take into account a range of factors, including whether an injunction is an appropriate response in the circumstances or in the public interest.

These factors, set out in proposed subsection 127A(7), reduce the likelihood of an injunction being granted against smaller search engine providers, or providers of services that include search functionality as a peripheral activity. Therefore, the power under proposed subsection 127A(11) will be a remedy of last resort.

The Committee also queried why exemptions need to be made by the Minister in delegated legislation without at least high guidance in the primary legislation about when the Minister can grant exemptions. The online search engine market is rapidly developing where, to varying degrees, search functionality is now in-built into virtually all websites and applications. Given the rapid changes underway in the market and the development of products and services that employ search functionality in some form, statutory guidance would run the risk of failing to accurately target intended parties. The proposed approach of a reserve declaratory power for the Minister provides a more flexible way of dealing with the small potential that an injunction is brought against a party to which these provisions were not intended to apply. Given the rapidly evolving nature of the on line environment, it could also be difficult to provide meaningful high level guidance about the circumstances when exemptions will be granted, especially since the decision to grant an exemption is highly circumstance-specific. As such, the Bill does not seek to provide guidance in the primary legislation about when the Minister can grant exemptions.

Having the exemptions contained in delegated legislation enables the Minister to flexibly respond to an evolving online environment and ensure exemptions are appropriately targeted. In summary, the instrument-making power in proposed subsection 127A(11) is intended to provide a 'safety-net'. Although it is highly unlikely that this power would ever be exercised, any declaration made under the new subsection 127A(11) would be a legislative instrument and therefore subject to Parliamentary scrutiny and disallowance.

Committee comment

2.79 The committee thanks the minister for this response. The committee notes the minister's advice that considering the serious and prohibitory nature of this remedy, it is necessary and appropriate that certain online search engine providers are exempted from the application of injunctions. The committee also notes the minister's advice that exemptions, where necessary, will provide a 'safety net' to ensure that applications for injunctions do not unfairly target smaller search engine providers that do not have the same reach or entities that provide only internal (intranet) or limited search functions.

2.80 The committee further notes the minister's advice that it is unlikely that the power to grant exemptions will be used because proposed subsection 127A(7) states that in determining whether to grant an injunction, the Court may take into account a range of factors, including whether an injunction is an appropriate response in the circumstances or in the public interest.

2.81 Finally, the committee also notes the minister's advice that given the rapidly evolving nature of the online environment, it could be difficult to provide meaningful high level guidance about the circumstances when exemptions will be granted, especially since the decision to grant an exemption is highly circumstance-specific.

2.82 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*).

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

2.84 In light of the fact that an exemption under proposed subsection 127A(11) will be subject to parliamentary disallowance, the committee makes no further comment on this matter.

Reversal of the evidential burden of proof

2.85 In *Scrutiny Digest 1 of 2020* 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, in this instance.

Minister's response

2.86 The minister advised:

> The reversal of the evidential burden of proof is proposed in section 197A in order to ensure consistency with other sections of the *Tertiary Education Quality and Standards Agency Act 2011* (TEQSA Act), namely, section 188(2) which makes it an offence for an entrusted person to

> disclose or use higher education information for purposes not set out in relevant legislation, and also reverses the evidential burden of proof. It is appropriate to reverse the evidential burden of proof for the offence in proposed section 197A because it meets the criteria set out in 4.3.1 of the Guide to Framing Commonwealth Offences. More specifically, it is peculiarly within the knowledge of the defendant whether they disclosed or used academic cheating services information obtained in their capacity as an entrusted person that was not for the purposes of the TEQSA Act or the *Education Services for Overseas Students Act 2000*. As the defendant peculiarly knows how they obtained the information, what they disclosed or used the information for and how this related to the purposes of the relevant Acts, it is significantly easier and less costly for the defendant to establish that an offence has not occurred than for the prosecution to prove it has. As the reversal of the evidential burden of proof in proposed section 197A meets the two criteria set out in the Guide to Framing Commonwealth Offences, it is appropriate to use an offence-specific defence in this instance.
>
> In accordance with the Guide to Framing Commonwealth Offences, my department will include the reasons for placing the burden of proof on the defendant for each provision where the evidential burden is reversed in the Bill's explanatory material.

Committee comment

2.87 The committee thanks the minister for this response. The committee notes the minister's advice that it is appropriate to reverse the evidential burden of proof for the offence in proposed section 197A because it meets the criteria set out in section 4.3.1 of the *Guide to Framing Commonwealth Offences*.

2.88 The committee also notes the minister's advice that as the defendant peculiarly knows how they obtained the information, what they disclosed or used the information for and how this related to the purposes of the relevant Acts, it is significantly easier and less costly for the defendant to establish that an offence has not occurred than for the prosecution to prove it has.

2.89 The committee thanks the minister for his advice that the reasons for placing the burden of proof on the defendant for each provision where the evidential burden is reversed will be included in the bill's explanatory material. The committee welcomes this undertaking and notes that it will assist in ensuring that the explanatory memorandum is an effective point of access to understanding the law. In accordance with its usual practice, the committee will consider the revised explanatory material when it is tabled in the Parliament.

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

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
Bill status	Before the Senate

Significant matters in delegated legislation[13]

2.91 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to 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.[14]

Minister's response[15]

2.92 The minister advised:

> **Requirements for aviation security tests**
>
> The Committee sought advice on the appropriateness of leaving the requirements for aviation security tests in delegated legislation.
>
> To be effective, testing of the security systems would follow the threat types used by people - here and overseas - who have attempted, and in some cases have been successful, taking weapons into a passenger cabin or having unauthorised explosives loaded into an aircraft's cargo hold. To test security systems, aviation security inspectors use examples derived

13 Schedule 1, item 2, proposed paragraphs 79(2)(h) and 80(2)(f). The committee draws senators' attention to these provisions pursuant to Senate Standing Order 24(1)(a)(iv).

14 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2020*, pp. 34-36.

15 The minister responded to the committee's comments in a letter dated 24 February 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

from old and new types of threats and novel methods used by terrorists around the world.

The requirements referred to in paragraphs 79(2)(h) and 80(2)(f) of the Aviation Act set out in Schedule 1 to the Testing and Training Bill are intended to prescribe relevant administrative or procedural matters in relation to testing aviation industry participants' security systems without exposing operational methods that might be subject to exploitation.

Testing requirements must be flexible enough to cater for modifications needed to respond to emerging threat types and risk levels. As a consequence, requirements must also be rapidly amendable to enable the adoption of new methods for thwarting attacks on aviation assets and infrastructure. Establishing the requirements in the primary legislation may place an unintended fetter on Australia's ability to rapidly respond to unanticipated changes in the security threat or risk environments.

While I thank the Committee for raising this matter, in developing the Testing and Training Bill, careful consideration was given to the most appropriate, flexible, and adaptable place to set out the administrative or procedural requirements for testing security systems. I concluded that it is necessary and appropriate to leave the requirements to delegated legislation.

Specifying that 'test pieces' are inert

The Committee also sought advice on the 'test pieces' used by aviation security inspectors to conduct security systems tests.

As indicated in the Explanatory Memorandum to the Testing and Training Bill, the proposed use of 'test pieces' is intended to ensure that the tests of security systems are as realistic as possible.

Aviation security inspectors are issued with test pieces for conducting systems testing in the course of their duties. The test pieces issued to aviation security inspectors are items provided by the Department that resemble or mimic weapons, for example handguns that cannot fire (because they are replicas or because they have had the firing pin removed), knife shaped implements that have no sharp edges (that cannot cut or stab) and simulated improvised explosive device or SIED (non-functional and unable to detonate). The training which aviation security inspectors receive, in combination with the test items issued by my Department, remove any risk of a 'real' weapon being used to conduct authorised systems testing. The Department does not issue functional or live weapons to aviation security inspectors.

If an aviation security inspector were to source and use an item that was a functional weapon to test a security system, they would face disciplinary action or be charged with an offence under another law of the Commonwealth, the States or Territories. The Testing and Training Bill provides aviation security inspectors with an immunity from prosecution in

certain circumstances. That immunity would not be available to that officer if the good faith element of the defence was absent.

I thank the Committee for bringing this question to my attention. My Department will amend the Bill following legal and technical advice. The Committee may wish to note that the Department would treat the use of non-authorised test items as a serious disciplinary issue.

Committee comment

2.93 The committee thanks the minister for this response. The committee notes the minister's advice that the requirements for aviation security tests must be flexible enough to cater for modifications needed to respond to emerging threat types and risk levels and that, as a consequence, requirements must also be rapidly amendable to enable to adoption of new methods for thwarting attacks on aviation assets and infrastructure. The committee also notes the minister's advice that establishing the requirements in the primary legislation may place an unintended fetter on Australia's ability to rapidly respond to unanticipated changes in the security threat or risk environments.

2.94 In relation to the committee's query regarding the appropriateness of amending the bill to specify that 'test pieces' used by aviation security inspectors must be inert, the committee notes the minister's advice that the training which aviation security inspectors receive, in combination with the test items issued by the department, remove any risk of a 'real' weapon being used to conduct authorised systems testing. The committee also notes the minister's advice that if an aviation security inspector were to source and use an item that was a functional weapon to test a security system, they would face disciplinary action or be charged with an offence.

2.95 The committee welcomes the minister's advice that, following the receipt of legal and technical advice, the government will propose amendments to the bill to specify that 'test pieces' must be inert. The committee thanks the minister for his constructive engagement with the committee on this matter. In accordance with its usual practice, the committee will consider any amendments to the bill when they come before the Parliament.

2.96 The committee also 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*).

2.97 In light of the detailed information provided, and the minister's undertaking in relation to amendments to the bill, the committee makes no further comment on this matter.

Adequacy of parliamentary oversight[16]

2.98 In *Scrutiny Digest 1 of 2020* the committee requested the minister's advice as to 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.[17]

Minister's response[18]

2.99 The minister advised:

> The Committee has sought my advice in relation to Parliamentary oversight of the use of the proposed Secretarial power to exempt a class of screening officers from one or more training or qualification requirements set out in section 948 of the Aviation Act and 1658 of the Maritime Act. I appreciate the Committee's acknowledgement of the need for operational security.
>
> The power to exempt a person from training or qualification requirements is intended to meet unanticipated and unavoidable needs, for example, where a training course cannot be offered in a particular locality for a short period of time, or in an emergency situation so that a port can continue to operate. The exemptions are explicitly not intended for use in any circumstance other than the exceptional.
>
> As the powers are only to be exercised in exceptional circumstances, I do not anticipate large numbers of exemptions to be made.
>
> The Committee suggested that Parliament should have some oversight of the exercise of the exemption, and suggested that the number of exemptions issued by the Secretary for these purposes might be included in the Department of Home Affairs' Annual Report.
>
> After consideration of the concerns raised by the Committee, I have asked my Department to amend the Bill to legislate the information on the exercising of the screening exemption powers through the Department's Annual Report or other appropriate mechanism.

Committee comment

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16 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).

17 Senate Scrutiny of Bills Committee, *Scrutiny Digest 1 of 2020*, pp. 34-36.

18 The minister responded to the committee's comments in a letter dated 24 February 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

2.100 The committee thanks the minister for this response. The committee notes the minister's advice that the power to exempt a person from training or qualification requirements is intended to meet unanticipated and unavoidable needs, for example, where a training course cannot be offered in a particular locality for a short period of time, or in an emergency situation so that a port can continue to operate. The committee also notes the minister's advice that as the powers are only to be exercised in exceptional circumstances, it is not anticipated that large numbers of exemptions will be made.

2.101 The committee welcomes the minister's advice that the government will propose amendments to the bill to provide that information on the exercise of the exemption power is to be published in the department's annual report or through another appropriate mechanism. The committee thanks the minister for his constructive engagement with the committee on this matter. In accordance with its usual practice, the committee will consider any amendments to the bill when they come before the Parliament.

2.102 The committee also 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*).

2.103 In light of the detailed information provided, and the minister's undertaking in relation to amendments to the bill, the committee makes no further comment on this matter.

Treasury Laws Amendment (Reuniting More Superannuation) Bill 2020

Purpose	This bill seeks to amend various Acts to facilitate the closure of eligible rollover funds by 30 June 2021 and allow the Commissioner of Taxation to reunite amounts he or she receives from eligible rollover funds with a member's active account
Portfolio	Treasury
Introduced	Senate on 2 December 2019
Bill status	Before the Senate

Merits review

2.104 In *Scrutiny Digest 2 of 2020* the committee requested the minister's advice as to whether decisions made under proposed Part 3C will be subject to similar review rights as currently provided for in existing Part 3A and, if not, the rationale for not providing for such review rights.[19]

Minister's response[20]

2.105 The minister advised:

> Part 3C of the Act, inserted by the Bill, provides that where an eligible rollover fund account is below $6,000 the superannuation provider must transfer the money to the Commissioner of Taxation by 30 June 2020. All remaining eligible rollover fund accounts must be transferred to the Commissioner of Taxation by 30 June 2021. As the Committee has identified, the decision from the superannuation provider to transfer the funds is not subject to a merits review.
>
> In addition to the proposed Part 3C, the Act already sets out a number of requirements, where, when certain conditions are met, a person's superannuation balance must be transferred to the Commissioner of Taxation. This includes where a member has been uncontactable, has a balance below a certain amount, or has sustained a continued period of inactivity. It also includes when a temporary resident has departed Australia. It is only this later case where review rights are afforded. In this case the right of review applies to the determination notice from the

19 Senate Scrutiny of Bills Committee, *Scrutiny Digest 2 of 2020*, pp. 4-5.

20 The minister responded to the committee's comments in a letter dated 24 February 2020. A copy of the letter is available on the committee's website: see correspondence relating to *Scrutiny Digest 3 of 2020* available at: www.aph.gov.au/senate_scrutiny_digest

> Commissioner of Taxation that the person is a departed temporary resident. This decision is reviewable under Part NC of the *Taxation Administration Act 1953* as a decision of the Commissioner of Taxation (and not of the superannuation provider).
>
> Unlike those provisions which deal with departed temporary residents, proposed Part 3C does not involve any administrative decision making. Therefore, it is not appropriate to afford the same review rights to an account holder of an eligible rollover fund. The proposed Part 3C is instead drafted consistently with other parts of the Act where the decision that a person has met certain criteria is made exclusively by the superannuation provider, and not the Commissioner of Taxation.
>
> In addition to this, the requirement to transfer the money to the Commissioner of Taxation under the proposed Part 3C is a statutory requirement, and the decision to transfer the money will not be reliant on a government body or public official exercising a discretion. Therefore, a merits review arrangement would not be appropriate.
>
> Instead, if there has been any wrongdoing or administrative error by the superannuation provider, the member may be able to take action under the best interest obligations contained in the *Superannuation Industry (Supervision) Act 1993*. The Australian Financial Complaints Authority can also consider a complaint from a person about a superannuation provider.

Committee comment

2.106 The committee thanks the minister for this response. The committee notes the minister's advice that proposed Part 3C does not involve any administrative decision making and therefore, it is not appropriate to afford the same review rights to an account holder of an eligible rollover fund.

2.107 The committee also notes the minister's advice that the requirement to transfer the money to the Commissioner of Taxation under the proposed Part 3C is a statutory requirement, and the decision to transfer the money will not be reliant on a government body or public official exercising a discretion and that therefore, a merits review arrangement would not be appropriate.

2.108 The committee further notes the minister's advice that where there has been any wrongdoing or administrative error by the superannuation provider, the member may be able to take action under the best interest obligations contained in the *Superannuation Industry (Supervision) Act 1993*. In addition, the Australian Financial Complaints Authority can consider a complaint from a person about a superannuation provider.

2.109 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*).

2.110 In light of the detailed information provided, 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 notes there were no bills introduced in the relevant period that establish or amend standing appropriations or establish, amend or continue in existence special accounts.

Senator 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*.